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***Swartbooi and Another v Speaker of the National Assembly* (SA 38-2021) [2021] NASC (4 August 2021)**

Dunia P. Zongwe[1]

In *Swartbooi*, the Supreme Court of Namibia failed to give flesh, blood and bones to a theory that could unify the cases that dealt with the separation of powers in Namibia. Though few lawyers would disagree with the outcome of its judgment, the Court nonetheless achieved this outcome by retreating into its legalistic shell.

At the same time, the *Swaartbooi* case completed a triangle that plotted all the possible relationships between the three organs of state in Namibia. After *Ex parte in re: the Constitutional Relationship Between the Attorney-General and the Attorney-General* (hereinafter referred to as '*AG and PG*') addressed the relationship between the executive and the judiciary,[2] the *Itula* case handled the relationship between the executive and legislative branches.[3] Thirdly, the *Swartbooi* case confirmed the relationship between the legislature and the judiciary.

Still, when tackling the separation of powers doctrine, the Supreme Court almost exclusively focused on the rule of law and neglected the democratic aspects of the doctrine, thereby missing a golden opportunity to articulate the two other principles (democracy and justice for all) that underpin Namibia as a state. The Court did not seize the moment to Namibianize the doctrine.

Facts

On 15 April 2021, while the President Hage Geingob was fulfilling his constitutional duties by delivering his State of the Nation Address (SONA) in Parliament, the leader of an opposition party, Bernadus Swartbooi, started heckling the President. A bitter exchange ensued and became so tense that, at one point, the President, aged 79, reminded the young Member of Parliament (MP) that he (i.e., Geingob) was "older than [Swartbooi's] mother!" – an invitation to Swartbooi, aged 43, to show respect to his elders.

Visibly shaken by Swartbooi's unruly behavior, the Speaker of the National Assembly tried on several occasions to bring calm and order to the lower house of Parliament, in vain. The Speaker, Peter Katjavivi, eventually ordered Swartbooi out of the National Assembly. Swartbooi was then escorted out by security. Immediately thereafter, Swartbooi's deputy Henny Seibeb tore apart the SONA speech that had been distributed to MPs. Parliament security, including the President's security detail, engaged in a physical scuffle with Seibeb and forcefully removed him out of Parliament.

A few days later, Speaker Katjavivi wrote to Swartbooi and Seibeb that he had reported the matter to the Committee on Standing Rules and Orders ('the Standing Committee') and that he, by virtue of rule 124(a) of the Standing Rules, had ordered that they remain "withdrawn from the House… until [his ruling] is set aside on the recommendation of the Standing

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[2] *Ex parte Attorney General in re: The Constitutional Relationship Between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC) (hereinafter referred to as the '*AG and PG*' case).

[3] Itula and Others v Minister of Urban and Rural Development and Others 2020 (1) NR 86 (SC). For a detailed commentary on *Itula,* see Dunia P Zongwe, '*Itula and Others v Minister of Urban and Rural Development and Others* 2020 (1) NR 86 (SC)' (2020) 3 SAIPAR Case Review 59.

Committee".[4] In other words, the Speaker had decided to suspend Swartbooi and Seibeb for an indefinite period.

Feeling that their indefinite suspension had violated their rights, Swartbooi and Seibeb approached the High Court of Namibia for an order declaring that the Speaker of the National Assembly had acted beyond his powers and forcing the Speaker to readmit the two MPs to the Assembly.

The urgent application to the High Court

On 21 April 2021, Swartbooi and Seibeb (the Applicants) filed an urgent application with the High Court. They specifically argued that rule 124(a) of the Standing Rules did not confer on the Speaker the power to suspend them indefinitely. They therefore prayed the court to declare the Speaker's suspension order unlawful and to set it aside accordingly. In addition, the Applicants sought an interim interdict restraining the Speaker from continuing to interfere with their rights as MPs to attend Parliament.

The High Court postponed the hearing of the urgent application to 26 April 2021 to give the Speaker an opportunity to answer on the merits of the application. As a consequence, the necessity for the Applicants to seek interim relief fell away.

The Speaker justified his decision to eject the Applicants by "the unprecedented nature of the disruption and the prospects of further disruption".[5] He also explained that, since the Standing Rules remain silent on suspensions pending the finalization of disciplinary proceedings, rule 124(a) empowered him to act in the interim and to suspend the Applicants until the Standing Committee determines that disciplinary matter.[6] In the meantime, the Standing Committee referred that matter to another committee, the Committee on Privileges ('the Privileges Committee').

