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INFORMATION ABOUT NAMIBIA'S LAW

SEXUAL ORIENTATION AND THE *DIGASHU* CASE

On 20 January 2022, a three-judge bench of the High Court issued an opinion in the *Digashu* case which concerns the recognition by Namibia of same-sex marriages concluded in other countries for purposes of Namibia's immigration law. Here is a simplified explanation of the case.

What issue was the Court asked to consider?

In terms of Namibia's Immigration Act, a non-Namibian spouse of a Namibian citizen has an automatic right to live in Namibia without any other permit. The key issue before the Court was whether this rule applies to a spouse in a same-sex marriage concluded in a country that allows such marriages.

Who were the parties?

Initially there were two cases involving two different couples. One was a gay couple (two men) who were legally married in South Africa and in the process of adopting a child together. The other was a lesbian couple (two women) who were legally married in Germany. South Africa and Germany, like an increasing number of countries in the world, allow same-sex marriages. The application was opposed by the Government.

Why were there three judges?

High Court cases are typically heard by a single judge. But the High Court Act gives the Judge-President discretion to direct that a case must be decided by a larger number of judges. This is generally done only for cases that raise particularly important issues.

What did the High Court decide?

The High Court ruled against the two couples, saying that the same-sex foreign marriages could not be recognised by Namibia for immigration purposes. But the three judges said that they made this ruling only because they were bound by the decision of the Supreme Court in the 2000 *Frank* case. They believed that the *Frank* case was wrongly decided, but they had to follow it since a Supreme Court decision can be reversed **only** by the Supreme Court itself.

What was the ruling in the *Frank* case?

This is a difficult question to answer, because it was one of the main points of disagreement in the *Digashu* case. Court judgments discuss the facts, the arguments put forward by the parties to the case, and the legal background to the issue under consideration before announcing the decision.

The only part of a court decision that is binding on lower courts is the actual reason for the outcome. The other parts of the judgement are not binding, although they may be persuasive when similar issues arise in future. Sometimes the difference between the binding and non-binding parts of a court judgment is clearly signalled, but this is not always the case.

The lengthy Supreme Court judgment in the *Frank* case touched on a wide range of factors, so the lawyers in the *Digashu* case had different ideas about parts of that judgment actually constituted the binding reasons for the decision.

The *Frank* case was about an application for permanent residence by the lesbian partner of a Namibian citizen. This couple was not formally married. In fact, there was no country in the world that allowed same-sex marriages back then.

The High Court took the view that the *Frank* case ruled in a binding way that no same-sex relationship can be recognised in Namibia. So the three High Court judges said that they had to rule against recognising the foreign same-sex marriages of the two couples.

Why did the High Court think that the Supreme Court ruling in the *Frank* case was wrong?

The three High Court judges found many problems in the *Frank* judgment. First, it went too far by making decisions on broad issues that were not actually necessary to the outcome of the case. Courts generally confine themselves to the issues raised and argued by the parties, so that their decision is informed by legal research and arguments on both sides.

Secondly, the *Frank* case misinterpreted the International Convention on Civil and Political Rights, which had already been adopted by Namibia at that stage and was thus a binding part of Namibian law. That Convention prohibits discrimination on the basis of “sex”, which had already been interpreted internationally as including “sexual orientation”.

Thirdly, Namibian courts have long held that Constitutional provisions must not be narrowly or rigidly interpreted, because the role of a constitution in a democratic society is to protect fundamental human rights. So the High Court said that it is “untenable” (a position that cannot be defended) to say that “sex” in Article 10 of the Namibian Constitution does not include sexual orientation. In addition, the High Court said that “social status” in Article 10 must also be understood to include sexual orientation. The result is that Article 10(2) should be understood as prohibiting discrimination on the basis of sexual orientation.

Fourthly, because the *Frank* case considered issues without “proper well researched arguments”, it did not apply the proper tests to consider whether unconstitutional discrimination had taken place.

Fifthly, the High Court pointed out to another Constitutional provision that must not be narrowly interpreted, which is the protection for human dignity in Article 8.

