CASE NO's: A 238/2009

A 430/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PROTASIUS DANIEL **APPLICANT**

WILLEM PETER **APPLICANT**

and

THE ATTORNEY GENERAL **FIRST RESPONDENT**

THE PROSECUTOR GENERAL **SECOND RESPONDENT**

THE GOVERNMENT OF THE REPUBLIC

OF NAMIBIA **THIRD RESPONDENT**

CORAM: Van Niekerk, J et Geier, AJ

HEARD ON: 26/07/2010

DELIVERED ON: 10/03/2011

JUDGMENT:

GEIER, AJ: [1] During 1998, and prior to the further amendment of the Stock Theft Act 12 of 1990, and in the course of considering the constitutionality of section 14(1)(b) thereof, which provided for the imposition of a mandatory minimum sentence of three years' imprisonment for a second or subsequent conviction of stock theft, which could not be suspended partially or wholly[1], Frank J, who delivered the full bench judgment in S *v Vries*[2], and in which O'Linn J (in a separate judgement) and

1 Ito section 14(2)

2 1998 NR 244 HC

Gibson J concurred, stated :

> *"In order to attempt to counter the prevalence of stock theft and the effects thereof especially in the rural areas where people barely eke out a living with the small number of livestock they possess Parliament thought it necessary to introduce a minimum sentence. This followed a public outcry especially from farmers and the rural community. This can easily be understood. To steal even one sheep or goat from a person trying to make a living out of say a herd of ten is catastrophic for such a person. Furthermore with transport and vast distances that can be covered in one night as well as the fact that extensive farming is mostly practised in this country it is not easy to counter stock theft. Parliament had every right to attempt to do everything within its powers to curb these pernicious activities".*[3]

[2] O'Linn J, in the said separate judgement, put it even more pertinently when he also took notice of certain notorious facts at the time:

> *" These are inter alia, that Parliament passed this law after an outcry from law-abiding farmers in Namibia clamouring for heavier sentences for stock theft on the ground that the crime has escalated considerably and that many of the owners of the stock are deprived of their livelihood or at least that considerable inroads are made on such livelihood by thieves. They demand protection from the State and the Courts for their fundamental rights to life and the security of their property. Some members of the High Court, including the writer of this judgment, had the opportunity to attend consultative conferences of representatives of society, particularly rural society, where the agony of farmers, communal and otherwise, were expressed about the accelerating crime rate and the deprivation of their livelihood by the thieves stealing the cattle or stock which they need to survive. They demand the protection of their rights by, inter alia, heavier sentences by Courts of law.*
>
> *In my view, full weight should be given to the aforesaid current public opinion as evidence of current values in view of the fact that these views are well-founded and not transient. They are consistent and corroborative of the general trend in society of escalating crime and the general expectation of society, for heavier penalties, as one of the means to counteract the crime phenomenon.*
>
> *However, the aforesaid public opinion goes no further than requiring heavier sentences to be prescribed by the Legislature and imposed by the Courts of law. It may also be accepted that the Namibian public opinion and norms would regard as permissible heavier sentences for offenders, who have in the past been convicted of similar offences. I however sincerely doubt whether public opinion expect a previous conviction in the distant past to be used as the basis*

3 at 255 B-C

> *for such a heavy mandatory sentence as a minimum of three years in the case of the second conviction. They will probably also expect a differentiation to be made between the theft of a goat and the theft of a more valuable head of cattle. Such an attitude would be consistent with the norms and values of reasonableness and fair play and the balancing of rights and responsibilities, which permeate and underpin the provisions of the Namibian Constitution.*
>
> *The aforesaid assumption of public opinion, norms and values, is also consistent with the norms and values of the civilised community of nations of which Namibia is a part.*

The Legislature, when acting in the public interest, and more specifically in the interests of the law-abiding citizens and purporting to protect their fundamental rights, must be presumed to do so bona fide and with due consideration to the public interest and the fundamental rights of all, enshrined in the Constitution.

> *The legislation enacted by the Legislature must also be presumed prima facie to be constitutional. This Court should not necessarily be prescriptive regarding legislation enacted in such circumstances. Mwellie v Ministry of Works, Transport & Communications (supra at 13)."*[4]

[3] It is not surprising therefore that the penal clause of the Stock Theft Act 1990, subsequent to its initial promulgation, continued to be the focus of Parliament's attention on three occasions: Section 14 was initially amended by section 6 of Act 4 of 1991, and later substituted by section 3 of Act 19 of 1993, and again by section 2

of Act 19 of 2004.

[4] In spite of Parliament's singling out of this crime for more severe punishment the Prosecutor General, the second respondent in this application, still states in the year 2010 that 'stock theft has escalated to unacceptable levels and erodes economic development in Namibia'.

[5] The scourge of stock theft thus continues to plague Namibia.