Crucially, the Speaker insisted that the provisions of the Powers, Privileges and Immunities of Parliament Act 17 of 1996 (the Act) prevent courts from interfering with the internal order of Parliament. He submitted that section 21 of the Act stopped the courts from challenging the Speaker's power to suspend the Applicants indefinitely in terms of rule 124(a).[7]

The High Court upheld the Speaker's position and rejected the Applicants' arguments on two grounds. First, the court found that the principle of separation of powers prevented it from usurping the proceedings pending before the Standing Committee.[8] It stressed that the matter fell "within the domain of Parliament" and that section 21 of the Act aligned with the separation of powers principle.[9] Second, the High Court held that, with their urgent application, the Appellants actually sought a declaratory order, a discretionary remedy.[10] The Court exercised its discretion against the Applicants, noting that the Applicants could raise their concerns with the Standing Committee, rather than the High Court, because the Committee had already been seized of the matter.[11]

[4] See *Swartbooi and Another v Speaker of the National Assembly* (SA 38-2021)[2021] NASC (4 August 2021) [3] (hereinafter the '*Swartbooi*' case).
[5] See *Swartbooi* (n) [7].
[6] *See* Swartbooi (n) [8]
[7] *Swartbooi* (n) [9].
[8] See *Swartbooi* (n) [10].
[9] See *Swartbooi* (n) [10].
[10] *Swartbooi* (n) [11].
[11] *Swartbooi* (n) [11].

Swartbooi and Seibeb did not agree with the judge's ruling. They therefore appealed against it to the Supreme Court.

The Supreme Court's decision

Writing for the majority, Smuts JA framed the core question in *Swartbooi* as revolving around

> the power of the Speaker of the National Assembly to suspend members of Parliament indefinitely within the context of the separation of powers and parliamentary privilege and the right of the National Assembly to make rules of procedure for the conduct of its business proceedings.[12]

Thus, resolving this question required the Supreme Court to assess the indefinite suspension of Swartbooi and Seibeb (the Appellants) in light of three criteria: the separation of powers doctrine, parliamentary privileges, and the right of the National Assembly to regulate itself.

Counsel for the Appellants maintained that section 21 of the Powers, Privileges and Immunities of Parliament Act did not insulate Parliament from constitutional control because the Constitution reigned supreme in Namibia's legal system.[13] Furthermore, the Appellants pointed out that section 21 did not apply to the matter and could not therefore oust the jurisdiction of the courts because section 21 referred to action by Parliament as defined in the Act[14] – a definition that excluded the Speaker of the National Assembly.[15]

Counsel for the Speaker countered the Appellants' submissions by supporting the decision handed down by the High Court. On the Speaker's behalf, counsel repeated, in substance, the heads of argument he presented in the High Court. In essence, the Speaker maintained that the suspension of the Appellants was an "'internal affair' of Parliament" covered by section 21 of the Act.[16]

In a unanimous judgment, Smuts JA concluded that the Speaker acted beyond the scope of his powers in terms of section 21, which rendered his suspension of the Appellants unlawful and of no effect.[17] The learned judge opened his analysis by quoting the relevant constitutional, legislative, and regulatory provisions. First, Smuts JA cited Article 1(3) of the Constitution, which "establishes at its very outset the principle of powers and the supremacy of the Constitution".[18] (However, the judge appears to have misquoted Article 1(3) as this clause only separates state power into three organs; it does not proclaim the supremacy of the Constitution, as does Article 1(6).) The judge specified that, subject to the powers of the President of the Republic and the National Council, Article 44 of the Constitution vests the National Assembly with the power to pass laws.[19]

After quoting Article 59(1)(on the powers of the National Assembly to make internal rules and set up committees) and Article 60 of the Constitution (on duties, privileges and immunities of MPs),[20] the judge went on to describe relevant provisions of the Act, namely Article 12 (investigating the conduct of MPs), Article 13 (discipline of MPs), Article 21, and Article 45

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[12] *Swartbooi* (n) [1].
[13] Swartbooi (n) [16].
[14] Powers, Privileges and Immunities of Parliament Act 17 of 1996, s 1 sv 'Parliament' (defining 'Parliament' as "the Assembly or the Council and includes any committee").
[15] Swartbooi (n) [17].
[16] *Swartbooi* (n) [17].
[17] *Swartbooi* (n) [65].
[18] *Swartbooi* (n) [20].
[19] *Swartbooi* (n) [20].
[20] *Swartbooi* (n) [25].