Similarly, it said that the *Frank* decision was too narrow in its approach to Article 14 on marriage and the family. The *Frank* case considered this provision in a way that was “mechanistic, rigid, austere and artificial” – which is not the correct approach to Constitutional interpretation. The High Court reiterated statements from previous Supreme Court cases that the Constitution is “a moving, living, evolving document” that must be broadly interpreted to avoid “the austerities of tabulated legalism”. (This legal phrase refers to narrow, rigid interpretations that do not speak to the real circumstances and complexities of life.) The High Court agreed with the sentiment of the one dissenting justice in the *Frank*

case that the fundamental rights and freedoms in the Constitution should be interpreted as broadly and generously as possible to provide the widest benefit.

Why did the High Court have to follow a Supreme Court case that it believed to be wrong?

The Supreme Court is the highest level in the hierarchy of Namibian courts. Article 81 of the Constitution talks about the “binding nature of decisions of the Supreme Court”. It says that a decision of the Supreme Court “shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted”.

It might be argued that the High Court could have distinguished the *Frank* case because it involved an informal relationship rather than a foreign marriage, or discounted the *Frank* case’s constitutional findings on issues that were not even asserted by the parties. But the High Court took the view that the *Frank* case was binding authority for the proposition that homosexual relationships in general are not legally recognised in Namibia.

The three judges respectfully put forward their reasons for believing that the *Frank* decision was incorrect and urged the Supreme Court to reverse its decision in the *Frank* case.

Why didn’t the couples just bring their cases in the Supreme Court?

The Supreme Court is primarily a court of appeal. This means that it generally decides only cases that have already been considered by a lower court. The Constitution gives the Attorney-General (the principal legal adviser to the Government) power to take a case straight to the Supreme Court for a decision on a constitutional issue where the matter is urgent or of particularly high importance, but other parties to a court case involving constitutional issues must ordinarily start out in the High Court.

What does the High Court judgment mean for the LGBTI+ community?

The rights of gay and lesbian individuals have never before been acknowledged so strongly in Namibia as in the *Digashu* case.

The High Court said, “We cannot in a functioning democracy, founded on a history such as our own, come from a system of unreasonable and irrational discrimination, to obtain freedom and independence, and then continue to irrationally and unjustifiably take away human rights of another segment of Namibian citizenry, simply because of their orientation. It amounts to cherry-picking of human rights, and deciding whose rights are more ‘human’, and to be protected, more than others. This is not what our democracy was founded upon.”

The High Court goes on to observe that the Preamble to the Namibian Constitution talks about the “inherent dignity” and the “equal and inalienable rights of all members of the human family”, noting that the Constitution comes out of a past where these rights had been “denied to the people of Namibia by colonialism, racism and apartheid”. The Court thus appears to suggest that the denial of rights on the basis of sexual orientation has similarities to the denial of rights on the basis of race.

Perhaps most importantly, the High Court stated: “Homosexual relationships are without doubt, globally recognised, and increasingly more countries have changed their laws to recognise one’s right not to be discriminated against on the basis of one’s sexual orientation. We believe it is time, too, for the Namibian Constitution to reflect that homosexuality is part and parcel of the fabric of our society and that persons - human beings - in homosexual relationships are worthy of being afforded the same rights as other citizens”.

The Supreme Court is not required to agree with the sentiments of the High Court if the parties take the case on appeal, but it would certainly take them into consideration.

Similar sentiments were expressed in another recent High Court case, *Luehl v Minister of Home Affairs and Immigration*, which concerned the citizenship rights of a child born via surrogacy to a gay couple composed of a Namibian and a non-Namibian. That judgment also stated that courts must give a “purposive interpretation” to the Constitution that will be “elastic, flexible and adaptive to changing norms, beliefs and practices in society” rather than “a narrow and pedantic interpretation”. The *Luehl* case also held that the protection against discrimination in Art 10 of the Constitution extends to sexual orientation and that the constitutional promise of justice “for all” applies to all people in Namibia, “regardless of colour, gender, sexual orientation, etc”. That case is also currently on appeal to the Supreme Court.

The High Court decisions in these two cases both point in the direction of the broad and inclusive nature of constitutional rights. They bode well for future legal challenges around LGBTI+ issues, such as challenges to the law criminalising sodomy between consenting adult men, discrimination on the basis of sexual orientation in the workplace or the exclusion of same-sex couples from the protections of the Combating of the Domestic Violence Act.

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