4 *S v Vries* op cit at p 279 B - 280 B

THE APPLICATION BEFORE THE COURT

[6] The applicant Daniel (hereinafter referred to as Mr Daniel) was convicted of the theft of nine goats worth N$4450. He was sentenced to 20 years' imprisonment.

[7] The applicant Peter (hereinafter referred to as Mr Peter) was a 38 year old man. He was convicted of participating in the theft of a single cow together with a number of other accused persons. He had a previous conviction for stock theft. The court sentenced him to 30 years' imprisonment.

[8] It is against this background that both these applicant's have now applied in terms of article 25[5] of the Constitution for orders declaring that the minimum sentences prescribed by sections 14(1)(a)(ii) and (b) of the Stock Theft Act 12 of 1990, as amended, are unconstitutional and invalid. They contend that the minimum sentences violate the prohibition of cruel, inhuman or degrading punishment in article 8(2)(b) and the guarantee of equality in article 10(1) of the Constitution.

[9] Mr Trengove, on behalf of applicants, succinctly summed up the main issues before court in his heads of argument where he submitted that more particularly Mr Daniel's application:

5 CHAPTER 3 Fundamental Human Rights and Freedoms
Article 25(2) Aggrieved persons who claim that a fundamental right of freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right of freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient. **Article 25(3)** Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

"... is directed at section 14(1)(a)(ii). It prescribes a minimum sentence of 20 years imprisonment for a first offender whose offence relates to stock to the value of more than N$500. The respondents do not oppose this application. The Attorney-General filed an answer on behalf of all of them. He was duly authorised to do so. He concedes that the minimum sentence violates the prohibition of cruel, inhuman or degrading punishment in article 8(2)(b) of the Constitution. He asks merely that, instead of striking down the whole s 14(1)(a)(ii), Its defect be cured by deleting the words "for a period not less than twenty years" *from it.'*

The Peter application is directed at s 14(1)(b). It prescribes a minimum sentence of 30 years imprisonment for a repeat offender. The respondents differ in their responses to this application: The Attorney-General and the Government do not oppose the application. The Attorney-General filed an answer on behalf of both of them. He was duly authorised to do so. He admits that the minimum sentence violates the prohibition of cruel, inhuman or degrading punishment in article 8(2)(b) of the Constitution. He asks merely that, instead of striking down the whole s 14(1)(b), its defect be cured by the deletion of the words "for a period of not less than thirty years" *from it.*

The Prosecutor General however denies that the minimum sentence prescribed by s 14(1)(b) is unconstitutional. She asks that this application be dismissed with costs.

The issues between the parties may be summarised as follows:

Mr Daniel's attack on s 14(1)(a)(ii) is unopposed. The parties agree that the section is unconstitutional. They differ only on the question of remedy. This applicant however accepts that the more limited remedy proposed by the respondents will cure the constitutional defect. There is accordingly no material dispute between these parties.

Mr Peter's attack on s 14(1)(b) is not opposed by the Attorney-General and the Government. They concede that the section is unconstitutional. They merely propose a more limited remedy. This applicant accepts that it will cure the constitutional defect. There are accordingly no material disputes between the applicant, the Attorney-General (the first Respondent) and the Government (the third Respondent). The Prosecutor General (the second Respondent herein) however denies that the section is unconstitutional."

[10] Before however deciding these issues it becomes necessary to deal with the second respondent's objection that the constitutional challenge brought by applicants herein is inappropriate.

THE APPROPRIATENESS OF THE CONSTITUTIONAL CHALLENGE

[11] In this regard it was essentially submitted on behalf of second respondent that

> *"... Each of these applicants (Peter with leave) was entitled to appeal their sentences. In fact, Daniel's appeal would have been heard on 10 July 2009. His appeal was removed from the roll at his instance (presumably on legal advice) and this application was launched on 14 July 2009.*
>
> *In each of the cases the factual findings that there were no substantial and compelling circumstances led to the sentences applicants now wish to have set aside by way of constitutional challenge. It is submitted the challenge is inappropriate.*
>
> *Daniel was sentenced by the regional court sitting in Ondangwa. He was unrepresented. It appears from the record that the magistrate simply mentioned to Daniel that he must put forward substantial and compelling circumstances without explaining what it is and without assisting him as he was obliged to. In Peter's case it can be argued that it was a misdirection to consider an eleven year old previous conviction - especially because it predates the minimum sentences.*
>
> *Furthermore, a strong argument can be made in respect of both matters that the sentencing magistrate and judge applied "substantial and compelling" too restrictively.*
>
> *As a result the applicants should have appealed their sentences. These constitutional challenges are inappropriate and should be struck from the roll with costs, alternatively, treated as appeals."*

[12] Mr Coleman, who appeared on behalf of the second respondent, based these submissions in the first instance on the general principles that *'a court should decide no more than what is absolutely necessary to determine the case and constitutional law should be developed cautiously, judiciously and pragmatically*[6] and on the principle as expounded by Kentridge AJ in S *v Mhlungu and Others*

6 *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at p 184 A

1995 (3) SA 867 (CC) para [59] (D-E);

> *" I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."*

[13] While it may undoubtedly be correct that both Mr Peter and Mr Daniel may have the arguments contended for by Mr Coleman at their disposal during an appeal hearing, this argument essentially loses sight of the fact that this application is no appeal and that no relief akin to appeal relief is sought by the applicants herein in terms of the Criminal Procedure Act, Act No. 51 of 1977.

