A summary of some recent cases of interest to the African continent

SAM RUGEGE
Associate professor of Public Law, University of the Western Cape

***South African National Defence Union v Minister of Defence and another* 1999 (11) BCLR 615**

The case deals with the question of whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions. The Transvaal High Court, Hartzenberg J, declared section 126B of the Defence Act 44 of 1957 to be unconstitutional and invalid in as far as it prohibited members of the South African National Defence Force (SANDF) from engaging in public protest and from joining trade unions. In accordance with the Constitutional requirements the order of unconstitutionality was referred to the Constitutional Court for confirmation.

Section 126B(1) prohibited a member of the permanent force (core military personnel) from becoming a member of any trade union as defined in the Labour Relations Act although it permitted such a member to belong to a professional society or association or a similar body approved by the minister. Section 126B(2) enjoined that a member of the SADF shall not strike or perform any act of public protest or participate in any strike or act of public protest. Contravention of the above was a criminal offence. The term 'public protest' was defined in very broad terms including 'holding or attendance of any meeting, assembly, rally, demonstration, procession, or other gathering.' which was intended to influence, support, promote or oppose any proposed or actual policy, action, or decision of the Government of South Africa or another country or territory. Prohibition of public protest also covered conduct in support of or opposition to private interests or those of a parastatal.

The Respondents, the Minister of Defence and Chief of the Defence Force opposed confirmation of the order of invalidity in as far as joining of a trade union was concerned but did not oppose the order relating to the invalidity of the prohibition against strike action and public protest. The Constitutional Court, however, decided to examine the constitutionality of all the prohibitions originally challenged.

Prohibition of participation in acts of public protest

O'Regan J, delivering the majority judgment held that prohibition against participation in acts of public protest was in violation of the right to freedom of expression entrenched in section 16 of the South African Constitution of 1996. The court noted that the very broad terms in which

"public protest" was defined made it very difficult to determine what conduct was proscribed and what was not. Freedom of expression, the judge said, was at the heart of a democracy, a guarantor of democracy and facilitated the search for truth by individuals and society as a whole.

The court observed that although members of the Defence Force needed to act in a manner that inspired confidence and trust in the dispassionate observance of their duties and that to do so required that they may not act in a partisan political fashion in the performance of their duties, nevertheless, the prohibition against participating in public protest went much further than was necessary to achieve that objective. Members of the Defence Force remained members of society with rights of citizenship. The sweeping prohibition was a grave incursion on the fundamental rights of soldiers and not a justifiable limitation on the right of soldiers to freedom of expression. The provisions were therefore inconsistent with the constitution. The court held that the offending provisions could be rendered constitutional by severing the references to "acts of public protest" from the relevant section and leave the prohibition as only applicable against strike action and incitement to strike. The applicant union did not seek to challenge this and it was so ordered.

Prohibition of membership of trade unions

The applicant argued that the prohibition against membership of a trade union in the Defence Act was contrary to the constitutional right of every worker to form and join a trade union. On the other hand the respondents argued that members of the armed forces were not workers and that even if they did constitute workers, the infringement of their right was justified in terms of the limitation clause in the Constitution. The respondents further argued that the defence force could not be a disciplined military force as required by the Constitution if members were allowed to form and join trade unions and to exercise their rights in that capacity.

After considering provisions of the Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948 of the International Labour Organisation, O'Regan J found that the ILO regards members of the armed forces and police to be workers but that the extent to which the provisions of the Convention were to apply to them was a matter for national law. In the context of South Africa, O'Regan J found that although members of the Defence Force may not be employees in the full contractual sense of the word, their conditions of enrolment in many respects resembled those of the people employed under a contract of employment. The court found, therefore, that the prohibition in the Defence Act against the joining of trade unions by members of the force was a violation of their constitutional right as workers to form and join trade unions and was therefore invalid.

The argument of the respondents that infringement of the right was justified by the constitutional requirement to structure the Defence Force as a 'disciplined military force' was rejected. The court held that allowing members of the Defence Force to join trade unions, if properly regulated, would not necessarily undermine the discipline and efficiency of the Defence Force. Limitations could be imposed if they were in compliance with the limitation clause, that is, if they were justifiable in a democratic society based on human dignity, equality and freedom.

