REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-CIV-MOT-GEN-2022/00279

In the matter between:

FRIEDEL LAURENTIUS DAUSAB **APPLICANT**

and

THE MINISTER OF JUSTICE **1ST RESPONDENT**

THE MINISTER OF HOME AFFAIRS, SAFETY AND SECURITY **2ND RESPONDENT**

THE MINISTER OF DEFENCE AND VETERANS AFFAIRS **3RD RESPONDENT**

THE PROSECUTOR GENERAL **4TH RESPONDENT**

THE ATTORNEY GENERAL **5TH RESPONDENT**

Neutral citation: *Dausab v The Minister of Justice* (HC-MD-CIV-MOT-GEN-2022/00279) [2024] NAHCMD 331 (21 June 2024)

Coram: NDAUENDAPO J, UEITELE J *et* CLAASEN J
Heard: **31 October 2023**
Delivered: **21 June 2024**

Flynote: Constitutional law — Fundamental rights — Equality before the law — Article 10 of the Constitution — Article 8 of the Constitution — Right to dignity — Same-sex relationships — Homosexuality — Criminal law — Common Law Sexual Offences — Sodomy — Unnatural sexual offences — Various forms of sexual conduct committed by a male person with another male person are not regarded as criminal, if committed by a male person with a female person — Differentiation which the impugned laws accord to homosexual men amounts to unfair discrimination and thus unconstitutional.

Summary: The applicant applied for an order to declare the common law offences of sodomy and unnatural sexual offences, as well as the statutory provisions that incorporates the said offences, unconstitutional. The contention is that these laws, unfairly and irrationally, discriminate against him and other gay men on the basis of sex and sexual orientation, and thus infringe his constitutional right to equality; dignity; privacy; freedom of expression and freedom of association. The respondents opposed the application and were of the view that there is no merit in the constitutional challenge.

Held that: the test to determine whether there is discrimination under Article 10 of the Constitution as set by the Supreme Court in *Müller v President of the Republic of Namibia & another* is reiterated and applied. The questioned legislation would be unconstitutional under Article 10(1), if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose.

Held that: the first step in the analysis to determine whether there is a breach of Article 10(2) is to determine whether there exists a differentiation between people or categories of people. The second step is whether such differentiation is based on one of the enumerated grounds set out in the sub-article. The third step is to determine whether such differentiation amounts to discrimination against such

people or categories of people. Lastly, once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution.

Held further that: the various forms of sexual conduct, if committed by a male person with another male person, are not regarded as criminal if committed by a male person with a female person.

Held further 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 governmental purpose.

Held further that: the court is not persuaded that in a democratic society such as ours, with a Constitution which promises the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family and the pursuit of individual happiness, it is reasonably justifiable to make an activity criminal just because a segment, maybe a majority, of the citizenry consider it to be unacceptable.

Held further that: the criminalisation of anal sexual intercourse between consenting adult males, in private, is outweighed by the harmful and prejudicial impact it has on gay men and that its retention in our law is thus not reasonably justifiable in a democratic society.

Held further that: the differentiation which the impugned laws accord to homosexual men amounts to unfair discrimination and thus unconstitutional. The finding of unconstitutionality leads to only one conclusion, namely, to declare the impugned laws invalid.

ORDER

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1. The common law offence of sodomy is declared unconstitutional and invalid.

2. The common law offence of unnatural sexual offences is declared unconstitutional and invalid.

3. The inclusion of the crime of sodomy in schedule 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is declared unconstitutional and invalid.

4. Section 269 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is declared unconstitutional and invalid.

5. The inclusion of the crime of sodomy in schedule 1 of the Immigration Control Act, 1993 (Act 7 of 1993) is declared unconstitutional and invalid.

6. The inclusion of the crime of sodomy in section 68(4) of the Defence Act, 2002 (Act 1 of 2002) is declared unconstitutional and invalid.

7. The respondents must pay the applicant's costs of the application, such costs to include the costs of one instructing and two instructed counsel.

8. The matter is finalised and removed from the roll.

JUDGMENT

NDAUENDAPO J, UEITELE J *et* CLAASEN J:

Introduction

[1] The applicant is a gay man, who, by notice of motion, commenced proceedings in this Court seeking constitutional redress under Article 25 of the Constitution.