[14] On the contrary applicant's crisply state that they *'apply in terms of article 25(1) of the Constitution for the declaratory orders'* set out in the respective notices of motion.

[15] Accordingly they expressly seek a decision only on the constitutional issues raised on their papers. This in my view leaves no room for the application for the relied upon 'general principle' as stated in the *Mhlungu* case as in such circumstances the applications here cannot be decided 'without reaching a constitutional issue'. This aspect also disposes of Mr Coleman's reliance of the case of S *v Strowitzki*[7] which constitutes authority for the view that Article 25 of the Namibian Constitution does not create an avenue for criminal appeals, which is not what the applicants seek to achieve here.[8]

[16] As far as the sought declaratory relief goes, it would appear that Mr Coleman's argument did also lose sight of the requirements of section 16 of the High Court Act which empowers the Court:

> *"... in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation,notwithstanding that such person cannot claim consequential upon the determination."*

[17] "The Court approaches the question of a *declarator* in two stages.[9] ... First, is the applicant a

7 1994 NR 265 HC
8 See for instance S *v Strowitzki* op cit at p 274
9 *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84 (A) at 93 A -C

person 'interested' in any 'existing, future or contingent right or obligation'. Secondly, and only if satisfied at the first stage, the Court decides whether the case is a proper one in which to exercise its discretion.[10]"

[18] "It was decided in *Ex parte Nell* 1963 (1) SA 754 (A) that an existing dispute is not a prerequisite for jurisdiction under section 19(1)(a)(iii).[11] There must, however, be interested parties on whom the declaratory order will be binding. The absence of an existing dispute may, or course, incline the Court, in the exercise of its discretion, not to grant a *declarator.*[12]"

[19] Clearly both Mr Peter and Mr Daniel are such 'interested persons', who cannot be said, not to have any 'existing, future or contingent right' to the determination of the constitutionality or not of the sentences which they presently serve.

[20] It is also not doubted that the *declaratory* orders sought herein will be binding on the parties hereto.

[21] As far as the Court's discretion is concerned it has been held that the Court will take into account whether:

> *" ...some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent right or obligation ... [appears] to flow from the grant of the declaratory order sought*[13]*... "*

[22] In this regard it will be firstly of material significance that it has been held that *".. Courts are no vehicles of injustice*[14]*... "* and that " ... *no derogation from the rights entrenched by art 8*[15] *is permitted*[16] ... ".

10 *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality & Others* 2001(4) SA 1144 (C) at 1153 A

11 Section 19(1)(a)(iii) is equivalent to section 16(d) of the Namibian High Court Act No 16 of 1990

12 *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality & Others* op cit at p 1153 B

13 *Adbro Investment Co Ltd v Minister of Interior & Others* 1961 (3) SA 283 (T) at 285D

14 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) para 45

15 *"No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."*

16 *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76

[23] Secondly, and should the minimum sentence regime, as imposed by the Stock Theft Act, be found to be in conflict with art 8 and be declared unconstitutional as a result of the declaratory orders sought herein, surely some tangible and justifiable advantage, in relation to the applicants' position, with reference to their existing, future or contingent right not to be subject to cruel, inhuman or degrading punishment, also emerges for the applicants to take this aspect further, should they be so advised. In this respect the applications under consideration are also not purely academic.

[24] It is of further relevance that it is only the High Court, as a competent Court[17], that can grant the declaratory constitutional relief sought. It is eminently desirablethat it should also do so, so as not to perpetuate a situation in which the courts turn a blind eye to and continue to be *'vehicles of injustice'* in their continued application of a possibly unconstitutional minimum sentence regime, as currently prescribed by the Stock Theft Act.[18]

[25] The grant of the sought declaratory orders, will so to speak also 'clear the decks' for the future proper application of sections 14(1)(a)(ii) and 14(1)(b) of the Stock Theft Act 12 of 1990, as amended[19] - in the High Court and all Lower Courts.

[26] All these factors indicate therefore that this would be an appropriate instance to entertain the applications for the declaratory order sought and I exercise my discretion accordingly.

[27] I therefore deem the constitutional challenge appropriate.

