

REPORTABLE



CASE NO: SA 69/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF SAFETY AND SECURITY **First Appellant**

**COMMISSIONER-GENERAL OF THE NAMIBIAN
CORRECTIONAL SERVICE** **Second Appellant**

**OFFICER-IN-CHARGE:
WINDHOEK CORRECTIONAL FACILITY** **Third Appellant**

**INSPECTOR-GENERAL OF THE
NAMIBIAN POLICE FORCE** **Fourth Appellant**

ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA **Fifth Appellant**

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **Sixth Appellant**

and

JACO KENNEDY **First Respondent**

KEVAN TOWNSEND **Second Respondent**

Coram: DAMASEB DCJ, HOFF JA and FRANK AJA

Heard: 26 October 2022

Delivered: 18 July 2023

Summary: The appellants (the Government) sought to set aside some orders granted by the High Court in favour of the respondents who are inmates at a correctional facility run in terms of the Correctional Service Act 9 of 2012 (the Act); while the second respondent (cross-appellant) cross-appealed the relief that was dismissed by the High Court. Amongst others, the cross-appellant had challenged the practice of placing handcuffs on inmates behind their backs while being transported; the practice of solitary confinement authorised under s 103 of the Act and reg 257 made thereunder; and the denial of contact visits to trial awaiting inmates.

The Government's appeal had lapsed due to non-compliance with the Supreme Court Rules. The Government then filed an application for condonation after two years of becoming aware of the non-compliance. The Government placed the blame at the doorstep of their legal representative for the breach of the rules of court.

Held that, an appeal from a judgment and order of the High Court is deemed to have lapsed if the record is not lodged within the stipulated time period of three months and that a condonation application must be brought with promptitude as soon as the non-compliance has become apparent.

Held that, the Government failed to make out a satisfactory case for the condonation application. Therefore, the application for condonation is dismissed but the Government's counsel was allowed to argue in opposition to the cross-appeal.

The cross appeal

The second respondent cross-appealed the High Court's finding that the definition of offender (which includes both convicted and unconvicted inmates) in the Act is not offensive to the presumption of innocence guaranteed under Art 12 of the Namibian

Constitution. He also cross-appealed the High Court's dismissal of his constitutional complaints (a) that he was being denied contact visits contrary to the Constitution and international law binding on Namibia and (b) that the solitary confinement regime under the Act and reg 257 was unconstitutional.

Held that, there is stigma attached to the word offender in its ordinary grammatical signification. It strikes at the heart of the constitutionally guaranteed presumption of innocence to attribute to a person who is only suspected of an offense and is yet to stand trial, a connotation that he or she had already been adjudged guilty. The definition of 'offender' therefore inconsistent with Art 12(1)(d) of the Constitution.

Held further that, whilst s 77 of the Act allows the officer-in-charge of a correctional facility to authorise contact visits to inmates, the blanket, non-discretionary adoption by the Correctional Service of the Police's policy of not allowing contact visits to awaiting-trial inmates is in conflict with Art 12(1)(d) and Art 10 of the Constitution.

Held that, s 103 and reg 257 fail to pass constitutional muster: the detention of an inmate in solitary confinement potentially for as long as 90 days without *audi* or independent review constitutes arbitrary detention proscribed by Art 11(1) of the Constitution.

The cross-appeal succeeds but parts of the declarations of constitutional invalidity are suspended in terms of Art 25(1)(a) of the Constitution to allow the Legislature and the Executive to remedy the defects identified in the judgment. No order as to costs is made.

APPEAL JUDGMENT

DAMASEB DCJ (HOFF JA and FRANK AJA concurring):

[1] The first and second respondents who were first and second applicants *a quo* (hereafter respectively Mr Kennedy and Mr Townsend) had approached the High Court seeking wide-ranging interim and final relief. The relief they sought relates to their status and treatment as awaiting-trial inmates at the Windhoek Correctional Facility (WCF) – a correctional facility run in terms of the Correctional Service Act 9 of 2012 (the Act).

[2] Amongst others, Mr Kennedy and Mr Townsend complained that certain provisions of the Act and resultant practices by Correctional Service officials and the Police affecting them amount to inhumane and degrading treatment and are thus inconsistent with the Namibian Constitution (the Constitution) and Namibia's international law obligations.

[3] The duo objected to being transported from their prison cells to court and back with their hands handcuffed behind their backs in a moving vehicle without safety features such as seatbelts; being made to appear in court in handcuffs; being defined as an 'offender' under the Act before conviction as a result of which either they receive less favourable treatment than convicted prisoners or are not afforded treatment befitting their status as unconvicted persons who are presumed to be innocent until proven guilty; being denied contact visits by friends and family; about their prison diet; the failure or refusal by the prison authorities to afford them adequate facilities for the preparation and presentation of their defence; and the conditions of solitary confinement.

[4] The High Court upheld only some of the complaints and rejected the rest. It declared to be inconsistent with the Constitution the practice of placing handcuffs on applicants while being transported. It also declared the words 'with or without mechanical restraint' in s 103(3) of the Act to be inconsistent with the Constitution and accordingly severed those words from s 103(3). The court *a quo* further held that sub-para (t) of s 132(1) of the Act is inconsistent with the Constitution and therefore invalid and accordingly severed it from that provision.

[5] I make reference to these declarations of constitutional inconsistency at this early stage because those orders are not supported by the parties to the appeal in the form that they have been granted by the court *a quo*.

[6] As Ms Katjipuka for Mr Townsend submits in her written heads of argument (at paras 11-12 and 14-15) and repeated during oral argument:

'The court *a quo* in a nutshell broadly declared the handcuffing or precisely, the restraining of persons in mechanical restraints unconstitutional, when [Mr Townsend] did not ask for it. The court *a quo*, in so doing also declared section 132(1) (t) unconstitutional when the section had not even been challenged by [Mr Townsend]. This is plainly impermissible. Not only did [Mr Townsend] not ask for this type of relief, but the court *a quo* also did not put this issue to the parties prior to determining it. What [Mr Townsend] sought was a declaration to the effect that the practice of handcuffing persons with their hands behind their back while in a moving vehicle (a practice that occurs and is applied only while persons are in a moving vehicle), which has no safety features, such as seatbelts and the like, is unconstitutional. [Mr Townsend] was successful in obtaining this declaration. However, to the extent that the court *a quo* declared any and all placement in handcuffs unconstitutional, the court *a quo*'s order is overly broad and goes beyond the relief sought by [Mr Townsend]. And to this extent the court *a quo*'s order needs to be refined to align with the relief sought by [Mr Townsend].' (My underlining)

[7] Ms Katjipuka's concession is properly made. As counsel quite properly pointed out, orders granted in those circumstances cannot be allowed to stand. Even if no appeal had been lodged against those orders, they would constitute a nullity and would be subject to reversal by this court *mero motu*. That is important in view of the ill-fated appeal by the first, second, third and fourth appellants (the Government) discussed below.