[2] The applicant contends that the common law offences of sodomy and unnatural sexual offences and the statutory provisions which incorporate the crimes of sodomy and unnatural sexual offences, unfairly and irrationally discriminate against him and other gay men on the basis of sex and sexual orientation and thus infringe his constitutional right to equality, dignity, privacy, freedom of expression and freedom of association.

[3] In his notice of motion the applicant seeks the following relief:

> ‘1 The common law offence of sodomy is declared unconstitutional and invalid.
>
> 2 The common law offence of unnatural sexual offences is declared unconstitutional and invalid.
>
> 3 The inclusion of the crime of sodomy in schedule 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is declared unconstitutional and invalid.
>
> 4 The order referred to in paragraph 3 shall not invalidate anything done in reliance on the inclusion of “sodomy” in the schedule, unless a court of competent jurisdiction decides that it is necessary and appropriate that conduct pursuant to such reliance shall be declared invalid.
>
> 5 Section 269 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is declared unconstitutional and invalid.
>
> 6 The order referred to in paragraph 5 shall not invalidate anything done in reliance on section 269 unless a court of competent jurisdiction decides that it is necessary and appropriate that conduct pursuant to such reliance shall be declared invalid.
>
> 7 The inclusion of the crime of sodomy in schedule 1 of the Immigration Control Act, 1993 (Act 7 of 1993) is declared unconstitutional and invalid.

8 The inclusion of the crime of sodomy in section 68(4) of the Defence Act, 2002 (Act 1 of 2002) is declared unconstitutional and invalid.

9 The inclusion of the crimes of sodomy and unnatural sexual offences in any other statute is declared unconstitutional and invalid where such inclusion subjects the accused to any form of sanction for breach…'

[4] There are five respondents cited by the applicant and they are: The Minister of Justice, in her capacity as the Minister responsible for matters of law reform in the country. The Minister of Safety and Security as the second respondent, the Minister of Defence and Veterans Affairs as the third respondent, the Prosecutor General as the fourth respondent and the Attorney General as the fifth respondent. We will in this judgment for ease of reference refer to the respondents as 'respondents', except where it is necessary to refer to a specific respondent.

[5] The Attorney General deposed to the answering affidavit on behalf of the respondents and their position is that there is no merit in the constitutional challenge. The respondents are of the view that the applicant's articulation that the common law was part of the legacy of colonialism is misguided. The respondents, through the Attorney General, deny that the laws relating to sodomy and unnatural sexual offences discriminate against any person on the basis of their sex or gender.

[6] The respondents furthermore oppose the application on the basis that the question whether or not laws proscribing homosexual sexual activity must remain part of Namibian law has been considered by a democratically elected Parliament and the decision was that the laws must remain in place. The Attorney General relies on the *Frank*[1] judgment which points out that our nation's leaders and founding fathers have said that not only is homosexuality inconsistent with the moral fabric of our society, but also that the framers of the Constitution did not have in mind the repeal of such laws when they drafted our Constitution.

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[1] *Frank and Another v Chairperson of the Immigration Selection Board* 2001 NR 107 (SC).

The applicant's experience

[7] In his affidavit in support of the relief that he seeks, the applicant narrated his experience which drove him to launch the application. In a gist, his evidence is that he brought the present application because he is homosexual and forms part of the LGBTQ[2] community. He is directly impacted by the common law offences of sodomy and unnatural sexual offences which criminalises an act committed in private between two consenting male adults.

[8] He was raised in a religious home and had known since the age of about 14 years that he was gay. He spent his teenage years confused, alone and scared as he knew that his family and the community at large disapproved of homosexuality. He denied that he was gay for many years and hoped that he would become attracted to women. After years of repressing his feelings, he finally told his mother and family that he was gay, and he was met with disappointment and rejection.

[9] The disclosure of his sexual orientation to his mother and family was followed by years of estrangement from his mother and family. During this time, he felt adrift and isolated. Through his university years in particular, he experienced bouts of anxiety and depression. Although he met a few fellow students who were gay, he was regularly subjected to derogatory and hostile comments from his peers resulting in his depression becoming so bad that he was unable to complete his final exams and dropped out of university. About two years after dropping out of university, he and his mother began the tortuous journey to healing their relationship.

[10] He further deposed that he has at this stage, dedicated 20 years of his life as an LGBTQ rights activist and has extensive experience in HIV prevention and treatment for the affected communities. He was also involved in the production of training materials in the HIV/AIDS sector, providing technical assistance and developing new programmes in the field. He states that his decision to start living

[2] LGBTQ stands for lesbian, gay, bisexual, transgender and queer.

openly as a gay man came at a personal cost as he continues to experience intolerance and opprobrium.