This case should be of interest to other African countries with similar constitutional protection of workers but which at the same time prohibit members of the Defence Forces and Police from joining trade unions or engaging in public demonstrations or other forms of public protest. For instance, section 31(2) of the Malawi Constitution of 1995 provides that "All persons shall have the right to form and join trade unions or not to form or join trade unions." Section 35 provides for freedom of expression and section 38 guarantees every person the "right to assemble and demonstrate with others peacefully and unarmed". The provisions in the Lesotho Constitution of 1993 are rather more problematic and more likely to benefit from the interpretation in the South African case. Every person is entitled to the rights to freedom of expression [14 (1)], freedom of peaceful assembly [section 15 (1)] and freedom of association, including for labour purposes, [section16 (1)]. However, all these rights are qualified by the further provision that laws may be made limiting those rights "in the interests of defence, public safety, public order . . ."

Restrictions are also imposed by the Constitution of Namibia, 1990, on the enjoyment of fundamental rights including the right to associate in trade unions and the right to freedom of expression and assembly [section 21]. Many of the other African countries do not recognise the right to form and join trade unions in their constitutions although most provide for (at least on paper) freedom of expression and assembly.

***Banana v Attorney-General* 1999 (1) BCLR 27 (25) (Zimbabwe)**

The case is about the right of an accused person to a fair hearing by an independent and impartial court, on the one hand, and the right of the press to freedom of expression and the duty to inform the public on matters of public interest, on the other.

The applicant, Canon Banana, a former non-executive president of Zimbabwe was accused by Jeftha Dube, defendant in a murder trial, of committing acts of sodomy and other homosexual acts over a number of years while Dube was serving as applicant's *aide de camp*. Dube was convicted of murder with extenuating circumstances as the court accepted his uncontroverted claim that he had been traumatised as a result of repeated homosexual abuse by the applicant.

The applicant was subsequently indicted on several counts of sodomy, attempted sodomy and indecent assault. The allegations against him received considerable publicity in the media. At the beginning of the trial, the applicant moved an application for a permanent stay of proceedings on the grounds that there was a real risk that he would not receive a fair trial because of the pre-trial publicity and statements as to inadmissible evidence set out in the outline of the state's case. The application was based on the provisions of section 18(2) of the Constitution of Zimbabwe which guarantees the right of an accused to a fair hearing before an independent and impartial court. The questions raised were referred by the presiding High Court judge to the Supreme Court as they raised important constitutional issues.

The main issue raised in the case as formulated by Gubbay CJ was "whether widespread publicity, adverse and hostile to an accused person may so indelibly prejudice the minds of the judge and assessors at the criminal trial as to negate the constitutional protection of a fair hearing before an independent and impartial court".

The Supreme Court noted the "political tension between the right of the press to freedom of expression in the conveyance of information to the public and the right of an accused person to a fair hearing". The court observed that a crucial element of a fair trial is the right to be tried solely on the evidence before the court and that the fairness and impartiality of the criminal process was the cornerstone of the legal system. On the other hand, freedom of expression was a right and enjoyment always to be jealously guarded. It was a "core value of society essential to truth, democracy and personal fulfilment". Freedom of the press was also crucial to the public nature of the administration of justice and the potential for scrutiny that comes with such openness. The judicial process had always been a matter of legitimate public interest. The people had a right to know and the press did a valuable service in informing them. However, occasionally restrictions on the freedom of expression and the press were necessary and acceptable in a free and democratic society as the rights were not absolute. In respect of legal proceedings, freedom of the press had to be exercised reasonably. What had to be balanced was the right of the public to information and that of the media to report and express views freely, against the right of an accused person to a fair trial.

The court stressed that in a hierarchy of constitutional rights, the right to receive a fair trial had to take precedence over freedom of the press. Gubbay CJ summarised the rule as follows:

> "Media reporting of a judicial process, or in advance of it, may in exceptional circumstances, be so irresponsible and prejudicial as to make the unfairness irreparable and the administration of justice impossible. If that were to occur . . . the court would have no option but to grant a stay of proceedings, for it is more important to retain the integrity of the system of justice than to ensure the punishment of even the vilest offender."

The court considered the articles published in the press about the applicant shortly after the Dube judgment. Some of the articles inferred that applicant's homosexual activities went far beyond those acts alleged by Dube and that Dube's claims "might just have opened a can of worms". The court accepted the argument for the applicant that the cumulative effect of the publicity was to induce a belief that the applicant had a propensity to homosexuality and was guilty not only of the charges for which he was to be prosecuted but many other similar offences.