[8] The High Court dismissed the following prayers advanced by Messrs Kennedy and Townsend in their respective notices of motion:

- '1. declaring the definition of offender, as provided for in the Correctional Facilities Act (sic), in so far as it includes trial awaiting persons, as inconsistent with articles 8, 10 and 12(d) of the Namibian Constitution and articles 9(3), 10(1) and 10(2) (a) as well as article 14(2) of the International Covenant on Civil and Political Rights (ICCPR);
2. declaring the adverse and differential treatment of trial awaiting persons *vis-à-vis* convicted persons to constitute discrimination on the basis of social status inconsistent with articles 8 and 12 of the Namibian Constitution as well as article 10 of the ICCPR;
3. declaring the denial of contact visits to applicants, as trial awaiting persons, inconsistent with articles 8 and 12 of the Namibian Constitution as well as article 10(1) and 14(2) of the ICCPR;
4. declaring section 103 (which provides for solitary confinement of prisoners) of the Correctional facilities Act (sic) inconsistent with articles 7 and 11 of the Namibian Constitution as well as article 9(1) and (4) of the ICCPR;
...
5. declaring Regulation 257 (which provides for the segregation of prisoners) of the Namibian Correctional Service Regulations published in Government

Notice 331 of 2013 ultra vires the Correctional Service Act as well as inconsistent with articles 7 and 11 of the Namibian Constitution as well as articles 9(1) and (4) of the ICCPR.'

Prayers granted

[9] The High Court granted relief in favour of Messrs Kennedy and Townsend as follows:

- (i) The words 'with or without mechanical restraint' in s 103(3) of the Act are declared to be inconsistent with the Constitution and are therefore invalid, and are accordingly severed from the provisions.
- (ii) Paragraph (t) of s 132(1) of the Act is declared to be inconsistent with the Constitution and is therefore invalid and is accordingly severed from s 132(1). [This order is disavowed by Ms Katjipuka as already stated because the provision in question was not challenged].
- (iii) The practice of restraining trial awaiting persons in handcuffs while being transported is declared to be inconsistent with the Constitution. [The relief sought was not couched in those terms as conceded by Ms Katjipuka].
- (iv) The practice of placing handcuffs on trial awaiting persons inside the courtroom is declared to be inconsistent with the Constitution.
- (v) Respondents are directed to provide applicants with adequate facilities for the preparation and presentation of their defence.

- (vi) It is declared that applicants are aggrieved persons within the meaning of Art 25(2) of the Constitution.

The appeals

[10] The Government appealed against the orders referred to in para [9] above while Messrs Kennedy and Townsend cross-appealed the unfavourable orders referred to in para [8] above.

Lapsed appeal

[11] The Government lodged an appeal on 17 August 2020 against only some parts of the court *a quo*'s judgment and order handed down on 16 July 2020. They are –

- 11.1 the severance of the phrase "with or without mechanical restraints" from section 103 of the Act;
- 11.2 the finding and declaration that sub paragraph (t) of section 132 (1) of the Correctional Service Act is offensive to the Constitution and is severed from the said section;
- 11.3 the declaration that the severed portions of the Act referred to above are unconstitutional for not being rationally connected to section 103;
- 11.4 the declarations that the practice by the Namibian Police Force and the Namibian Correctional Service of restraining unconvicted detained trial-

awaiting persons in handcuffs whilst being transported to court or other places is inconsistent with Art 8 of the Constitution and consequently unlawful and invalid.

Condonation application

[12] In terms of rule 8(2)(a) and (b) of the Supreme Court Rules, an appeal record must be lodged within three months from the date of judgment or order appealed against. In the present case, the High Court's judgment and order were handed down on 16 July 2020. The Government's main appeal was lodged on 17 August 2020 and the record filed on 15 December 2020. In other words, about five months after the court *a quo* handed down its judgment and order. It is settled jurisprudence of this Court that an appeal to it from a judgment and order of the High Court is deemed to have lapsed if the record is not lodged within the stipulated time period of three months.¹ When that happens, an application for condonation must be brought without delay and be accompanied by a full and detailed explanation for the entire period of delay, including the timing of the condonation application. In other words, a condonation application must be brought with promptitude as soon as the non-compliance has become apparent.²

¹*Ondjava Construction CC & others v Haw Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) para [5] and *Pietersen-Diergaardt v Fischer* 2008 (1) NR 307 (HC) at 307C-D; *Kalipi v Telecom Namibia Limited* (SA 80/2014) [2016] NASC (13 December 2016).

² *Ibid.*

[13] The appeal was set down for hearing on 26 October 2022. The Government's application for condonation and re-instatement was only filed of record on 7 October 2022 – that is more than two years after the judgment and order were handed down. The application also sought condonation for the late delivery of the heads of argument which, in terms of rule 17(1), should have been filed at least 21 days before the date of the hearing of the appeal.

[14] The affidavits in support of the condonation and reinstatement application were deposed to by the Commissioner-General of the Correctional Service (Commissioner-General) on behalf of second appellant, Mr Jamunomundu Kazekondjo on behalf of first and fourth appellants and by Mr Khupe from the office of the Government Attorney as the Government's legal practitioner of record. I will start with Mr Khupe's affidavit.

[15] According to Mr Khupe, the delay to lodge the record of appeal timeously resulted from the cross-appeal lodged by Mr Townsend on 15 September 2020 which necessitated Mr Khupe engaging Mr Townsend's legal practitioner as required by rule 11(10), and Mr Khupe labouring under the mistaken belief that the period for filing the appeal record was interrupted. Although it was Government's intention to

file a condonation and re-instatement application as per the parties' joint rule 11(10) (b) report, same was only filed on 7 October 2022.

[16] Mr Khupe tenders his apology for the non-compliance(s) and the inordinate delay in filing the condonation application and pleads that his clients not be made to suffer as a result of his inaction. Mr Khupe maintains that his non-compliance was not a flagrant disregard for the rules of this Court but attributes it to him being inundated with other matters at the High Court and the lack of experienced legal officers and high staff turnover at the Office of the Government Attorney, which resulted in him taking on more work than he could handle.