The basis on which the applicant challenges the constitutionality of the offences

[11] The applicant asserted that the Constitution guarantees protection against inhuman and degrading treatment, but he is not free to be himself. It is very hard for a homosexual to live in a country where one is supposed to have the freedom to do what he pleases, provided he respects the law, but where sodomy is criminalised. Homosexuals are automatically classified as criminals because for many persons, being a homosexual is equivalent to committing the offence of sodomy. Homosexuals are not considered as normal persons, they are called derogatory names which are very demeaning and which belittle them.

[12] The applicant pointed to the negative consequences that the crimes of sodomy and unnatural sexual offences have on gay and bisexual men. He contends that gay and bisexual men live in fear that they are committing criminal offences when they express love and affection towards each other. The mere existence of the crime of consensual sodomy, perpetuates the stigmatization and vilification of gay men in various areas of their lives. Their parents suffer opprobrium and anguish in the knowledge that their children engage in sexual acts, which are regarded as criminal. Their self-esteem is undermined by the existence of the offences, which label their most intimate relationships as criminal, undesirable and wrong.

[13] He continued and contended that the prejudicial consequences of criminal conviction emerge in any situation where obedience to the law may be in issue, including custody disputes. Such prejudicial consequences may also flow from any situation in which disclosure of criminal conviction is required, for example, job applications, applications for visas or licenses and the like. The prejudicial impact of criminalisation also manifests in policy decisions taken by the State. For example, the Namibian Correctional Service has cited the existence of sodomy and unnatural sexual offences as the reason for not providing condoms to inmates, notwithstanding the fact that it is common knowledge that consensual

sexual intercourse takes place between men in Namibia's prisons/correctional facilities.

[14] Based on the contentions set out in the preceding paragraphs, the applicant challenges the validity of the common law offences of sodomy and unnatural sexual offences, as well as all statutory enactments, which refer to or incorporate these crimes (the impugned laws), on six constitutional grounds, namely, that the impugned laws:

(a) irrationally and unfairly differentiate on the basis of sex and sexual orientation and therefore violate Article 10 of the Constitution;

(b) unlawfully limit the right to dignity as contained in Article 8 of the Constitution;

(c) unjustifiably limit the applicant's right to privacy as contained in Article 13(1) of the Constitution;

(d) unjustifiably violate the right to freedom of association in Article 21(*e*) of the Constitution;

(e) unjustifiably violate the right to freedom of expression in Article 21(*a*) of the Constitution; and

(f) the crime of 'unnatural sexual offences' is unconstitutionally vague.

[15] The crux of the present case is, thus, whether the common law offences of sodomy and unnatural sexual offences are unconstitutional. It is to that enquiry that we now turn. We start off by considering the first ground upon which the challenge is mounted.

<u>Do the impugned laws violate Article 10 of the Namibian Constitution?</u>

[16] We indicated earlier on that the common law offences of sodomy and unnatural sexual offences are challenged on the ground that they violate Article 10 of the Constitution, which provides that:

'**Article 10 Equality and Freedom from Discrimination**

(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

[17] The common law crime of sodomy is defined as 'unlawful intentional sexual relations per anum between two human males',[3] while 'unnatural sexual offences' covers mutual masturbation, sexual gratification obtained by friction between the legs of another person and other unspecified sexual activity between men. In *S v Kampher;*[4] the High Court of South Africa (Western Cape Division), *per* Justice Farlam with Justice Ngcobo concurring, helpfully set out a historical analysis of the background to the crime of sodomy.

[18] What emerges from the definition of sodomy is that the offence clearly and undoubtedly criminalises such sexual conduct between males, whether committed with or without consent and in public or in private. What furthermore emerges is that various forms of sexual conduct, which have been held to constitute an offence, if committed by a male person with another male person are not regarded as criminal, if committed by a male person with a female person.

