A LEGAL CASE STUDY FROM NAMIBIA – HOW THE COURT APPLIED CONSTITUTIONAL RIGHTS IN THE *DAUSAB* CASE, AND WHY PUBLIC *ANIMUS* TOWARDS MINORITY GROUPS CANNOT INTERFERE WITH CONSTITUTIONAL RIGHTS IN AN AFRICAN DEMOCRACY.

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Introduction

1. On 21 March 2025 Namibia celebrated its 35th Independence Anniversary! We also celebrated the peaceful handover of power, for the fifth time, albeit to a candidate, from the same political party as before. This time was different though because we were also celebrating our first ever female President. Only the second ever democratically female President on the continent. A day later, the three highest positions in government were occupied by women. The President, the Vice-President and the Speaker of Parliament!

2. We have come a long way indeed! Not only have we adopted policies, changed laws and passed laws to ensure equality and dignity for women, but we have also succeeded in changing people's mindsets – enough for a majority of our people to elect a female President. My sense is that none of this is symbolic. There is a true sense of excitement and believe that Her Excellency, Dr Netumbo Nando-Ndaitwa is going to do well for all Namibians as she promised in her oath.

3. There are still countries, mature democracies, where the majority of the populace do not believe that a woman can or should be President. She can stand for President, the law allows her to, but she certainly does not have a chance of winning, not because she is not capable but because of the unfortunate views held by the majority and in a democracy, that is what prevails in an election context.

4. This was the central argument too of the Namibian Government in the cases of Digashu and Others v Government of the Republic of Namibia and Others[1] ("Digashu") and Dausab v Minister of Justice and Others[2] ("Dausab").

5. In both cases, Government argued that it is the public opinion expressed by the elected representatives in Parliament through legislation which must determine the nature and extent of the right to dignity and equality because they hold the mandate of the majority, whose views must prevail over the wishes of a minority in a democratic State.

6. In both cases, this argument was rejected. In Digashu[3] the Supreme Court stated that whilst the views of the majority as expressed through Parliament may be relevant, in determining the views and aspirations of the Namibian people, it is ultimately for the court, fulfilling its constitutional mandate, to protect fundamental constitutional rights entrenched in the Constitution and to apply the aspirations, norms and expectations of the Namibian people as they are expressed in the Constitution itself. The court agreed with the following exposition by Chaskalson P in the challenge to the death sentence in South Africa –

> "Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and

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[1] 2023 (2) NR 358 (SC)
[2] 2024 (3) NR 791 (HC)
[3] At par [103] to [104]

> others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected."[4]

7. The High Court in Dausab was even more bold in its rejection of the public opinion or majority view as justification for the continued existence of the laws criminalising sodomy –

> "…can it be said that to criminalise consensual anal intercourse between consenting males in private, simply because we consider it to be immoral, shameful and reprehensible and against the order of nature, is so important an objective as to outweigh the protection against unfair discrimination? What threat does a gay man pose to society, and who must be protected against him? We are of the firm view that the enforcement of the private moral views of a section of the community (even if they form the majority of that community), which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose."[5]

8. Digashu was not a decriminalisation case. In Digashu the court had to determine whether the refusal of the Ministry of Home Affairs and Immigration to recognise a spouse in a same-sex marriage, validly concluded outside Namibia, as a spouse for purposes of section 2(1)(c) of the Immigration Control Act, 7 of 1993 ("Immigration Act") is unconstitutional. Section 2(1)(c) of the Immigration Act exempts the foreign spouse of a Namibian citizen from obtaining any permit, otherwise required for non-citizens, in order to enter into, reside and work in Namibia.

9. Digashu really laid the groundwork for the High Court's ultimate decision in Dausab which is why I consider it important to discuss Digashu in this paper. Not surprisingly, Government used the same (or similar) arguments in

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[4] S v Mwakwanyane and Another 1995 (3) SA 391 (CC) at par [88]
[5] Dausab at par [28]

opposition to both matters, its central argument being that the Supreme Court had already held in the case of Chairperson of the Immigration Selection Board v Frank and Another[6] ("Frank") that the Namibian Constitution only recognises a marriage between a man and a woman and not between a man and a man or a woman and a woman.

