IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

and

DONALD ACHESON

CORAM: MAHOMED A.J.

Counsel for State: H. Heyman

Counsel for Accused: T. Grobbelaar S.C. (with him G.H. Oosthuizen) instructed by Van der Merwe-Greeff.

Dates of hearing: 18,19,20,23 April 1990

Date of Judgement: April 23, 1990

JUDGEMENT

MAHOMED A.J.: The accused in this matter is Mr. DONALD ACHESON, an Irish citizen who is charged with the murder of Adv. ANTON LUBOWSKI, on the 12th of September 1989.

When the matter was called on the 18th of April 1990, Mr. Heyman who appeared for the State applied for an adjournment. He indicated that he sought a lengthy adjournment and that the accused should be kept in custody in the interim.

The material facts appearing during the hearing on the 18th

of April 1990.

In support of Mr.Heyman's application he called Colonel Smit from whose evidence and other documentation the following material facts emerged.

1. The accused was arrested on the 13th of September 1989 and he has been in continued custody since that day.

2. Although the initial arrest on the 13th of September 1989 was on the allegation of murder, he was on the 15th of September 1989, detained as a prohibited immigrant in terms of the admission of Persons to the Republic Regulations Act of 1972.

3. An application to set aside the accused's detention in terms of this Act was successful in the Supreme Court on the 6th of November 1989, but the accused was immediately arrested again on the allegation that he had murdered Mr. Lubowski.

4. An unsuccesful application for bail was made to the Magistrate on the 13th of November 1989. An appeal to the Supreme Court against that refusal of bail also failed.

5. On the 10th of January 1990 the accused again

appeared before the Magistrate, and the accused pleaded not guilty pursuant to the provision of Section 119 of the Criminal Procedure Act of 1977.

The State requested a postponement until the 15th of February 1990, so as to enable the Attorney-General to make his decision as to the further prosecution of the matter in terms of Section 122 of the Criminal Procedure Act.

The defence objected to such a lengthy postponement, whilst the accused was to be kept in custody and the Magistrate decided to adjourn the matter until the 25th January 1990.

6. On the 25th of January the accused again appeared before the Magistrate. The prosecutor informed the Court that the Attorney-General had decided to arraign the accused on the charge of murder in the Supreme Court on the 18th of April 1990.

7. The accused was thereafter served with a formal indictment, charging him with the murder of Mr. Lubowski, together with a summary of substantial facts and a list of witnesses to be called by the State.

8. On the 2nd of February 1990 and before the inde-

pendence of Namibia (which took place on the 21st of March 1990), Colonel Smit procured warrants for the arrest of one Burger and one Maree whom he suspected of complicity in the murder.

He could not locate these persons before the date of Namibia's independence, notwithstanding the apparent co-operation of the South African Police. After the independence of Namibia, Burger who is the former head of the Brixton Murder and Robbery squad of the South African Police, has surfaced openly within South Africa, but has apparently taken the view that he is not amenable to the processes of a foreign state.

9. On the 8th of April, the Namibian Police served a subpoena on one FERDINAND BARNARD at Roodepoort in South Africa, requiring him to attend this trial as a witness for the State. Although statements had previously been obtained from Barnard, it was later intimated to Colonel Smit that Barnard did not wish to attend Court and did not wish to get involved.

10. Similarly witness subpoenas were served on one CALLA BOTHA and one ABRAM VAN ZYL, (also known as "SLANG" VAN ZYL) on the 9th of April care of there advocate, Mr. Etienne Du Toit at Schreiner Chambers in Johannesburg. Although

Van Zyl had previously made a statement to the police and Botha had undertaken to do so, the information given to Colonel Smit was that neither of them were willing to give evidence.

11. The same applies to one Detective-sergeant W.B. Knox on whom a subpoena was similarly served in South Africa on the 9th April 1990. He also made a previous statement to the police.

12. Maree, Burger, Van Zyl, Botha and Barnard, were apparently at some time or another all members of the Brixton Murder Robbery squad of the South African Police.

13. According to the evidence of Colonel Smit the Civil Corporation Bureau, (also known as the "CCB"), is alleged to have been involved in the assassination of Adv. Lubowski. The CCB is a division of the Department of Defence of the Republic of South Africa.

14. Colonel Smit conceded in cross-examination that the possibility of getting Burger and Maree into Namibia to be joined as co-accused was extremely remote.

15. Colonel Smit was also asked what the prospects were of getting to Namibia the four South

African witnesses who had been subpoenaed by him. He said it was difficult to answer that question. He thought Barnard and Botha and possibly Knox would not attend, but Van Zyl might. He said that the only way in which the evidence of these witnesses could be facilitated, was through diplomatic co-operation between the Governments of Namibia and South Africa.