[19] It is not an unnatural sexual offence where a female masturbates a male; or allows him to obtain sexual gratification by friction between her legs or performs oral sex with a man,[5] or, even more significantly, permits penetration into her anus.[6] The position is, however, different if such acts are performed by a male person upon another male person.[7] Furthermore, consensual sexual acts of the

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[3] J R L Milton *Hunt South African Criminal Law and Procedure* 3rd ed (1996) at 248.
[4] *S v Kampher* 1997 (4) SA 460 (C) at 1287D - 1289D paras 11 - 21.
[5] See *R v K & F* 1932 EDL 71 at 73 – 4.
[6] See *R v N* 1961 (3) SA 147 (T) at 148; *R v H* 1962 (1) SA 278 (SR) at 279E – G.
[7] See *R v Gough and Narroway* 1926 CPD 159 at 163; *S v M* 1977 (2) SA 357 (Tk) at 357G - H.

kind set out earlier between women do not constitute an offence. Women may thus do what men may not do, for today only male-male sexual acts are the subject of criminal inhibition. Clearly the only distinction that makes such acts criminal is the participants' gender or sex. Ackerman J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,*[8] neatly summed up the extent of the differentiation as follows:

'Before the new constitutional order came into operation in our country, the common law offence of sodomy differentiated between gays and heterosexuals and between gays and lesbians. It criminally proscribed sodomy between men and men, even in private between consenting adults, but not between men and women; nor did it proscribe intimate sexual acts in private between consenting adult women.'

[20] Article 10 of the Constitution guarantees equality before the law to all persons and confers protection against any law which is discriminatory, either of itself or in its effect. In the present case, we are concerned with the common law offences which proscribes sodomy, other unnatural sexual offences and the statutory provisions, which incorporate these offences (the impugned laws). The case for the applicant is that the impugned laws, which criminalise anal intercourse between gay men, violates Article 10 of the Constitution as the differentiation made by the impugned laws is irrational and unreasonable. The applicant further contents that the impugned laws discriminate on the ground of sexual orientation. In this respect, it is the applicant's contention that the word 'sex' in Article 10 of the Constitution must be read as including 'sexual orientation'. Thus, the questions which we have to determine are:

(a) Firstly, whether the differentiation is rational and unreasonable; and whether we must interpret the word 'sex' in Article 10 as including 'sexual orientation', and

(b) Secondly, if the answer to the first question is in the affirmative, whether the impugned laws, subject the applicant to unfair discrimination.

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[8] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 11.

[21] In *Mwellie v Minister of Works, Transport and Communication and Another,*[9] this Court recognised that Article 10 is not absolute. The Court stated that the content of the right to equal protection takes cognizance of 'intelligible differentia' and allows provision therefore.

[22] In *Müller v President of the Republic of Namibia and Another*[10] the Supreme Court, quoting with approval from *Prinsloo v Van der Linde and Another*[11] held that Article 10(1) of the Namibian Constitution requires the Court to give content to the words 'equal before the law' so as to give effect to the general acceptance that:

'... in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. ... In regard to mere differentiation the Constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate purpose for that would be inconsistent with the rule of law and the fundamental premises of the Constitutional State ... Accordingly, before it can be said that mere differentiation infringes s. 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it.'

[23] We digress to note that Justice Ackerman[12] has argued that there is a confusion caused by arguing that all people are born equal, or are equal in rights despite the self-evident empirical fact that all human beings differ extensively as far as their physical, mental, intellectual, emotional, artistic and creative abilities, and their economic, social, cultural circumstances in life are concerned. The learned author further argued that based on the different circumstances in a

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[9] *Mwellie v Minister of Works, Transport and Communication and Another* [1995 (9) BCLR 1118 (NmHC)].
[10] *Müller v President of the Republic of Namibia and Another* 1999 NR 190 (SC).
[11] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at 1024.
[12] Laurie Ackerman. *Human Dignity: Lodestar for Equality in South Africa*. Juta & Co (Ltd) 2012

human beings life, the noun *equality* and the adjective *equal* cannot be used substantively but in an *attributive* sense.[13] He argued that:

'Put more simply intelligible meaning can only be given to equality as applied to human beings if the antecedent question 'Equality of *what?'* is first asked, or more expansively 'In respect of what are all human beings equal and in respect of what may one not be discriminated against?' The "*what"* and the "in respect of what'' will for the sake of brevity be referred to as the *criterion of attribution* or the *criterion of reference* … the answer to the question "equality of what" (or the *criterion of attribution*) is/should be human worth (dignity).'

[24] We return to *Müller v President of the Republic of Namibia & another*[14] where the Supreme Court made it clear that the tests to be applied in determining whether there is discrimination under Article 10 (1) and (2) differ and summarised the test to be applied in respect of each sub-article in these terms:

'(a) Article 10(1).

The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose.