10. Further, that the Supreme Court in Frank held that unlike the South African Constitution, art 10 of the Namibian Constitution did not proscribe discrimination on the ground of sexual orientation and that a degree of differentiation is permissible under art 10 if based on a rational connection to a legitimate purpose. The Supreme Court in Frank concluded that '*equality before the law for each person does not mean equality before the law for each person's sexual relationships.*'

11. Most of the other arguments adopted by the Government in both Digashu and Dausab stem from and were developed on the basis of what the Supreme Court said in Frank.

Breaking Ground – Digashu

12. Digashu was heard by five permanent judges of the Supreme Court, including the Chief Justice and the Deputy Chief Justice. There was one dissenting judgment by Mainga AJ. The very introduction to his minority judgment[7] appears to have been intended to emphasise, not only Government's view but also the views of the so-called majority of Namibians when it comes to the question of whether members of the LGBTQ+ community enjoy the same rights under the Namibian Constitution. After quoting from the Namibian Sun Newspaper of 8 March 2023 where it quotes from the Attorney General's answering affidavit in opposition to the Dausab application –

[6] 2001 NR 107 (SC)
[7] Digashu at par [136] – [141]

> "As the applicants accept, for many Namibians, homosexual conduct is immoral and unacceptable. I deny that the mere existence of the sodomy law promotes the stigmatisation of gay men. If these men suffer any stigma, it is in consequence of their choice to engage in sexual conduct considered to be morally taboo in our society."

Judge Mainga AJ said the following:

> "The AG is the chief advisor of government, what he stated in his answering affidavit to the sodomy matter currently pending before the High Court should be considered to be the instructions he received from government reflecting the government's standpoint on the issue of sodomy."[8]

13. Mainga JA disagreed with the majority's decision to resolve the matter on the constitutional relief sought by the appellants. He did so for the following reasons:

> 13.1. The laws in Namibia, including the Constitution, do not recognise same sex-relationships and marriages. He referred to a number of pieces of legislation which included the laws criminalising sodomy and other pieces of legislation which excludes same-sex relationships and marriages from the definitions of domestic relationships and marriages all of which (except for some of the sodomy laws) he said, were passed after the Constitution was adopted.[9]
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> 13.2. These laws, including the Immigration Control Act, are consistent with the Constitution. The Supreme Court in Frank was correct in the interpretation of "marriage", "spouse" and "family" because that interpretation is consistent with the laws of Namibia and the aspirations and ethos of Namibian society.[10]

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[8] Digashu at par [140] – [141]

[9] Combating of Domestic Violence Act 4 of 2003; Children's Status Act 6 of 2006; Child Care Protection Act 3 of 2005; Married Persons Equality Act 1 of 1996; Recognition of Certain Marriages Act 18 of 1991 and the SWAPO Family Act

[10] Digashu at par [147] – [148]

13.3. He criticised the majority's reliance on South African authorities saying that even in South Africa, where the Constitution prohibits discrimination on the grounds of sexual orientation, the Civil Union Act 17 of 2006 had to be passed to accommodate same-sex marriages/partnerships.[11]

13.4. The Ministry was entitled to reject the appellants' same sex marriages because they are not recognised in Namibia. The majority was wrong in applying the common-law principle – *if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia*[12] – because there are exceptions to this rule and Namibia is under no obligation to recognise a marriage which is inconsistent with its policies and laws for the reason that said marriage is warranted by the municipal law of the country where it was contracted. This is what was stated in a South African case, Seedat's Executors v The Master (Natal) 1917 AD 302 at 307 – 309 – stating, as an example, that a polygamous marriage would not be recognized on the basis of this common law principle in South Africa where polygamous marriages are forbidden and are fundamentally opposed to the its principles and institutions, that it is only the Legislature that can deal with such an issue – the courts have no place in deciding something as vital as that.[13]