THE LAW

An adjournment of a criminal trial is not to be had for the asking. It must be motivated in terms of the Criminal Procedure Act, on the grounds that it would be necessary or expedient to do so. What I am required to do is to exercise a judicial discretion in terms of Section 168 of the Criminal Procedure Act, which provides as follows:

"A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act."

The word "necessary" in the section, I think means "reasonably necessary" in the circumstances of a particular case and "expedient" in the context, must refer to what is

advantageous, proper or suitable to the case, judicious. (Kabe v Attorney-General and Another, 1958 (1) SA 303 (W).

An adjournment of a criminal trial, necessarily involves delay, and in the case of State v Geritis, 1966 (1) SA 753 (W) at 754 C-F, VIEYRA, J. stated that in the exercise of the discretion to adjourn proceedings two principles must be borne in mind -

> "The one is that it is in the interests of society and accordingly of the State that guilty men should be duly convicted and not escape by reason of any oversight or mistake which can be remedied. The other, no less valid, is that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition."

Mr.Grobbelaar,S.C, who appeared with Mr. Oosthuizen, on behalf of the accused underlined the words "oversight" and "mistake" in the judgement of VIEYRA, J.

It is of course true that where an "oversight" or a "mistake" made previously, makes it impossible for the State to proceed with a trial on the appointed date and a refusal of an adjournment might lead to a person who might be guilty avoiding a conviction, a Court, in appropriate

circumstances, might exercise its jurisdiction to adjourn the proceedings. But a "mistake" or an "oversight" is not a sine qua non. There may have been no "mistake" or "oversight" at all. A witness whom the State might have intended to call, might have died or become incapacitated and another witness who is able to provide the same evidence needs to be subpoenaed. Or, as in the instant case, the witness sought might no longer be automatically compellable in the Court's jurisdiction. In all such cases, the Court might, depending on the circumstances, still be persuaded, to exercise its discretion to adjourn the proceedings, nothwithstanding the absence of any previous "oversight" or "mistake".

There are two fundamental issues which the Court would ordinarily wish to satisfy itself about, where an adjournment is sought in order to call witnesses who are not available in Court.

Firstly: Are the witnesses whom the party seeks to call on the adjourned date material witnesses?

Secondly: Is there a reasonable expectation (not a certainty) that the attendance of such witness will be procured on the adjourned date.

I refer in this regard to:

The State v Geritis, supra at 754 (H) to 755C

R v Le Chevalier D'Eon, 97 E.R. 955

S v Magoda, 1984(4) SA 462(C) at 465 to 466.

The fact that these two basic requirements are satisfied does not mean however, that the Court must necessarily exercise its discretion in favour of an adjournment. That discretion has to be exercised, regard being had to all the circumstances of the case. This would include inter-alia the following:

(a) the length of the adjournment sought;

(b) how long the case has been pending;

(c) the duration and the reasons for any previous adjournments;

(d) whether or not there has been any remissness from the party seeking the adjournment and if so, the degree and nature of such remissness;

(e) the seriousness of the offence in respect of which the accused is charged;

(f) the attitude and the legitimate and reasonable needs and concerns of the adversary of the party seeking the adjournment;

(g) the resources, capacity and ability of the party affected by the adjournment, to protect and advance its case on the adjourned date;

(h) the financial prejudice caused to such party by the adjournment;

(i) the public interest in the matter;

(j) whether or not the accused is in the interim to be kept in custody.

Some of these considerations might overlap, and others might sometimes be in conflict with each other. They have to be carefully assessed and weighed, in the exercise of a proper discretion.

During the course of argument it was at some times suggested to me that the enquiry as to whether an adjournment was expedient for the purposes of enabling the State to get the absentee persons concerned before the Court, was a separate matter, to be decided independently of the issue as to the length of the adjournment and independently of the issue as to whether bail should be granted. It is no doubt correct that the Court must apply its mind to the merits of each of these issues, but it would I think be an erroneous approach to fragmentize the enquiry. The question as to whether bail is to be granted is for example, one which clearly affects the issue as to whether an adjournment is to be granted at all and if so, for what period.

The Law requires me to exercise a proper discretion having regard not only to all the circumstances of the case, and the relevant statutory provisons but against the backdrop of the constitutional values, now articulated and enshrined by the Namibian Constitution of 1990.