THE IMPUGNED MINIMUM SENTENCE REGIME

(NmS) at p 86

17 Article 25(3) as read with Article 80(2)

18 See also : *Compagnie Interafricaine de Traveaux v South African Transport Services & Others* 1991 (4) SA 217 (A) at 231B

19 See also : *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality & Others* op cit at p 1154 B

[28] Section 14 of the Stock Theft Act No 12 of 1990, as amended provides as follows:

"14 Penalties for certain offences

(1) Any person who is convicted of an offence referred to in section 11(1) (a), (b), (c) or (d) that relates to stock other than poultry-

a) of which the value-

(1) is less than N$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;

(ii) is N$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine;

(b) shall be liable in the case of a second or subsequent conviction, to imprisonment for a period not less than thirty years without the option of a fine.

2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in subsection (1)(a) or (b), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

3) A sentence of imprisonment imposed in respect of an offence referred to in section 11(1)(a), (b), (c) or (d), or an additional sentence of imprisonment imposed under section 17(1)(b) in respect of noncompliance with an order of compensation, shall, notwithstanding anything to the contrary in any law contained, not run concurrently with any other sentence of imprisonment imposed on the convicted person.

(4) The operation of a sentence, imposed in terms of this section in respect of a second or subsequent conviction of an offence referred to in section 11(1)(a), (b), (c) or(d), shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, if such person was at the time of the commission of any such offence eighteen years of age or older.

[29] In the Heads of Argument filed on behalf of applicants[20] it was submitted that the following main features appear upon analysis of section 14:

" In terms of section 14(1), minimum sentences must be imposed for all the offences in sections 11(1)(a), (b), (c) and (d) that relate to "stock other than poultry".

'Stock' is defined in section 1. It includes other than poultry-

- " any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig,... domesticated ostrich, domesticated game" and

- *"the carcase or portion of the carcase of any such stock".*

The offences in sections 11(1)(a), (b), (c) and (d) relate to "stock" and "produce". Insofar as they relate to stock, they include the following offences:

- *theft or attempted theft of stock;*
- *receiving stock knowing it to have been stolen;*
- *inciting, instigating, commanding or conspiring with or procurinq another person to steal or receive stolen stock;*
- *knowingly disposing or assisting in the disposal of stolen stock.*

These offences also extend to the lesser offences of the peripheral role-players involved in the theft and disposal of stock.

The regime imposed by s 14, prescribes minimum sentences for all these offences. All of them are caught in the net created by the section. It prescribes three minimum sentences for all of them. The applicable sentence depends in the first place on whether the accused is a first or repeat offender.

20 para's 8 -13

Section 14(1)(a) prescribes the minimum sentences for first offenders. It distinguishes between them on the basis of the value of the stock involved. If it is less than N$500, the minimum sentence is two years' imprisonment. If it is more than N$500, the minimum sentence is 20 years' imprisonment. The sentence may be wholly or partially suspended[21]*.*

Section 14(1)(b) prescribes a minimum sentence of 30 years' imprisonment for any second or subsequent conviction of stock theft. It differs from the approach to first offenders in two fundamental respects:

i) It makes no distinction between trivial and more serious offences as is done in the case of first offenders. The minimum sentence of 30 years is prescribed for all repeat offenders, however trivial their offences might be.

ii) The court may not ameliorate the minimum sentence by suspending it or any part of it. Section 14(4) provides that the minimum sentence may not be suspended at all as long as the offender is 18 years or older.[22]

[30] It would appear that this analysis is correct.

THE ARGUMENTS IN SUPPORT OF THE CONSTITUTIONAL CHALLENGE

[31] Counsel for both applicants commenced argument on this score by emphasising the following cardinal features, which flow from the above analysis:

a) "that the prescribed minimum sentence regime in respect of first offenders proceeds from the premise :

21 This submission is not correct : see S *v Tjambiru* unreported High Court judgement in case no's Cr 47/2008, Cr 48/2008 and Cr 49/2008, delivered on 21 July 2008 where the court held "Section 297(4) of the Criminal Procedure Act (CPA) provides for the suspension of sentences in circumstances where minimum sentences are prescribed. In such instances the Court is empowered to "order the operation of a part thereof to be suspended". This section is clear and where a minimum sentence is prescribed it cannot be suspended in toto and only a part thereof may be suspended.' This does not only follow from the wording of this subsection but becomes abundantly clear when juxtaposed with section 297(l)(b) which states that the whole of a sentence may be suspended where no minimum sentence is prescribed."