Having noted that the applicant enjoyed a significant amount of notoriety, being a former president, a professor and religious leader, therefor an extremely newsworthy person against whom grave crimes were alleged, the court found that the media had every right to report on this matter of public interest. Nevertheless, the articles went beyond the acceptable standard of fair, temperate and unbiased reporting that a high profile figure accused of criminal charges is entitled to be accorded.

The court then considered whether the pretrial publicity had been of such magnitude that the accused could not have a fair trial. Taking into account the process of appointing judges, the quality of judges and assessors Gubbay, CJ, expressed the view that "only a remote possibility exists of a judge imbued with basic impartiality, legal training and power of objective thought, being consciously or subconsciously influenced by extraneous matter". He argued that to think otherwise would mean that it would be impossible to find an impartial judge for a high profile case and that such an accused could never receive a fair trial with the result that people who had committed crimes would go free.

The court concluded that applicant had failed to discharge the burden of establishing the existence of a real or substantial risk of not being afforded a fair trial before the High Court. The application for a permanent stay of proceedings was therefore dismissed.

The well argued judgment should be of considerable interest around the continent, especially in cases of corruption and fraud by public officials in countries like South Africa, Uganda, Nigeria and others where such cases are becoming common and where the vibrant press ruthlessly reports on such cases. It is interesting to note that the case arose out of a prosecution for alleged acts of homosexuality at around the same time that the South African Constitutional Court declared the crime of sodomy unconstitutional for being inconsistent with the right not to be discriminated against on the basis of sexual orientation. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

***August & Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC)**

The case concerns the right of prisoners, both those awaiting trial and those already convicted, to vote in national elections. The applicants, a convicted prisoner and an awaiting-trial prisoner, failed to get assurance from the Electoral Commission that they would be able to vote in the impeding national elections. They then jointly applied to the Transvaal High Court for the appropriate relief. The court dismissed the application on the ground that failure on the part of the Commission to make arrangements for applicants to vote was not an undue limitation of the applicant's constitutional right to vote. The Electoral Act 73 of 1998 required that to be able to vote a person amongst other things must have registered in a "voting district in which that person is ordinarily resident". The prisoners had not been able to register in the districts where they were ordinarily resident as they were in prison. The court held that if a person did something which deprived him or her of the opportunity to register as a voter or to vote, he or she had only himself or herself to blame. The applicants had deprived themselves of the opportunity to register and vote and it was not the fault of the respondents.

The applicants filed an application in the Constitutional Court for leave to appeal to that court against dismissal of their application on the basis of the right to vote, the right to equality and the right to dignity. They sought a declaration that they and all other prisoners were entitled to register and vote in the forthcoming elections and an order directing the respondents to make all necessary arrangements for them and all prisoners to be able to vote.

The respondents argued that nothing had been done by them to limit the applicants' right to register or vote. They contended that there was difficulty in determining the ordinary residence of a prisoner, whether it was the place of residence before incarceration or the prison. They further argued that if either interpretation would pose immense logistical, financial and administrative difficulties.

The Constitutional Court, however, said it was not persuaded about the existence of any insuperable problems that would arise if it was determined that ordinary residence for prisoners meant prison. Further, it was said that even in the case of an interpretation that the last residence prior incarceration was the place of residence for prisoners, no explanation had been given why provision of special votes for prisoners could not be provided just like for those in hospitals or in diplomatic missions abroad. The court affirmed that the constitutional right to vote imposed positive duties on the legislature and the executive. The first respondent had the obligation to take reasonable steps to ensure that eligible voters were registered. Universal adult suffrage on a common voters role was one of the foundational values of the entire constitutional order.

Sachs J, delivering the judgment of the court, observed that under the common law, prisoners retained their rights when they went to prison except those taken away by law expressly or by implication. In South Africa, the Constitution had reinforced and entrenched common-law rights. Rights could not be limited without justification and legislation dealing with voting had to be interpreted in favour of enfranchisement rather than disenfranchisement. Parliament had not passed a law limiting the right of prisoners to vote in terms of section 36. The court did not decide whether parliament could limit the right to vote in respect of some prisoners such as those convicted of murder, robbery or rape as the matter did not arise. However, there is a hint from judge Sachs that if parliament had passed a law limiting the right of such prisoners, as was the case in the Electoral Act of 1993 which limitation was authorised by the 1993 Interim Constitution, the court would probably have found it justified.

