REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: **HC-MD-CIV-MOT-REV-2017/00447**

In the matter between:

MATSOBANE DANIEL DIGASHU	**1st APPLICANT**
JOHAN HENDRIK POTGIETER	**2nd APPLICANT**
T L DIGASHU	**3rd APPLICANT**
and	
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**1st RESPONDENT**
MINISTER OF HOME AFFAIRS AND IMMIGRATION	**2nd RESPONDENT**
CHIEF OF IMMIGRATION	**3rd RESPONDENT**
ACTING CHAIRPERSON OF THE IMMIGRATION CONTROL BOARD	**4th RESPONDENT**
IMMIGRATION SELECTION BOARD	**5th RESPONDENT**
IMMIGRATION TRIBUNAL	**6th RESPONDENT**
OMBUDSMAN	**7th RESPONDENT**
ATTORNEY-GENERAL OF NAMIBIA	**8th RESPONDENT**

Case no: **HC-MD-CIV-MOT-GEN-2018/00427**

In the matter between:

ANITA ELFRIEDE SEILER-LILLES **APPLICANT**

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **1st RESPONDENT**

MINISTRY OF HOME AFFAIRS AND IMMIGRATION **2nd RESPONDENT**

THE CHIEF OF IMMIGRATION **3rd RESPONDENT**

CHAIRPERSON OF THE IMMIGRATION CONTROL BOARD **4th RESPONDENT**

IMMIGRATION SELECTION BOARD **5th RESPONDENT**

IMMIGRATION TRIBUNAL **6th RESPONDENT**

Neutral citation: *Digashu v Government of the Republic of Namibia (HC-MD-CIV-MOT-REV-2017/00447) and Seiler-Lilles v Government of the Republic of Namibia (HC-MD-CIV-MOT-GEN-2018/00427) [2022] NAHCMD 11 (20 January 2022).*

Coram: Prinsloo J, Sibeya J *et* Schimming-Chase J

Heard: 20 May 2021

Delivered: 20 January 2022

Flynote: Immigration — Legislation – Immigration Control Act, 7 of 1993 – Application for permanent residence permit – Section 26 (3) (d)– Application for work permit – Section 27 (2) (b) – Requirements for – Applicants averring they have met the requirements for the sections in so far as necessary– and that their applications were rejected based on their same-sex relationships – as such discriminatory against them.

Administrative law — Fair administrative justice — Article 18 of Namibian Constitution - Article requiring administrative bodies to follow rules of natural justice – to apply their minds fairly and objectively in consideration of an application for a work permit or a

permanent residence permit.

Constitutional law – Same-sex relationships - Right to family life- same-sex relationships not recognised in Namibia – Definition of family not included in same-sex relationships- *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR107 SC.
Court — Supreme Court — Article 81 of Constitution — Finality of Supreme Court decisions — Competent for Supreme Court under art 81 to correct injustice caused by its own decision.

Court – Namibian Constitution – Article 81 – Precedent and *stare decisis* – Binding authority of precedent limited to *ratio decidendi* and not extending to *obiter dicta* – Judges who believe decision of higher court to be plainly wrong cannot simply avoid it and are bound – Proper way of bringing about change of decision believed to be wrong is to formulate reasons why should be changed, and urge higher court to effect change.

Summary: Two same sex couples launched a consolidated application to court for declaratory relief, alternatively constitutional relief, and in the further alternative, review relief ('the Digashu application and the Seiler-Lilles application respectively'). The parties were married in South Africa and Germany respectively, to Namibian citizens. Applications for a work permit (in terms of s 27(2)(b) of the Immigration Control Act, Act 7 of 1993 and a permanent residence permit in terms of s 26(3)(d)) were made by the foreign parties to the Immigration Selection Board. The applications were refused.

The applicants thereafter applied to this court for an order that their civil marriages be recognised by the Immigration Selection Board, and that they be recognised as spouses in terms of s 2(1)(c) of the Immigration Control Act. In the event that the court finds that the word 'spouse' as used in the Immigration Control Act does not include same-sex spouses, the parties sought to have the section declared

unconstitutional and rectified by reading into the sections the words ‘including persons lawfully married in another country and an order that the applicants (and the minor child, in the Digashu application) are declared to be a family as envisaged in article 14 of the Namibian Constitution.

As regards the minor child, an additional order was sought in relation to the third applicant minor child, that the applicants are the joint primary caregivers and joint guardians of the minor child and are permitted to relocate him to Namibia, and that the child is their dependent. A court order from the Gauteng High Court making such declaration was produced.
In the event that this relief was not granted in the Digashu application, an order was sought reviewing and setting aside the decision of the Immigration Selection Board to refuse Mr Digashu’s application for an employment permit. This relief was conceded and it was submitted that the application should be referred for reconsideration. In the Seiler-Lilles application, Ms Seiler-Lilles sought an order setting aside the decision to refuse her application for a permanent residence permit.

The respondents’ opposition was based on the decision of the Supreme Court in *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107, *inter alia* to the effect that same sex relationships are not legal in Namibia, and that the right to family entrenched in article 14 of the Constitution also did not include same- sex relationships.

Held that in terms of article 81 of the Constitution, a Supreme Court decision must be followed by the High Court, even if that decision is wrong, unless the findings were *obiter,* which they were not.

Held that should the High Court hold the view that the decision, or

findings, or even the reasoning of the Supreme Court is wrong, or outdated, and that it should be changed, it is at liberty to formulate those reasons and urge the court of higher authority to effect the change, with the necessary courtesy and respect.

Held that the interpretation by the Supreme Court of articles 8, 10 and 14 was narrow, outdated and couched in tabulated legalism.

Held that 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. It is time to recognise 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.

Held that the Supreme Court's interpretation of the international law was wrong. International conventions ratified by Namibia are binding on it. 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 article 2 (1) of the ICCPR, should be read to include "sexual orientation" – Accordingly article 10 should be interpreted to include sexual orientation, given that article 10(2) specifically provides that no persons may be discriminated against on the grounds of social status, which would include sexual orientation.

Held further that in a functioning democracy, founded on a history such as our own, coming from a system of unreasonable and irrational discrimination, to obtain freedom and independence, and then to continue to irrationally and unjustifiably take away human

rights of another segment of Namibian citizenry, simply because of their orientation - amounted 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.

Held that the Constitution must, because it is a moving, living, evolving document, stand evolution and the test of time, be broadly interpreted so as to avoid the austerities of tabulated legalism.

Held accordingly that s 26(3)(g) does not apply to any of the applicants in this matter, nor to the applicants in the *Frank* matter. S 26(3) (g) applies when one applies for permanent residence as a spouse of a permanent resident. The Immigration Control Act does not require a spouse of a Namibian citizen to apply for permanent residence because that spouse is automatically domiciled in Namibia by virtue of s 22 of the Immigration Act, and becomes a citizen in terms of article 4. The other obvious factor is that the spouses in these cases are Namibian citizens and not permanent residents.

Held that, in the result, the review applications had to be determined.

Held that with respect to the Digashu application, the decision to refuse his work permit was set aside, as conceded by the respondents, and referred back for reconsideration.

Held that with regard to the Seiler-Lilles application, the prescribed portion of her application for permanent residence was in terms of s 26(3)(g) of the Immigration control Act, which was not applicable to her circumstances. As s 26(1)(a) provided that an application for permanent residence should be made on a prescribed form, there was no proper application to consider in terms of s 26(3)(d), and therefore the relief could not be granted.

ORDER

The following order is made:

Digashu application:

1. The applicants' application for an order declaring:

1.1. that the respondents recognise the civil marriage between the first and the second applicants on 4 August 2015 at Johannesburg, in terms of the provisions of the South African Civil Union Act, 2006;

1.2. that the first applicant is a spouse of the second applicant as envisaged in s 2(1)(c) of the Immigration Control Act; and

1.3. that the first, second and the third respondents are a family as envisaged in article 14 of the Namibia Constitution;

is dismissed.

2. The applicants' application declaring s 2(1)(c) of the Immigration Control Act, 1993, unconstitutional and reading the words "including persons lawfully married in another country" is dismissed.

3. The applicants' application for the recognition of the Court Order granted on 3 March 2017 by the Gauteng Local Division of the High Court of South Africa is granted in as far as it relates to the second respondent.

4. The applicants' application that the third applicant be declared a dependent child of the second applicant as envisaged in s 2(1)(c) of the Immigration Control Act, is granted.

5. The applicants' application that the third applicant is a dependent child of the first applicant as envisaged in s 2(1)(c) of the Immigration Control Act, is dismissed.

6. The applicants' application that the first applicant is domiciled in the Republic of Namibia is dismissed.

7. The first respondent's decision dated 26 September 2017, refusing the first applicant's application for an employment permit in terms of s 27 of the Immigration Control Act, is hereby reviewed and set aside.

8. The fifth respondent's decision dated 26 September 2017, refusing the first applicant's application for an employment permit in terms of s 27 of the Immigration Control Act, is remitted back to the fifth respondent for reconsideration afresh.

9. The respondents, jointly and severally, the one paying, the other to be absolved, are directed to pay the applicants' costs in the review application, being the costs of one instructing and two instructed counsel, up until the delivery of the respondents' answering affidavit.

Seiler-Lilles application

1. The applicant's application reviewing and setting aside the fifth respondent's decision dated 9 May 2017 and 17

December 2017, refusing to grant the applicant a permanent residence permit in terms of s 26 of the Immigration Control Act, is dismissed.

2. The application to correct the fifth respondent's decision dated 09 May 2017 and 17 December 2017, to refuse to grant the applicant a permanent residence permit in terms of s 26 of the Immigration Control Act, is dismissed.

3. The applicants' application for an order declaring:

3.1. that the respondents recognise the civil marriage concluded between the applicant and Anette Seiler concluded on 28 November 2017 at Weilerswist Germany;

3.2. that the applicant is the spouse of the Anette Seiler, as envisaged in s 2(1)(c) of the Immigration Act, 1993; and

3.3. that the applicant is domiciled in the Republic of Namibia;

is dismissed.

4. The applicants' application declaring s 2(1)(c) of the Immigration Control Act, unconstitutional and reading the words "including persons lawfully married in another country" is dismissed.

5. There shall be no order as to cost.

JUDGMENT

PRINSLOO J, SIBEYA J et SCHIMMING-CHASE J

'I would not worship a God who is homophobic and that is how deeply I feel about this. I would refuse to go to a homophobic heaven. No, I would say 'Sorry, I would much rather go to the other place. I am as passionate about this campaign as I ever was about apartheid.'[1]

Introduction

[1] There are two cases before the court, heard on a consolidated basis by direction of the Judge President. Constitutional relief (in the form of declarators), alternatively review relief is sought in both applications. The essence of the relief sought is the recognition of same-sex marriages, concluded between Namibian citizens and foreign nationals outside the Republic of Namibia.

[2] In the first case,[2] the first applicant is Mr Matsobane Daniel Digashu, a major male and citizen by birth of the Republic of South Africa. The second applicant is Mr Johan Hendrik Potgieter, a major male and citizen by birth of the Republic of Namibia. The first and second applicants have been a committed couple since 2010.They got married in Johannesburg, South Africa on 4 August 2015, in terms of the South African Civil Unions Act, 17 of 2006.