22 At para 15

i) that a significant custodial sentence of at least two years' imprisonment, is appropriate for first offenders guilty of stock theft, however trivial their offence might be;

ii) that the N$500 threshold beyond which the minimum sentence jumps from two to twenty years' imprisonment, is low in itself and gets lower all the time as the value of money depreciates;

iii) that the minimum sentence jumps from two years to twenty years' imprisonment as soon as the value of the stock exceeds N$500. There is no gradation of sentences between the two. The minimum sentence increases ten-fold even if the value of the stock only marginally exceeds N$500. The section does not distinguish between the isolated theft of a sheep on the one hand and the theft of a herd of cattle by an organised gang of cattle hustlers on the other. It prescribes the same minimum sentence for all of them;

iv) that the section prescribes minimum sentences. It means that the only way in which the courts can implement a system of fair gradation of sentences commensurate with the severity of the stock theft for which they are imposed is to impose the minimum sentences for the less serious offences and even harsher sentences for the more serious offences.[23]

b) that the prescribed minimum sentence regime in respect of second offenders proceeds from the premise that the previous conviction which makes the accused a repeat offender subject to the minimum sentence of 30 years' imprisonment, need not be one which would otherwise have qualified him for harsher treatment than a first offender. That is so for two reasons:

i) it makes no difference whether the previous conviction was for a serious or trivial offence. , It counts as a previous conviction and renders the accused subject to the prescribed minimum sentence of 30 years' Imprisonment, however trivial it might have been;[24]

ii) the previous conviction need not have been recent. It is immaterial when it occurred, even if it is so long ago as to have lost its significance.[25]

23 Heads of Argument at para 14.1 -14.4
24 Heads of Argument at para 15.1
25 Heads of Argument at para 16.1

c) The implication of these features could be that a poor man who steals a piece of meat (that is a portion of the carcass of an animal) to feed his family, is subject to a minimum sentence of 30 years' imprisonment if he was convicted of doing the same thing in his youth, even if it happened decades earlier. "[26]

CERTAIN FACTORS RELEVANT TO SENTENCING LEFT OUT OF ACCOUNT

[32] "The applicable sentence in any case, depends only on whether the accused is a first or repeat offender and, in the case of a first offender on the question whether the stock was worth more or less than N$500. No other factors relating to the seriousness of the crime, the personal circumstances of the accused or the interests of society are taken into account." [27]

[33] "According to the definition of 'stock' a wide range of animals and even the carcass or portion of the carcass of any of them fall within the ambit of the section. Their actual value, the socio-economic significance and the impact of their loss, will vary enormously from case to case. Section 14(1) however generalises about all of them without distinction."[28]

[34] "The section also ignores the age of the accused. It applies to juveniles and adults alike. The only concession made to juveniles, is that s 14(4) allows the court to suspend the minimum sentence of 30 years' imprisonment if the repeat offender is under 18. This highlights the fact that the legislature applied its mind to the application of the minimum sentence regime to juveniles and intended it to apply to them, subject only to this concession." [29]

[35] It was accordingly submitted further that "the implication of this is that even a juvenile who steals an item of stock, has to be sentenced to imprisonment for at least two years if the stock is worth less than N$500, 20 years if the stock is worth more than that, and 30 years if the youth has a previous conviction, however trivial it might be. The youthful offender is subject to the same minimum sentence

26 Applicants' Heads of Argument para 17
27 Heads of Argument at para 18
28 Heads of Argument at para 19
29 Heads of Argument at para 20

regime as members of a hardened gang of cattle rustlers who steal herds of cattle in an organised fashion for profit."[30]

THE EFFECT OF THE PROHIBITION THAT SENTENCES MAY NOT RUN CONCURRENTLY

[36] "The prohibition that sentences may not run concurrently applies to every sentence imposed for stock theft. Accordingly an accused convicted on multiple charges of stock theft, is liable to the minimum sentence on each of them and those sentences must then run concurrently, whatever their cumulative effect. It means for instance that, if the court convicts an accused on five charges of stock theft, it must sentence him -

- to 100 years' imprisonment if he is a first offender and the value of the stock exceeded N$500 in each case, and

- to 150 years' imprisonment if he has a previous conviction of stock theft, however trivial both the previous and the current offences might be. "[31]

THE EFFECT OF THE 'BENCHMARK' SET BY MINIMUM SENTENCES ON THE COURT'S SENTENCING DISRECTION

[37] Section 14(2) is the only provision which ameliorates the sentencing regime created by section 14 of the Stock Theft Act. It provides that:

" If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in subsection (1)(a) or(b), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence".

[38] Mr Trengove submits that this provision does not vest the court with its ordinary sentencing discretion. The court has no discretion at all to depart from the minimum sentences in the absence of

30 Heads of Argument at para 21
31 Applicants' Heads of Argument para 23

substantial and compelling circumstances which justify it. Only if there are such substantial and compelling circumstances, does a court exercise any discretion at all. But even then, counsel submits, its discretion isfettered because the sentence it imposes must have regard to the benchmark set by the minimum sentence regime.[32]

[39] The first question is accordingly when the circumstances of a case are *"substantial and compelling"* so as to justify a departure from the minimum sentences.