13.5. The majority's finding in this regard is "*not only wrong, but it trashes the historical, social and religious convictions of the Namibian people*".[14]

13.6. The question whether same-sex marriages should be recognised should be left to be regulated by the national laws passed by Parliament

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[11] Digashu at par [153]
[12] This is the *lex loci celebrationis* principle
[13] Digashu at par [169] – [180]
[14] Digashu at par [169] and [170]

– as is the case in many other jurisdictions. "*Homosexuality is a complex issue that is better left in the constitutional province of the legislature. Parliament is better equipped to deliberate and evaluate the ramifications and practical ramifications of same-sex couples or any other union."*[15]

13.7. The common law definition of marriage is "*a voluntary union between one man and one woman, to the exclusion of others*" and the protection of the family in the traditional sense is in principle a weighty consideration which might justify a difference in treatment – meaning not applying the common law principle of *lex loci celebrationis*.[16]

14. Mainga AJ also emphasised that the Court "*should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely"* referring to the sentiments expressed in Prinsloo v Van der Linde and Another.[17] For this reason, Mainga AJ did not consider the constitutional challenge mounted by the appellants in Digashu.

15. The majority, who also had the benefit of considering the minority judgment of Mainga AJ, disagreed that the statements made by O'Linn AJA in Frank on same-sex relationships was binding because they were made *obiter* – the matter being decided on the basis that the failure to afford Ms Frank the right to be heard as required by article 18 meant that the decision refusing her permanent residence was to be set aside on review. This, and the underlying reasons for the court's order to refer the matter back to the Immigration Board for consideration and that the High Court should not have directed that the permit be granted to her, was found to constitute the *ratio* for the court's decision in Frank, and not the court's entire digression on the issue of the same-sex relationship which was in no way determinative of the outcome.[18]

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[15] Digashu at par [181] (e)
[16] Digashu at par [181](f)
[17] 1997 (3) SA 1012 at par [20] and referred to with approval in Müller v President of the Republic of Namibia and Another 1999 NR 190 (SC) at 197I-J
[18] Digashu at par [69] – [79]

16. The majority also found that the facts in Digashu were distinguishable from the facts in Frank because Ms Frank and her partner had not concluded a lawful marriage in a jurisdiction which recognised such a marriage. This led to the majority's main finding on the common law principle of *lex loci celebrationis*. Without going into too much detail on this part of the Digashu judgment, it is important to mention that the majority took into account the fact that the Immigration Act did not define the term 'spouse' and that the ordinary meaning of the word denotes 'a wife', 'a husband' and that the use of the word in section 2(1)(c) would not contemplate a wider meaning than 'a person who has entered a marriage'. It also held that the Ministry had not raised any reason relating to public policy as to why the marriages of the appellants should not be recognised in accordance with this common law principle.[19]

17. In addressing some of the authorities which Mainga AJ relied on in his minority judgment, the court stated the following[20] –

> 17.1. In Namibia, there is no statutory provision which precluded the operation of the common-law principle as was the case in the UK in Wilkinson v Kritzinger and Others[21] in which the reliance on the European Convention on Human Rights for the challenge to the existing legislation was rejected in stark contrast to the approach adopted by the House of Lords in another case, just two years before.
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> *17.2.* There had been a growing trend since 2010 in affording recognition to same-sex couples which, according to the European Court of Human rights rendered it '*artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy family life for the purpose of Article 8.'*[22]

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[19] Digashu at par [82] – [85]
[20] Digashu at par [86] – [95]
[21] [2006] EWHC 2022 (Fam)
[22] Schalk and Kopf v Austria ECHR Application No 30141/04 (24 June 2010) at par 94 where the court concluded that relationship of the applicants, a co-habiting same-sex couple living in