[3] The first and second applicants decided to relocate to Namibia during the first half of 2016. On 3 March 2017, they were declared joint primary caregivers and guardians of the third applicant, a minor

[1] Remarks by the late Archbishop Desmond Tutu, at the launch of a United Nations Gay Rights Campaign in July 2013.
[2] Hereinafter referred to as "the Digashu application", where applicable.

herein referred to as "L"[3], by the High Court of South Africa, in accordance with the South African Children's Act, 38 of 2005[4]. Furthermore, the court granted the applicants permission to remove L from South Africa and relocate to Namibia. The parties reside in Windhoek.

[4] In the second case,[5] the applicant, Ms Anita Elfriede Seiler-Lilles, a German national, who first entered into a committed relationship with Ms Anette Seiler, a Namibian citizen during 1998. On 2 February 2004 the couple entered into a formal life partnership ("Lebenspartnerschaft") in Germany, and thereafter concluded a civil marriage at Weilerswist, Germany on 28 November 2017. Ms Seiler-Lilles wants to retire in Namibia with her spouse.

[5] In summary, both sets of applicants seek the following declaratory relief:

> (a) an order declaring that the respondents recognise the civil marriage of Messrs Digashu and Potgieter concluded in terms of the South African Civil Unions Act, and the civil marriage of Ms Anita Seiler-Lilles to Ms Anette Seiler concluded in Germany;

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[3] L, is Mr Digashu's cousin.

[4] Sec 24 of the SA Children's Act provides that:

"24 (1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant

(2) When considering an application contemplated in subsection (1), the court must take into account-

(a) the best interest of the child;

(b) the relationship between the applicant and the child, and any other relevant person and the child; and

(c) any other fact that should, in the opinion of the court, be taken into account.

(3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child."

[5] Hereinafter referred to as "the Seiler-Lilles application", where applicable.

(b) an order declaring that the applicants are spouses as envisaged in s 2(1)(c)[6] of the Immigration Control Act, 7 of 1993;

(c) in the event that the court finds that the word 'spouse' as used in the Immigration Control Act cannot be interpreted to include same-sex spouses, the parties seek to have the section declared unconstitutional and rectified by reading into the sections the words 'including persons lawfully married in another country';

(d) an order that the applicants (and the minor child, in the Digashu application) are declared to be a family as envisaged in article 14 of the Namibian Constitution.

[6] With regard to L, Messrs Digashu and Potgieter[7] also seek an order declaring that L is their dependent child as envisaged in s 2(1)(c) of the Immigration Control Act, and an order directing the respondents to recognise the court order of the South African High Court, dated 3 March 2017, which declared them to be L's joint primary caregivers and guardians.

[7] The declaratory relief sought by Ms Seiler-Lilles is sought by way of an amendment which is opposed by the respondents.[8]

[8] In the event that the above relief is not granted the applicants seek the following review relief:

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[6] For ease of reference, s 2(1)(c) of the Immigration Act exempts spouses of Namibian citizens from having to apply for entry, work, permanent residence or other permits provided for in Part 5 of the Act titled "Limitation of entry into, and residence in, Namibia permanent residence permits, employment permits, students' permits and visitors' entry permits". In terms of s 22(1)(c) of the Act, a person married 'in good faith' to a Namibian citizen acquires domicile in Namibia and is not required to apply for any permit in terms of Part 5.

[7] On L's behalf.

[8] The aspect is dealt with in more detail below.

(a) in the Digashu application, an order is sought reviewing and setting aside the fifth respondent's decision to refuse Mr Digashu's application for an employment permit. This relief was conceded, and it was submitted that as such, the respondents' decision should be set aside, and the matter referred back to the fifth respondent for reconsideration. No clear grounds were provided for this concession.

(b) in the Seiler-Lilles application, Ms Seiler-Lilles seeks an order reviewing and setting aside the decision to refuse her application for a permanent residence permit. This relief is opposed by the respondents, on the grounds that firstly, Ms Seiler-Lilles unreasonably delayed the launching of the review, and secondly, based on the prescribed form she completed for her application for permanent residency, the fifth respondent was entitled to refuse same, as same-sex relationships are not legally recognised in Namibia.

[9] Mr Heathcote SC, assisted by Mr Jacobs, appeared for both sets of applicants, and Mr Madonsela SC, assisted by Mr Muhongo, appeared for the respondents.

Background facts

The Digashu application

[10] Mr Potgieter was born and raised in Tsumeb as part of a traditional Afrikaans family. During 1999 he moved to Cape Town to start his own satellite installation business, which became quite successful. Sometime later, he started his own wireless provision company and moved his offices to Johannesburg, where he met Mr Digashu, who is originally from the Limpopo Province where he was raised by his maternal grandmother. The two gentlemen met in 2010, found that they had much in common, and began a romantic

relationship. Mr Digashu holds a National Diploma in Information and Technology, together with a networks certificate from Cisco. He has worked extensively in the IT sector.

[11] After their marriage in South Africa in 2015, Messrs Digashu and Potgieter commenced the adoption process in South Africa of the third applicant, L, who as previously stated is Mr Digashu's cousin. L's mother, the maternal aunt of Mr Digashu, passed away in 2014.

[12] The adoption process was a slow and an arduous one. During the period that this process was ongoing, Mr Potgieter often travelled between South Africa and Namibia, having expanded his business enterprise to Namibia during 2013. As Mr Potgieter's constant commuting between the two countries placed immense pressure on the applicants as a family, Messrs Digashu and Potgieter decided to relocate permanently from South Africa to Namibia in 2016, together with L.

[13] During December 2016, Mr Potgieter moved the applicant's belongings and animals to Windhoek, in anticipation of their intended relocation to Namibia. Mr Digashu and L remained behind in South Africa, for purposes of finalisation of the adoption process. However, the adoption process took longer than expected, and the applicants approached the South African Courts with an application for guardianship in terms of the South African Children's Act. On 3 March 2017 the guardianship application was granted by the Gauteng High Court where the couple was declared as the joint primary caregivers of L[9]. They were also awarded joint guardianship of L and granted leave to remove L from South Africa and to relocate to Namibia.[10]

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[9] Case 416/2017, per Van Der Linde J.

[10] Although counsel for the applicants referred to the adoption of L in both their written heads of argument and in oral submissions, it was no point submitted that the adoption process was successfully completed. Therefore, for purposes of this judgment (and in line with the relief sought and that which is contained in the founding affidavit) this court will only consider Messrs Digashu and Potgieter as having been declared joint guardians of L by the Gauteng High Court and not as his adoptive parents.

[14] In the interim, the applicants established a travel and tourism company in Namibia, under the name and style of African 4x4 Hire CC, with the assistance of their business partner, one Mr Schmidt.

[15] On 19 April 2017 Mr Digashu and L travelled to Windhoek to join Mr Potgieter. Mr Digashu and L entered Namibia on a visitor's permit.

[16] During May 2017, Mr Digashu applied for a work permit in which he disclosed his marriage to Mr Potgieter. His application was rejected on 4 July 2017 on the grounds that it did not meet the requirements of s 27(2) (b)[11] of the Immigration Control Act, because the market was saturated. The point was also taken that Mr Digashu failed to attach proof of his investment and registration of the tourism company to his application for the work permit. This documentation was later provided by Mr Digashu.

[17] Mr Digashu appealed the decision to refuse the issuance of a work permit. On 15 November 2017, he received a letter dated 26 September 2017 informing him that his appeal was unsuccessful. The original reason was reiterated, namely that the requirements of the Immigration Control Act were not met in that the market is saturated.

[18] In December 2017 the Digashu applicants approached this court on an urgent basis seeking urgent interdictory relief, and review and declaratory (constitutional) relief in the normal course. The urgent relief sought was settled on 14 December 2017.

The Seiler-Lilles application

[11] S 27(2)(b) provides that the Immigration Selection Board will not issue an employment permit unless the applicant satisfies the Board that the employment, business, profession or occupation concerned is not, or is not likely to be one in which a sufficient number in Namibians are already engaged, to meet the requirements of the inhabitants of Namibia.

[19] Ms Anita Seiler-Lilles (née Lilles) was born and raised in Porz-Westhoven, Germany. During 1998, she met Ms Anette Seiler on the internet. The pair began a romantic relationship and subsequently entered into a life partnership ('Lebenspartnershaft') on 2 February 2004 in Germany, where they resided until the applicant retired in 2017.

[20] Ms Anette was born and raised in Windhoek. After completing high school, Ms Anette undertook her tertiary education at the University of the North West in South Africa. After completing her studies and working a few years in Namibia, she moved to Germany in 1999. She, however, retained her Namibian citizenship.

[21] Ms Seiler-Lilles bought a house in Windhoek in 2010, and she and Ms Anette visited Namibia regularly because Ms Anette’s elderly mother still resided in Namibia.

[22] The couple then decided that they wanted to retire in Namibia, and on 24 October 2016, Ms Seiler-Lilles submitted an application for a permanent residence permit in terms of s 26 of the Immigration Control Act with the Ministry of Home Affairs and Immigration.

[23] Before filing her application, Ms Seiler-Lilles was advised against applying for domicile based on her life partnership with a Namibian citizen as the life partnership was not recognised in Namibia. She was advised by an official of the first respondent to instead apply for permanent residency, as marriage to a Namibian citizen would not be relevant for purposes of an application for a permanent residence permit.

[24] On 24 October 2016, Ms Seiler-Lilles proceeded to apply for

permanent residency in terms of s 26(3) (d)[12] of the Immigration Control Act. In her application form, Ms Seiler-Lilles disclosed that she was in a permanent life partnership with a Namibian citizen and indicated her marital status as 'married'. In addition, she attached he relevant documentation to prove her financial means and good character in support of her application (in terms of s 26(3) (d)).

[25] Between October 2016 and 9 August 2017, repeated enquiries about the progress of her application at the Ministry of Home Affairs were met with the response that her application was being processed. On 9 August 2017, Ms Seiler-Lilles was handed a copy of a rejection letter dated 9 May 2017 in which the fifth respondent rejected her application for permanent residence, without giving any reasons. Reasons for the rejection were requested on two occasions. After no information was forthcoming, Ms Seiler-Lilles proceeded to lodge an appeal against the decision on 19 October 2017. In the appeal, she reiterated that although retired, she is financially self-sufficient and involved in charity work in Namibia.

[26] In the interim, the laws in Germany changed, enabling gay and lesbian couples to marry. On 28 November 2017 the applicant and her life partner, Ms Anette, were married in Germany.

[27] On 23 April 2018 the fifth respondent advised Ms Seiler-Lilles that her application was rejected during an extraordinary meeting of the Board on 12 December 2017. The reason for such decision was that ‘the applicant did not meet the requirements of s 26(3)(d) of the Immigration Control Act as the applicant’s marriage or partnership to a Namibian is not legally recognised in Namibia’.

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[12] In essence, this section allows a person to apply for permanent residency if the applicant satisfies the fifth respondent that he or she, inter alia, has sufficient means or is likely to earn sufficient means to maintain him or herself and his or her spouse and dependent children (if any), or he or she has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation he or she intends to pursue in Namibia.

[28] This decision by the Board caused Ms Seiler-Lilles to seek legal advice, whereafter she approached this court in the ordinary course to review the Board's decision to reject her application for permanent residency. The matter was opposed.