[17] The Commissioner-General deposed that his Legal Services Directorate was informed by Mr Khupe towards the end of October 2022 that the appeal record had been lodged late and that the necessary application for the reinstatement of the lapsed appeal would be made. According to the Commissioner-General, although they are generally aware that the prosecution of appeals to this court is regulated by the court's rules, they rely on their legal representatives to ensure that the procedural requirements are complied with. He averred that the Correctional Service would have had no reason to enquire about the status of the appeal as their understanding was that the setting down and hearing of appeals takes some time and is not determined by the litigants.

[18] According to Mr Jamunomundu Kazekondjo of the Namibian Police's Legal Services Directorate, around 9 September 2020 and 10 August 2021 they enquired on the status of their appeal with Mr Khupe. Mr Khupe indicated to them that the

appeal was still pending. They therefore had no reason to suspect that anything was amiss with their appeal and believed it was still pending. He indicated that they were not aware that the record of appeal in their appeal had been filed late and that the appeal had lapsed as a result.

[19] The upshot of the Correctional Service's and Police's affidavits is to place the delay in the non-prosecution of their appeals at the doorstep of Mr Khupe. It is apparent from Mr Khupe's explanation that the inaction on his part was due to him being overworked as a result of dysfunction at the office of the Government Attorney.

[20] Mr Townsend does not oppose the application for condonation. He takes the view that because the Government's appeal raises issues of public importance, the non-compliances must be condoned and the Government's appeal reinstated.

[21] The fact that a party to an appeal does not oppose a condonation application is an important but not a decisive consideration for the grant of such an application.³ In any event, the concern expressed by Mr Townsend is moot in the light of the concession made by Ms Katjipuka in regard to some orders erroneously granted and the fact that the Government is still entitled to argue against the cross-appeal.

[22] The non-compliance(s) in this matter constitute a flagrant disregard of the rules of court. The record was filed outside the three months as prescribed by the rules of this court. To crown it all, the condonation application was lodged quite late and the reason therefor inexcusable. The Government Attorney's office being poorly

³ *PE Bosman Transport Works Committee & others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 797G.

staffed and its lawyers being overworked is not a satisfactory explanation for the inordinate delay. The matter could just as well and with great ease have been outsourced to a legal practitioner in private practice. Why that was not considered as an option is not explained by Mr Khupe.

[23] We have in the past cautioned that dereliction of duty by a party's legal representative will be visited upon a litigant in circumstances where non-compliance with the rules has been glaring, flagrant and inexplicable. With its incomparable resources, the Government has to lead by example when it comes to litigation in the courts.

[24] It was because the Government failed to make out a case for the condonation application filed on 7 October 2022 that we made an order during oral argument dismissing the application for condonation but permitted its counsel to only argue in opposition to Mr Townsend's cross-appeal.

What is before us?

[25] In the light of the refusal of the condonation application, Mr Kennedy whose interest only related to opposing the Government's appeal fell by the wayside and consequently his *pro amico* counsel, Mr Nekwaya, no longer took part in the appeal. What is before court therefore is the cross-appeal by Mr Townsend.

The cross-appeal

[26] Mr Townsend's cross-appeal impugns the High Court's –

1. Finding that the definition of offender passes constitutional muster.

2. Finding that s 103 of the Correctional Service Act passes constitutional muster save for the aspect of mechanical restraints.
3. Finding that reg 257 is neither unconstitutional nor *ultra vires* the Act.
4. Finding that the right to security of one's person is not protected by Art 9 of the International Covenant on Civil and Political Rights (ICCPR).
5. Finding that no case was made out to support the relief sought in respect of contact visits.

Factual matrix

[27] In the summary of the facts that follows, I will only refer to those facts and contentions that relate to the relief that was refused by the High Court.

[28] The following facts emerge from the founding affidavits deposed to by Messrs Kennedy and Townsend. Both are awaiting-trial inmates at the WCF, Mr Kennedy since June 2016 and Mr Townsend since January 2011. The duo pegged the relief it sought on the alleged breach by the respondents of the following constitutional rights: the right to liberty (Art 7), dignity (Art 10); the right against arbitrary arrest and detention (Art 11); the right to the presumption of innocence (Art 12(1)(d)), family (Art 14) and the right of children to be cared for by their parents as well as their right to education (Art 15).

[29] Mr Townsend alleges that he has been denied contact visits by a girlfriend he has had a stable relationship with since 2010 – thus denying him physical contact with other human beings in order to remain psychologically healthy and to flourish. According to him, the authorities do not at all allow contact visits for trial awaiting inmates. He contends that the rationale behind the blanket ban, ie security, is

unfounded because sentenced persons and those deemed medium and minimum security risk, are allowed contact visits. He contends that unconvicted inmates must be treated as they would be outside prison in the exercise of their fundamental rights and freedoms. He alleges that he was advised to apply to be allowed contact visits. However, he was not given any guidance as to what factors the officer-in-charge takes into account, or what requirements he would have to meet, in order for his application to be granted. That notwithstanding, all his requests to be allowed contact visits by his girlfriend were denied without reasons being given. Mr Townsend states that what he seeks is limited physical contact with his loved one, to be allowed to embrace and to kiss her.

[30] Mr Townsend maintains that he does not seek contact visits every week but simply wants to be treated no less favourably than sentenced inmates who, unlike him, no longer enjoy the right to be presumed innocent. He maintains that all the precautions the authorities consider necessary should remain during the contact visits to minimise the threat that the authorities want to guard against.

[31] According to Mr Townsend, when he is being transported from his prison cell and back, he is placed in handcuffs behind his back. In that position, he is unable to secure himself when the vehicle moves or makes a sudden stop. The vehicles that inmates are transported in have no safety features such as seatbelts as a result of which he runs the risk of physical injury. He maintains that such treatment and mode of transportation is in violation of Art 9 of the ICCPR as it harms the security of his person.

[32] Mr Townsend takes issue with the definition of 'offender' in s 1 of the Act and asserts that it is inconsistent with the presumption of innocence in so far as the definition includes both an unconvicted inmate and one already convicted and sentenced. According to him, the definition – which implies proven wrongdoing – sets the tone for the treatment of awaiting-trial inmates in every aspect during detention, including their security classification, their enjoyment of what the authorities term privileges, whether they are kept in mechanical or other restraints and restriction on visits.