18. Although the appellants were entitled to the main relief they sought on the application of the common law principle of *lex loci celebrationis*, the majority, determined the constitutional challenge as well, insisting that the court has a duty to exercise its constitutional mandate and deal with and determine alleged violations of rights entrenched in chapter 3 of the Constitution when raised by litigants – a failure to do so amounts to an abdication of that fundamental duty in the context of the doctrine of separation of powers.[23]

19. The appellants had relied on their rights to dignity and equality in support of the relief they sought – article 8 and 10 of the Constitution. The court approached the challenge in a related manner on the basis that the right to dignity and equality are closely related. In this regard the court emphasised that –

> 19.1. The '*recognition of the inherent right to dignity and of equal and inalienable rights of all members of the human family*' is indispensable for freedom, justice and peace as is stated in the first sentence of the preamble to the Constitution;
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> 19.2. Recognition of equal worth of all human beings is at the very root of the Constitution and the value attached to dignity is central to the protection of other rights, in particular the right to equality, and is at the very heart of the constitutional framework;
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> 19.3. The right to dignity is inviolable and does not allow for any exceptions.

20. The court went further and held that the '*value judgment to be made by a court when determining the ambit of the right to dignity would be with*

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a stable *de facto* partnership, falls within the notion of family life, just as the relationship of a different-sex couple in the same situation would.

[23] Digashu at par [104]

reference to the constitutional values, the aspirations, norms, expectations and sensitivities of the Namibian people as expressed in the Constitution'.[24]

21. This was crucial in the court's dismissal of the Government's argument that dignity is a value judgment to be decided by parliament as well as the argument that parliament is the voice of the majority public opinion or that it is best placed to determine the views and aspirations of the Namibian people.[25]

22. The majority furthermore held that where legislation or its interpretation would significantly impair the ability of spouses to honour their obligations to one another, this would infringe the constitutional right to dignity of spouses protected in article 8 of the Constitution.[26]

23. It furthermore held that the Ministry's interpretation of section 2(1)(c) to effect that it excludes a spouse in a same-sex marriage infringes the right to dignity and the right to equality entrenched in article 10 which reads as follows –

> "1. All persons shall be equal before the law.
>
> 2. No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

24. The majority declined the appellants invitation to find that sexual orientation constitutes social status for purposes of article 10(2) but left the question open.[27]

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[24] Digashu at par [96] – [102]
[25] Digashu at par [103]
[26] Digashu at par [108]
[27] Digashu at par [116] – [117] – the court considered it unnecessary to express itself on this argument because of the view it took in respect of art 10(1) but made clear that the reference to public international law on this subject by the majority in Frank does not correctly reflect that position – In the High Court, the full bench made clear that the majority's interpretation of international law was wrong – reported as Digashu and Others v Government of the Republic of Namibia and Others 2022 (1) NR 156 (HC). It stated the following in this regard at par [118]-[121] –

25. The court also found it unnecessary to express its view on whether 'sex' as a proscribed ground in article 10(2) includes sexual orientation as is the approach of the UN Human Rights Committee in its interpretation of articles 2 and 26 of the ICCPR.

26. In determining the unfairness of the discrimination, the court considered the impact on the victims, discriminated against, the purpose sought to be achieved by the discrimination, the position of the victims in society, the extent to which their rights and interests have been affected and their dignity impaired. With respect to the impairment of the dignity of the appellants, the court quoted what was said by Ackerman J in National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others[28] in this regard -