(the principle of representation of all people).[21] Of special interest, Article 21(1) embodies the Parliament's power to "control, regulate and dispose of its internal affairs".[22] Article 21(2) ousts the jurisdiction of courts when Parliament exercises its powers to control its own affairs:

> Subject to Articles 5, 79(2) and 80(2) of the Namibian Constitution, no proceedings of, or decision taken by, Parliament in accordance with the relevant Standing Rules and Orders or this Act shall be subject to any court proceedings.

Last but not least, Smuts JA cited several provisions (i.e., rules 68, 111-115 and 124) in the Standing Rules,[23] which govern the internal workings and the procedures of the National Assembly. Particularly, rule 111 enables the Speaker to eject an MP, rule 112 allows him to report MPs to the Standing Committee, and rule 113 sets out the consequences of ejecting or suspending MPs. The Speaker relied on rule 124 to suspend the Appellants indefinitely. This rule permits the Speaker to decide matters when 'unforeseen circumstances' arise, and it makes the Speaker's decision valid until the Standing Committee sets it aside.

After he analyzed the laws that apply to the case, Smuts JA made two decisive rulings. First, he ruled that the jurisdictional facts that the Speaker needed to establish before he could invoke section 21 of the Act (the ouster clause) did not exist.[24] Section 13 of the Act had actually foreseen the circumstances (i.e., the discipline of MPs), such that the Speaker could not lean on rule 124 to indefinitely suspend the Appellants.[25] The judge refused to heed the call by the Speaker's counsel to contextually interpret rule 124 as implying the power to suspend MPs indefinitely; the judge considered that the Standing Rules do not accord to the Speaker the power to suspend MPs at all, let alone to do so indefinitely.[26] Section 13 of the Act authorizes only the House to discipline MPs.[27] The Speaker, the Standing Committee, the Privileges Committee do not have that power.[28] In other words, the Speaker had arrogated to himself powers which the Act conferred on Parliament only.

Second, Smuts JA reasoned that, since section 21 subjected the ouster clause to Articles 5, 79(2), and 80(2) of the Constitution, that ouster clause could not prevent this court from enforcing the Constitution.[29] The judge could not see why the provisions of the Act had purported to oust the jurisdiction of the courts if in the selfsame provision it held that the ouster was subject to Namibia's supreme Constitution.[30] In any event, the ouster would have been subject to the Constitution, whether or not section 21 had expressly so declared.

Because of the absence of the required jurisdictional facts, the court concluded that the ouster clause (section 21 of the Act) did not preclude the court from considering the validity of the Speaker's decision to suspend the Appellants indefinitely while waiting for the disciplinary proceedings to finish.[31] Having determined that the Speaker overstepped his powers, the court set aside the Speaker's suspension decision.[32]

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[21] *Swartbooi* (n) [26]-[30].
[22] Powers, Privileges and Immunities of Parliament Act, s 21(1).
[23] *Swartbooi* (n) [31]-[40].
[24] *Swartbooi* (n) [61].
[25] *Swartbooi* (n) [46]-[53].
[26] *Swartbooi* (n) [50].
[27] *Swartbooi* (n) [48].
[28] *Swartbooi* (n) [48] and [60].
[29] *Swartbooi* (n) [56].
[30] *Swartbooi* (n) [56]. See also ibid [62]-[63].
[31] *Swartbooi* (n) [64].
[32] *Swartbooi* (n) [65] and [72].

Significance of the judgment

Swartbooi enriches the scant Namibian jurisprudence on the separation of powers by offering the first installment on the relationship between the legislature and the judiciary. *Swartbooi* marks the first time a separation-of-powers case dwells on that relationship. Before *Swartbooi,* most separation cases featured tensions between the executive and the judiciary.[33]

Swartbooi also afforded the Supreme Court an occasion for drawing the line that separates the right of the legislature to self-regulate and the jurisdiction of the courts to check and balance the acts of the other branches. Though the court correctly determined that section 21 of the Powers, Privileges and Immunities of Parliament Act could not oust the jurisdiction of the courts, it clarified this determination by pointing out that the ouster clause nonetheless translated the principle that inheres in the separation doctrine and that puts Parliament in full control of its own affairs.[34] That principle further implied that the legislature intended, through section 21, that Parliament's internal affairs would not amount to the 'administrative actions' contemplated by Article 18 of the Constitution, which promotes administrative justice.[35] This means that Parliament must operate independently from the other organs; still, questions as to whether Parliament has powers and what its lawful limits are, in the context of the separation doctrine, remain questions for the courts to settle.[36]