[33] According to Mr Townsend, by virtue of being defined as an 'offender' under the Act, he and others similarly situated are subjected to the same treatment as convicted persons save for those instances where convicted inmates are treated more favourably than awaiting-trial inmates. It is said that whereas convicted inmates receive visitors on weekends, he, as an unconvicted person is denied this privilege – a practice he says infringes on the right to be presumed innocent until proven guilty guaranteed under art 12(1)(d) of the Constitution.

[34] Mr Townsend also challenges the imposition of solitary confinement of inmates in terms of s 103 of the Act and reg 257 made under the Act, as being unconstitutional because an affected inmate is not afforded the opportunity to make representations prior to its imposition or when it is extended. Besides, the argument goes, there is no provision for independent review of the confinement or its extension – thus making the power to impose it arbitrary and in conflict with Arts 7 and 11. He gives an example of solitary confinement that was imposed on him on 4 July 2014 without any explanation in a cell whose door and windows were completely

barricaded with mesh bars. He alleges that he was only released from solitary confinement on 15 January 2016. That would be only a few months shy of two years.

[35] According to Mr Townsend, s 103 of the Act must not be used as a form of punishment. He further contends that solitary confinement as provided for in the Act violates the United Nations Minimum Standards for the Treatment of Prisoners – also known as the Nelson Mandela Rules (the Mandela Rules⁴). He states that the Mandela Rules prohibit prolonged indefinite or prolonged solitary confinement.⁵

Respondents' answers

[36] Mr Victor Eichab, a retired senior correctional officer with over 30 years' experience deposed to an answering affidavit and a supplementary answering affidavit on behalf of the Correctional Service. He was the officer in charge at the WCF at the time that Messrs Kennedy and Townsend were transferred to the facility and bears personal knowledge of the complaints they raise. Mr Eichab's departure point is that Messrs Kennedy and Townsend did not lay a proper or adequate factual and legal basis for the relief they seek.

[37] I proceed to summarise Mr Eichab's evidence in relation to each of the complaints which are the subject of the present appeal.

Contact visits

⁴The appellants admitted that Namibia ratified The United Nations Minimum Standards for the Treatment of Prisoners. *Vide* para 25.2 of Mr Eichab's supplementary affidavit.

⁵Under the Nelson Mandela Rules, prolonged solitary confinement refers to the solitary confinement for a time period in excess of 15 consecutive days (rule 44).

[38] According to Mr Eichab, the Act and the regulations made under it do not expressly prohibit contact visits for awaiting-trial inmates. The general practice of not allowing contact visits to awaiting-trial inmates was adopted from the Namibian Police who do not allow contact visits for suspects detained at the police holding cells. (The Police's policy was adopted by the Correctional Service because awaiting-trial inmates are no longer detained in police holding cells but in the custody of the Correctional Service).

[39] Mr Eichab disputes Mr Townsend's allegation that all his requests for contact visits were denied. He recollects one occasion where Mr Townsend was allowed a contact visit by his girlfriend and other occasions he received consular visits from the American Embassy. He states that in those instances where it was denied it was for legitimate reasons and that Mr Townsend was informed of those reasons. It is said that the authorities are reluctant to grant requests for unlimited visits to Mr Townsend lest it sets a wrong precedent as well as create impractical logistical difficulties if the same is extended to all inmates.

[40] Mr Eichab further contends that, in any event, the inability of having regular and unrestricted contact visits is a consequence of being in custody. He states that allowing unlimited contact visits to awaiting-trial inmates' poses the risk of interference with witnesses and ongoing investigations and that it can result in possible exchange of prohibited articles. Besides, as I understand the position of the correctional service official, if frequent visits are allowed for the general population of unconvicted inmates, it will present logistical challenges due to a shortage of personnel and inadequate facilities.

[41] According to Mr Eichab, where visitation requests were denied, Mr Townsend was provided with reasons for such denial and that every request for contact visits was considered by the officer-in-charge on its particular merits and granted or not granted based on the circumstances of each application and that the discretionary grant of contact visits is not unlawful, unconstitutional nor a violation of international human rights relating to the treatment of a detained person.

Solitary confinement

[42] Mr Eichab states that Mr Townsend was placed in a single cell as a result of a gang fight that he took part in against another inmate. After the incident was reported to the chain of command, Mr Townsend was placed in a single cell and segregated for a period of 25 days and his privileges under the Act and the regulations suspended as a result. It is said that the treatment meted out to him was justified in the circumstances and was lawful.

[43] According to the Correctional Service, there was a genuine fear of escape by Mr Townsend and his co-accused in a murder trial pending in the High Court – hence his segregation, including the extended period with the approval of the Minister. An account is then given of how Mr Townsend was involved in a well-publicised alleged attempt to escape from the WCF. It is unnecessary to repeat it

here as Mr Townsend's alleged dramatic escape from the WCF is a matter of public record.

[44] Mr Eichab states that the conditions at the single cells are not any different from the communal cells. The segregated inmates retain their rights and privileges which they are entitled to as unconvicted inmates in terms of the Act and the regulations. It is contended that the conditions at the single cells are not cruel, degrading or inhumane, nor are the conditions unlawful or in violation of inmates' rights under the Constitution. He further contends that the segregation of Mr Townsend was sanctioned in terms of s 103 read with reg 257.

Analysis and disposal

[45] Mr Khupe for the Government supports the dismissal of the relief which is now the subject of the cross-appeal and with that the reasoning of the High Court underpinning the impugned orders.

Is the definition of 'offender' offensive of the Constitution?

[46] In terms of s 1 (definitions) of the Act:

“offender” means an inmate, or a convicted person who is outside a correctional facility by reason of parole, temporary absence, release with remission or escape or by any other reason but is under the supervision of a correctional officer or of any other person authorised by the Correctional Service or under any law. . .

And:

An 'inmate' means any person, whether convicted or not, who is lawfully detained in a correctional facility'.

[47] It is therefore undeniable that, as defined, an unconvicted awaiting-trial inmate in a correctional facility is equated to a convicted person by virtue of the common denominator of their being incarcerated in a facility run by the Correctional Service which, by legislative policy, is mandated to detain under its auspices persons who have been arrested and by court order remanded as awaiting-trial inmates. It is a matter of public knowledge that in Namibia the legislative policy referred to is borne of the reality that there are no separate facilities for the long-term detention of remanded unconvicted persons. (It has not been suggested that such a policy is *per se* unconstitutional).