The Constitution of a nation is not simply a statute, which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

Crucial to that tenor and that spirit is its insistence upon the protection of Personal Liberty in Article 7, the respect for human dignity in Article 8, the right of an accused to be brought to trial within a reasonable time in Article 12(1)(b) and the presumption of innocence in Article 12(1)(d).

I think Mr. Grobbelaar was correct in submitting that I should have regard to these provisions in exercising my discretion. They constitute part of the Constitutional Culture which should influence my discretion. No judicial officer should ignore that culture where it is relevant, in the interpretation or application of the Law or in the exercise of a discretion.

I turn now to the application of this Law to the facts as they emerged before me on the 18th of April 1990.

Mr. Heyman submitted that the evidence which he sought to lead from the absentee

witnesses was material evidence and he said in this regard that this evidence would show that the accused had a motive to kill Adv. Lubowski, because, he said, it would show that the accused was connected with the CCB, which it is alleged had an interest in the elimination of Mr. Lubowski. Mr. Heyman also contended that the joinder of Burger and Maree was important to strengthen his case against the accused, because it would render admissible against the accused certain additional evidence on the basis of the doctrine of common purpose.

Mr. Grobbelaar, correctly conceded that the evidence sought was material, but he forcefully contended that the State had not established that there was any reasonable possibility that the absentee persons would indeed be willing to come to Namibia and to testify in the trial against the accused, on the adjourned date or in the case of Burger and Maree to stand trial as co-accused.

He submitted inter alia that these absentees were resident in a foreign jurisdiction, that on Major Smit's evidence there was no reasonable prospect that they would voluntarily come to Namibia and that as experienced policemen, they had the knowledge and the skills to avoid apprehension and detection.

There was in my view undoubted force in these submissions by Mr. Grobbelaar and I accordingly debated with Mr. Heyman, how he proposed to procure the attendance of the four witnesses and the two potential co-accused whom he

sought.

His answer was that whilst there may be serious difficulties in persuading these persons to come to Namibia, voluntarily in these circumstances, the machinery of International diplomacy, might secure that result. He referred me in this regard firstly to the Extradition Act No., 67 of 1962. He conceded that no extradition treaty presently exists between Namibia and South Africa, but he said that this was in fact being drafted and negotiated and he suggested that in terms of Section 3(2) of the Extradition Act, the State President of the Republic of South Africa was entitled to consent to the surrender of a person within that country accused or convicted of certain offences, even if there was no extradition agreement. Secondly, Mr. Heyman also relied on the provisions of Section 171 of the Criminal Procedure Act which permits the Court to direct the hearing of evidence on commission, read with Section 33 of the Supreme Court Act 1959 (which applies to Namibia by virtue of Proclamation 220 of 1981.) (Section 33 of the Supreme Court Act makes it possible for the machinery of a foreign State to be harnassed, for the purposes of serving process emanating from this jurisdiction, if the Minister of Justice intimates that it is desirable for effect to be given to such process.)

It was suggested that Section 33 applied not only to civil proceedings, but also criminal proceedings and I was referred to Hiemstra, 4th Edition, Suid-Afrikaanse Strafproses, p. 379, where the learned author expresses himself as follows:

"Die proses is primêr vir privaatregtelike gedinge bedoel, maar sal waarskynlik ook vir strafsake beskikbaar wees, onderworpe aan kwalifikasies in verband met politieke aanklagte."

I am not sure, that Section 33 of the Supreme Court does in fact apply to criminal proceedings.

In the third place, it was faintly suggested to me at some point that section 328 of the Criminal Procedure Act which provides that any warrant, subpoena, summons or other process relating to any criminal matter shall be of force throughout the "Republic" (which is defined to include Namibia) might still make subpoenas served in South Africa after the date of Namibian Independence valid, notwithstanding Independence. This submission was strongly resisted by Mr.Grobbelaar who relied in this regard on Section 2(2) of the Recognition of the Independence of Namibia Act No.34 of 1990, of South Africa which provides that:

"Any rule of law in the Republic which was in force in the said territory immediately prior to the commencement of the Act, shall as far as the Republic is concerned cease to be of any force in the territory."

I am not quite sure that this section has the effect of negating the operation of Section 328 of the Criminal Procedure Act, (insofar as it preserves the force of

Namibian processes inside the Republic of South Africa) if such operation is indeed preserved by the Namibian Constitution. In the view I take of this matter it is however unneccesary to decide this issue at this stage.

I say this because central to all the three possible mechanisms suggested by Mr. Heyman for procuring the attendance of the absentees concerned, is some successful diplomatic initiative and I would therefore need some evidence as to the prospects of such diplomatic initiatives, if I was to hold that there is a reasonable possibility of procuring the attendance of these absentees.