[40] The Court was referred in this regard to *S v Malgas*[33] were the South African Supreme Court of Appeal considered this question in relation to a different but very similar regime of minimum sentences for a range of serious offences subject to exception on the grounds of substantial and compelling circumstances. It considered what circumstances qualified as substantial and compelling and summarised its conclusions in paragraph 25 of its judgment as follows:

> *"A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).*
>
> *B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should* ordinarily *and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.*
>
> *C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.*
>
> *D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.*

32 Heads of Argument at para 25
33 2001 (2) SA 1222 (SCA)

E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided."

[41] The South African Constitutional Court endorsed this interpretation of the substantial and compelling requirement in S *v Dodo* [34] when it found that the SCA's interpretation *"as an overarching guideline, is one that this court endorses as a practical method to be employed by all judicial officers".*

[42] It was on this basis then submitted further[35] that the SCA's summary endorsed by the Constitutional Court, makes it clear that the regime of minimum sentences plays a dual role. The first is that it prescribes the minimum sentences that must be imposed in the absence of substantial and compelling circumstances to depart from them. The second is that, even where substantial and compelling circumstances are present, the court must still have regard to the benchmark set by the

34 *S v Dodo* 2001 (3) SA 382 (CC) para 11
35 Heads of Argument at para 28

minimum sentences, in its determination of the appropriate sentence. As appears from paragraph J of the SCA's summary above, it held that, when the court finds that there are substantial and compelling circumstances to impose a lesser sentence,

> *"account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided."*[36]

[43] This interpretation was underscored by the South African Court of Appeal in S *v Mvambu*[37] were it was held that the trial judge in the court *a quo* had committed a material misdirection because:

> *"... having found substantial and compelling circumstances to be present, he considered himself to have a free and unfettered discretion to impose any sentence he considered appropriate" ...*[38]

and that this constituted such material misdirection because it overlooked *"a bench mark indicating the seriousness with which the legislature views offences of this type".* [39]

NO PROPER GRADATION OF PUNISHMENT IN THE OVERALL SENTENCING SCHEME

[44] Mr Trengove further submitted[40] that the minimum sentences are also grossly disproportionate, not only because they are unduly severe in themselves, but alsobecause they are wholly out of kilter with the sentences meted out to those who commit other crimes which are equally and even significantly more severe than stock theft. He referred the Court to *R v Latimer*[41] were the Supreme Court of Canada held

that,

36 See also S *v Abrahams* 2002 (SA) SACR 116 (SAC) at para 25 were the Court confirmed this aspect by stating: *"... The prescribed sentences the Act contains play a dual role In the sentencing process. Where factors or substance do not compel the conclusion that the application of the prescribed sentence would be unjust, that sentence must be imposed. However, even where such factors are present, the sentences the Act prescribes create a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before."*

37 S *v Mvambu* [2005] 1 All SA 435 (SCA)

38 S *v Mvambu* at para 17

39 S *v Mvambu* at para 17

40 Heads of Argument at para 46

41 *R v Latimer* [2001] 1 SRC 3

"There is no doubt that a sentencing regime must exhibit a proportionality to the seriousness of the offence, or to put it in another way, there must be a gradation of punishments according to the malignity of the offences." [42]

[45] The submission is that the minimum sentences are disproportionate in this regard in that they are wholly out of keeping with the sentences generally meted out to those convicted -.

- of theft, fraud and corruption which are at least as serious as stock theft, and
- assault to do grievous bodily harm, robbery, rape and murder which are immeasurably more serious than stock theft in that they threaten, injure and even destroy human lives.[43]

[46] The effect of this latter discrepancy, so the submissions continue, is that the state responds more severely to threats to property than to immeasurably more serious threats to human life and safety. This is, so it is argued, a manifestation of a skewed perception of constitutional values. Although property is worthy of protection, it is quite inimical to the Constitution and the values that underpin it, to afford property greater and more aggressive protection than that afforded to human life.[44]

THE ALLEGED VIOLATION OF ARTICLE 8(2)(b)

[47] In this regard the argument ran thus:

"Article 8(2)(b) of the Constitution provides that:

"No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

This prohibition forms part of the provisions of article 8 which are designed to protect the innate dignity of every human being. Article 8(1) provides that the dignity of all persons "shall be inviolable". Article 8(2)(a) goes on to say that, in any judicial proceedings or in other proceedings before any organ of the state and during the enforcement of a penalty, "respect for human dignity shall be guaranteed".