The court rejected the view that the prisoners had lost their opportunity to exercise their right through their misconduct. The first respondent had failed to make arrangements to enable prisoners to vote and had not complied with the obligation to take reasonable steps to enable eligible persons to register and vote. Judge Sachs suggested a number of ways in which it could be made feasible for prisoners to vote; for instance the setting up of polling stations in the prisons or providing special votes which could then be transported to stations outside prison.

The court concluded that the applicants had established a threatened breach of their rights to vote. Respondents had not complied with their obligations to take reasonable steps to create the opportunity to enable eligible voters to register and vote. The application for leave to appeal was granted and the appeal allowed. The court declared that all persons who were prisoners during the registration period and were not excluded from voting by law were entitled to vote if they had registered. The respondents were ordered to make all necessary arrangements to enable prisoners to register and vote.

An interesting point that was raised but dismissed was that a concentrated prison electorate would exercise a disproportionate local influence on election results if prisoners were allowed to vote. In the circumstances of South Africa which has the proportional representation electoral system based on party lists, distortion of the outcome was unlikely. This could however, be a real danger in those countries with a constituency-based electoral system.

The case provoked some public reaction in the press and the electronic media, with members of the public complaining that murderers, robbers and rapists were being allowed to vote while law abiding citizens who could not register, for one reason or another, for instance because they were out of the country on business or studying, were denied the opportunity to vote. It is possible that the government will initiate legislation to limit the right of certain categories of prisoners to vote in future elections.

This case should be of considerable constitutional and political interest to neighbouring and other countries, particularly in those third world countries where prisoners are often treated as lesser human beings who do not deserve to exercise their political rights. It should get policy-makers in many African countries thinking about giving voting rights to most if not all categories of prisoners.

***Kohlhaas v Chief Immigration Officer and Another* 1998 (6) BCLR 757 (ZSC) (Zimbabwe)**

This case concerns the right of a wife who is a citizen of Zimbabwe to have her alien husband live with her in Zimbabwe on a permanent basis. The case also discusses the question of marriage of convenience as a factor that could defeat the wife's right. The case arose because previous to this and two other cases discussed below, a foreign woman married to a Zimbabwean man automatically acquired Zimbabwean citizenship whereas a foreign husband of a Zimbabwean woman could not. This practice, though patently discriminatory, was seen by the state as being in accordance with African culture. A man can marry a woman from anywhere and bring her into his community but not the other way round. The same practice is in fact recognised in the laws of a number of African countries based on similar justification.

Mr Kohlhaas, a German national, was resident in Zimbabwe as a holder of a temporary permit, renewed from time to time, from 1988 until 1996. In December 1996 he was informed that his permit would not be renewed and that he would have to leave the country by 21 January 1997. He, however, managed to get a temporary visitor's visa to stay until April 1997 to wind up his affairs in Zimbabwe. In the meantime, he met the applicant and after a short courtship they got married on 1 February 1997.

The applicant sought an order directing the Zimbabwean Government to grant her husband permanent resident status and to permit him to work. The Supreme Court referred to two previous decisions of the court in which similar issues were considered. *In Rattigan & others v Chief Immigration Officer* 1994 (2) ZLR 54(S), 1995 (1) BCLR(ZS) the Supreme Court declared that a female citizen of Zimbabwe married to an alien was entitled, by virtue of the right to freedom of movement guaranteed by the

Zimbabwe constitution, to live permanently with her husband in Zimbabwe. The court reasoned that to prohibit the alien husband would "place the wife in a dilemma of having to decide whether to accompany her husband to a country other than Zimbabwe and live with him there or to exercise her constitutional right to continue living in Zimbabwe without him." This would undermine her right as a citizen to live in Zimbabwe. In *Salem v Chief Immigration Officer and another* 1994 (2) ZLR 287(S), 1995 (1) BCLR 78 (ZS) the ruling in Rattigan was extended to cover the right of the alien husband to lawfully engage in employment or other gainful activity in Zimbabwe on the basis of the wife's right to freedom of movement. The *Rattigan* and *Salem* decisions led the government to move to limit the ability of foreign husbands of local women to become permanent residents in Zimbabwe. The Constitution was amended permitting the imposition of restrictions on the freedom of movement or residence within Zimbabwe of persons who are neither citizens nor permanent residents of Zimbabwe permitting the exclusion or expulsion of such persons whether or not they are married or related to other persons who are citizens or are permanently resident in Zimbabwe.