The first mechanism based on the provisions of the Extradition Act, requires an extradition agreement or the consent of the South African State President in terms of Section 3(2). This clearly necessitates successful diplomatic initiatives.

With regard to the second mechanism based on Section 33 of the Supreme Court Act, even if section 33 were of application to criminal proceedings, what would be needed to procure an enforceable process in South Africa would be the assistance of the Minister of Justice of South Africa.

In regard to the third mechanism based on Section 328 of the Criminal Procedure Act, even if this section did operate to preserve the validity within South Africa of a process issued in this country, Namibian officials would not be entitled to go in and enforce such process. What

will again be required would be the co-oporation of the South African Government to enforce such processes.

It is therefor clear to me that each of the three mechanisms suggested by Mr. Heyman as mechanisms which could be employed to procure the attendance of these absentees involves succesful diplomatic initiatives between the two governments.

For these reasons I asked Mr. Heyman to obtain evidence or information, which would enable me to assess the prospects of such diplomatic initiatives. I repeatedly explained to him to inform me -

(a) Exactly what agreements were being concluded between South Africa and Namibia.

(b) When were they likely to be completed.

(c) Whether or not, and quite apart from any general agreements between the two countries, any special initiatives had been undertaken by the Namibian authorities to secure the co-operation of the South African State with respect to the procurement of the absentees concerned in the trial against Mr. Acheson.

(d) If so, who had commenced the initiatives on behalf of the Namibian State and when was this done.

(e) What if any had been the response of the South African Authorities.

(f) When did any such response from South Africa

manifest itself and how.

Faced with these questions Mr. Heyman asked for an adjournment at the conclusion of argument on the 18th, in order to obtain such evidence, and the matter was accordingly postponed to Thursday the 19th of April to enable him to do so.

Events which took place after the conclusion of argument on the 18th of April.

When the Court assembled on the 19th, Mr. Heyman said that he was not in a position to lead any evidence and an adjournment was sought until Friday, the 20th. It was again made plain to Mr. Heyman what the difficulties of the Court were and what it needed in order to enable it to exercise a proper discretion.

When the Court assembled at 10 a.m. on the 20th, Mr. Heyman lead no evidence. He said he had had difficulty in contacting the Attorney-General, but he was in a position to assure me that the Government of Namibia was indeed negotiating certain agreements with South Africa.

He gave the Court no details, but he said that it would take some 6 weeks to finalise the agreements and that the matter was "sensitive".

Argument then proceeded from 10 a.m. until 1 p.m. on the

20th of April, on whether or not there was a reasonable possibility that the absentees concerned would be in Court, on the adjourned date sought by the prosecution, some 6 weeks hence. In the course of this argument frequent references were made to Major Smit's evidence and I expressly canvassed with counsel the issue as to whether in the alternative to the lengthy postponements sought by the State, there was a case to be considered for giving to the State a short adjournment not for the purposes of procuring the attendance of the absentees, but specifically for the purpose of giving to the Court such information as to the nature and state of the diplomatic initiatives, as might enable me to decide whether or not the long postponement sought to procure the absentees concerned should indeed be granted or further considered.

Shortly after the Court adjourned at 1 p.m. on the 20th, my attention was drawn to a newspaper report in The Beeld of Thursday the 19th April, which referred to the proceedings before me. The report purported to quote the legal representative of Calla Botha and "Slang" Van Zyl as saying that contrary to what the Court might have been informed, no decision had been taken by Van Zyl and Botha to refuse to give evidence in the case against Mr. Acheson. They were apprehensive about their freedom in Namibia if they gave evidence and therefore before they could decide to give evidence they sought guarantees as to their safety and freedom.

The content of this report is not of course evidence, but I

communicated this content to both counsel before the Court was to resume after the lunch recess.

After the resumption following on the lunch recess, Mr.Grobbelaar reacted to this report, by producing to the Court four affidavits, in virtually identical terms (representing the triumph of the word processor.) These affidavits made by Van Zyl, Barnard, Knox and Botha. The affidavit by Knox was made on the 18th of April and the affidavits of Botha, Van Zyl and Barnard were made on the 19th of April.

The material parts of their affidavits are as follows: I quote from the affidavit of Van Zyl (the others being in substantially the same terms):

"3. I was informed by the said attorneys of record that the Attorney-General of Namibia applied for a postponement inter alia on the ground that the presence of certain witnesses were to be obtained and that more accused persons are to be joined in the said murder trial.

4. I was in fact informed that my name was mentioned as being one of the witnesses aforementioned and that Staal Burger and Chappie Maree have been mentioned as the two accused persons who are to be joined as co-accused persons.