[29] The record of proceedings of the respondents revealed that the prescribed form completed by Ms Seiler-Lilles in support of her permanent residence application, was the form utilised for applications for permanent residence in terms of s 26(3)(g)[13] and not in terms of s 26(3)(d). This was raised in the answering affidavit, deposed to on behalf of the respondents by the second respondent, Honourable Frans Kapofi. The respondents also raised the point that that Ms Seiler-Lilles unreasonably delayed her application, which we deal with later in this judgment. The stance of the respondents remained that for purposes of permanent residence in Namibia, Ms Seiler-Lilles' marriage / partnership to a Namibian is not legally recognised in Namibia.

[30] In this regard, Ms Seiler-Lilles submitted that s 26(3)(d) focuses entirely on the requirement that an applicant should have sufficient means to support himself or herself and his or her dependents and has nothing to do with the marital status of the applicant. It was also pointed out that s 26(3)(g) was equally inapplicable to her case, because that subsection deals with an application for permanent residence when the applicant is the spouse of a person permanently resident in Namibia. In this instance, Ms Seiler-Lilles' spouse is a Namibian citizen and <u>not</u> a permanent resident. As regards the provisions of s 26(3)(d) the applicant emphasised that she satisfies this requirement as she has sufficient means to support herself and has immovable property in both Germany and Namibia, which

[13] S 26(3)(g) permits a person who is inter alia the spouse of a person who is permanently resident in Namibia to apply to the fifth respondent for a permanent residence permit.

properties are unencumbered. Sufficient documentation was provided by Ms Seiler-Lilles and this is not in dispute.

[31] Subsequent to the filing of the answering affidavit by the respondents, Ms Seiler-Lilles applied for leave to amend her notice of motion, to introduce the same relief sought by Mr Digashu. She also averred that as with regard to the prescribed form that she completed, she was not aware that she had submitted an application for permanent residence in terms of s 26(3)(g) of the Act. She submitted that the only possible explanation for the said form would be that she received the incorrect form from the Ministry of Home Affairs to complete for submission together with her application for permanent residence. She further confirmed that she applied for permanent residence, not based on her marriage to a Namibian citizen (i.e. in terms of s 26(3)(g) of the Act) and that she was well aware that Home Affairs did not recognise her same-sex marriage.

[32] The rest of the allegations in this affidavit deal mainly with the constitutional relief sought, and will be addressed later in this judgment.

[33] As mentioned above, the application for leave to amend was opposed. The opposition was confirmed at the hearing of this matter. We deal shortly with this application to amend before delving into the merits and main relief sought.

[34] The basis for the opposition to the application for leave to amend is, firstly, that the civil union purportedly concluded has no status in terms of the laws of the Republic of Namibia, and secondly that Ms Seiler-Lilles did not present facts informing the legal conclusions reached for purposes of the constitutional relief sought. It was also averred that the constitutional relief as well as the review relief is raised very late in the proceedings (seven months after she

obtained notification of the decision taken), and this delay should militate against granting of the relief sought.

[35] Mr Heathcote countered that there was no delay, and that consulting her legal practitioners three months after the fifth respondents' decision was not inordinate, given the fact that she had to obtain significant documentation in order to prepare for the review application.

[36] It is to be noted that the respondents withdrew their opposition to the application for leave to amend on 16 July 2020 via a status report and agreed to the consolidation of these applications. It is not understood why the application to amend remained opposed at the hearing of this matter. This was also pointed out by Mr Heathcote during argument.

[37] Having regard to all the facts and circumstances[14], including the nature of the claim and the effect of non-compliance via delay (if any), we hold the view that same is neither egregious, nor are the respondents prejudiced thereby. This is to be borne in mind given the respondents' own delays in responding to queries made by the applicants. We are therefore satisfied that leave to amend was already granted by the managing judge at the status hearing, and that the issue of delay is a non-issue.

The applicants' arguments

[38] Turning back to the grounds for the declaratory relief sought, the applicants' declaratory relief is based on what is alleged to be discriminatory practices that were levelled against them by officials of the Ministry of Home Affairs because of their sexual orientation. In this regard, they were informed that same-sex

[14] See *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC) at [58]-[67].

relationships/marriages are not recognised in Namibia.

[39] In the Digashu application, the discrimination was extended to the minor L, as the stance was taken that a family construct cannot exist in a homosexual parental context.

[40] The officials of the second respondent refused to recognise the respective marriages of the first applicants to their Namibian spouses, validly concluded in other countries, and which would have been accepted for purposes of s 22(1)(c) read with s 2(1)(c) of the Immigration Control Act, and accorded them automatic domicile in Namibia (as with heterosexual marriages), without the necessity to apply for a work permit or a permanent residence permit, but for the fact that they are in a same-sex marriage.

[41] In this regard, Mr Digashu submitted in his founding papers that his marriage is a marriage in good faith as envisaged in article 4(3)(a)(aa)[15] of the Constitution. He further submitted that it was not acceptable for the second respondent to hold the view that their marriage is not recognised by Namibian law, because such a position offends their right to equal treatment as embodied in article 10 of the Constitution, on the grounds of their sexual orientation, which is included in the word 'sex' as well as in the words 'social status' as envisaged in article 10(2) of the Constitution.

[42] He pointed out that being gay still bears a negative social connotation, resulting in individuals who were transparent about their sexual orientation being treated as unworthy of basic human respect and dignity, whereas heterosexuals and their relationships are respected in all aspects of society. This, he submitted, was a clear infringement of their dignity and contrary to the provisions of article 8.

[15] Art 4(3)(a)(aa) provides that those who are not Namibian citizens and who in good faith marry a Namibian citizen shall be deemed to be citizens of Namibia by marriage.

[43] When it comes to L, it is the same discrimination as regards the refusal by officials of the second respondent to accept L as a member and part of the family on the same grounds, which offended their right to found a family as envisaged in article 14.

[44] Ms Seiler-Lilles was met with the same attitude. She averred that she was informed that she would not be granted permanent residence, in spite of the fact that on her own, she met all the requirements of s 26(3)(d) of the Immigration Control Act, because of her same-sex marriage. She described the treatment of her and her marriage as naked prejudice towards same-sex couples married in foreign countries.

[45] From the onset, Mr Heathcote emphasised that it is not the case of the applicants to legalise marriage by same-sex couples in Namibia. The case of the applicants was placed in context, namely that the law as it stands should be interpreted by this court to include the applicants as 'spouses' as envisaged in s 2(1)(c) of the Immigration Control Act and 'family' as used in article 14 of the Namibian Constitution. Only if the court should find that the word ‘spouse’ as used in s 2(1)(c) of the Immigration Control Act, cannot be interpreted to include same-sex spouses, then in that case the applicants sought to have that section declared unconstitutional and rectified by reading into the section the words “including persons lawfully married in another country”.

[46] In this regard, the court was urged to make a clear distinction between parties that are married, in this instance in a foreign jurisdiction, and parties that are merely in a relationship. Counsel pointed out that a foreign spouse of a Namibian citizen is given preferential treatment over other foreigners, because a foreign spouse need not apply for permanent residency or an employment permit. By virtue of their marriage to a Namibian citizen, the foreign

spouse could, without any further requirements, live in Namibia with their Namibian spouse and work. S 2(1)(c) of the Immigration Control Act effectively exempted the spouse of a foreign citizen from certain limitations as set out by the Immigration Control Act.

[47] Counsel argued that the respective foreign spouses should be treated the same as any other foreign spouse of a Namibian citizen. As a result neither Mr Digashu nor Ms Seiler-Lilles should have been required to apply for a permanent residence permit. They would be entitled to live and work in Namibia by virtue of their marriage to a Namibian citizen. The discrimination lay in them having to apply for a work permit and a permanent residence permit, which spouses of Namibian citizens did not need to. In any event, the rejections were based on the parties being of same-sex, as opposed to non-compliance with the relevant provisions of the Immigration Control Act.

[48] As regards Ms Seiler-Lilles, Mr Heathcote argued that she had demonstrated that the Board refused to grant a permanent residence permit to her even though she met all the requirements of s 26 of the Immigration Control Act. The reason given by the Board for refusing her application for a permanent residence permit was that she did not meet the requirement of s 26(3)(d) of the Immigration Control Act, because her same-sex marriage was not recognised in Namibia.

[49] Mr Heathcote submitted further that due to an about-turn by the respondents in stating that the application was rejected in terms of s 26(3)(g) – as opposed to s 26(3)(d) (which is the section in terms of which Ms Seiler-Lilles applied for a permanent residence permit and in terms of which her application was rejected) – the respondents' exposed their prejudice towards same-sex couples lawfully married in foreign countries, and as a result the Board refused permanent residence to Ms Seiler-Lilles, notwithstanding that she met and

exceeded all the applicable requirements of s 26(3)(d) of the Immigration Control Act.

The respondents' arguments

[50] The respondents premised their grounds of opposition on the following basis in respect of the Digashu application:

(a) the applicants did not set out the facts necessary to make out a case for the constitutional relief sought;

(b) the South African Civil Union Act, 2006 that the applicants rely on is not applicable in Namibia, and Namibia does not recognize same-sex unions;

(c) the first applicant is therefore not domiciled in Namibia as he does not meet the requirements of s 22 of the Immigration Control Act;

(d) the applicants are not a family as envisaged in article 14 of the Namibian Constitution as the Namibian Parliament has not enacted law that altered the common law with respect to the recognition of same-sex unions;

(e) the third applicant is not dependent on the first applicant in so far as s 2(1)(c) of the Immigration Control Act is concerned for purposes of legalizing and regularizing the first applicant's stay in Namibia.

[51] Mr Madonsela, argued that in the event that the court considers the constitutional relief, that the applicants' reliance on the jurisprudence of other jurisdictions, in support of their principal and constitutional claim was of very little assistance to them and the court, as the views on homosexuality worldwide is quite divergent. He

urged the court to only consider existing Namibian jurisprudence and to adjudicate the matter with regards to the prevailing *boni mores* of the Namibian society.

[52] Mr Madonsela further emphasised that there is no legislation governing and providing for recognition of same-sex unions in Namibia, even those concluded beyond the borders of Namibia. In the absence of enabling legislation speaking to the principal relief sought, the current matter is not a proper one for this court to exercise its discretion in favour of the declarator sought by the applicants, i.e. that the respondents recognise the applicants' same-sex marriages concluded in another jurisdiction.

[53] Mr Madonsela submitted that these issues were already adjudicated by the Namibian Supreme Court in *Chairperson of the Immigration Selection Board v Frank*[16] and this court is bound by the said decision by virtue of article 81 of the Namibian Constitution, which expressly provides 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'.

[54] As far as the review relief was concerned, Mr Madonsela submitted that as the same was conceded in the Digashu application, it should be referred back for reconsideration without the determination of the constitutional questions, because it was not necessary to make a constitutional finding, or consider constitutional relief in the circumstances.[17]

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[16] *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC). In fact, the respondents use identical arguments to that placed before the Supreme Court in that case.