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> "[119] In his article 'Lesbian and Gay Rights in Namibia' George Coleman points out that there is a general consensus that international law is now a crucial source for the protection of lesbian, gay, bisexual and transgender (LGBT) persons. The UN Human Rights Committee in 1994 recognised that the word 'sex' in art 2(1) of the ICCPR, should be read to include 'sexual orientation' — No 488/1992 (31 March 1994) UN Human Rights Committee Document No CCPR/C/50/D/488/1992; reference was made to this decision in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* in para 46 and which was referred to at least three times in the Supreme Court in *Frank*.
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> [120] In its concluding observations on the second report of Namibia the UN Human Rights Committee observed on 22 April 2016 that it is concerned about, amongst other things:
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> > 'Discrimination, harassment and violence against lesbian, gay, bisexual and transgender persons, including cases of so called corrective rape against lesbians.'
>
> And:
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> > 'Discrimination on the basis of sexual orientation not being explicitly prohibited, exclusion of sexual orientation as a prohibited ground for discrimination from the Labour Act (Act No 11 of 2007), the maintenance of the common law crime of sodomy, the exclusion of same-sex partnerships from the Combating of Violence Act (Act 4 of 2003).'
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> [121] To interpret that the prohibited form of discrimination on the basis of sex does not include sexual orientation is also untenable. Article 10(2) goes further to prohibit discrimination on the basis of social status, and to then state that all these exclude sexual orientation, constitutes a narrow interpretation of a constitutional provision. This restrictive approach, couched in tabulated legalism, cannot be sustained in a society founded on democratic values, social justice and fundamental human rights enshrined in the Constitution."

[28] 2002 (2) SA 1 (CC) at par [42

"The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays."

27. The court concluded that[29] –

27.1. The Government had raised no rational connection to a legitimate statutory object;

27.2. It expressly disapproves of the *obiter* statement in Frank that '*equality before the law for each person does not mean equality before the law for each person's sexual relationship*' because that approach is incompatible with the right to equality properly interpreted in a purposive right-giving way and also fails to take into account the human worth and dignity of all human beings including those in same-sex relationships which is at the very core of the equality clause;

27.3. '*Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that*

[29] Digashu at par [125] – [127]

demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity'[30];

27.4. '*Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era – it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place*.'[31]

28. Although it was not necessary for purposes of its decision, the majority also expressed the view that the procreation argument cannot defeat the claim of same-sex couples to be accorded the same degree of dignity, concern and respect that is shown to heterosexual couples, and more particularly in the context of the status, entitlements and responsibilities heterosexual couples receive through marriage.[32]

29. It is important to note that the court made clear that its judgment only addresses the recognition of spouses for purposes of section 2(1)(c) of the Immigration Act and that the precise contours of constitutional protection which may or may not arise in other aspects or incidents of marriage must await determination when those issues are raised.[33]

Decriminalisation - Dausab

30. The Managing Judge in Dausab insisted on awaiting the outcome of Digashu before allocating hearing dates. The Digashu judgment, specifically, the approach adopted by the majority in its interpretation of the right to dignity and equality and its dismissal of similar arguments raised by the appellants in

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[30] Quoting from Egan v Canada (1995) 29 CRR (2d) 79 [1995] 2 SCR 513) at 104 - 105
[31] Quoting from Hoffmann v South African Airways 2001 (1) SA 1 (CC) at par [37]
[32] Digashu at par [131]
[33] Digashu at par [134]

Digashu gave us much hope that Government might reconsider its continued opposition to the Dausab application. For us, it was almost obvious that it would be the sensible approach.

31. Maybe a little overly optimistic from us, because much to our disappointment, it appeared that the outcome hardened Government's stance.

32. I also, naïvely maybe, thought that it may soften the stance of those members of the public and organised civil society, change their mindsets, or at the very least, plant the seeds for a changed mindset, giving rise to more tolerance towards members of the LGBTQ+ community. This was, unfortunately, also not the case.

33. As one would expect with such a landmark judgment, a public debate ensued in support of, and in criticism of the judgment. Whilst the debate was initially respectful of the independence of the Judiciary, the criticism of the Judiciary took on an inappropriate tone.

34. For instance, two persons, claiming to represent the "*Stop the Homosexuality and Same-Sex Marriages Committee*" made a written submission to the Supreme Court in which they accused the Supreme Court of having "*attacked and threatened*" their fundamental constitutional rights and freedoms, including family and children's rights, and the right to culture. They demanded that the Supreme Court review and reverse the judgment within 21 working days failing which they will demand a referendum. They furthermore stated that they, as Namibians, are a "*peaceful nation but that if provoked, they know how to fight for their rights*".