[48] The court *a quo*, in dismissing the relief under this heading reasoned that 'since the word 'offender' has been defined by the Act, the word assumes a technical meaning, and not to be understood in its 'ordinary sense, but in accordance with the meaning ascribed to them by the definition clause . . . Accordingly . . . I hold that as far as the Act is concerned, an offender includes an awaiting-trial inmate, that is, a person who has 'not been convicted'. For that reason, according to the High Court, 'the statutory definition of "offender" is not offensive of Arts 8, 10 and 12(1) (d) of the Constitution and Arts 9(3), 10(1), 10(2) and 14 (2) of the ICCPR . . .' Accordingly, Mr Townsend's 'right to be presumed innocent' 'has not been violated.'

[49] Ms Katjipuka for Mr Townsend criticises the conclusion reached by the High Court. She argued that the High Court failed to appreciate the context in which the challenge arises: That the primary function of a correctional facility is to detain persons who had been convicted and that detention of awaiting-trial persons in a correctional facility is, by the Government's own admission, a recent development.

This development has resulted in the Correctional Service failing to appreciate the importance of treating unconvicted inmates differently from those already convicted and sentenced. According to counsel: 'Terminology and words used guide not only our thinking but also our behaviour.' For that reason, she submits, 'the Mandela Rules . . . use the term "prisoners" and distinguish between trial awaiting prisoners and convicted/sentenced prisoners'.

[50] There is merit in Ms Katjipuka's argument. Quite apart from the weighty submissions she makes, I find the High Court's reasoning circular. It amounts to this: because the Act says 'offender' also includes a person not yet convicted, it matters not that it also includes one who has already been convicted. In so doing, the court missed the opportunity to address the fundamental question: Does that make it right? If it did, it would, perforce, have interrogated the sociological underpinning of the word offender and how its negative connotation is reinforced by the fact that awaiting-trial inmates are incarcerated in the same facility as convicted and sentenced ones.

[51] The noun 'offender' in its ordinary grammatical meaning carries with it some turpitude – which represents how society views a person falling in that category. The Shorter Oxford English Dictionary defines 'offender' thus: 'A person who . . . offends; a person who breaks a law, rule, or regulation; a person who commits an offence. . .' In common parlance therefore, an offender is a person who has been lawfully adjudged by a court of law as having broken society's normative rules.

[52] The fact that, as the court *a quo* found, the Act, in relation to an awaiting-trial person, gives it some other technical meaning does not remove the stigma attached

to the word in its ordinary grammatical signification. It strikes at the heart of the constitutionally guaranteed presumption of innocence to attribute to a person who is only suspected of an offense and yet to stand trial, a connotation that he or she had already been adjudged guilty. It is not far-fetched that such definitional confusion may actually influence the perceptions and behaviour of those whose responsibility is to watch over such a person in a correctional facility.

[53] Ms Katjipuka's contention that words influence our thinking and conduct assumes irresistible force considering that because of a legislative choice there is no difference in physical location and oversight between already convicted persons and those who are yet to be tried to final conclusion. I must agree that a legal-status-sensitive definition is more likely to influence the behavioural attitude of correctional service officials than one that is not.

[54] I am therefore satisfied that Mr Townsend had made out the case for the relief that he sought in respect of the definition of 'offender' under the Act and that the High Court misdirected itself in coming to a contrary conclusion.

Right to be treated in accordance with presumption of innocence

[55] This head of relief is relied upon separately from that dealing with the definition of offender and the alleged denial of contact visits.

[56] It is stating the obvious that a person who is presumed innocent in the face of a criminal accusation must be treated in a manner consistent with that status. One such situation is that of contact visits which I deal with below. I have also already

disposed of the insinuation of guilt which comes with subsuming an awaiting-trial inmate in the definition of offender. The consequence of that finding will be reflected in the executive order at the end of this judgment.

[57] From a reading of the papers it is unclear, apart from that related to the definition of offender and relating to contact visits, what treatment Mr Townsend seeks to challenge as being constitutionally non-compliant. In any event, the High Court was of the view that it was being asked to declare 'the adverse and differential treatment of trial awaiting persons vis-à-vis convicted persons to constitute discrimination on the basis of social status inconsistent with Arts 8 and 12 of the Namibian Constitution as well as Art 10 of the ICCPR'.

[58] The court *a quo* added: 'The long and short of the relief sought under this paragraph is that, according to applicants, treating trial awaiting inmates differently from convicted inmates constitutes discrimination. . .' It stated further: 'The gravamen of applicant's challenge, as so powerfully articulated by counsel on the basis of the applicant's affidavit, is that as a result of the statutory definition of 'offender' in s 1 of the Act, the WCCF officials treat all inmates as persons 'guilty of having committed a particular offence, albeit in the eyes of the law, according to them, awaiting-trial inmates (like applicants) have not been found guilty of any offence'.

[59] The judgment of the court below does not set out in detail the factual basis of the complaint under this head as it understood it. In his affidavit, Mr Townsend makes reference (*vide* para [33] above) to being denied weekend visits while convicted inmates enjoy that benefit. Be that as it may, the High Court dismissed the

complaint as it understood it on several grounds. It found that Mr Townsend failed to 'define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within the definition' of Art 10 of the ICCPR.

[60] The court *a quo* was also not satisfied that the discrimination complained of was constitutionally impermissible because 'not every discrimination based on the enumerated grounds will be unconstitutional but only those which unfairly or unjustly discriminate against a complainant . . .'

[61] The High Court concluded that 'Not one iota of cogent evidence was placed before the court to support Ms Katjipuka's submission, suggesting that applicants, *qua* unconvicted persons, have been denied the rights guaranteed to them by the Constitution, and which specific rights and which in terms (sic) to discrimination'.

[62] On appeal, the High Court's conclusions on this aspect, are dealt with in four paragraphs of Ms Katjipuka's written submissions on behalf of Mr Townsend. As part of the four paragraphs Ms Katjipuka submits thus: 'This presumption [of innocence] requires not only that trial awaiting persons are not treated as if they are offenders, but rather their rights and freedoms are protected and they be allowed to exercise those rights, save for those that are necessarily limited by the fact of their detention'. The remaining text of the four paragraphs consists of quotes from a case and international instruments.