42 *R v Latimer* at par 83
43 Heads of Argument at para 47
44 Heads of Argument at para 48

The Supreme Court held in the Corporal Punishment case, that "no derogation from the rights entrenched by art 8 is permitted", that the state's obligation under it "is absolute and unqualified" and that "no questions of justification can ever arise". [45]

A full bench of this court held in Vries, that a sentence violates article 8(2)(b) if it is grossly disproportionate to the severity of the offence for which it is imposed.[46] *It went on to consider when that would be the case and concluded that the gross proportionality test was not materially different from the "shocking" test conventionally applied by our courts in their evaluation of sentences on appeal. It adopted the "shocking" test, by which it meant that the court should ask whether the sentence is "so excessive that no reasonableman would have imposed it", for the determination of its constitutional validity.*[47]

This court also recognised in Vries that, when it assesses the constitutional validity of a statutory sentence, it should obviously do so, not only on the basis of the facts of the particular case before it, but also "with respect to hypothetical cases which ... can be foreseen as likely to arise commonly".[48] *In the current applications, the constitutional validity of the two minimum sentences are the only Issue before the court. It is not called upon to determine the fate of the particular applicants. The constitutional validity of the minimum sentences under attack must accordingly be determined, not on the facts of the particular cases before the court, but on the basis of such hypothetical cases as can be foreseen as likely to arise commonly. "*[49]

[48] Accordingly it was submitted that the minimum sentences under attack in these applications, are also unconstitutional because of their disproportionality. They are so severe because their only purpose is to deter.[50] This, so the argument ran further, was made clear by the Prosecutor General in her defence of the minimum sentences when she states that: *"Farming with stock has become the only viable option for many inhabitants of the country and the high incidence of stock theft threatens this only means of income to legitimate stock farmers and the legislature was compelled to devise means that would stem the tide. "* But, applicants submitted, in its zeal to "stem the tide" of stock theft, the legislature has resorted to minimum sentences which are grossly disproportionate in that they unfairly and unjustly punish those who are caught and convicted, not because their crimes deserve the sentences meted out to them, but to deter others from committing the same crime.

45 *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* op cit at p 86
46 S *v Vries* at 248J to 249B
47 At 250E
48 At 253C
49 Heads of Argument at para 36 -41
50 Heads of Argument at para 45

Persons who fall foul of the minimum sentences are thus used as instruments of deterrence in violation of their right to recognition of and respect for their innate human dignity. They are used as a means to an end and not as an end in themselves as the Constitution requires. Accordingly it should be concluded that both sections 14(1)(a)(ii) and (b) are unconstitutional and invalid.[51]

[49] I pause to mention that an attack on sections 14(1)(a)(ii) and (b) was also mounted on Article 10 of the Constitution. However in view of the finding subsequently made it has now become unnecessary to deal with this aspect.[52] In addition it was pointed out that any finding of unconstitutionality of section 14(1)(a)(ii) and 14(1)(b) would directly also affect the validity of section 14(1)(i). In view of the principle enunciated by the Supreme Court in *Kauesa,* and as this aspect was not raised on the papers I am obliged to decline the invitation to also pronounce on the validity of section 14(1 herein.

THE FIRST AND THIRD RESPONDENT'S STANCE

[50] Mr Markus, who appeared on behalf of the first and third respondent's, conceded on behalf of these respondents, as already mentioned above, that in their view both sections are unconstitutional as they are in conflict with Article 8(2)(b) of the Constitution.

[51] The point of departure of the reasoning advanced on behalf of first and third respondents is the Supreme Court decision of *Ex parte Attorney General, Namibia: In re Corporal Punishment by the Organs of State* 1991 (3) SA 78 (Nms) were the Court observed that " ... the question as to whether a particular form of punishment authorized by law is inhuman or degrading involves the exercise of a value judgment. It is made with regard to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution. Regard is also had to the emerging consensus of values in the civilized international community, of

51 Heads of Argument at para 44 - 45

52 *Kauesa v Minister of Home Affairs and Others* op cit at p 184 A "... *'a court should decide no more than what is absolutely necessary to determine the case and constitutional law should be developed cautiously, judiciously and pragmatically... ".*

which Namibia is a part, and which Namibians share ... "[53]. Thus no evidentiary enquiry is required.[54] The values of the Namibian Constitution are that of a 'broad and universalist human rights culture".[55]

[52] First and third respondents acknowledge that this Court has previously accepted that the Act serves a legitimate governmental purpose and that the stipulation of a minimum sentence is in itself not objectionable.[56] It is the methods employed to achieve the laudable objective that are problematic, so it was submitted.[57]

[53] The Attorney General identified the shortcomings of section 14(1)(a)(ii) as follows:

a) "The section fails to distinguish between different kinds of stock. It makes no difference whether cattle, sheep or goats are involved, yet it is common knowledge that the value of cattle is much higher than that of goats or sheep.

b) The same sentence is visited on all persons who are convicted of an offence referred to in section 11(1) (a), (b), (c) or (d) of stock, other than poultry, of more than N$ 500.00, irrespective of the actual value and quantity of the stock.