[17] It is settled practice that the Supreme Court decides no more than is absolutely necessary. And, in doing so, develops constitutional law cautiously, judiciously and pragmatically. This approach has been endorsed in *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 184 A-B. We respectfully endorse those words, particularly when applied to constitutional issues, and commend such a salutary practice to the Courts of this country. Constitutional law in particular should

[55] As regards the case of Ms Seiler-Lilles, it was submitted that the core of Ms Seiler-Lilles' complaint was that the Ministry of Home Affairs' refusal of the permit was erroneously premised on s 26(3)(d) of the Immigration Control Act as the reason for the refusal is because her marriage/partnership to a Namibian is not legally recognised in Namibia. However, she filed her application for permanent residence in terms of s 26(3)(g) of the Immigration Control Act (read with Regulation 9), i.e. an application for a permanent residence permit by a spouse/dependent/child/parent of a person permanently resident in Namibia. Her application was accordingly considered in the context of s 26(3)(g) of the Act, and it was in that context that the Board rejected the application.

[56] Mr Madonsela conceded that the rejection letter miscommunicated the fifth respondent's decision by referring to s 26(3)(d) of the Immigration Control Act as reason for rejection of the application, instead of s 26(3)(g). However, although reference was made to the incorrect sub-section, it did not invalidate the decision. Therefore Ms Seiler-Lilles failed to show how and when the respondents specifically contravened article 18 of the Namibian Constitution (or common law) or how the respondents acted unfairly and unreasonably and in contravention of the Immigration Control Act in the circumstances.

[57] Mr Heathcote argued that this court should not follow the decision in *Frank.* In support of this argument he submitted that the Supreme Court's findings relating to same-sex relationships, and the word 'sex' as referred to in article 10(1) does not include sexual orientation, were both *obiter dictum*, and wrong. This, it was submitted, caused a domino effect with regard to the findings in respect of article 10, which counsel contended was also *obiter.* In

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be developed cautiously, judiciously and pragmatically if it is to withstand the test of time.'

addition, Mr Heathcote submitted that the Supreme Court erroneously interpreted international binding precedent to mean that 'sex' excludes 'sexual orientation' while the precedent speaks to the contrary.

Chairperson of the Immigration Selection Board v Frank and Another

[58] A substantial portion of the respective counsel's arguments were devoted to the interpretation of the majority judgment of the Supreme Court, authored by Justice O'Linn AJA (as he then was) in *Frank.* It is therefore necessary to consider the submissions of the parties within the scope of this case. After doing so, we expound on the relevant principles relating to *stare decisis.*

[59] In brief, the *Frank* matter commenced in this court by way of a review application, which was heard on 4 June 1999 by Justice Levy AJ (as he then was). The applicant, Ms Frank, a German national, had worked and resided in Namibia since 1990 and she applied to the Immigration Board for a permanent residence permit in terms of s 26 of the Immigration Control Act. Throughout the period that Ms Frank was in Namibia she was in a committed relationship with another woman, Ms Khaxas, the second applicant, who is a Namibian citizen. Ms Frank also took on the role of a second parent to Ms Khaxas' son, and they lived together as cohabitants, and – together with Ms Khaxas' son – as a family unit. Both made wills nominating the other as sole heir in their respective estates in the event of death and Ms Khaxas had nominated Ms Frank as sole guardian and custodian of her son.

[60] Both Ms Frank's applications for permanent residence in 1995 and again in 1997, were rejected by the Board. In her application to set the decision aside, it was pointed out that it was possible that her application would be rejected because she made no secret of the fact

that she was a lesbian, and in a long term and committed relationship with another woman.

[61] Ms Frank then applied to this court to set aside the decision rejecting her application[18]. There was initially no opposition to this application, due to the relevant officials not receiving a copy of the notice of motion. This necessitated an application for rescission of the judgment granted in default of appearance, and an affidavit was deposed to by the relevant authorised official in this regard. The application for rescission was not opposed, resulting in opposing papers being filed in the review application.

[62] The Immigration Selection Board effectively took two different stances on Ms Frank's relationship which she had disclosed during the application process for permanent residence. In the affidavit in support of the rescission application it was averred that the parties' long-term relationship was considered, but that it did not fall within the ambit of relationships stipulated under s 26(3)(g) of the Immigration Control Act, nor was '… such a relationship one recognised in a court of law'. Therefore, Ms Frank could not be assisted in her application for permanent residence.

[63] However, in the opposing affidavit in the review application, and in particular as regards the second and latter rejection of Ms Frank's application for permanent residence permit it was stated that the fact that Ms Frank is a lesbian played no role whatsoever in the decision taken by the Board. It was averred that '…the applicant's sexual preference was considered to be a private matter having no bearing on the applicant's application'.

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[18] *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

[64] Justice Levy remarked the following:[19]

> 'When Mr Light on behalf of the applicant addressed this Court, he said that in light of this categorical statement the applicant's sexual orientation was no longer an issue in these proceedings.'

[65] It is also to be noted that the main thrust of Ms Frank's application for review was the fact that the Board had not given reasons for its rejection of both her applications. The constitutional obligation upon the Board to act fairly and reasonably and give reasons, and to apply its collective mind and not be influenced by improper or indirect information was reaffirmed by Justice Levy in his judgment.[20]

[66] However reasons were provided by the Board for the rejection of the permanent residence application in the answering papers (even though it was expressly stated that there was no specific information before the Board that adversely affected Ms Frank's application). These reasons were couched in s 26(3)(e) of the Immigration Control Act.[21]

[67] After a consideration of the papers, Justice Levy held that the Board had not presented any evidence to show that the nature of work being undertaken by Ms Frank was work that Namibians were already engaged in within the meaning of s 26(3)(e). The absence of reasons given to Ms Frank, and the reasons given in the review were sufficient – both separately and cumulatively – to set aside the rejection, which is effectively what Justice Levy did.[22]

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[19] At 264F.
[20] At 266A-E.
[21] This section provides that the Board can refuse an application for permanent residence if the applicant pursues a business, performs or occupation in which a sufficient number of Namibians inhabitants are already engaged.
[22] At 269I. He also, relying on the High Court's inherent power to remedy a wrong perpetrated by a public official, and to substitute the correct decision, endured the Board to issue a permanent residence permit within 20 days.

[68] However, those were not the only reasons given for the decision to set aside the decision of the Immigration Board. Justice Levy [23] also brought up the Board's stance that Ms Frank's long-term relationship was not one recognised in a court of law and that this could not assist Ms Frank in her application. He held that this conclusion was an incorrect statement of the law. In this regard, he held the following:

> 'In *Isaacs v Isaacs* 1949 (1) SA 952 (C) the learned Judge dealt with the position in common law where parties agree to put in common all their property both present and any that they may acquire in future. From the common pool they pay all their expenses incurred by either or both of them. They can enter into this type of agreement by a specific undertaking verbal or in writing or they can do so tacitly. Such an agreement is known as a universal partnership.
>
> A universal partnership concluded tacitly has frequently been recognised in our Courts of law as between a man and a woman living together as husband and wife but who have not been married by a marriage officer.
>
> (See *Isaacs (supra*) and *Ally v Dinath* 1984 (2) SA 451 (T).) Article 10 of the Constitution of Namibia provides:
>
> > "(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."
>
> If therefore a man and a woman can tacitly conclude such a partnership because of the aforesaid equality provision in the Constitution and the provision against discrimination on the grounds of sex I have no hesitation in saying that the long-term relationship between applicants insofar as it is a universal partnership, is

[23] At 268F.

recognised by law[24]. Should it be dissolved the Court will divide the assets of the parties according to the laws of partnership.

Furthermore, in terms of art 16:

> "(1) All persons shall have the right in any part of Namibia to *acquire, own and dispose of all forms of immovable or movable property individually or in association with others and to bequeath their property to their heirs or legatees*."

This is exactly what applicants have done.

Finally, art 21(1)*(e)* provides *inter alia* that all persons have the right to freedom of association. In the circumstances the chairperson was wrong when he said the long-term relationship of applicants is not recognised in the law.
Not only is this relationship recognised but respondent should have taken it into account when considering first applicant's application for permanent residence and this respondent admits it did not do.'[25]

and:

> 'The decision to refuse first applicant permanent residence was for the reasons set out above motivated by several factors which should not have been taken into account while some relevant factors were not taken into account at all.
>
> For all these reasons the decision of 29 July 1997 refusing first applicant permanent residence is reviewed and I set aside.'[26]

[69] This judgment and in particular the findings of Justice Levy[27] is said to have been the first to open the door as regards recognition of

[24] Emphasis supplied.
[25] At 268F-269D.
[26] At 269H-269I.
[27] At 268J-269B.

same-sex relationships in Namibia.[28]

[70] The Immigration Selection Board appealed this decision to the Supreme Court, and the decision of Justice Levy was overruled by the Supreme Court.[29] Justice Strydom CJ (as he then was) dissented in a minority judgment. In his judgment, the appellants should have been refused condonation because firstly, they had not properly explained or put forward any explanation seeking to justify their permitting the appeal to lapse, with no indication for a period of five months thereafter of their intention to prosecute the appeal.[30] Secondly, because of the concession by the appellant that the *audi alteram partem* principle had not been complied which would result in non-compliance with the provisions of article 18 of the Namibian Constitution.

[71] The majority, in the judgment of Justice O'Linn, made the findings elucidated below. The essence of the findings were that the application of Ms Frank should have been remitted to the Board for a re-evaluation of the application given that the Board did not comply with article 18 of the Constitution. The Supreme Court further held that same-sex relationships were not recognised in Namibia, and that the respondents could not rely on article 14 of the Constitution. Further, it was held that article 10 of the Constitution prohibits discrimination on the basis of sex which does not include sexual orientation.

[72] Given the nature of the arguments raised, specifically how this court should interpret the findings made by Justice O'Linn for

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[28] Coleman George 'Lesbian and Gay Rights in Namibia' (2017) (an article in *Beyond a Quarter Century of Constitutional Democracy – Process and Progress in Namibia* edited by Nico Horn and Manfred O Hinz) Konrad Adenauer Stiftung at 151.
[29] Mr Justice Teek, AJA, as he then was, concurred with the judgment of Justice O'Linn.
[30] At 168H, 169D.

purposes of the declaratory relief sought, it is necessary to set out in detail, the material findings made in this judgment.

[73] At the outset, Justice Levy was criticised for making findings relating to the parties' universal partnership when the issue of a partnership was never relied on or raised by Ms Frank. It was held that it was a misdirection for the judge to raise this issue *mero motu* for the first time in his judgment.