[63] In other words, Ms Katjipuka made no effort to engage with the specific findings of the High Court that no case was made out for the relief sought both on a factual and legal basis. Nowhere in the heads does counsel by reference to the affidavits identify the adverse differential treatment meted out to Mr Townsend which is constitutionally offensive.

[64] The courts cannot make orders in the abstract. The conduct complained of which violates the Constitution must be clearly identified. The Correctional Service officials must have certainty as to what is expected of them. They should not be left to speculate. The complaint under this heading therefore fails on a factual basis and was properly dismissed by the High Court.

Contact visits

[65] In assessing this complaint, I bear in mind the real risk of the court unduly trespassing on the responsibility of the Executive to maintain order and security in the prison system. It can never be correct to postulate that contact visits should be allowed whatever the circumstances. There could be perfectly rational reasons linked to a legitimate governmental objective why contact visits may not be allowed to an inmate.

[66] As Gubbay CJ observed in *Conjwayo v Minister of Justice, Legal & Parliamentary Affairs & others*⁶:

‘Traditionally, Courts in many jurisdictions have adopted a broad ‘hands off’ attitude towards matters of prison administration. This stems from a healthy sense of realism

⁶*Conjwayo v Minister of Justice, Legal & Parliamentary Affairs & others* 1992 (2) SA 56 (ZS) at 60G-61A.

that prison administrators are responsible for securing their institutions against escape or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems. But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection. Fortunately the view no longer obtains that in consequence of his crime a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him. For while prison officials must be accorded latitude and understanding in the administration of prison affairs, and prisoners are necessarily subject to appropriate rules and regulations, it remains the continuing responsibility of Courts to enforce the constitutional rights of all persons, prisoners included.'

[67] The case for unrestricted or unlimited contact visits is weaker in the case of awaiting-trial inmates than it is for inmates who have already been convicted. The desirability of such visits must be weighed against the real danger of possible interference with witnesses and tampering with evidence. That public interest cannot be subordinated to the equally important presumption of innocence. There is just as important a public interest in the integrity of criminal investigations as that a person who has not yet been convicted is treated in a manner befitting that status. Where that balance lies will vary from case to case and is properly a matter for the prison authorities and not for the courts.

[68] Whether or not the authorities got that balance right in a particular case is a matter for scrutiny by the courts preferably by means of review and not a constitutional declarator. That is so because constitutional declarations have far-

reaching implications which set standards to be adhered to regardless of the circumstances. Hence, the principle that where it is possible to decide a case without reaching a constitutional issue, that is the course to be taken.⁷

[69] Although, as Gubbay CJ recognised, prison authorities must be allowed a measure of latitude in administering prisons, the courts will not shirk their responsibility to ensure that inmates' constitutional rights are not trampled upon whilst in custody- either as convicted or unconvicted inmates.

[70] Mr Townsend's case is that because he is an awaiting-trial inmate, Correctional Service does not allow him contact visits because it applies a policy - inherited from the Police - which does not permit contact visits for inmates detained in police cells. The Police's policy appears to be informed by the objective reality, as pertains to police cells, where such visits are logistically impractical or inherently risky because of the overcrowded conditions and the real security risks associated with contact visits under those conditions.

[71] I agree with Ms Katjipuka for Mr Townsend that the Correctional Service's affidavit in the present case not only does not seriously deny Mr Townsend's allegation that he is being systematically denied contact visits, but the Correctional Service's admission that they have adopted - in relation to awaiting-trial inmates - the Police's blanket denial of such visits supports Mr Townsend's version. Mr Townsend's admission that he was allowed one contact visit by his girlfriend and the

⁷ *Kauesa v Minister of Home Affairs & others* 1995 NR 175 (SC); *Zantsi v Council of State, Ciskei & others* 1995 (4) SA 615 (CC) para 8.

common cause fact that he was on more than one occasion allowed consular visits by the American Embassy does not alter the position.

[72] The wholesale adoption of the Police's policy without consideration of the merits of individual cases is a violation of s 77(1) of the Act which states that 'the officer-in-charge of a correctional facility may, for the purpose of promoting and maintaining a relationship between the offender, family and community. . . permit any offender to –

(a) receive visitors;

. . .

(3) The Commissioner-General may, after having given an offender an opportunity to be heard, withdraw or amend any permission to receive visitors . . .'

[73] Against the backdrop of s 77 of the Act, I wish to make two important observations. The first is that the Act permits contact visits to awaiting-trial inmates in the discretion of the officer-in-charge of a correctional facility. Secondly, to apply a policy in relation to awaiting-trial inmates which denies them a right which is axiomatic to convicted inmates supports Mr Townsend's grievance that he and others similarly circumstanced are being treated less favourably than convicted inmates in clear violation of the presumption of innocence. Besides, he also impugned the policy on the basis that it is discriminatory contrary to Art 8 of the Constitution.

[74] The concerns I expressed in paras [64] – [66] above can properly be dealt with in terms of s 77(3) of the Act and in no way justify a blanket denial of contact

visits to unconvicted awaiting-trial inmates because the officer-in-charge of the WCF by way of a pre-determined policy has abdicated the power given to him or her under s 77(1) of the Act.

[75] I am satisfied that Mr Townsend made out a case for the constitutional relief sought in relation to the denial to him of contact visits. The High Court's conclusion to the contrary is therefore a misdirection and should be set aside and replaced with an appropriate order.

Solitary confinement

[76] According to s 103 of the Act:

- (1) Where the officer in charge considers it necessary –
- (a) to secure or restrain an offender who has –
 - (i) displayed or threatened violence;
 - (ii) been recaptured after escape from custody or in respect of whom there is good reason to believe that he or she is contemplating to escape from custody; or
 - (iii) been recommended on medical grounds for confinement in a separate cell by a medical officer;
 - (b) for the safe custody of an offender, that such offender be confined; or
 - (c) for any other security reason,

such officer in charge may order that such offender be confined, with or without mechanical restraint, in a separate cell and in the

prescribed manner, for such period not exceeding 30 days as such officer in charge considers necessary in the circumstances.

- (2) If it is considered necessary to continue with the confinement referred to in subsection (1) for a period exceeding 30 days, the officer in charge must report to the Commissioner-General stating the facts and making his or her recommendations.
- (3) Upon the receipt of the report and recommendation referred to in subsection (2), the Commissioner-General may order the extension of the period of confinement, with or without mechanical restraint, for an additional 60 days, but the total period of such confinement may not exceed 90 days, unless with the explicit consent of the Minister.