5. I wish to make it quite clear that because of present circumstances particularly the Inde-

pendence of the Republic of Namibia, I do not intend now, or any future date to make myself available as a State witness in any trial in the Republic of Namibia. I am furthermore not willing to risk my personal safety and freedom in a foreign country.

6. In this regard I wish to emphasise that I am not aware of any Rule of Law or any Rule of International Law which would under any circumstances compel me to tender my testimony in a country other than the country in which I am permanently resident, namely the Republic of South Africa."

These affidavits are of course not conclusive, as to whether or not these persons will in fact be available as witnesses in the case against Mr. Acheson. If the diplomatic initiatives are successful, and these persons are subjected to any available disciplinary processes of the South African Legal System and the advantages inherent in accepting the indemnity offered to them, they may possibly decide to testify. But the affidavits are clearly of direct and central relevance to the issue which I debated for three days with counsel, as to what the prospects were in this regard. This was a major focus of the debate for some three hours on the 20th of April 1990. The affidavits were however, available to the defence from the afternoon of the 19th and in terms these affidavits were obviously procured to meet the very problems occasioned by the proceedings of the 18th of April 1990. I

therefore expressed my surprise to counsel that these affidavits had not been disclosed earlier and particularly during the three hours of argument on the morning of the 20th. Counsel stated that the affidavits had been obtained by the attorneys of the accused from the attorneys acting on behalf of the four witnesses and that they merely confirmed what had been said by Major Smit. I think however that they go much further and were quite peremptory and aggressive in their terms. My surprise remains intact. I wish to say nothing more in this regard.

After Mr. Grobbelaar's address Mr. Heyman sought and obtained a further opportunity on the afternoon of the 20th of April to react to these affidavits and more particularly to obtain more information from the Government of Namibia concerning the diplomatic initiatives. I even enquired whether the Attorney-General, or the Minister of Justice or the Minister of Foreign Affairs or some other person in authority could not be called to Court to give to me the necessary information. I made it clear that I was prepared to sit at night if necessary, but I was anxious to get the information, because the matter was one of great public importance.

I waited and I waited. Nothing was forthcoming. Late on the afternoon of Friday the 20th of April, I was informed by Mr. Heyman that he could find nobody in authority. The phones were not being answered. No physical contact could be established either. After three days of hearing, I had

no tangible information about the state of diplomatic initiatives, on a matter of very great public and even international importance. I expressed my exasperation, and I said that I would give judgement on Monday the 23rd of April after the intervention of the week-end.

The proceedings which took place on the 23rd of April.

Before the Court resumed on Monday the 23rd of April, Mr.Heyman indicated that he wished to make certain further submissions and to provide certain additional information. The Court decided to give him a further opportunity to do so.

When the Court reassembled Mr. Heyman said that he joined issue on the correctness of the averments made in the affidavits of Van Zyl, Botha, Barnard and Knox to the effect that they were not aware of any Rule of Law or any Rule of International Law which would under any circumstances compel them to give evidence in any country outside of South Africa. I pointed out to Mr. Heyman that the affidavits did not purport to set out what the objective position of the Law was in this regard, but merely what the states of mind of the deponents were. In the light of this, Mr. Heyman did not take this aspect further.

Mr. Heyman then handed in a letter which was dated April 20, 1990 from the office of the Attorney-General. I quote in full from this letter:

"STATEMENT ON STATUS OF EXTRADITION AGREEMENT BETWEEN THE GOVERNMENTS OF THE REPUBLIC OF NAMIBIA AND THE REPUBLIC OF SOUTH AFRICA.

The enforcement of warrants issued by the authorities of the Government of the Republic of Namibia and the Government of the Republic of South Africa for the arrest and the subsequent extradition in appropriate cases from one country to another would be dependent on a bilateral agreement between the respective Goverments.

A draft extradition agreement is presently under consideration by the Government and a decision regarding an agreement with South Africa will be made by the Cabinet at the very earliest opportunity. In this regard I should mention that the Government has, since 21 March 1990, had to deal with a significant number of matters peculiar to a State which has just achieved it's independence, including numerous agreements which require the attention of the Cabinet. In these circumstances it is at times very difficult to deliberate on every agreement within the time frame which should ideally be followed in regard to matter as important as an extradition agreement, particularly in view of

it's immediate relevance to the administration of justice.