[74] Justice O'Linn also held that Justice Levy misdirected himself when he held that the Board should have taken the lesbian relationship into account (as a universal partnership) when it considered Ms Frank's application for permanent residence.[31]

[75] The reasoning that followed was premised on the following:

> 'In argument before this court, Miss Conradie, who appeared before us for respondents, submitted that the Court a quo misunderstood the attitude of Mr Light, who appeared for the respondents in the Court a quo. Miss Conradie proceeded to argue that the issue of the lesbian relationship had to be considered and decided upon by this Court, unless the appellant's application for condonation is refused on other grounds, making it unnecessary to consider and decide the issue of the lesbian relationship and particularly its impact on the application by first respondent for a permanent residence permits.'[32]

and the following:

> 'I must emphasize at the outset that the argument before us on behalf of the respondents was not that the Board had infringed their fundamental rights as individuals in that it had e.g. failed to deal with them on a basis equal to other unmarried heterosexual

[31] At 113H-114E. A significant portion of his judgment was devoted to what was termed 'Section D – The issue of the respondents' lesbian relationship and the alleged breach of their fundamental rights'.
[32] At 129G-H.

individuals. The argument was that the Board had failed to accord their lesbian relationship equal status and privilege with that accorded men and women who are legally married and by this failure, the Board had violated their fundamental right to equality and non-discrimination and their fundamental rights to live as a family and to privacy and freedom of movement.'[33]

and:

'What we have then is a complaint that the Immigration Selection Board should have given them equivalent status to that of spouses in a lawful marriage and as members of a family.'[34]

[76] The following findings were then made:

(a) as far as the Namibian Constitution is concerned, the marriages which in terms of article 4(3) qualify a spouse of a citizen for citizenship, is clearly between a man and a woman, that is a heterosexual marriage, not a homosexual marriage, or relationship;[35]

(b) although homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they argued in terms of the Namibian Constitution, no provision was made for the recognition of such relationship as equivalent to a marriage or at all. It follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual relationship:

'The reference to spouse in sub art (3)(a)(b) of article 4 also clearly refers to the spouse in a heterosexual marriage.'[36]

[33] At 138I-131A.
[34] At 142H.
[35] At 143F.
[36] At 143G-H.

(c) in regard to the protection of the 'family', article 14(3) of the Namibian Constitution, provides for the protection of the family as a fundamental right in regard to which the duty to protect is laid upon society and the State. But the 'family' is described as the 'natural' and 'fundamental' group unit of society. It was clearly not contemplated that a homosexual relationship could be regarded as 'the natural group unit' and/or the 'fundamental group unit';[37]

(d) the marriage is between men and women, not men and men and women and women;

(e) the homosexual relationship, whether between men and men or women and women and clearly falls outside the scope and intent of article 14;[38]

(f) whether or not the interest of the minor child of Khaxas is protected by being raised with this lesbian partnership is debatable and a controversial issue that was not debated before the court and need not be decided in this case;[39]

(g) the ‘family institution’ of the African Charter, the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Namibian Constitution, envisage a formal relationship between male and female, where sexual intercourse between them in the family context is a method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race;[40]

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[37] At 144 C-D.
[38] At 144 I-G.
[39] At 146 D-E.
[40] At 146 F-H.

(h) the International Covenant on Civil and Political Rights (ICCPR) in its articles dealing with the prohibition on discrimination specifies 'sex' as one of the grounds on which discrimination is prohibited but not 'sexual orientation';[41]

(i) on the right to equality and non-discrimination under article 10 of the Constitution Justice O'Linn remarked that in Namibia the Constitution does not expressly prohibit discrimination on the ground of 'sexual orientation'. If Namibia had the same provision in the Constitution relating to sexual orientation and no provision such as article 14 relating to the duty to protect the natural and fundamental group unit of society and also no provision equivalent to article 4(3), the result would probably been the same as in South Africa. The court however held that, because the Constitution of South Africa explicitly prohibited discrimination on grounds of sexual orientation, the reasoning behind the extension of the South African law could not be applied in Namibia;[42]

(j) the court suggested that the implications of recognising sexual orientation as a prohibited ground of discrimination were such that it could extend to "any sexual attraction of anyone towards anyone or anything" (emphasis in the original judgment). According to the court this could potentially extend to the decriminalisation of bestiality;[43]

(k) the court found that unlike in South Africa, where a "legislative trend" evinced a greater commitment to equality with respect to sexual orientation, "Namibian trends, contemporary opinions, norms and values tend in the opposite direction".[44] The court held that the position in Namibia was

[41] At 145 E-F.
[42] At 149I-1560D.
[43] At 149 G-H.
[44] At 150 G.

more closely aligned to that of Zimbabwe where, in cases such as *S v Banana*[45], the court refused to follow the South African decisions *and* had shown little inclination to extend constitutional protections in relation to sexual orientation and "sexual freedoms";

(l) the court held that some differentiation was permissible under article 10 of the Constitution if it was based on a rational connection to a legitimate purpose and that "equality before the law for each person, does not mean equality before the law for each person's sexual relationships";[46]

(m) the failure to include in s 26(3)(g) of the Act an undefined, informal and unrecognized lesbian relationship with obligations different of marriage, may amount to 'differentiation', but does not amount to 'discrimination' at all;

(n) the court held that 'a court requiring a 'homosexual relationship' to be read into the provisions of the Constitution and/or the Immigration Control Act would itself amount to a breach of the tenet of constructions that a constitution must be interpreted 'purposively'. The court decided that it was not in a position to make orders that would usurp parliament's role as legislator, by ordering a law of Parliament to be regarded as amended by adding to the word spouse in s 26(3)(g) of the Immigration Control Act, the words 'or partner in a same-sex partnership';[47]

(o) the court stated that "nothing in this judgment justifies discrimination against homosexuals as individuals, or deprives

[45] *S v Banana* 2000 (2) SACR 1 (ZS).
[46] At 155 F.
[47] At 156 D-F.

them of the protection of other provisions of the Namibian Constitution";[48]

(p) that although the Constitution of Namibia and international human rights treaties do not expressly recognize same-sex and heterosexual relationships as equal, the Board is still obligated to provide reasons for rejecting residence permits to same-sex partners.

[77] Mr Heathcote urged the court not to follow the *Frank* judgment, firstly because the remarks by Justice O'Linn were *obiter* (and thus this court is not bound by it) and secondly, because the findings made are repugnant to the Constitution. Mr Madonsela submitted that the remarks and findings of Justice O'Linn were *ratio decidendi* and this court has no choice but to follow the authoritative judgment by the Apex Court.

[78] In developing his argument, Mr Heathcote submitted that apart from the fact that *Frank* is clearly distinguishable from the current matter,[49] Justice O'Linn went completely outside the ambit of issues that he was called upon to determine[50], and because of that fact the remarks made by him were *obiter* in nature and this court is not bound by same. Mr Heathcote submitted that it was not necessary for Justice O'Linn to make some of the remarks made, as the court was not seized with a constitutional challenge and therefore the court's utterances regarding what marriage is in the Namibian Law was, objectively viewed, not central to the issue before the court, thus rendering his remarks *obiter*.

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[48] At 156 G-H.

[49] The differentiating factor being that the applicants in the matter are actually legally married (albeit in other countries) and the Digashus have specifically sought relief declaring them as family, as well as a declaration accepting them as legal guardians of L.

[50] In *Kauesa v Minister of Home Affairs and Others* 1996 (4) SA 965 (NmS) the Supreme Court held (At 973I-974A/B) that it is wrong for judicial officers to rely for their decisions on matters not put before them by litigants and that it is further undesirable for a Court to deliver judgment with a substantial portion containing issues never canvassed or relied on by counsel.

[79] It was argued further that Justice O'Linn did not make his ultimate findings on the interpretation of the respective articles of the Constitution. The proper interpretation should be that if the parties are not recognised as spouses for purposes of the Immigration Control Act, then, such an approach:

> (i) violates their and their families' dignity protected in terms of article 8;
> (ii) also discriminates against them on the basis of their sexual orientation which is included in the listed grounds of sex and social status, in violation of article 10(2); alternatively, article 10(1);
>
> (iii) further violates the spouses' right (and the right of the minor child L) to a family as envisaged in article 14; and
>
> (iv) violates their right to reside and settle in any part of Namibia and to leave and return to Namibia, in terms of article 21(1)(h) and (i) of the Act.

[80] In respect of the rights to human dignity in the context of a foreign spouse who intend to reside with the citizen spouse, the court was referred to the South African decision of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others and Thomas and Another v Minister of Home Affairs and Others*[51] to underscore that marriage was part of dignity. Article 8 of our Constitution expressly provides that the dignity of all persons shall be inviolable. The following remarks of Ms Justice O'Regan were highlighted as apposite:

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[51] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others and Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936; *See also Mzalisi v Ochogwu* 2020 (3) SA 83 (SCA).

‘[30] Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.

[31] The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends. The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the 'natural' and 'fundamental' unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms’.

[81] The learned Judge found at para 36 of the judgment that in the case of individuals who wanted to sustain permanent intimate relationships (which includes same-sex spouses), the right to dignity was of and in itself the most specific right that protected such

relationships, particularly in the absence of the right to family in the South African Constitution.[52]

[82] Mr Heathcote noted that the court found that 'a central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.' And further at para 39 of the judgment of that court, in considering the statutory provision authorising discretionary grant (or refusal) of a temporary residence permit to foreign spouses of South Africans to allow them to remain in South Africa pending the outcome of their applications for permanent residence, found that such provision infringed dignity and was unconstitutional. The reason was that it was possible for an official to refuse the temporary residence permit.

[83] Counsel correctly pointed out that in Namibia, the rights of foreign spouses are firmly protected by s 2(1)(c) of the Immigration Control Act in terms of which, foreign spouses are automatically and by virtue only of their marriage, allowed to cohabit with their Namibian spouse in Namibia. No permit is required and therefore no discretion exists for the refusal of the automatic benefit. However, not affording the same right to a spouse in a same-sex marriage clearly violates their right to dignity which is guaranteed and inviolable.

[84] Counsel argued in no uncertain terms that the different treatment of same-sex spouses is constitutionally untenable as they are entitled to be treated equally with their heterosexual counterparts, and in terms of the provisions of articles 10 and 14 the right to family and equality must be informed by the right to dignity which recognises the equal worth of all human beings, including homosexuals.

[52] Unlike South Africa, the right to family is specifically protected in Namibia, in art 14 of the Constitution.

[85] Mr Heathcote argued in addition that if the word 'spouse' in s 2(1)(c) of the Immigration Control Act cannot be interpreted to include same-sex spouses lawfully married in terms of the laws of the *lex loci celebrationis*, then the section differentiates between heterosexual spouses, on the one hand, and homosexual spouses, on the other hand. In this regard, the trite principle is that, in terms of private international law, the exclusive choice of law in respect of formal and essential validity of marriage is the *lex loci celebrationis*[53] as the law of the place where the marriage is concluded. The effect thereof is to allow heterosexual spouses, when one is a Namibian and the other is a foreigner, the absolute right to cohabitate in Namibia (which right is necessary to respect the rights to dignity and family), but to deny those fundamental rights to homosexual spouses, otherwise similarly situated should be and is prohibited. This differentiation is on the prohibited grounds of social status and sex which includes sexual orientation, so it was argued.

[86] Mr Madonsela strongly argued that the findings by Justice O'Linn in the *Frank* matter are not *obiter*, neither was the court wrong. This was the position in Namibia, and it was to be noted that the views on homosexuality are divergent worldwide. Therefore, this court is not at liberty to depart from the *ratio decidendi* of the judgment of the Supreme Court. Even if the judgment is *obiter*, a lower court must obey the judgment of the higher court because of the source of authority. Mr Madonsela argued that even if the judgment of the higher court is patently wrong the lower court should defer to the higher court and in case of a difference of opinion the lower court must say so in its judgment so that the higher court can reconsider the matter. If the lower court is not bound to the judgment, so argued Mr Madonsela, then there would be chaos in the legal system.

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[53] *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307.