(b) Article 10(2)

The steps to be taken in regard to this sub-article are to determine –

(i) whether there exists a differentiation between people or categories of people;

(ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;

(iii) whether such differentiation amounts to discrimination against such people or categories of people; and

(iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution.'[15]

<u>Is the differentiation by the impugned laws based on a rational connection to a legitimate purpose (Article 10(1))?</u>

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[13] At p17.
[14] Footnote 10 above.
[15] Ibid at 200A-D.

[25] We have demonstrated that the impugned laws do take into account the physiological differences between the male and female genders. The question that then follows is whether those laws have been shown to be rationally connected to a legitimate governmental purpose. To determine whether a limitation is reasonable and justifiable or connected to a legitimate purpose, all relevant factors must be taken into account, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose and less restrictive means to achieve the purpose. In *Kauesa v Minister of Home Affairs and Others*[16] the Supreme Court quoting with approval from the Canadian case of *R v Oakes*[17] stated that:

'To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central *criteria* must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutional protected right or freedom … Second, the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test … (I)n each case courts will be required to balance the interests of society with those of individuals or groups.'

[26] In accordance with the guidance in the *Kauesa* matter, the first question is to identify the objective of the criminal law. Various theories have been advanced as to what the purpose of criminal law is. The most popular theory is that the purposes of criminal law are numerous. Its main function is to keep order and deter crime, protecting the public; punishing and rehabilitating those who commit crimes and supporting those who have been victimised by crime.

[27] Professor Milton remarks that the 'real reason' for the criminal proscription of sodomy 'is the extreme disgust and abhorrence which such conduct arouses'.[18] The common law offence of sodomy is thus considered to be immoral, shameful and reprehensible and against the order of nature.[19] There can be no doubt that

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[16] *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC).
[17] *R v Oakes* (1986) 26 DLR (4th) 200 at 225.
[18] JRL *Milton SA Criminal Law and Procedure vol II Common Law Crimes* (revised reprint 1990) at 271.

there are some sexual acts which are repugnant to and in conflict with human dignity so as to amount to a perversion of the natural order. Bestiality (whether committed by a man or woman) is an obvious example.

[28] However, 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.

[29] In *S v Banana*[20] Justice Gubbay reasoned that it may well be that the majority of the people, who have normal heterosexual relationships, find acts of sodomy morally unacceptable. This does not mean however, said the learned Judge, that today in our pluralistic society, moral values alone can justify making an activity criminal. If it could, said the learned Judge, one immediately has to ask: 'By whose moral values is the State guided?' He continued and quoted Professor R Dworkin,[21] who contended that:

'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 position he could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not

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[19] See *R v Baxter* 1928 AD 430 431 (acts of indecency' between two consenting adult men 'of so disgusting a nature that I refrain from repeating them' (Per Solomon CJ)) and *S v C* 1987 2 SA 76 (W) at 79G-H (statute aimed at conduct 'which, from time immemorial, has to many people been profoundly repulsive as depraved and repugnant to nature').

[20] *S v Banana* 2000 (3) SA 885 (ZS).

[21] R Dworken Taking Rights Seriously at 258.

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.'

[30] For the reasons set out in the preceding paragraphs, we are not persuaded that in a democratic society such as ours, with a Constitution which promises the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family and the pursuit of individual happiness, it is reasonably justifiable to make an activity criminal just because a segment, maybe a majority, of the citizenry consider it to be unacceptable.

Is it reasonable and demonstrably justified to criminalise consensual anal intercourse in private between male persons?

[31] We, earlier in this judgment, arrived at the conclusion that various forms of sexual conduct which have been held to constitute an offence, if committed by a male person with another male person, are not regarded as criminal if committed by a male person with a female person or between female persons. The question that springs to mind is, what is rational about criminalising one sexual activity and not the other? The answer must surely be that there is nothing rational about it. If anal sex between men is immoral and against the order of nature we see no reason why anal sex between a men and a woman is not immoral and against the order of nature.

[32] Counsel for the respondents relied heavily on the dissenting views of Justice McNally,[22] who in essence denies that the common law offence of sodomy discriminates on the basis of gender. Justice McNally opined as follows:

'It is important to bear in mind that what is forbidden by s 23 [that is s 23 of the Constitution of Zimbabwe] is discrimination between men and women. Not between

[22] In *S v Banana (supra)* footnote 19 at 934-935.

heterosexual men and homosexual men. That latter discrimination is prohibited only by a Constitution which proscribes discrimination on the grounds of sexual orientation, as does the South African Constitution.