35. There were, furthermore, calls from various parts of Namibian society on Parliament to change the laws of the country to "overrule" the judgment. In the Namibian of 19 June 2023, it was reported that the SWAPO Party[34] has informed the media that it has decided to "*instruct the Government to take*

[34] Which is the ruling party in Namibia

immediate executive and legislative action to amend the Immigration Control Act to include a definition of the term "spouse" in accordance with Namibian laws on marriage and family" reportedly expressing its "*grave disappointment*" with the judgment, claiming that "*it causes confusion and uncertainty*".

36. More importantly, for purposes of the subject matter of this paper, the SWAPO Party in its press statement also stated that it "*strongly condemns and repudiates all kinds of immoral and indecent acts and other associated acts that are either inconsistent with Namibian laws or against public policy. In this respect, SWAPO Party directs its government to enforce all laws in force that are aimed at preventing and combatting such acts".*[35] These laws would obviously also include the sodomy laws.

37. It also resulted in a debate in the National Assembly, during which debate the judgment was termed "*unconstitutional"*.

38. Some Namibian churches also expressed their unhappiness with the judgment. The Council of Churches in Namibia actively called for legislation to ban such unions, saying they are contrary to Namibian culture and a threat to traditional values and religious beliefs. A protest was led by the Christian Coalition of Churches in Namibia and its leader reportedly said that they *"advocate for an enactment of an act of parliament to explicitly prohibit the practice of homosexuality in Namibia'.*

39. During June 2023, two private member Bills, were introduced by a member of parliament. The Bills, which proposed an amendment to the Marriage Act, 25 of 1961 and the Married Persons Equality Act, 1 of 1996 -

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[35] SWAPO PARTY PRESS STATEMENT ON THE OUTCOME OF THE EXTRAORDINARY MEETING OF ITS CENTRAL COMMITTEE, WHICH WAS HELD OON SATURDAY, 17 JUNE 2023 ON THE RECENT SUPREME COURT JUDGEMENT ON THE "RECOGNITION" OF SAME-SEX MARRIAGE FOR PURPOSES OF SECTION 2(1)(C) OF THE IMMIGRATION CONTROL ACT, WHICH WAS DELIVERED ON 16 MAY 2023

39.1. limited the definition of marriage to that of a union between persons of opposite sex;

39.2. defined the word “spouse”, where used in any legislation as meaning a partner in a marriage between persons of the opposite sex;

39.3. prohibited same sex marriage;

39.4. prohibited the recognition of same sex marriages concluded outside Namibia;

39.5. criminalised the solemnisation, witnessing, promotion and propagation of same-sex marriages.

40. The Bills were passed by Parliament and presented to the late President, H.E Dr Hage Geingob for his assent. On 14 March 2025, his successor, former President, H.E Dr Nangolo Mbumba took a decision to withhold his consent for the Bills. The former President’s decision to withhold his consent was based on the fact that although the Bills were passed without any objections in both Houses, they were passed by a simple majority whilst the Constitution requires that they be passed by a two-thirds majority of voting members of the National Assembly.

41. Furthermore, the Bills were not subjected to constitutional assessment and certification by the Attorney General and the former President, after taking advice, had concerns about the potential constitutional and social implications of the Bills.

42. This decision was, however, communicated months after Parliament passed the Marriage Act, 14 of 2024 which the former President signed on 2 October 2024, and which Act contains provisions which contradict the Supreme

Court's judgment in Digashu and essentially achieves what the private member Bills were intended to achieve.[36] I discuss these in short below.