[87] Even if the statement made is *obiter* or 'by the way', Mr Madonsela argued that this court should follow the Supreme Court findings for the simple reason that it is the highest court in the land, and a lower court should not be permitted to side step authoritative utterances made on the law.

[88] In any event, it was argued that the court in *Frank* was specifically requested to decide the issue of the lesbian relationship of the respondents and particularly its impact on the first respondent's permanent residence permit. Mr Madonsela pointed out that in addition, the argument before the Supreme Court was that the Immigration Selection Board failed to accord to the respondent's lesbian relationship equal status and privilege with that accorded to men and women who are legally married. By this failure the Board violated the respondent's fundamental rights to equality and non-discrimination and their fundamental right to live as a family and to privacy and freedom of movement, it was argued. These were the exact issues to be considered by this court.

[89] Mr Madonsela remained steadfast that Justice O'Linn did not embark on a frolic of his own. The extent and breadth of his full consideration of all issues before court was contained in the landmark 70 page judgment. He critically analysed the fundamental rights of family and equality during the course of the judgment.

[90] Mr Madonsela further contended that as far as the Supreme Court is concerned, the Namibian Constitution, and *inter alia* article 4(3) was interpreted to mean that marriages which qualify foreign spouses of a Namibian citizen for citizenship clearly means a marriage between a man and woman, i.e. a heterosexual marriage and not a homosexual marriage or relationship. Mr Madonsela argued that the court considered the fact that homosexual relationships were known

when the terms of the Constitution were drafted, yet no provisions were made to recognize a homosexual relationship or marriage as equivalent to a heterosexual marriage.

[91] It was argued that article 14 of the Constitution, which referred to men and women of full age having the right to marry (even though the article did not specify that family only exists in the context of a heterosexual relationship) was the exact issue considered in the *Frank* matter. Reference was made to the discussion[54] where the court stated that 'the word 'spouse' is clearly used in the same sense as in article 4(3)(a)(bb) of the Constitution' and further on:

> 'Article 14 clearly does not create a new type of family. The protection extended is to the 'natural and fundamental group unit of society known at the time as an institution of Namibian society. The homosexual relationship, whether between men and men or women and women clearly falls outside the scope and intent of article 14.'

[92] Counsel also pointed out that it would be unhelpful to draw a comparison between the Namibian Jurisprudence and South African Jurisprudence in relation to discrimination, as the Namibian Constitution does not prohibit discrimination on the grounds of 'sexual orientation', whereas 'sexual orientation' is one of the enumerated grounds of discrimination (s 9(3) of the Bill of Rights) prohibited by the South African Constitution.[55] Mr Madonsela pointed out that the Namibian Constitution (article 10) is limited to discrimination on grounds of sex and not sexual orientation.

[93] He argued that the *boni mores* of the Namibian society is

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[54] At 144H-I.

[55] S 9(3) of the RSA Constitution provides that: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." The Legislature in South Africa took a further step to legislate for same sex marriages in the Civil Unions Act 17 of 2006.

clearly reflected in legislation, for example, the Prevention of Domestic Violence Act[56], Children's Status Act[57] and the Child Care and Protection Act[58], all of which are congruent with the *Frank* decision and more specifically regarding the definition of marriage as set out in Child Care and Protection Act[59].

Discussion of the relevant legal principles and the application thereof

Stare decises

[94] The first point of call for this court is to determine whether it can – and if so in what instances – decide not to follow the findings of the Supreme Court if this court does not agree with those findings. The answer lies in article 81 of the Namibian Constitution. It provides 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.

[95] This is in essence the constitutional foundation of the principle of *stare decisis*[60] (more commonly referred to as the doctrine of precedent), which encourages the consistent development of legal principles and ensures reliability of judicial decisions. The doctrine, which became firmly established in our law since its adoption from English law,[61] is aimed at ensuring legal certainty and equality before

[56] Act 4 of 2009.
[57] Act 6 of 2006 (repealed by the Child Care and Protection Act, 3 of 2015).
[58] Act 3 of 2015.
[59] S 1 of the Act defines marriage as 'a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, where such a marriage is recognised as a marriage under the laws of Namibia'.
[60] A latin term which translates into: "to stand by things decided" a court must follow earlier judicial decisions when the same points arise again in litigation , or on a narrower interpretation, with reference to Lord Halsbury's assertion as stated in literature by Cross and Harris, Precedent in English Law: "that a case is only authority for what it actually decides". Ibid; Rupert Cross & J.W Harris. 1991. Precedent in English Law 4th Ed. 100-1.
[61] *Schroeder and Another v Solomon and Others* 2011 (1) NR 20 (SC) at 30A-C.

the law,[62]

[96] The Supreme Court in *Schroeder and Another v Solomon and Others* stated the principle to be thus: [63]

> 'The rule *stare decisis et non quieta movere* (stand by the decisions and do not disturb settled law) was adopted from the English law with the establishment of the Supreme Court at the Cape in 1828. This country until independence ruled as an integral part of South Africa shares the Roman Dutch law traditions with South Africa and the rule *stare decisis* is embedded in our legal system.'

[97] The rule encompasses a test that a decision which formed part of the *ratio decidendi* of the matter on a point which was in issue and on which a decision was made is binding. However, remarks which fall outside *ratio decidendi*, such as *obiter dicta*[64] are not binding. In *Namunjepo v Commanding Officer Windhoek Prison and Others* [65] Justice O'Linn remarked that:

> 'The binding force of the decisions of the Supreme Court on all other Courts in Namibia is termed the rule of *stare decisis*. The decision referred to in the aforesaid article is by the clearest implication only a valid decision, ie not a nullity vitiated by illegality or given per incuriam. What is binding on other Courts is only the *ratio decidendi* of the decision on a point which was in issue and on which it was necessary to give a decision. *Obiter dicta*, however weighty, are not binding.'[66] (Emphasis provided)

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[62] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at para 62.
[63] *Schroeder* at 30A-C.
[64] The term *obiter dictum*, Latin for 'a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential'. See Rupert Cross & J.W Harris. 1991. Precedent in English Law 4th Ed. 65-6.
[65] An unreported judgment by O'Linn AJ at 30 – 1.
[66] Quoted with approval by the Supreme Court in *S v Katamba* 1999 NR 348 (SC) at 351 E-F. See also *S v Vries* 1998 NR 244 at 261 C-E and authorities cited there; Hahlo H and Kahn E 'The South African Legal System and its Background' 1967 SALJ at 310.

[98] In *Schroeder*[67] the Supreme Court expressed itself as follows:

> '[18] Where a judgment of this Court is arrived at by error (*per incuriam*), in subsequent appeals before it, when satisfied that the previous decision was wrong, it may depart from it. I must be quick to say in an appeal before this Court or in a constitutional application as contemplated in Article 79(2) and section 15 of the Supreme Court Act there would be nothing wrong for a litigant to argue that the Court should depart from any of its previous decisions, for example, should the issue of homosexuality resurface in this Court by way of an appeal or the issue of corporal punishment be repetitioned by the Attorney-General to this Court, it would be competent for the appellant or the Attorney-General or their counsel to argue that the matters of the Chairperson of the Immigration Selection Board v Frank and Another and Ex Parte Attorney General: In the Corporal Punishment by Organs of State were wrongly decided and urge the Court to depart therefrom.' (emphasis added)

[99] In *S v Likanyi*[68], the Supreme Court stated, that it can only depart from a principle if later facts are distinguishable, it was arrived at *per incuriam*[69] or is found to be clearly wrong[70]. Mr Justice Shivute CJ expressed it as follows:

> '[103] What is binding on lower courts is the *ratio decidendi* (reason of or for the decision) of the higher court. It is the principle underlying the decision that is binding on lower courts and not the order or concrete results (also sometimes loosely referred to as the decision as pointed out above). In context this is obvious as the parties to a particular legal suit are bound by a final decision or order and no other court will pronounce itself in respect of the same matter

[67] *Supra.*
[68] 2017 (3) NR 771 (SC).
[69] According to Garner B, in his book, Blacks' Law Dictionary, the term "*per incuriam*" means, 'of a decision wrongly decided, because the judge or judges were ill-informed about the applicable law.' See Garner B. 1999. Black's Law Dictionary 8th Ed. 1175. An example of such a decision can be where a court makes a decision in ignorance or inconsistent with a statutory provision binding on the court. *Joseph v Joseph* (SA 44-2019 and SA 18-2020) [2020] NASC 22 (30 July 2020) para 21.
[70] *Likanyi* para 30.

involving the same parties. This is simply the effect of the principle of res judicata. In contrast the principle(s) pronounced (*ratio decidendi*) may be relevant to other similar cases.

[104] To summarise the principle of *stare decisis* in general terms; a court is bound by the *ratio decidendi* only of higher courts unless it was rendered *per incuriam* or there was subsequent overriding legislation and this court will follow its own past decisions unless satisfied it is wrong when it will overrule it. It goes without saying that where no binding principle is laid down the doctrine does not apply. Lastly, only a pronouncement of law can constitute a *ratio decidendi*. Here it must be borne in mind that where there are two contradictory judgments the rules of *stare decisis* do not prescribe that the later decision must be followed. In such case the court must follow the decision it considers the correct one. A decision on the facts in one case can never bind another court who must decide any other matter on its particular facts.'[71]

[100] The exception of distinguishability was similarly dealt with by the South African Constitutional Court in *Daniels v Campbell NO and Others*[72], where the court stated that such an exception will arise where the points commented on were not argued; or where the issue is in some legitimate manner distinguishable.[73]

[101] In *Camps Bay Ratepayers' and Residents ' Association v Harrison*[74], the Constitutional Court reaffirmed the principle that lower courts are obliged to follow decision of a higher court, and remain so obliged unless and until the higher court itself decides otherwise, as the case may be.[75]

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[71] *Likanyi* para 103. See also *S v Katamba* 1999 NR 348 (SC) at 350C-351.
[72] South African Constitutional Court in *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC).
[73] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at para 95.
[74] 2011 (4) SA 42 (CC) at para 28-30.
[75] At 56 D, par [29], and the authorities collected at fn35 of the judgment, it was stated that '..It does not matter . . . that the Constitution enjoins all courts to interpret legislation and to develop the common-law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals.

[102] Mr Justice Brand JA writing for the Constitutional Court expressed it thus:

> '[28] .... Considerations underlying the doctrine were formulated extensively by Hahlo & Kahn. What it boils down to, according to the authors, is: '(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.' Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.
>
> [29] .....
>
> [30] Of course, it is trite that the binding authority of precedent is limited to the ratio decidendi (rationale or basis of deciding), and that it does not extend to *obiter* dicta or what was said 'by the way'. <u>But the fact that a higher court decides more than one issue, in arriving at its ultimate disposition of the matter before it, does not render the reasoning leading to any one of these decisions *obiter*, leaving lower courts free to elect whichever reasoning they prefer to follow.</u> It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are 'doing the right thing'. Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. <u>If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to</u>

> say this should be done in a manner which shows courtesy and respect, not only because it relates to a higher court, but because collegiality and mutual respect are owed to all judicial officers, whatever their standing in the judicial hierarchy.[76] (Emphasis supplied)

[103] The provisions of article 81 are clear. To our minds, and upon a consideration of the relevant authorities, a Supreme Court decision must be followed by the High Court, even if that decision is wrong. We hold the view, given that the Supreme Court is the constitutionally appointed final arbiter, that the statements in *Camps Bay Ratepayers* find favour and are of persuasive authority. It is also a constitutional direction to respect the rule of law, which promotes certainty, and a judicious, pragmatic, and properly conceived development of our law.