The importance of this point is that the real complaint by homosexual men is that they are not allowed to give expression to their sexual desires, whereas heterosexual men are. Insofar as that is discrimination - and, of course it is - it is not the sort of discrimination which is struck down by s 23. The Constitution goes on, in s 23(5)(b), to make the obvious qualification that a law may be discriminatory 'to the extent that it takes due account of physiological differences between persons of different gender'…

But realistically, and without going into sordid detail, how often does it happen that men penetrate women per anum? How often, if it does happen, is it the result of a drunken mistake? Or an excess of sexual experimentation in an otherwise acceptable relationship? And, most importantly, how can it be proved? I refrain from further analysis. In my view, the law has properly decided that it is unrealistic to try to penalise such conduct between a man and a woman. I do not accept that that fact should lead us to the conclusion that it is discriminating to penalise it when it is between two men. The real discrimination, as I have said earlier, is against homosexual men in favour of heterosexual men - and that is not discrimination on the ground of gender.'

That being so, the penalising of consensual sodomy is not 'discrimination' as that word is defined in the Constitution, because it is not discrimination on the grounds of: 'race, tribe, place of origin, political opinions, colour, creed or gender'. This kind of discrimination is not dealt with in the Constitution. It is thus not outlawed by the Constitution.'

[33] The flaws in the above reasoning are self-evident. Firstly, it is a contradiction to accept that criminalising anal sex between man and man and not between man and woman amounts to differentiation but is not discrimination. Secondly, the conduct that is criminalised is not the frequency with which anal sex takes place between man and woman or the ease or difficulty of proving anal sex between male and female. The conduct that is criminalised is the act of anal sex and whether it happens frequently or occasionally. The argument that it is more difficult to prove anal sex between a man and a woman than between a man and a man is unconvincing, because in both instances the sexual acts take place in private.

[34] The assumption by Justice McNally that men rarely penetrate women per anum, and that if it happens, it is as a result of a drunken mistake, is not based on any evidence. There may be men who enjoy sexual gratification through anal penetration, whether that of a man or a woman. Finally, the argument that discrimination is proscribed only if it is based on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status is fallacious. We will deal with the argument that differentiation only amounts to discrimination if it is based on the grounds enumerated in the Constitution later in this judgment.

[35] Counsel for the respondents further placed great emphasis on the historical context of, or the background to Article 10(2), and argued that the drafters of the Constitution made a conscious and deliberate decision to exclude sexual orientation or preference as a protected ground under Article 10(2). The Attorney General in the answering affidavit actually states that:

'.. one of the founding fathers of our nation, publicly explained that the drafters of the Constitution did not intend to include "sexual orientation" as a protected ground under section 10(2) of the Constitution.'

[36] The argument relating to public opinion was emphatically rejected by the Supreme Court in *Digashu*[23] where that Court stated that whilst public opinion expressed by the elected representatives in Parliament through legislation can be relevant in manifesting the views and aspirations of the Namibian people, the doctrine of the separation of powers upon which our Constitution is based means that it is ultimately for the Court to determine the content and impact of constitutional values in fulfilling its constitutional mandate to protect fundamental rights entrenched in the Constitution. The Supreme Court with approval quoted the following exposition of that principle by Chaskalson P:[24]

'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

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[23] *Digashu and Others v Government of the Republic of Namibia and Others* 2023 (2) NR 358 (SC).
[24] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 88.

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 the 1993 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 others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the 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.' [Emphasis added.]

[37] We thus come to the conclusion that the law of consensual sodomy is arbitrary and unfair and is based on irrational considerations.

Balancing the interest of society with the interest of homosexual men

[38] The consequences that criminalisation of sodomy has on gay men is now well documented that we need not seek evidence in that regard. Cameron has contended that the criminal inhibitions on sex between gay men have a severely negative effect on their lives.[25] He further advanced that even when these provisions are not enforced, they reduce gay men and women to what one author has referred to as 'unapprehended felons'. The learned author quoted from the Irish judgment of *Norris v Republic of Ireland,*[26] where it was held that:

'One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow …'

[39] The learned author furthermore posits that:

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[25] Cameron, Edwin. '*Sexual Orientation and the Constitution: A Test Case for Human Rights.*'1997 (110) SALJ 450.

[26] *Norris v Ireland* (1989) 13 EHRR 186.