[77] Regulation 257 states:

- (1) When an offender –
 - (a) has a bad or harmful effect on another offender or is responsible for the deterioration of the relationship between an officer and an offender and their attitudes towards each other;
 - (b) causes unrest or dissatisfaction among other offenders or incites other offenders to submit trivial or untrue complaints and representations or incites or influences other offenders to disregard or contravene any command or instruction or tries to do or bring about any of the things mentioned in this paragraph;
 - (c) has attempted to escape, or when there are reasonable grounds for believing that he or she is planning to escape;
 - (d) has again been taken into custody after escape from correctional facility or other lawful detention or custody;
 - (e) becomes violent or adopts a threatening or aggressive attitude towards an officer or any other offender or person;
 - (f) conducts himself or herself or acts in any manner which conflicts with the good order and discipline of the Correctional Service, the officer in charge may order the segregation of that offender.
- (2) The officer in charge must, immediately after issuing an order to segregate an offender, make or cause to be made, an entry in a register to be kept for that purpose, recording the particulars of the segregation.

- (3) The segregation referred to in sub-reg (1) must be for such period as may be considered absolutely necessary, but not exceeding 30 days.
- (4) If it is considered absolutely necessary to continue with the segregation referred to in sub-reg (2) in a separate cell for a period exceeding 30 days, the officer in charge must report to the Commissioner-General stating the facts and making his or her recommendation.
- (5) Upon receipt of the report and recommendation referred to in sub-reg (4), the Commissioner-General may order the extension of the period of segregation in a separate cell for 60 additional days, but no such segregation must exceed a period of 90 days without an explicit permission of the Minister.
- (6) Despite sub-reg (1), segregation of an offender may not be ordered or enforced if in any particular case or at any time the medical service personnel certifies that any such segregation would be or is dangerous to the offender's physical or mental health.
- (7) The segregation described in this regulation is not considered to be confinement in single cells for the purposes of any provision of the Act.'

[78] Although the Government is at pains to minimise the effect of these provisions by characterising them as mere 'confinement' or 'segregation', at their core they represent a form of solitary confinement. It is not in dispute on the papers that a person who is subjected to 'confinement' under s 103 or 'segregation' under reg 257 is placed alone in a cell and has no contact with other inmates during the currency of the confinement. That is clearly solitary confinement and was treated as such by the High Court.

[79] Mr Townsend impugns the following features of the solitary confinement regime. Solitary confinement can be imposed without the affected person being invited to make representations. It may be imposed for an initial period not exceeding 30 days and may be extended for an additional 60 days by the Commissioner-General, but the total period of such confinement may not exceed 90 days, unless

with the explicit consent of the first appellant, the Minister of Safety and Security. The affected inmate has no right to *audi* in respect of any extension beyond the initial confinement. In addition, there is no independent review mechanism (as to the necessity or otherwise) during the period that solitary confinement is extant.

[80] Therefore, according to Mr Townsend, the s 103 scheme governing solitary confinement infringes an inmate's right to protection against arbitrary detention prohibited by Art 11(1) of the Constitution. In addition, if measured against the Mandela Rules, the periods for which solitary confinement may be imposed and subsequently extended are way above the acceptable norm.

[81] Ms Katjipuka relied on the so-called The Mandela Rules (the Mandela Rules), adopted without vote by the General Assembly on 17 December 2015, which in relevant part provide as follows:

'Rule 43: . . . the following practices, in particular, shall be prohibited:

- a) indefinite solitary confinement;
- b) prolonged solitary confinement;

. . .

Rule 44: for the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

Rule 45: Solitary confinement shall be used in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority. . .'

[82] To the extent that s 103 and reg 257 sanction solitary confinement in excess of the internationally recognised guidelines, such practice, Mr Townsend maintains, is constitutionally non-compliant.

[83] The High Court rejected Mr Townsend's criticism of s 103 of the Act and reg 257. In its opinion, there is predictability in the provision and it is 'rationally connected to the objective sought to be achieved as provided in the section' – presumably when (in the language of s 103) an inmate has 'displayed or threatened violence'. The High Court was satisfied that s 103 does not authorise prolonged and indefinite solitary confinement. It however disapproved the words 'with or without mechanical restraints' in subsec (1) of s 103. It reasoned that those words and their effect were 'not proportional to the objective' and severed those words from the provision.

[84] I do agree with Ms Katjipuka's submission that the Mandela Rules should aid in our assessment of whether the solitary confinement scheme under s 103 passes constitutional muster. That approach was sanctioned by this court in *Namunjepo & Others v Commanding Officer, Windhoek Prison & another*⁸

[85] I am unpersuaded that the absence of audi in imposing the initial solitary confinement is per se objectionable and therefore constitutionally offensive. For example, and as alleged by the Correctional Service in the answering affidavit, such confinement could be necessitated by a gang fight posing a serious risk of injury to a part of the prison population. It may be impractical in such circumstances to afford

⁸ *Namunjepo & others v Commanding Officer, Windhoek Prison & another* 1999 NR 271 (SC) at 284E-F.

audi to an inmate who has been fingered as being involved before the first confinement.

[86] However, once the immediate danger has been contained, I can think of no conceivable reason why the affected inmate should not be afforded the opportunity to make representations why the solitary confinement should not be terminated or extended. Therefore, a scheme for solitary confinement which does not afford an inmate the opportunity to make representations to end it after it had been imposed to avert an emergency, unduly perpetuates the deprivation of an inmate's meaningful human contact with others.

[87] *A fortiori*, there can be no legitimate governmental purpose in denying an inmate *audi* when a decision is being considered to extend the initial period of solitary confinement. In that case, the inmate is already in solitary confinement and poses no immediate danger to peace and order in the facility. The absence of independent review of solitary confinement to ascertain whether it is necessary to continue poses the real risk of arbitrariness on the part of the authority authorising it, especially in circumstances where the affected inmate has no right to make representations to have the solitary confinement discontinued or not extended.

[88] I have deliberately chosen not to address the length of solitary confinement based on the yardstick set by the Mandela Rules. In my view, if sufficient safeguards of *audi* and independent review are infused into the scheme authorising solitary confinement, the length of solitary confinement will be greatly ameliorated. It would no doubt be preferable if the period is as short as possible. However, no evidence

has been led as to why a 15-day period is more suitable for solitary confinement than, say, ten days or 20 days. It would therefore be arbitrary for a court to determine that legislation providing for solitary confinement in excess of 15 days does not pass muster.