[104] The above cited principles require at the outset, a critical analysis of the utterances of Justice O'Linn in the context in which they were made, and determine whether it was *obiter* or *ratio*, because as correctly pointed out by both counsel, if we find that the statements and findings by Justice O'Linn falls within the ambit of *stare decisis* then we are bound by them. However, should we hold the view that the decision, or findings, or even the reasoning is wrong, or outdated and that it should be changed, we are at liberty to formulate those reasons and urge the court of higher authority to effect the change, with the necessary courtesy and respect.[77]

Application to the finding made in Frank

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[76] It is apparent that this expression was necessitated by tension between the Supreme Court of Appeal and the Constitutional Court, which arose as a result of inconsistencies in the application of the doctrine of precedent. According to the constitutional court, this created legal uncertainty and could potentially lead to the breakdown of the rule of law itself.[7] This tension was seemingly created by amongst others, the majority decision in *True Motives 84 (Pty) Ltd v Mahdi and Another*[7], where the Supreme Court of Appeal, did not follow a decision by the Constitutional Court in *Walele v City of Cape Town and Others*[7], on the basis that it was not only *obiter*, but wrongly decided.

[77] *Campsbay Ratepayers* [30] supra at 74.

[105] The majority in *Frank* held that the court *a quo* erred in the following material findings:

> (a) that the Board did not act in terms of article 18 of the Namibian Constitution and took irrelevant facts into account and ignored other relevant facts;
>
> (b) that the Board failed to act in terms of article 18 as it did not provide reasons for its decision;
>
> [106] that the Board took into account irrelevant or extraneous facts and could not be prompted or influenced by improper or incorrect information or motives, and that the Board accepted hearsay evidence;
>
> (d) that the Board was obliged to grant Ms Frank the permit if all requirement in s 26 were satisfied to the Board;
>
> (e) that the Board did not give recognition to the universal partnership which existed between the parties, and that the law recognised such partnership between male and female, and where it did not afford this recognition to a same-sex partnership discriminated against them.

Was the findings on same-sex relationships necessary?

[107] This question must be determined with due consideration for the findings that were made on same-sex relationships in the High Court, where it all started. Justice Levy expressly held that same-sex relationships were accepted, and that they fall within the parameters of a universal partnership, properly proven. He also held that the

Board should have given favourable consideration to the relationship in the determination of whether or not to grant Ms Frank the permit. In making this finding, he interpreted articles 10, 16 and 21 purposively.[78] It is to be noted, however, that this findings were made, after Justice Levy noted the concession in the form of a "categorical statement" that Ms Frank's sexual orientation was no longer an issue in the proceedings.[79]

[108] It is evident that, with respect, Justice Levy set the ball rolling by not following the well-established cautionary remarks relating to judicial decision making set out in *Kauesa*[80] by making a finding on a matter he was not called upon to make. And it is evident, given his remarks, that this finding formed part of the reasons why the Board's decision was set aside. At 268 H-I he said as follows:

> 'The decision to refuse first applicant permanent residence was for the reasons set out above motivated by several factors which should not have been taken into account while some relevant factors were not taken into account at all. For all these reasons the decision of 29 July 1997 refusing first applicant permanent residence is reviewed and set aside'.

[109] The Supreme Court then specifically raised for consideration, the issue of the respondent's lesbian relationship and "its impact on the application for a permanent residence permit and the appropriate order to be made", and then devoted some 30 pages to overruling Justice Levy and holding effectively that same-sex relationships are not legally recognised in Namibia; that homosexuals are not a family as envisaged in art 14; and that any differentiation between heterosexual and homosexual relationships amounted to a rational connection to a legitimate object, and such differentiation was

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[78] At 268J-269I.
[79] At 264F.
[80] *Kauesa v Minister of Home Affairs and Others* 1996 (4) SA 965 (NmS) at 973I-974C.

therefore justifiable. Effectively, a segment of Namibian citizens – who, like all Namibian citizens must comply with all laws and contribute to the country as citizens – were declared not to have the same constitutional rights as their heterosexual counterparts.

[110] Mr Heathcote is entirely correct in pointing out that, in addition, the facts of this matter are entirely distinguishable to those in *Frank*. A constitutional challenge in respect of same-sex couples was not before the court in the *Frank* case, nor was it dealt with before the Board, or the court *a quo*, or canvassed in the pleadings.

[111] In fact, this would confirm our view that the decisions that flowed from the issue of same-sex couples were, with respect, not necessary and not material. Our concern with that approach is firstly that Justice Levy made findings that were *obiter* of themselves, which the Supreme Court overturned, as a matter of law. The court held that homosexual relationships are not legally recognised and gave its reasons for it. The reasons for the decision in those circumstances, remain binding. A significant amount of the reasoning, as we demonstrate below, was without foundation, and we cannot in line with our constitutional mandate and oath of office as judges, in any way align ourselves with them. This is where the sentiments expressed in *Campsbay Ratepayers* matter are persuasive, namely that the fact that a higher court decides more than one issue, in arriving at its ultimate disposition of the matter before it, does not render the reasoning leading to any one of these decisions *obiter*, leaving lower courts free to elect whichever reasoning they prefer to follow.[81] This is in addition to the article 81 directive.

[112] Therefore, we find that we are bound by the decision of the Supreme Court in *Frank* and must follow it for purposes of the constitutional direction to maintain the rule of law, and engage in the

[81] *S v Katamba* 1999 NR 348 (SC) at 351 E-F.

considered and judicious approach to significant changes we feel, need to be made to our laws relating to same-sex relationships. We are guided in this regard by the remarks in *Campsbay,* namely that if judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. We propose to do so, with the utmost deference, below.

Where the Supreme Court went wrong

[113] There was, with respect, an off-the-cuff manner in which the Supreme Court approached and determined the same-sex issue, apparently solely for the sake of removing uncertainty and the anguish of the respondents[82]. This is however, with deference to the learned judge, not the manner in which the Supreme Court should have determined such important constitutional issues.

[114] The court specifically stated that "the respondents alleged that they are lesbians in that they are emotionally and sexually attracted to women, they did not allege that they are spouses and that the board should have acted in terms of s 26(1)(g) to grant a permit to first respondent"[83]. (emphasized) The court defined the issue to be a 'complaint' not a constitutional issue. At page 142H-I, the court stated:

> 'What we have then is a *complaint* that the Immigration Board should have given them equivalent status to that of spouses in a lawful marriage and as members of a family' (emphasis added)

[115] Having made these concessions, it cannot be said, with respect, that it was necessary for Justice O'Linn to make findings on what, in his view, is a 'spouse' in Namibian law. However, the court appeared

[82] 128I-129A.
[83] 142 E-F under 4.1.

to have in this instance, considered more than one issue in arriving at its ultimate decision, which effectively would not render the reasoning leading to any one of those decisions *obiter*. And whether the reasoning and the resulted findings were wrong or not, we are bound by article 81 to follow it.[84]

[116] If follows that according to the Apex court, same-sex relationships are not recognised in the Namibian Constitution or protected as family on an equal footing with heterosexual relationships, and that discrimination against gays and lesbians is justifiable, or rationally connected to a legitimate object, as it were.

[117] If we are bound by the decision, then even though the facts in this matter are distinguishable, the main determination was the decision not to recognise same-sex relationships as a matter of law. Therefore, and by extension, a same-sex marriage would also not be considered part of our law, because it is an extension of the same-sex relationship, and the validity of a marriage is governed by the *lex loci celebrationis.*[85]

[118] 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. We suggest a proper reconsideration of a most imperative recognition of inviolable human rights under article 8.

A wrong interpretation of the ICCPR

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[84] *Campsbay supra.*
[85] *Seedats Executor (supra).*

[119] The Supreme Court's interpretation of the international law[86] was wrong. International conventions ratified by Namibia are binding.[87]

[120] In his article 'Lesbian and Gay Rights in Namibia'[88], 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 article 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*[89] at para 46; and which was referred to at least 3 times in the Supreme Court in *Frank*.

[121] 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 others:

> '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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[86] At 145D-F.
[87] The ICCPR was ratified by the Namibian government on 28 November 1994, in terms of art 63(2)*(e)* of the Constitution and is, therefore, part of the law of Namibia according to art 144 of the Constitution and binding (SEE: Alexander v Minister of Justice and Others 2010 (1) NR 328 (SC) para 84; Prosecutor-General v Daniel and Others 2017 (3) NR 837 (SC) para 40; *Government of the Republic of Namibia v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC) at 259E - H and 269C – G; Namunjepo and Others v Commanding Officer, Windhoek Prison and Another 1999 NR 271 (SC) 285B-C)
[88] Fn 28 above at 153.
[89] 1999 (1) SA 6 (CC)

> '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)[90].

[122] 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.[91]

Interpretation of article 14 unduly narrow

[123] We also hold the view that the Supreme Court was unduly narrow in its interpretation of article 14. It was, with respect, mechanistic, rigid, austere and artificial, which is not the proper approach to the interpretation of the Constitution of a country.[92]

[124] Moreover, as a result of there not being a proper challenge, joinder of parties and proper well researched arguments on that point, the Supreme Court per Justice O'Linn did not, with respect, embark on the proper tests employed when considering whether discrimination in terms of the Constitution has taken place. The correct approach was set out in *Mwellie v Minister of Works, Transport and Communication and Another* [93] as follows:

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[90] https://documentsddsny.un.org/doc/UNODC/GEN/G16/084/97/PDF/G1608497.pdf/OpenElement

[91] See: *Hassam v Jacobs* NO 2009 (5) SA 572 (CC) 583E.

[92] *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1993 NR 328 (SC) 340 A-B.

[93] 1995 (9) BCLR 1118 (NmH).

'. . . article 10(1) . . . is not absolute but . . . it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognizance of "intelligible differentia" and allows provision therefor'[94].

[125] The preamble of the Namibian Constitution, sets out the basic temper of the Constitution.[95]

'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;

. . .

Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid;

Whereas we the people of Namibia have finally emerged victorious in our struggle against colonialism, racism and apartheid; are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle; . . .

Now, therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our sovereign and independent Republic.' (Emphasis supplied)

[126] The Constitution must, because it is a moving, living, evolving

[94] At 1132E – H; approved in *Müller v President of the Republic of Namibia and Another* 1999 NR 190 (SC) at 196.
[95] *S v Van Wyk* 1993 NR 426 (SC) at 172-173.

document, stand evolution and the test of time, be broadly interpreted so as to avoid the austerities of tabulated legalism. This much is clear from the words of Mohamed AJA in Government of the *Republic of Namibia and Another v Cultura* 2000 and Another 1993 NR 328 (SC) at 340 A-C, where the learned CJ says:

> ‘Such a result would be anomalous and the result of giving to the Constitution a narrow, mechanistic, rigid and artificial interpretation. This is not the proper approach to the interpretation of the Constitution of a country.
>
> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.’ (emphasis added)

[127] 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 court was wrong in its interpretation of article 26(3)(g) as applicable

[128] The misinterpretation relating to this section commenced at 130 F-G where the following was stated:

> 'The Board consequently was not alerted to any specific fundamental rights on which first respondent and Khaxas relied and no issue was made at the time of fundamental human rights. It was also not then or even in the review application claimed that the applicant Frank was the spouse of Khaxas in terms of s 26(3)(g) and therefore entitled to be granted a permanent residence permit.'