I have no doubt that in the case of the State versus Acheson, and subject to an agreement coming into existence in the very near future, the authorities in Namibia may count on the full support of the South African authorities to co-operate with the authorities in Namibia to see to it that justice is done in this case, which concerns the assassination of a leading member of the Namibian society, the late advocate Anton Lubowski. In this regard the President of the Republic of South Africa has made his position plain in a statement which received wide publicity, indicating that he would ask the South African authorities to co-operate fully in this matter.

Dated at Windhoek this 20th day of April 1990.

H. RUPPEL

ATTORNEY-GENERAL"

After the letter was handed in by Mr. Heyman, he said that he had certain other letters which were of so confidential and sensitive nature that he could not disclose any further details. He said that he could assure me that "negotiations are under way". The Attorney-General was not available to come to Court, and was apparently out of the country this morning.

Mr. Grobbelaar reacted by contending with some justification that he was not being put into the position of testing the information which was communicated by Mr. Heyman and that the letter was much too vague.The letter says nothing about:

(1) who on behalf of Namibia was conducting the negotiations pertaining to these matters with the South African government;
(2) who on behalf of the South African Government was responding to these negotiations;
(3) when had these negotiations commenced;
(4) when were they expected to be completed;
(5) whether or not the witnesses sought by the State would be procurable, if these negotiations succeeded;
(6) whether or not the specific needs of the State to procure the attendance of the absentees concerned in this case, was the subject matter of any specific negotiations between the two Governments;
(7) what the attitude of the South African Government was to the urgency of procuring the attendance of these specific absentees.

In the result I have been put in the position where the State has clearly not satisfied me that there is any reasonable prospect that the absentees concerned will be procured by the State, to enable it to proceed on the

merits, on the adjourned date, some six weeks hence which is sought by the State.

The application for the six week postponement to procure these witnesses must therefore be refused.

The only issue which I now have to decide is whether I should forthwith order the State to proceed with the trial and to abandon the prosecution if it cannot do so, or whether having regard to what Mr. Heyman has said, I should give to the State a short adjournment, not for the purposes of actually procuring the attendance of the absentees concerned, but only for the limited purpose of having an opportunity of obtaining some tangible and specific evidence of diplomatic initiatives, which would enable the Court to decide whether a long adjournment should indeed be granted or considered.

I must confess that I have had very considerable difficulty in deciding this issue. Mr. Grobbelaar undoubtedly presented a persuasive argument in support of a refusal to allow any further postponement whatever, however limited its duration or purpose.

The enquiries which I have sought to apply to this aspect are again twofold:
Firstly, I have asked myself what is in the public interests and
Secondly, I have asked how would the accused by prejudiced by such a short postponement.

After considerable hesitation and some reluctance, I have decided however, to adjourn the proceedings for a few days only until the 7th of May 1990 for the limited purpose of enabling the State to give me some tangible information about the diplomatic initiatives referred to. If such tangible information is not forthcoming on the adjourned date, the State will have to elect whether it wishes to proceed with the trial on that date, with such evidence as it is able to lead, or to "bite the bullet" by withdrawing the charge. Such a withdrawal would not preclude the State from charging the accused in the future if it can procure the necessary evidence, nothwithstanding the fact that the accused pleaded not guilty in the Magistrate's Court (S v Hendrix, 1979 (3) S.A. 816 (D); S v Singh, 1990 (1) SA 123 (A).

In coming to the decision which I have, I have been influenced by five main considerations:

Firstly, The murder of Adv. Lubowski is a matter of very fundamental public importance. It is common cause that Mr. Lubowski was a prominent public figure who was a member of the present governing party and was during his lifetime generally perceived to be a vigorous proponent of the right of the Namibian people to self-determination and to emancipation from colonialism and racism - ideals which are now eloquently formalised inter-alia in the preamble to the Namibian Constitution and Articles 10

and 23.

His cold blooded murder is a serious matter. The vigorous prosecution of whoever might have been responsible for this deed is clearly in the public interest and crucial to the administration and image of Justice in Namibia.

That image and that interest might prejudicially be impaired if there ever follows a perception in the public (legitimate or otherwise), that justice was defeated by procedural complexities, by legal stratagems, by tactical manoeuvres or by any improper collusion. The general community of Namibia must be able to feel that every permissable avenue to pursue the prosecution of whoever might be the killer of Mr. Lubowski was followed.