‘Apart from misery and fear, a few of the more obvious consequences of such laws is to legitimate or encourage blackmail, entrapment, violence (‘queer-bashing’) and peripheral discrimination such refusal of facilities, accommodations and opportunities.’

[40] The above sentiments were articulated in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[27] as follows:

'The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.’

[41] In the *Banana* matter, Chief Justice Gubbay stated that:[28]

'Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination…

Even if the discrimination is experienced at the hands of private individuals, it is the State that denies protection from that discrimination. Thus the adverse effects are particularly invidious…’

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[27] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 2000 (2) SA 1 (CC) at 27A - 28F (2000 (1) BCLR 39 at 62H - 64E).

[28] *Supra* footnote 19 in which he quotes Cory J in *Vriend v Alberta* (1998) 50 CRR (2d) 1 (SC) at 42 – 3.

[42] We therefore conclude that the criminalisation of anal sexual intercourse between consenting adult males in private, is outweighed by the harmful and prejudicial impact it has on gay men and that its retention in our law 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.

Does the differentiation by the impugned laws amount to discrimination (Article 10(2))?

[43] Counsel for the respondents argued that the applicant's key refrain is that the laws prohibiting homosexual sodomy violate Article 10, and in particular Article 10(2) which proscribes discrimination 'on the grounds of sex'. The applicant, however, concedes that Article 10 does not make express reference to 'sexual orientation' as a ground of discrimination. This, counsel submitted, must be the end of the matter as to whether the Constitution, in particular, Article 10, requires the legalisation of homosexual sodomy. Counsel argued that:

> 'It is significant that the applicant makes no effort to explain why the term "sexual orientation" does not appear among the grounds listed in Article 10(2) of the Constitution. The reason is given by the Government: a conscious and deliberate decision was made by the drafters of the Constitution to exclude sexual orientation or preference as a protected ground under Article 10(2). The applicant does not deny this.'

[44] We have no qualms with counsel's argument that Article 10 does not make express reference to 'sexual orientation' as a ground of discrimination. The Supreme Court declined to decide on the question of whether the word sex includes sexual orientation.[29] We, however, hold the view that the matter is not as simple as counsel portrays it to be, because the fact that a ground is not listed in Article 10(2) is not a license for the law to discriminate on that ground.

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[29] *Digashu and Others v Government of the Republic of Namibia and Others* 2023 (2) NR 358 (SC) para 116-117.

[45] In *Brink v Kitshoff NO,*[30] Justice O'Regan who authored the majority judgment reasoned that equality has a very special place in the South African Constitution. She said that the Constitution's preamble states that ' … there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races . . .'

[46] The learned Judge continued and argued that the Constitution states that rights entrenched in chapter 3 may be limited to the extent only that it is 'justifiable in an open and democratic society based on freedom and equality'. It is not surprising that equality is a recurrent theme in the Constitution she said. She continued and stated that the Constitution is an emphatic renunciation of South Africa's past in which inequality was systematically entrenched.

[47] We further hold the view that the sentiments expressed by Justice O'Regan hold true for Namibia. In fact, the preamble to the Namibian Constitution recognises that the inherent dignity and the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace. The preamble further recognises that these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid. Against that background 'We the people of Namibia' resolved to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle; desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world.

[48] In *Pretoria City Council v Walker,* [31] the Constitutional Court of South Africa made it clear that the existence of past patterns of discrimination against complaints is not a condition precedent to a finding of unfair discrimination. In the *Prinsloo* matter, the Constitutional Court commented that:

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[30] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).
[31] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) paras 47-48, 73.

‘Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity ... In our view, unfair discrimination, when used in this second form in s 8(2), in the context of s 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.’

[49] The Court went further and reasoned that the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment. It quoted with approval the following passage from *President of the Republic of South Africa and Another v Hugo*:[32]

‘At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked’

[50] The Court similarly quoted with approval the following passage from *Egan v Canada*:[33]

'This Court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society … More than any other right in the Charter, s 15 gives effect to this notion. Equality, as that concept is enshrined as a fundamental human right within s 15 of the Charter, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens that demean

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[32] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.
[33] *Egan v Canada* (1995) 29 CRR (2d) 79.

them, that treat them as less capable for no good reasons, or that otherwise offend fundamental human dignity.'