The respondents opposed the application on the grounds that the constitutional amendment permitted the denial of permanent residence to and expulsion of Mr Kohlhaas. They further argued that applicant's marriage was a marriage of convenience contracted with the main purpose of evading immigration laws.

The court held that if the applicant had been Mr Kohlhaas he would have been met with the "unassailable answer that the decision was justified" under the law. But the applicant was the wife and it was her right to freedom of movement as a citizen of Zimbabwe which was under consideration. The court held that there was nothing in any law that qualified her right as a citizen to move freely and to reside anywhere in Zimbabwe and to be immune from expulsion from Zimbabwe. This right included the entitlement of the applicant wife to have her alien husband reside with her in Zimbabwe. According to the court, this position, established in *Rattigan* and *Salem,* was not altered by the constitutional amendment as the amendment only affected non-citizens. Thus Mr. Kohlhaas would not have been able to assert a right to stay with his wife although the reverse was permissible.

On the allegation that the marriage was one of convenience entered into to defeat the law, the court discussed the criteria for determining that a marriage is an impermissible one. A marriage would be such if not only there is proof that the marriage was entered into with the primary purpose of evading immigration laws but also that there was a lack of intention to live together permanently as husband and wife. Absence of either of these would leave the marriage intact as a legal marriage. In the present case it had not been proved that the couple had no intention of living together permanently as husband and wife. The evidence was indeed to the contrary.

In the result, the court allowed the application declaring that the applicant's right to freedom of movement including the right to reside in Zimbabwe with her husband had been contravened by the actions of the respondents. The court ordered that by virtue of the applicant's right

under the Constitution to have her husband residing with her in Zimbabwe, Mr Kohlhaas was to be issued with the written authority to remain in Zimbabwe like any other alien who is a permanent resident. Mr Kohlhaas was also to be accorded the same rights as other alien permanent residents to be employed or to engage in other gainful activity in any part of Zimbabwe without restriction.

This case is part of a growing jurisprudence on the right of a woman to have her alien husband reside with her in her home country. It is important in the context of the situation in many countries, as indicated earlier, whereby an alien wife of a citizen may automatically or on application qualify for citizenship while an alien husband married to a citizen may not and may be denied entry into the country of his spouse or once there may be expelled. A related issue arose in the Botswana case of *Attorney-General v Dow* 1994 (6) BCLR 1 (Botswana) in which the respondent (the applicant at trial) sought an order declaring certain sections of the Citizenship Act unconstitutional on the ground that they discriminated against female citizens. Under the Act, children born of a marriage between a citizen husband and an alien wife, acquired the citizenship of Botswana at birth while those born of a citizen wife and an alien husband did not and had to follow the citizenship of their father whose position in the country was tenuous. The trial court held that the relevant provisions of the Citizenship Act were unconstitutional as they were discriminatory on the basis of gender. The appeal court dismissed the appeal by the Attorney-General. The court rejected appellant's argument that the framers of the constitution must be taken to have intended to permit discrimination on the basis of gender since sex or gender were not included in the prohibited grounds of discrimination and as the whole fabric of customary law in Botswana was based on that society being patrilineal and amenable to discrimination on the basis of gender. The court preferred a generous, liberal, non-technical and purposive approach to interpreting the constitution to find that prohibition against discrimination included that based on sex or gender. It is hoped other jurisdictions in Africa will follow these cases in outlawing discrimination and promoting the rights of women.

***Speaker of the National Assembly v Patricia De Lille MP and the Panafricanist Congress of Azania* 1999 (11) BCLR 1339 (SCA)**

The case raises two main issues: the power of the National Assembly to suspend a member of the assembly and the right of a member to freedom of expression. At the trial court, in *De Lille and another v Speaker of the National Assembly* 1998 3 SA 430 (C), two further issues, bias on the part of a parliamentary committee investigating misconduct by a member of the National Assembly and the right of such a member to a fair hearing, were raised. However, these latter issues were found by the Supreme Court of Appeal not to be crucial to the result of the appeal and were not decided. These latter issues are not discussed here.

The first respondent, a member of the National Assembly, made allegations in the House to the effect that twelve members of the ruling party, the African National Congress (ANC) had been accused of having been 'spies of the apartheid regime'. In order to establish whether the accusations

were true, she called on the Government to "tell the public at large who the agents are who received blood money to betray the genuine struggle of the African people." The statement provoked a number of interventions from members of the Assembly and she was challenged to name the alleged "spies". She took the challenge and named eight people including some who were not members of the Assembly.