(Mis)understanding the separation doctrine in Namibia

Although lawyers will undoubtedly welcome the *Swartbooi* judgment, jurists and political scientists will regret that the court confined its perspective of the separation of powers doctrine to a narrow, almost legalistic vision anchored on the rule of law. Article 1(3) of the Namibian Constitution couches the separation doctrine in these words:

> The main organs of the State shall be the Executive, the Legislature and the Judiciary.

Smuts JA approaches Article 1(3) of the Constitution by highlighting "Article 1[sic]" of the Constitution, which clarifies that the Constitution rests on the rule of law, which in turn subsumes the doctrine of legality.[37] (Actually, the judge did not portray Article 1 faithfully when he broadly described it as basing the Constitution on the rule of law: Article 1(1) specifically, as opposed to Article 1 generally, establishes the Republic of Namibia as "founded upon the principles of democracy, *the rule of law* and justice for all".[38])

The exact wording of Article 1(1) clearly shows that, before the rule of law, *democracy* underpins the Republic of Namibia, including the manner in which it separates state power into three organs and functions. Jurists, historians, and political scientists would concur with such insight.

The Court's reasoning in *Swartbooi* suggests that, if the Standing Rules had allowed the Speaker to suspend an MP, the Speaker's decision to suspend the MP indefinitely would conform to the separation of powers outlined in the Constitution. This approach failed to speak

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[33] Those cases comprise *AG and PG* (n); *Mostert v Minister of Justice* 2003 NR 11 (SC); and *Minister of Justice v Magistrates' Commission and Another* 2012 (2) NR 743 (SC). For a thorough discussion of the executive-judiciary nexus, see Nico Horn, 'An Overview of the Diverse Approaches to Judicial and Executive Relations: A Namibian Study of Four Cases' in Charles M Fombad (ed), *The Separation of Powers in African Constitutionalism* (Oxford University Press 2016).
[34] *Swartbooi* (n) [56].
[35] *Swartbooi* (n) [56].
[36] *Swartbooi* (n) [56]-[57].
[37] *Swartbooi* (n) [21].
[38] Constitution of the Republic of Namibia, art 1(1). Emphasis added.

to the deeper philosophies that animate the separation doctrine. In fact, the doctrine derives much of its spirit from the quest to realize liberty. For John Locke, the father of classical liberalism, separating political powers should aim not so much to constrain the power of the sovereign as to 'enlarge freedom'.[39] While scholars and thinkers have, from antiquity to date, held onto the idea of separating the powers of rulers to fetter those powers,[40] thereby avoiding arbitrariness, tyranny or totalitarianism, Locke became famous for his insistence on freedom. Locke affirmed that "the end of law is not to abolish or restrain, but to preserve and enlarge freedom."[41]

By ignoring the 'democracy' part of Namibia's founding principles, the judge implied that the Speaker's suspension offended the Constitution because the *Standing Rules did not allow him to do so;* not because the democratic values undergirding the Namibian state forbade him to do so. If the Rules did allow him to suspend the Appellants indefinitely, the Court would have declined to assert its jurisdiction because the Speaker's decision would have complied with the separation doctrine. Emphasizing the rule of law and neglecting democracy when construing the separation doctrine crippled the *Swartbooi* judgment.

The court's flawed perspective on the separation of powers doctrine in *Swartbooi* becomes evident, when considering that Article 1(2) of the Constitution vests "*all power*… in the people of Namibia who shall exercise their sovereignty through the *democratic* institutions of the State". Rousseau, too, believed that the true source of state power in society was the 'social contract', which expresses the general will of the people.[42] Only the people – not the state or even the Constitution itself – serves as the fountain of all state powers.

Three thought experiments demonstrate what the Supreme Court in *Swartbooi* would have accomplished had it factored in its judgment the popular sovereignty principle. First, assume that the laws permitted to suspend MPs. Insofar as people democratically elected Swartbooi and Seibeb to the National Assembly, the popular sovereignty principle compels the Speaker to restrain himself before he thinks of suspending MPs or ordering them out of Parliament, even if the existing law or the Standing Rules authorize him to suspend them indefinitely. This holds especially true in light of the fact that the Speaker belonged to the ruling party whereas Swartbooi and Seibeb, members of the Landless People's Movement (LPM) party, represented the political opposition.