[51] In *Digashu,*[34] the Supreme Court confirmed its earlier decision that the rights to equality and dignity are closely related.[35] This, in the language of Justice Ackerman,[36] means that the Court has used human worth (dignity) as the criterion of attribution for human equality. In simple terms, the courts have used human worth (dignity) as an aspect or feature or quality of humankind in respect whereof all human beings must be treated equally and an aspect in respect whereof human beings may not be discriminated against.

[52] In *S v Makwanyane and Another,*[37] O'Regan points out that the importance of dignity as a founding value of the new Constitution cannot be overemphasised. She stated that recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings and concludes her judgment by stating that the new Constitution stands as a monument to this society's commitment to a future in which all human beings will be accorded equal dignity and respect.[38] We add that, in our case, the Constitution also stands as a monument to the people of Namibia's commitment to promote, amongst all of us, the dignity of the individual.

[53] We are aware of the caution sounded by the Supreme Court that:

'The decisions of the South African Courts, and more particularly that of the Constitutional Court, are very relevant and in the past this Court and the High Court of Namibia, have frequently applied these decisions but this must always be done with due recognition of the differences that may exist between our two Constitutions. In my opinion there are some differences between our Articl10 and sec. 8 of the Interim Constitution and sec. 9 of the South African Constitution, which must be kept in mind when comparisons are drawn.

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[34] Supra footnote 26.
[35] In *Müller v President of the Republic of Namibia & another* 1999 NR 190 (SC) at 202C-D.
[36] See footnote 22.
[37] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 328.
[38] *Id* para 344.

First of all the word "unfair", as a prefix describing the word discrimination, is not part of our Article 10. Secondly sec. 8(2) and 9(3) and (4) make it clear that the prohibition against discrimination is not limited to the enumerated grounds set out in sections 8(2) and 9(3) of the South African Constitutions.

In Namibia any discrimination based on other grounds than those mentioned in Article 10(2) will have to be dealt with and will have to be brought in under Article 10(1) and/or Article 8(1), which provides that the dignity of all persons shall be inviolable.'[39]

[54] The Supreme Court, after pointing out the differences between Article 10(2) of our Constitution and ss 8 and 9 of the South African Constitution, gives guidance on how to determine whether a law breaches Article 10(2) of our Constitution. The first step is to determine whether there exists a differentiation between people or categories of people; the second step being to determine whether such differentiation is based on one of the enumerated grounds set out in the sub-article, the third step is to determine whether such differentiation amounts to discrimination against such people or categories of people. Once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution.

[55] We have, in this judgment, found that the impugned laws differentiate between people or categories of people that is; between male and female and between gay men and heterosexual men. We have found that the differentiation between the categories of people we have identified is, in so far as it criminalises anal sex between men and men but not between men and women, based on one of the enumerated grounds set out in Article 10(2). We, however, found that, in so far as the impugned laws differentiate between heterosexual men and gay men, it is not based on one of the enumerated grounds set out in Article 10(2). The next question then is to determine whether the differentiation between men and women or between heterosexual men and gay men amount to discrimination.

[56] The Supreme Court in *Müller,*[40] considered the meaning of the words

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[39] *Digashu and Others v Government of the Republic of Namibia and Others* 2023 (2) NR 358 (SC).
[40] In *Müller v President of the Republic of Namibia & another* 1999 NR 190 (SC).

‘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.’

[57] We also established that 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 thus unconstitutional. The finding of unconstitutionality leads to only one conclusion, namely, to declare the impugned laws invalid.

Costs

[58] The general rule is that costs is in the discretion of the court and that costs follow the cause. We have not been referred to any cogent reason why we must deviate from the general rule that costs follow the result.

Order

[59] In the result, we make the following order:

1. The common law offence of sodomy is declared unconstitutional and invalid.

2. The common law offence of unnatural sexual offences is declared unconstitutional and invalid.

3. The inclusion of the crime of sodomy in schedule 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is declared unconstitutional and invalid.

4. Section 269 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is declared unconstitutional and invalid.

5. The inclusion of the crime of sodomy in schedule 1 of the Immigration Control Act, 1993 (Act 7 of 1993) is declared unconstitutional and invalid.

6. The inclusion of the crime of sodomy in section 68(4) of the Defence Act, 2002 (Act 1 of 2002) is declared unconstitutional and invalid.

7. The respondents must pay the applicant's costs of the application, the costs to include the costs of one instructing and two instructed counsel.

8. The matter is finalised and removed from the roll.

N NDAUENDAPO
Judge

S F I UEITELE

Judge

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C CLAASEN

Judge

APPEARANCES

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