The Speaker ruled that it was unparliamentary to refer to members of the Assembly as "spies" and to name them. The respondent was asked to withdraw the offending part of the statement. The respondent withdrew her statement.

It appeared that the Speaker was satisfied with the withdrawal of the statements. However, an ANC member of the house proposed a motion to appoint an *ad hoc* committee of the House to investigate and report on the conduct of the respondent with regard to the statements. The motion was adopted by a majority. The Committee was duly appointed consisting of eight ANC members and seven from the opposition and chaired by an ANC member.

The committee recommended that the respondent be directed to apologise to the Assembly by a letter addressed to the Speaker and be suspended for fifteen parliamentary working days. The National Assembly by resolution adopted the recommendations and added that the apology also be extended to the individual members of the Assembly who the respondent had named in her remarks.

The respondent made an application in the Cape High Court attacking the resolutions of the committee and the Assembly regarding her suspension on the ground that the majority of the members of the committee were biased against her, were *mala fide* and had not afforded her a fair hearing before adopting the resolutions. The Cape High Court upheld her application and granted an order declaring void the relevant resolutions of the Assembly.

The speaker appealed to the Supreme Court of Appeal arguing that the evidence on affidavit relied on by the trial court did not justify the finding that the majority of the committee or the assembly were biased against the respondent or were *mala fide* or that they failed to give the respondent a fair hearing before passing the resolutions.

The appeal court, Mohamed CJ delivering the judgment of the majority, decided that the main issue was not whether the committee and the Assembly had been biased or *mala fide* or whether the respondent had been afforded a fair hearing but rather "whether or not in the circumstances . . . the Assembly had any lawful authority to take any steps to suspend the respondent from Parliament." Mohamed CJ pointed to constitutional supremacy as the basis of the South African legal order, how every law and every act of Parliament or any other institution had to be in conformity with the constitution and that they were all not immune from judicial scrutiny. The court therefore had to investigate whether Parliament had acted contrary to the Constitution when its conduct was challenged.

The appellant relied on the power of the National Assembly to "determine and control its internal arrangement, proceedings and procedures".

[Section 57 of the Constitution of the Republic of South Africa, 108 of 1996]. The court found this power was enough to enable the Assembly to maintain internal order and discipline by means which it considered appropriate. This included the power to exclude from the Assembly, for temporary periods, a member who was disrupting or obstructing its proceedings. However, the court found that the respondent had not been suspended for disrupting or obstructing or unreasonably impeding the management of the business of the Assembly, but as a kind of punishment for making a speech some days earlier which was not obstructive or disruptive but which some members of the Assembly considered objectionable and unjustified.

The question was therefore not whether the Assembly had the authority to suspend the respondent in order to maintain orderliness in its proceedings but whether it was entitled to suspend the respondent as a punishment for an objectionable statement. This led to consideration of the respondent's right to freedom of expression in the Assembly.

Section 58(1) (a) of the constitution provides that cabinet members and members of the Assembly have freedom of speech in the Assembly and its committees subject to its rules and orders. The appellant argued that the right was also subject to other privileges and immunities of the Assembly as prescribed by national legislation [58(2)]. These privileges and immunities, it was argued, were contained, by reference, in the law and custom of parliament in the United Kingdom saved in Act 19 of 1911 which provided that members of the South African House of Assembly would enjoy the same privileges as enjoyed by the House of Commons of the UK. Act No 19 of 1911 was saved by Act 32 of 1961 which stated that the privileges and immunities of the Assembly would be those applicable at the time of independence in 1961 and which was in turn saved by the current Powers and Privileges of Parliament Act of 1963.

Mohamed CJ rejected this "edifice" which appellant sought to erect by "incorporating a reference to other laws which in turn incorporate further laws which incorporate the parliamentary law and custom of the United Kingdom which arguably allows the suspension of members of Parliament" and which appellant sought to justify in terms of the 1996 Constitution.

Mohamed CJ pointed out that the threat that a member of the Assembly may be suspended for something said in the Assembly inhibits freedom of expression and adversely impacted on the guarantee given by section 58 (1)(a). Provisions regarding other "privileges and immunities" of Parliament had to be interpreted in such a way as not to detract from that guarantee. The right to freedom of expression was entrenched while legislation had to conform with the constitutional provisions and construed taking into account the values of the Constitution. In particular the internal rules of Parliament had to have "due regard to representative and participatory democracy".