[129] At 148B-D, when the rights of 'spouses' was considered in relation to s 26(3)(g), the following was stated:

> 'Counsel for respondents again referred to several decisions beginning with the Zimbabwean Courts. She says that these cases laid down the right of the citizen to reside permanently in Zimbabwe, but to do so with one's spouse, even if the latter is a foreigner. The problem for counsel for respondents is that the right which extends to the spouse, is the spouse in a recognized marital relationship not a partner in a homosexual relationship. The South African case relied on namely Patel and Another v Minister of Home Affairs and Another 2000 (2) SA 343 (D) which allegedly followed the Zimbabwean decisions, again dealt with the case where the spouse was a South African citizen married to an alien. The same principle does indeed apply under the Namibian Constitution where art 4(3) provides for the right to citizenship of such a spouse and s 26(3)(g) which provides that permanent residence may be granted to such a spouse.' (Emphasis provided)

[130] As correctly pointed out by Mr Heathcote, s 26(3)(g) does not apply to any of the applicants in this matter, nor to the applicants in the *Frank* matter. S 26(3)(g) applies when one applies for permanent residence as a spouse of a permanent resident. The Immigration Control Act does not require a spouse of a Namibian citizen to apply for permanent residence because that spouse is automatically domiciled in Namibia by virtue of s 22 of the Immigration Control Act, and becomes a citizen in terms of article 4. The other obvious factor is

that the spouses in these cases are Namibian citizens and not permanent residents.

Dissenting Judgment by Strydom CJ provides much needed clarity

[131] The minority judgment, as per Strydom CJ, agreed that the court *a quo* did not arrive at its decision, on the basis of the constitutional issues raised in respect of the lesbian relationship.[96]

[132] Justice Strydom, further agrees that the court *a quo* dealt with articles 10, 16 and 21(1)*(e)* of the Constitution only insofar as it related to the forming of a universal partnership and the protection of property and freedom of association[97].

[133] In considering the appeal without the need to consider the issue of same-sex relationships, Justice Strydom took issue that the appeal, though timeously noted, had lapsed due to no record being lodged for a period of almost five months.[98]

[134] In considering the element of prospects of success he concluded the following:

> 'As far as the prospects of success on appeal are concerned, these are greatly influenced by two concessions made by counsel for the appellant, namely that art 18 of the Constitution applied to the proceedings whereby appellant refused to grant to first respondent a permanent residence permit. Secondly that from the reasons supplied by appellant, it is clear that the Board came to their conclusion on an issue which was not canvassed by the first respondent and in regard of which she should have been informed by the Board and given an opportunity to deal with.' [99]

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[96] 169G-I.
[97] 169 G-I.
[98] 169 C-D.
[99] 170 B-D.

[135] Justice Strydom further found that Ms Frank suffered prejudice by not being informed about an issue which adversely affected her application and not being given an opportunity to respond thereto.[100] In addition, found that Chapter 3 of the Constitution applied to citizens as well as non-citizens, unless the article clearly distinguishes which provisions only apply to citizens, i.e. article 17, and those to non-citizens, i.e. article 11(4) and (5).[101]

[136] Lastly, and probably the most important statement by Justice Strydom in respect of Constitutional interpretation, is that fundamental rights and freedoms should be 'interpreted broadly, liberally and purposively' to give to the article a construction which is most beneficial to the widest possible amplitude'.[102]

Conclusion

[137] From our discussion above and the provisions of article 81, it is clear that the applicants cannot obtain the declaratory and constitutional relief sought in this court. Only the Supreme Court can overturn its decision and we trust that we have provided some assistance in proper and due esteem to the Supreme Court.

Review application

[138] What remains for determination is the review application.

a) Work permit application of Mr Digashu

[139] With regards to the work permit application of Mr Digashu, the

[100] 175 F-I.
[101] 170 G-I.
[102] 175A-B.

Immigration Selection Board conceded that it had not properly applied the *audi alteram partem* principle with regard to the necessary information to consider whether the market is indeed saturated. On this basis the decision to reject the application for a work permit of Mr Digashu is set aside with costs, and referred back to the Immigration Selection Board to reconsider.

b) Relief sought in respect of L

[139] As regards the position of L, it is to be borne in mind that this court is the upper guardian of all minor children, tasked with the responsibility of ensuring that their best interests remain paramount. The order of Van Der Linde J of the Gauteng Local Division in terms of which the second applicant was declared to be the caregiver and guardian of L is unopposed. The respondents only take issue with the declaration as far it relates to the Mr Digashu. In light of the concession by the respondents, also contained in their proposed draft order filed on E-Justice, we have no issue in recognising the Court Order granted on 3 March 2017 by the Gauteng Local Division, as it relates to the second applicant. The respondents also took no issue with the application for an order declaring that the third applicant is a dependent child of the second applicant.

[140] We are however not able to grant the relief sought by the first applicant in respect of L in spite of the order made by Van Der Linde J for the reasons advanced in this judgment.

c) Permanent residence application of Ms Seiler-Lilles

[141] Ms Seiler-Lilles' position differs from that of Mr Digashu in that there are two sets of application forms, one of which appears to be an unprescribed form. Ms Seiler-Lilles remained steadfast in her averment that she was unaware completed a form in terms of s 26(3)

(g) of the Immigration Control Act, which deals with the position of a financially dependent spouse of a financially independent spouse permanently resident in Namibia, but who is not a citizen or permanently domiciled in Namibia.

[142] She stated that she was well aware of what the position is in Namibia in respect of same-sex partnerships upon earlier advice received. It is clear that she intended to bring an application in terms of s 26(3)(d), which is evident from the host of documents filed in support of her application. S 26(1)(a)[103] of the Immigration Control Act however provides that an application shall be made on a prescribed form and shall be submitted to the Chief of Immigration.

[143] Therefore, in spite of the applicant's intended application in terms of s 26(3)(d), the fact remains that the initial application (dated October 2016) was made on a unprescribed form. Therefore there was not a proper application in terms of s 26(3)(d) for the fifth respondent to consider in the circumstances. The subsequent application appears to be in terms of s 26(3)(g) which, according to the review record was dully considered by the fifth respondent and refused. On that basis is therefore no proper application that can be set aside, and review relief sought must fail.

Other issues

[144] Of serious concern, is the decision of the Attorney-General ('the AG') to abstain from participating in these proceedings, given the magnitude of this matter, with grave legal, constitutional and social consequences to the Namibian people. The AG is the principal advisor to the President and Government of Namibia (article 87(b)), and is duty bound to protect to uphold the Constitution by any means necessary (article 87(c)). It is irresponsible, in our view, for the AG to sit idle and not file papers to indicate the position of Government in a

[103] S 26(1)(a) 'An application for a permanent residence permit shall be made on a prescribed form and shall be submitted the Chief of Immigration.'

matter of this nature, particularly, where the AG was served with the application. This court in *APP v ECN*,[104] castigated the Electoral Commission of CN for laxity in carrying out its duties and failure to file papers in a matter pending before court which could have assisted the court in resolving the issue. We fully associate ourselves with the views expressed by the court in the *APP* matter.

Costs

[147] The final issue to consider is the question of costs. The respondents tendered the costs of the Digashu application up to the filing of the answering papers wherein they conceded the review relief sought. In respect of the Seiler-Lilles application the respondents seek costs limited to the opposition to the applicant's application for review. In both cases, the costs are to include the costs of one instructing and two instructed counsel.

[148] Having considered the *Frank* matter and having held that the findings made by the Supreme Court were wrong, we are of the considered view that it would be unfair to mulct the respective applicants with costs, in spite of them not being successful or only partially successful with their applications.

[149] As a result, apart from the tender as to costs in respect of the Digashu applicants we are of the view that no further order as to cost should be made.

Order

[150] The following order is made:

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[104] (EC 2/2021) 13 September 2021 at in paras [21] and [22].

Digashu application:

1. The applicants' application for an order declaring:

1.1. that the respondents recognise the civil marriage between the first and the second applicants on 4 August 2015 at Johannesburg, in terms of the provisions of the South African Civil Union Act, 2006;

1.2. that the first applicant is a spouse of the second applicant as envisaged in s 2(1)(c) of the Immigration Control Act; and

1.3. that the first, second and the third respondents are a family as envisaged in article 14 of the Namibia Constitution;

is dismissed.

2. The applicants' application declaring s 2(1)(c) of the Immigration Control Act, 1993, unconstitutional and reading the words "including persons lawfully married in another country" is dismissed.

3. The applicants' application for the recognition of the Court Order granted on 3 March 2017 by the Gauteng Local Division of the High Court of South Africa is granted in as far as it relates to the second applicant.

4. The applicants' application for an order declaring that the third applicant is a dependent child of the second applicant as envisaged in s 2(1)(c) of the Immigration Control Act, is granted.

5. The applicants' application for an order declaring that the third applicant is a dependent child of the first applicant as envisaged in s 2(1)(c) of the Immigration Control Act, is dismissed.

6. The applicants' application for an order declaring that the first applicant is domiciled in the Republic of Namibia, is dismissed.

7. The second to sixth respondents' decision dated 26 September 2017 refusing the first applicant's application for an employment permit in terms of s 27 of the Immigration Control Act, is hereby reviewed and set aside, and is remitted back to the fifth respondent for reconsideration.

9. The respondents, jointly and severally, the one paying, the other to be absolved, are directed to pay the applicants' costs in the review application, being the costs of one instructing and two instructed counsel, up until the delivery of the respondents' answering affidavit.

Seiler-Lilles application

1. The applicant's application reviewing and setting aside the second to fifth respondent's decision dated 9 May 2017 and 17 December 2017, refusing to grant the applicant a permanent residence permit in terms of s 26 of the Immigration Control Act, is dismissed.

2. The application to correct the fifth respondent's decision dated 9 May 2017 and 17 December 2017, to refuse to grant the applicant a permanent residence permit in terms of s 26 of the Immigration Control Act, is dismissed.

3. The applicants' application for an order declaring:

3.1. that the respondents recognise the civil marriage concluded between the applicant and Anette Seiler concluded on 28 November 2017 at Weilerswist Germany;

3.2. that the applicant is the spouse of the Anette Seiler, as envisaged in s 2(1)(c) of the Immigration Act, 1993; and

3.3. that the applicant is domiciled in the Republic of Namibia;

is dismissed.

4. The applicants' application declaring s 2(1)(c) of the Immigration Control Act, unconstitutional and reading the words "including persons lawfully married in another country" is dismissed.

5. There shall be no order as to costs.

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JS PRINSLOO

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O SIBEYA

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EM SCHIMMING-CHASE

APPEARANCES:

Applicants:	Adv Heathcote assisted by Adv Jacobs Instructed by Schickerling Attorneys
Respondents:	Adv Madonsela assisted by Adv Muhongo Instructed by Government Attorneys