Secondly, The dilemma in which the State finds itself arises from very extraordinary circumstances created by the position of a nation in transition, caught between the certainty of its colonial legal mechanisms and the articulation and effectiveness of the new mechanisms created to underpin and support its birth as a new and independent State among the free nations of the world. The legal processes of service were initiated in the old, but required enforcement in the new State. The death of the old and the birth of the new are not however pragmatically effective, simultaneous conditions. New laws, new procedures and above all internationally enforceable agreements with friendly neighbours have to be identified, nurtured and finalised during the first days of the new

birth. Some delay, some greyness, some uncertainty, even some confusion, clouds the excitement of the new dawn. It is in that condition, that the State in this case found itself with warrants validly issued at the time, but not easily enforceable on the date when they needed to be enforced. It has to clear that greyness and it is entitled to a fair opportunity to show with what promptitude and effect it is going to do so.

The third consideration and related to the second consideration is this. Relevant to the prospects of successful diplomatic initiatives, which might lead to the procurement of the absentees concerned, is the likely attitude of a neighbouring State, to the legitimate needs of its neighbour, to secure justice for its own inhabitants and to punish those whose escape from justice cannot be in the interest of either State. I do not believe that either Namibia or South Africa in the pursuit of their mutual interests, would ever deliberately wish to protect those within their borders who have seriously invaded the rights of the residents of a neighbouring country, or who are seeking to escape from their obligation to assist the Courts of that country in determining the guilt or otherwise of those who are accused of having done so. Neighbouring states would wish to assist each other in such respects, subject to the availability of the legal mechanisms in their respective laws.

This kind of co-operation is essential for the comity of nations on which the principles of International Law are based.

I am fortified in these expectations by the evidence of a speech made by the State President of South Africa, on the first of March 1990, which was tendered to me by Mr. Heyman without any objection from Mr. Grobbelaar, and I wish to quote from an important passage in that speech. The State President of South Africa was on that occasion responding to a call made by Mr.Theo-Ben Gurirab, the Foreign Minister of Namibia, in which he asked for an investigation into the circumstances which led to the death of Adv. Lubowski. The South African State President said that he had decided at that stage against the course, suggested by Mr.Theo-Ben Gurirab, regard being had inter-alia to the fact that the police investigations in Namibia had reached such an advanced stage that a person was to stand trial on the 18th of April 1990. President De Klerk then added the following:

> "Indien in die loop van daardie saak feite na vore kom wat dui op onbehoorlike Suid-Afrikaanse owerheidsbetrokkenheid, sal ek oorweeg om die opdrag van Regter Harms uit te brei. Intussen gee ek opdrag dat daar nou nouste met die owerhede in Namibië saamgewerk moet word om te verseker dat die reg aldaar sy gang gaan en geregtigheid geskied."

This undertaking by the South African State President would clearly be relevant to the State's prospects of success in initiating any diplomatic mechanisms to procure the attendance of the absentee persons concerned, and has

considerably influenced me in the exercise of my discretion.

Fourthly, it was only on Thursday the 12th of April that the State was definitely informed that the absentee witnesses were resisting attendance in Court. Not many days have intervened for the State to set in motion the necessary diplomatic initiatives and to get its act together.

Fifthly and finally, a factor which has also influenced me in the exercise of my discretion to give a short adjournment, has been the consideration that any prejudice caused to the accused by a short postponement for this limited purpose, would substantially be mitigated if he was released on bail in the interim, if this could properly be allowed, in all the circumstances.

BAIL

I accordingly now turn to the question of bail. The State was vigorously opposed to bail for the accused even if the adjournment sought was to be for a substantial period of time. Mr. Heyman submitted that there was the danger that the accused would not stand trial, regard being had to the fact that he was an Irish citizen with no real roots in Namibia or any African country, that there was no existing extradition treaty with Ireland, and that the borders of the Republic of Namibia were extensive and difficult to police. He also submitted that this Court had previously

dismissed the appeal against the refusal of bail by the Magistrate.

I am unable to agree with the suggestion that I am precluded from considering bail for the accused, merely because the accused was previously unsuccessful in this Court.

Each application for bail must be considered in the light of the circumstances which appear at the time when the application is made. A Judge hearing a new application is entitled and indeed obliged to have regard to all the circumstances which impact on the issue when the new application is heard.

More than seven months have now elapsed since the accused was first taken into custody. The Court which heard the previous application, was not and could not be aware that the trial would not commence on the 18th of April 1990 and that a further adjournment would be sought by the State. Moreover it is no fault of the accused that the trial cannot proceed. He is willing and able to continue with his defence having engaged eminent Senior and Junior Counsel. The prima facie-case which the State, alleged it had, when it previously opposed bail, may turn out to be very much less than a prima facie-case if the absentee witnesses are not procured.