The Powers and Privileges of Parliament Act, 1963, provides mechanisms to discipline and punish members of the Assembly for contempt of parliament including the kind of misconduct committed by respondent. Punishment includes imposition of a fine and detention where such fine

has not been paid. No provision, however, is made for suspension as a form of punishment. The appellant sought to rely on Rule 77(A)(1) of the standing Rules of the Assembly which makes freedom of speech and debate in the House "subject to the restriction placed on such freedom in terms of the Constitution, any other law or rules." However, this was rejected by the court on the basis that the Constitution provides no such restriction nor was there legislation which qualified the right to freedom of expression except for temporary exclusion of a member to maintain order in the Assembly.

Mohamed CJ concluded: "The right of freedom of speech in the Assembly is a fundamental right crucial to representative government in a democratic society." It was held that the National Assembly had no constitutional authority to suspend the respondent from the Assembly in the circumstances and the appeal was dismissed with costs.

The case should be of interest to other countries especially in the former British colonies and protectorates which inherited the Westminister type of constitutional order at independence. Not only does it emphasise the importance of freedom of expression to the nurturing of democracy but it illustrates the departure from parliamentary supremacy whereby Parliament may pass any law however oppressive and not be censured by the courts, to constitutional supremacy under a constitution with an entrenched bill of rights and judicial review.

***Prince J D C Mpuga Rukidi v Prince Solomon Iguru* Civil Appeal No 18/94 (Supreme Court of Uganda) (decided 17/5/1996).**

Just as one thought that African kingdoms were in decline or dying if not already dead in this era of republican democracy, the inter-lacustrine kingdoms of Uganda were in the last few years, restored after being abolished for 27 years.

This case concerns a struggle by two brothers for the throne of one of the oldest kingdoms in Uganda, Bunyoro-Kitara. The appellant, the eldest son of Sir Tito Winyi, the last Bunyoro-Kitara king before the kingdom was abolished in 1966, claimed that at the time of abolition, he was the crown prince and was recognised as such at official functions of the Kingdom and during visits to other countries and kingdoms. He argued that he, therefore was the rightful successor to the throne. He further argued that the respondent, his half-brother was not entitled to succeed to his father's throne as he was the issue of an incestuous relationship between the late king and respondent's mother. The allegation of incest was based on the fact that respondent's mother was a princess and closely related to the respondent's father and since, according to the appellant, princesses were not allowed by custom to marry, respondent was not born of a legitimate marriage. He was therefore, it was argued, not a member of the royal family and not entitled to succeed as required by the 1962 Uganda Constitution. What complicated the issue further was that there was a will left by the late king, Tito Winyi in which the respondent was nominated to succeed to the throne. At the trial, only a photocopy of the will was produced, the original apparently having been lost in the High Court where it was

deposited for safekeeping by the late king. Although the appellant disputed the admissibility of the will in evidence, the trial court, Tinyinondi J, admitted it as a valid nomination of respondent to the throne of Bunyoro-Kitara. The appellant's argument that the will was not a valid will as it was not attested was rejected on the ground that wills by Africans did not require attestation to be valid.

The court further rejected the argument that the nomination had lapsed with the abolition of kingdoms. The trial court found, and the appeal court agreed, that the right to be the heir and succeed to the throne of Bunyoro-Kitara was an acquired right which subsisted despite the abolition of the kingdom. It was further held that even if the right had been lost with abolition, it was restored by the Constitution (Amendment) Statute of 1993 which had paved the way for the restoration of kingdoms.

On the question of the right of the respondent to succeed, the trial court held that Schedule Three of the 1962 Constitution which dealt with succession to the Bunyoro kingdom referred to nomination by the king from the "Royal line". Since Royal line or family was not defined, it was held to include all the king's sons. This contrasted with provisions regarding the kingdom of Toro where a successor was to be nominated first from a particular wife (omugowekitebe) before other potential successors could be considered and provisions relating to the Ankole kingdom where the successor was to be nominated first from the sons of the legally wedded wife (omwigarire). The respondent was therefore held to be a member of the royal family of Bunyoro and to have been properly nominated to succeed to the throne.