[89] I come to the conclusion that s 103 fails to pass constitutional muster and ought to have been struck as being inconsistent with the Constitution: the detention of an inmate in solitary confinement potentially for as long as 90 days without *audi* or independent review constitutes arbitrary detention proscribed by Art 11(1) of the Constitution. Ms Katjipuka is correct in her submission that the fact that a person is already lawfully detained 'does not mean that any measures further restricting or limiting the right to liberty, may be imposed arbitrarily.'

[90] As this court had occasion to observe in *Alexander v Minister of Justice & others*:⁹

'Arbitrariness does not mean against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

...

Article 7 does not deal with procedure only but also a substantive right, namely the right to liberty, which as previously set out, must be afforded a wide and purposive interpretation to play its role together with the other rights and freedoms to form and support the values enshrined in the Constitution. This substantive right must also be protected by the procedures that are to be followed'.

Regulation 257

⁹ *Alexander v Minister of Justice & others* 2010 (1) NR 328 (SC) paras 86 and 98.

[91] Regulation 257¹⁰ on its terms provides for prolonged and indefinite segregated detention (in other words solitary confinement) of an inmate without audi and without independent review. As I showed in para 44 above, the Government justified reg 257 as the means by which it gives effect to solitary confinement contemplated in s 103. It must follow that if s 103 is struck reg 257 must suffer the same fate. That makes it unnecessary for me to consider whether reg 257 is *ultra vires* the Act.

The right to security of the person

[92] On appeal Mr Townsend seeks to fault the High Court for not finding that being transported with hands handcuffed behind his back in vehicles without safety features, is a breach of his right under Art 9 of the ICCPR which 'protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or not detained.

‘ . . .

The right to personal security also obliges States to protect individuals from foreseeable threats to life or bodily integrity from any governmental or private actors’.¹¹

[93] As Ms Katjipuka submits in her heads of argument:

‘[T]he manner of transport practised by the appellants [the Inspector General of Police] is a clear violation of [Mr Townsend’s] right to security of his person and the right to his dignity as a human being. The Court a quo should have found accordingly.’ (My underlining).

¹⁰ GG No.: 5365 of 18 December 2013 made in terms of s 132 of the Act.

¹¹ HRC GC/35 para 9.

[94] Ms Katjipuka however omitted to propose the order which would correct the perceived misdirection. I presume that the omission was deliberate because an order declaring the practice of transporting inmates in handcuffs behind their backs more than sufficiently takes care of the concern and makes a specific order to that effect superfluous.

Conclusion

[95] At the end of her written heads of argument Ms Katjipuka makes a proposed order in the cross-appeal. It relates to (a) definition of offender, (b) s 103, (c) reg 257 and (d) transportation of inmates in unsafe vehicles. Conspicuously absent from the proposed order are (a) contact visits and (b) the right to security of the person at para [92] above I dealt with the omission in respect of security of the person.

[96] It is not clear why Ms Katjipuka omitted a proposed order in respect of contact visits after so much time and energy was spent persuading this court of the High Court's misdirection on that issue. I will however assume in Mr Townsend's favour that the omission was unintentional. As I have demonstrated in this judgment, the conduct of the Correctional Service in relation to contact visits is clearly unlawful and needs to be corrected. The issue has been properly ventilated in evidence and in legal argument and was raised squarely in the grounds of cross-appeal. I therefore have no difficulty to include it in the order that I am about to make. I do not hold the same view in respect of the omission of a proposed order as regards security of the person and will make no order thereon.

[97] A court declaring legislation or action unconstitutional has a discretion under Art 25(1)(a) of the Constitution to suspend the order of unconstitutionality and to allow 'Parliament, any subordinate legislative authority, or the Executive and the agencies of Government . . . to correct any defect in the impugned law or action within a specified period . . . In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid'.

[98] Except for the relief in respect of contact visits and transportation in unsafe vehicles, I have decided to apply Art 25(1)(a) in respect of the declarations of unconstitutionality of the remaining orders in respect of which the appeal succeeds. I will make appropriate orders to that effect. Because of the clear and present risk to inmates' safety by its prolongation, it would be inappropriate to suspend the declaration of unconstitutionality of the practice of transporting inmates with hands handcuffed behind their backs in vehicles without safety features.

Costs

[99] Ms Katjipuka appears for Mr Townsend *pro amico*. She has not asked this court to make any costs order in favour of Mr Townsend and accordingly I make no such order.

Order

[100] In the result, the following order is made:

1. The cross-appeal succeeds in part and the judgment and order of the High Court are set aside (save in relation to those orders in respect of which the Government's appeal has lapsed) and replaced by the following:

'1. Definition of offender

- 1.1 The definition of offender, as provided for in the Correctional Service Act 9 of 2012, in so far as it includes trial awaiting persons, is inconsistent with Articles 8, 10 and 12(d) of the Namibian Constitution and is therefore struck.
- 1.2 The declaration of unconstitutionality is suspended for a period of 18 months from the date of this order in terms of Article 25(1) (a) of the Constitution, for the Legislature and the Executive to correct the defect identified in this judgment.

2. Transportation of inmates in police vans

The transportation of an inmate in police vans with their hands handcuffed at the back, while the vehicle is moving and such vehicle has no safety features to prevent physical harm to an inmate, is declared inconsistent with Article 8(2)(b) the Namibian Constitution.

3. Section 103

- 3.1 Section 103 of the Correctional Service Act 9 of 2012 is declared to be inconsistent with Articles 7 and 11(1) of the Namibian Constitution and is therefore invalid.
- 3.2 The declaration of unconstitutionality is suspended for a period of 18 months from the date of this order in terms of Article 25(1)(a) of the Constitution, for the Legislature and the Executive to correct the defect identified in this judgment.

4. Regulation 257

- 4.1 Regulation 257 made in terms of the Correctional Service Act 9 of 2012 is declared to be inconsistent with Articles 7 and 11 of the Namibian Constitution and is therefore invalid.
- 4.2 The declaration of unconstitutionality is suspended for a period of 18 months from the date of this order in terms of Article 25(1)(a) of the Constitution, for the Executive to correct the defect identified in this judgment.

5. *Contact visits*

The denial of contact visits to trial-awaiting inmates without regard to the merits of each individual case is declared to be inconsistent with Articles 8 and 12 of the Namibian Constitution.

6. There is no order of costs.'

2. There is no order of costs in the appeal.

DAMASEB DCJ

HOFF JA

FRANK AJA

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