An accused person cannot be kept in detention, pending his trial as a form of anticipatory punishment. The presumption

of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. The considerations which the Court takes into account in deciding this issue include the following -

1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub-issues such as -

   (a) How deep are his emotional, occupational and family roots within the country where he is to stand trial;
   (b) what are his assets in that country;
   (c) what are the means that he has, to flee from the country;
   (d) how much can he afford the forfeiture of the bail money;
   (e) what travel-documents he has to enable him to leave the country;
   (f) what arrangements exist or may later exist to extradite him if he flees to another country;
   (g) how inherently serious is the offence in respect of which he is charged;
   (h) how strong is the case against him and how much inducement there would therefore be for

him to avoid standing trial;

(i) how severe is the punishment likely to be if he is found guilty;

(j) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements.

2. The second question which needs to be considered is whether, there is a reasonable likelihood that if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted.

This issue again involves an examination of other factors such as -

(a) whether or not he is aware of the identity of such witnesses or the nature of such evidence;

(b) whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject matter of continuing investigations;

(c) what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;

(d) whether or not any condition preventing

communication between such witnesses and the accused can effectively be policed.

3. A third consideration to be taken into account, is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination other issues such as for example -

(a) the duration of the period for which he has already been incarcerated if any;

(b) the duration of the period during which he will have to be in custody before his trial is completed;

(c) the cause of any delay in the completion of his trial and whether or not, the accused is partially or wholly to be blamed for such a delay;

(d) the extent to which the accused needs to continue working in order to meet his financial obligations;

(e) the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing for his defence, if he remains in custody;

(f) the health of the accused.

Some of these considerations will be more weighty than others depending on the circumstances of a particular case.

Applying them to the circumstances of the present matter, I have come to the conclusion that bail should be allowed for the accused subject to stringent conditions designed to minimise the danger that he might abscond or otherwise prejudice the interests of justice. The accused has previously stated under oath that he intends to stand trial and that he will abide by the conditions of the bail. I have also been informed that the accused still has an offer of employment in Windhoek. If the accused is confined to his place of residence and employment as a condition of his bail, the State is put in a position of monitoring his movements.

The bail offered by the accused previously was R10 000.00. Mr. Grobbelaar has stated that some of this money has since been depleted by other necessary obligations including some of the costs of his defence. He submitted that there is no point in fixing bail in an amount which the accused cannot afford. I agree with Mr. Grobbelaar. The quantum of bail must not be so high as to be beyond the resources of the accused but not so low as to make its possible forfeiture a prospect which the accused can comtemplate with easy resignation.

In the result I make the following order:

1. The proceedings against the accused are adjourned to 7 May 1990 to afford to the State an opportunity of adducing clear,

specific and tangible evidence as to -

(a) what specific diplomatic initiatives have been taken to procure the attendance in this Court of the absentees presently in South Africa whom the State requires;

(b) what the prospects of success are in regard to these diplomatic initiatives;

(c) when these initiatives were commenced;

(d) when they are likely to be completed;

(e) whether the negotiations have any specific reference to the absentees sought by the State in this case;

(f) what response in principle, if any, has emanated from the South African authorities.

2. The accused is released on bail subject to the following conditions:

(a) he shall cause to be deposited with the Registrar of this Honourable Court the sum of R4 000.00;

(b) he shall report thrice daily to the Central Windhoek Police Station between the hours of

(i) 7 a.m. and 9 a.m.

(ii) 12 noon and ,2 p.m.

(iii) 5 p.m. and 7 p.m.

(c) The accused shall refrain from leaving his place of residence at 7 Love Street, Windhoek, without the written consent of the

investigating-officer, Col. Smit or his duly authorised delegate save for the purposes of discharging his duties as an employee of the Windhoek Observer, and for the purposes of reporting to the police station in accordance with the conditions of his bail.

(d) The appellant shall follow the most direct convenient and accessible route in order to travel to and from his place of residence and employment for the purposes of discharging his duties as an employee and he shall not in the discharge of his duties as an employee, leave the business premises of his employer, (save for the purposes of reporting to the police station in terms of his conditions of bail) unless he obtains the permission of Col.Smit or his duly authorised delegate in the Namibian Police. Such permission shall not be unreasonably withheld.

(e) The accused shall surrender his passport or such other travel document which he still might have in his possession or under his control, to Col.Smit or to the officer in charge of the Windhoek Central Police Station immediately upon his release.

(f) Save with the permission of Col.Smit or his duly authorised delegate in the Namibian Police, the accused shall refrain from communicating with any witness whose name

appears as a witness to the indictment, or whose name is communicated to the accused by the State, save with the written permission of Col.Smit or his duly authorised representative.

A. Mahomed

MAHOMED A.J.