This case is of interest not only on the issue of succession of traditional leaders, but also on the interaction between traditional institutions and modern democratic institutions. The 1962 Constitution of Uganda gave the reigning king the right to nominate an heir from among his sons. The 1993 Constitution (Amendment) Statute which cancelled the abolition of kingdoms and made provision for their restoration stated that the institution of traditional ruler may exist "where the people of the community for which a person is to be Ruler" so desired and where it was "according to culture, customs and traditions of the people".

A question raised in this case was how the wish of the people is to be determined. It emerged in the evidence that at council meetings of two of the three districts forming part of the kingdom of Bunyoro-Kitara, resolutions had been passed calling for the restoration of the kingdom and expressing support for the respondent as the nominee of the late king to be the successor to the throne. It was argued by the appellant that the views of district councils, which were political institutions, were irrelevant to the issue of succession to the throne since they had nothing to do with custom or tradition. Tinyinondi J, however, held that by giving the "people of the community" the right to determine whether kingdoms should be restored and to determine who shall be their rulers, the legislators had intended to introduce "modern democratic monarchies". He found the fora at which the issue was deliberated (that is, the District Councils) to be sufficient for purposes of gauging the will of the people as required by the statute. He said, short of a referendum, which is not what the statute

required, those fora constituted "the people of the community". On appeal, Odoki JSC agreed and observed that "it was common ground" that the people of Bunyoro-Kitara had popularly expressed a wish to have the institution of the Omukama (King) as the Traditional Ruler of Bunyoro-Kitara restored.

On the question of custom and tradition, Tinyinondi, J, found that there was no clear tradition as to succession to the throne since some kings had come to power through wars among siblings within the royal family, others peacefully through nomination and one as usurper. The only common element was that, except for one, a princess, all were either sons or brothers of previous kings. Colonial rule had since the 1933 Bunyoro Agreement introduced a requirement of nomination by the reigning king and approval by the governor. The requirement was later incorporated into the 1962 Constitution, substituting the President for the Governor. The 1993 Statute had, however, omitted the requirement of nomination and approval by the Governor or President and instead provided that if the people wished they may have the monarchy restored. The judge interpreted the provision that the person to become Ruler shall be determined in accordance with "the culture, customs and traditions of the community for which that person is to be Traditional Ruler" to mean that the people shall determine the person to be their Ruler. He further held the "culture, customs and traditions" in case of the Bunyoro-Kitara kingdom to mean no more than that the person must be from the Babito dynasty and be a son or brother of the previous king, this being the minimum content of the custom and tradition relating to succession to kingship in Bunyoro-Kitara. Thus, whereas the respondent had acquired his right to succeed to the throne through nomination in accordance with the 1962 Constitution, his nomination had been confirmed and strengthened by his acceptance by "the people of the community" in accordance with the democratic element introduced by the 1993 statute. The respondent also satisfied the "custom and tradition" requirement as he was from the Babito clan and a son of the previous king (Omukama).

The trial court dismissed the plaintiffs' case with costs. The appeal raised the same issues as those at the trial. It was argued that the trial judge erred in holding that respondent was qualified to succeed Sir Tito Winyi as the Omukama of Bunyoro, erred in admitting the will in evidence and holding that it was a valid will. The appellant also appealed against the order for costs. The Supreme Court dismissed the appeal on the main issue but allowed the appeal on the award of costs to the respondent. The Supreme Court decided that as this was an important constitutional case determining who was to be the successor to the throne of Bunyoro-Kitara and as there was need for reconciliation in the community among the supporters of either party, each party should pay his own costs.

The case is interesting on two issues raised. First, it shows that traditional leadership, even where it is not economically or politically significant, is still keenly contested because of the high esteem in which traditional leaders are held by many, if not most, of the people in their areas of jurisdiction. Traditional leadership is even more prized where, like in South Africa, Swaziland and Lesotho, traditional leaders still have an

important political role to play as well as controlling access to land in rural areas. Secondly, the case is interesting in demonstrating how an element of democratic choice can be infused in the determination of whether traditional institutions should continue to exist in this age of republicanism and democracy and even in the choice of the person to be a traditional leader. This may be relevant in South Africa where some traditional leaders are urging the government to restore the status of kingship in their areas (particularly in the Northern province and the Eastern Cape) and to bring them to par with the Zulu King. In some parts of the continent, traditional leadership is continually under stress while in others there are calls for restoration of defunct kingdoms. In both cases a mechanism may have to be found to determine the future of traditional leadership in accordance with the will of the people.