43. It is thus in this context which Dausab was eventually heard on 31 October 2023.

44. The full bench of the High Court in determining whether the sodomy laws violate article 10 of the Constitution found that the laws differentiate between same-sex partners and opposite-sex partners, but only where such same sex partners are both males, thus between gays and homosexuals and between gays and lesbians.[37]

45. It further found that there was no rational connection for this differentiation to a legitimate purpose. In doing so, the court considered the purpose of criminal laws and whether the fact that a part of society considers sodomy to be '*immoral, shameful, and reprehensible against the order of nature*' outweighs the protection against unfair discrimination. The court found that these '*private moral views*' of a section of the community, even if the majority in the community, cannot qualify as a legitimate purpose. It endorsed the sentiments expressed by Justice Gubbay in S v Banana[38] quoting from Professor R Dworken[39] -

> "Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures because they are effeminate), rationalisation (based on assumptions of fact so unsupported that they challenge the community's own standards of rationality), and personal aversion (representing no conviction but merely blind hate rising from unacknowledged self-suspicion). It remains possible that the ordinary man could produce no reasons for his views, but would simply parrot his neighbour who in turn parrots him, or that he would produce a reason which presupposes a general moral

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[36] The Act also repeals the Marriage Act, 25 of 1961 and sections 23, 24 and 25 of the Married Persons Equality Act, 1 of 1996
[37] Dausab at par [18] and [19]
[38] 2000 (3) SA 885 (ZS) at
[39] Taking Rights Seriously at 258

> position he could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of a consensus, for the belief that prejudices, personal aversions and rationalisations do not justify restricting another's freedom, itself occupies a critical and fundamental position in our popular morality."

46. The Court also held that there is nothing rational about criminalising the same act when it is committed by two men but not when it is committed by a man and a woman and that it is arbitrary and unfair. It dismissed the argument of Government based on the dissenting views of Justice McNally in S v Banana[40] pointing out the flaws in his reasoning that it is not very often that men penetrate women per anum and that this is more often as a result of a drunken mistake.[41]

47. The court held that irrespective of the fact that the sodomy laws might not be actively enforced[42], retaining those laws continues to be harmful and prejudicial to gay men and is thus not reasonably justifiable in a democratic society.

> "We share the sentiments expressed by Justice Gubbay that depriving gay men of the right to choose for themselves on how to conduct their intimate relationships, poses a greater threat to the fabric of society as a whole than tolerance and understanding of non-conformity could ever do. We therefore find that the impugned laws are unconstitutional."[43]

48. The court mentioned Government's argument that article 10(2) does not list sexual orientation as a protected ground. It mentioned that the Supreme court declined to decide whether the word 'sex' in article 10(2) includes 'sexual orientation'. It then expressed the view that the matter is not as simple as Government argues because the fact that a ground is not listed in article 10(2) is not a licence for the law to discriminate on that ground and thereafter pointed out that dignity is used by the courts as an '*aspect or feature or quality of*

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[40] At 934 - 935
[41] Dausab at par [32] – [34]
[42] Which is what was asserted by Government in its answering affidavit
[43] Dausab at par [42]

humankind in respect whereof all human beings must be treated equally and an aspect in respect whereof human beings may not be discriminated against'.

49. On this aspect, the court's finding that '*insofar as the impugned laws differentiate between heterosexual men and gay men, it is not based on one of the enumerated grounds set out in art 10(2)*' appears to suggest that it upheld the Government's argument that the word 'sex' in article 10(2) does not include 'sexual orientation'. It went on to say the following –

> *'…The next question then is to determine whether the differentiation between men and women or between heterosexual men and gay men amounts to discrimination.*
>
> *[56] The Supreme Court in Müller considered the meaning of the words 'discriminate' and 'discrimination' and concluded that 'discriminate' refers to making a distinction unjustly and on the basis of race, age, sex etc or select for unfavorable treatment. The court found 'discrimination' to mean 'unfavorable treatment based on prejudice, regarding race, age or sex'. Chief Justice Strydom (as he then was) said:*
>
> > *'It seems to me that inherent in the meaning of the word discriminate is an element of unjust or unfair treatment. In South Africa, the Constitution clearly states so by targeting unfair discrimination, and thus makes it clear that it is that particular type of discrimination that may lead to unconstitutionality. Although the Namibian Constitution does not refer to unfair discrimination, I have no doubt that in the context of our Constitution that is also the meaning that should be given to it.' [Emphasis added.]*
>
> *[57] We also established the view that homosexuality is an abominable vice and that a section of our society cannot tolerate its presence. It remains possible that this common opinion is a compound of prejudice and personal aversion (representing no conviction but merely blind hate rising from unacknowledged self-suspicion). We further found that it remains possible that the ordinary man could produce no reasons for his views, but would simply parrot his neighbour who in turn parrots him. We thus find that the differentiation which the impugned laws accord to gay men, amounts to unfair discrimination and is thus unconstitutional. The finding of unconstitutionality leads to only one conclusion, namely, to declare the impugned laws invalid.'*