Second, imagine that the laws only empowered the Speaker to suspend MPs *temporarily.* Would it have made any difference if the Speaker could only suspend unruly MPs for a few days or a few hours? Here, the logic of the popular sovereignty principle dictates that exercising this temporary suspension power would not infringe on popular sovereignty because it restricts the principle slightly.

Third, assume that the existing laws permitted the Speaker to suspend MPs indefinitely. The indefinite nature could in itself negate popular sovereignty and suppress voters' rights. This fact should have kept the Speaker, in this hypothetical scenario and in the actual *Swartbooi* case, from suspending the Appellants indefinitely, however uncivil and wounding the words of the MPs had been.

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[39] John Locke, *Second Treatise of the Government: An Essay Concerning the True Origin, Extent and End of Civil Government* (1689).
[40] See MJC Vile, *Constitutionalism and the Separation of Powers* (2 edn, Liberty Fund 1998) 21 (stating that the long history of the separation of powers doctrine reflects the goals of nations over centuries to flesh out a system that effectively controls the exercise of government power).
[41] Locke (n).
[42] Jean-Jacques Rousseau, *The Social Contract* (1762).

Conclusion: Squaring the triangle

The outcome of the *Swartbooi* case has solidified the separation of powers doctrine in Namibia. For that reason, the Supreme Court judges should be lauded for, once again, preserving their independence vis-à-vis the executive, especially given the political context that prevails in Namibia. The recession in which the country has slid since 2016; the Fishrot Files, arguably Namibia's worst corruption scandal; the loss of the ruling party's supermajority in Parliament in 2019; and the devastating socio-economic fallout of the COVID-19 pandemic – they have all conspired to thin the skin of the government and MPs from the ruling South West Africa Peoples' Party (SWAPO) while emboldening the opposition in defying SWAPO in the usually restrained and dignified atmosphere of the Parliament building. In such context, the apex court has stood still despite the turbulences and the perfect storm, like a church in the middle of the village.

Nonetheless, the Supreme Court missed a chance to square the triangle that the *Swartbooi* has completed by dealing with the judiciary-legislature relationship of the separation doctrine: The Supreme Court did not embed this triangle within a larger vision of the doctrine in Namibia. The Supreme Court does not seem aware of the fact that the doctrine is not uniform; the doctrine displays various permutations in different countries. Instead, the court quoted judges from South Africa when tackling the doctrine in the Namibian context,[43] not realizing that the separation doctrine in South Africa is imbued by transformation constitutionalism, a constitutional theory that Namibia has not (yet) explicitly endorsed. Put another way, the Supreme Court has not started to Namibianize the separation of powers doctrine: It has not yet squared the triangle.

The reflections in the Commentary have hopefully drawn the contours of such contextualization of the separation doctrine in Namibia. Forging a Namibian theory of the separation of powers would enable the courts to unify their approach to cases involving the separation of powers. In short, the Namibian context demands that the separation doctrine should align with the founding principles of the Namibian state, as listed in Article 1(1) of the Constitution, namely democracy, the rule of law, and justice for all. Thus, the Namibian separation doctrine should strive for 'justice for all', particularly when separating powers may entail blocking access to courts through ouster clauses or other means. Second, just like Smuts JA did in *Swartbooi,* the Namibian strand of the doctrine should preoccupy itself with the rule of law.

Moreover, the Namibian doctrine should consist in the quest for political liberty and popular sovereignty – two values expressly consecrated in the Namibian Constitution and actualizing the 'democracy' part of the separation doctrine. Lastly, a Namibianized separation doctrine should emphasize the nation-building aspects of the separation of powers. Like Rousseau observed, though the man is born free, he is everywhere in chain;[44] Namibian judges should turn this aphorism around and ensure that, in their future jurisprudence, the law should hand the individual the keys to his freedom everywhere. He must enjoy his freedom to vote, to run for office, to choose a political party, to debate public policies, and to express within or outside Parliament his opinions, however vexing this freedom may sound outside or inside the majestic Parliament building towering the center of Windhoek

[43] *Swartbooi* (n) [22] (where the Supreme Court quoted with approval and applied the principles governing legislature-judiciary interactions enunciated by the South African Constitutional Court in *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC) [36]-[38]).
[44] Rousseau (n).