50. From this, it appears that the court still found the differentiation based on sexual orientation to constitute unfair discrimination. I assume this finding to be based on article 10(1), and not 10(2) and also based on the close connection between the inviolable right to dignity and right to equality as discussed above in relation to the Supreme Court's findings in Digashu.

51. In my view, the question whether the word 'sex' in article 10(2) of the Constitution includes 'sexual orientation' was not properly ventilated and can is

open to be raised and determined in future litigation. The full bench of the High Court in Digashu had this to say –

> "[121] To interpret that the prohibited form of discrimination on the basis of sex does not include sexual orientation is also untenable. Article 10(2) goes further to prohibit discrimination on the basis of social status, and to then state that all these exclude sexual orientation, constitutes a narrow interpretation of a constitutional provision. This restrictive approach, couched in tabulated legalism, cannot be sustained in a society founded on democratic values, social justice and fundamental human rights enshrined in the Constitution."

52. This position, although not upheld on appeal by the Supreme Court, is in line with the argument that the enumerated grounds in art 10(2) are not exhaustive.[44]

53. Most important for Mr Dausab and other gay men in Namibia, the court refused the Government's request that it refer the laws to Parliament in accordance with article 25(1) of the Constitution for it to correct the defects that are found to exist instead of striking down the impugned laws. This would have meant that the laws would be deemed to be valid until such time that Parliament addresses the defects in the laws. The court also refused its request to, in the alternative, grant an order of prospective invalidity. The default position thus applies. The laws which the court declared unconstitutional thus became invalid as at the time of enactment.

Conclusion

54. Government, as expected has since filed an appeal against the High court's judgment and orders. The appeal is opposed. A date for the appeal has not been set. It is unlikely that the Supreme Court will overturn the High Court's judgment. It may, however, limit the retrospectivity of its orders proposed in the High Court by the applicant.

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[44] See Müller at p200I – 201E

55. The Dausab judgment was another major victory, not only in the context of decriminalisation but also in the quest for equality and equal treatment of members of the LGBTQ+ community in all respects.

56. The inclusion of provisions in the Marriage Act, 14 of 2024 which limits the definition of :

56.1. ‘spouse’ to a person married to a person of the opposite sex;

56.2. ‘marriage’ to a union between persons of the opposite sex;

56.3. ‘customary marriage’ to one concluded between person of the opposite sex;

56.4. ‘foreign marriage’ to a marriage concluded outside Namibia between persons of the opposite sex;

56.5. ‘opposite sex’ to the sex determinatively assigned for purposes of birth registration –

- is somewhat of a disappointment and a minor setback for this fight for equality. They have the effect of contradicting the Supreme Court’s judgment in Digashu regarding, specifically the recognition of foreign marriages for purposes of section 2(1)(c) of the Immigration Act and generally with respect to the Supreme’s Court’s interpretation of the rights to dignity and equality. I call it a minor setback because the Marriage Act has not been brought into operation yet and is bound to be challenged. Such a challenge should succeed.

57. One can only hope that in time, we can change the minds of Namibians and that, as we have done with respect to, women, we can achieve equality for members of the LGBTQ+ community in all spheres of life.

58. It is important to keep the momentum going in order to achieve this goal and therefore, the challenge to the Marriage Act seems not only crucial, but also inevitable.