C) No distinction is made between an offender who is convicted in respect of stock valued at N$ 500.00 and an offender convicted in respect of stock valued at N$ 100 000.00."[58]

[54] Therefore it was submitted on behalf of first and third respondents that as a result of the above mentioned effects, the minimum sentence prescribed by section 14(1)(a)(ii) is likely to be grossly disproportionate to the offence committed in many instances. Given the prevalence of stock theft in the country and the abovementioned defects the sentence mandated by s 14(1)(a)(ii) will be shocking with respect to 'hypothetical cases which can be foreseen as likely to arise commonly'.[59]

[55] With regard to section 14(1)(b) the Attorney General is for similar reasons of the view that the

53 At p 86
54 S *v Tcoeib* 1999 NR 24 SC at 33 footnote 11
55 Government of the Republic of Namiba v Cultura 2000 1994 (1) SA 407 (NmSc) at 412 C-D
56 5 S *v Vries* 1996 (12) BCLR 1666 (Nm HC) at 1678 G-I
57 Heads of Argument at para 15
58 Heads of Argument at para 16
59 Heads of Argument at para 17

mandated sentence will be shocking, "with respect to hypothetical cases which can be foreseen as likely to arise commonly".[60]

[56] With reference to the decision of this Court in S *v Lopez* 2003 NR 162 HC, in which Hannah J, (Maritz J, as he then was, concurring) adopted the interpretation of *'substantial and compelling circumstances'* as expounded in the South African decisions of S *v Malgas*[61] and S *v Dodo*[62], it was submitted that ' ... given the fact that the benchmark set by the legislature of twenty and thirty years is relatively high, it is not difficult to imagine circumstances where the Court finds that substantial and compelling circumstances exist, but the sentence ultimately imposed would still be disproportional to the crime and induces a sense of shock in the constitutional sense'.[63]

[57] Accordingly, so it was reasoned, both sections are in conflict with article 8(2) of the Constitution which proscribes cruel, inhuman or degrading treatment or punishment, as the infliction of excessive punishments is incongruent with the tenor and spirit of the Namibian Constitution referred to above.

THE SECOND RESPONDENT'S GROUNDS FOR OPPOSITION

[58] As already indicated above it was only the second respondent that opposed the applications.

[59] In this regard Mr Coleman relied heavily on, what he called, 'certain instructive principles'[64] as articulated by the Constitutional Court in *S v Dodo* :

60 Heads of Argument at para 18
61 2001 (2) SA 1222 (SCA)
62 2001 (3) SA 382 (CC)
63 Heads of Argument at para 28
64 Heads of Argument at para 36

"The executive and legislative branches of State have a very real interest in the severity of sentences. The Executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law [65]

In order to discharge this obligation to protect its citizens the executive and legislative branches must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.[66] *It is submitted this consideration is equally applicable to stock theft which second respondent asserts threatens the livelihood of many law abiding Namibians.*

It is not for the courts to judge the wisdom of the legislature with respect to the gravity of various offences and the range of penalties which may be imposed. Parliament has a broad discretion in proscribing conduct as criminal and determining proper punishment.[67]

On a proper construction of the concept "substantial and compelling circumstances" [as enunciated in S v Malgas 2001 (2) SA 1222 (SCA)] section 51(1) does not require the High Court to impose a sentence of life imprisonment in circumstances where it would be inconsistent with the offender's right guaranteed by section 12(1)(e) of the South African Constitution."[68]

[60] It was submitted further that the abovementioned principles are applicable in Namibia and to these applications. "It takes care of any reliance on Article 8 of the Namibian Constitution. It was then submitted that neither section 14(1)(a)(ii) norsection 14(1)(b) of the Act requires a court in Namibia to impose a minimum sentence of either 20 years or 30 years where it would be inconsistent with the offender's rights guaranteed by Article 8(2)(b) of the Constitution - or any other right for that matter."[69]

[61] If I understand Mr Coleman's argument correctly he seems to suggest that, on a proper

65 S *v Dodo* at para [24]
66 S *v Dodo* at para [25]
67 S *v Dodo* at para [30]
68 S *v Dodo* at para [39] - Section 12(1)(e) of the South African Constitution is the equivalent of Article 8(2)(b) of the Namibian Constitution
69 Heads of Argument at para 37

construction of the concept "substantial and compelling circumstances", sections 14(1)(a)(ii) and 14(1)(b) do not require a Court to impose a minimum sentence of 20 or 30 years imprisonment in circumstances where this would be inconsistent with the offender's right guaranteed by Article 8(2)(b) of the Namibian Constitution and that the court would therefore be free, in such circumstances, to impose a lesser sentence.

[62] This argument was also mounted on the 'disproportionality test'. Here the argument ran thus:

> *"In the Vries matter*[70] *the court expressed the view that the disproportionality test appears to be the same as the 'shocking' test and ultimately 'disturbingly inappropriate' test in sentencing. This aspect was addressed cogently in the Malgas case referred to supra. The court held that the legislature deliberately and advisedly left the concept 'substantial and compelling circumstances' undefined to leave it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence.*
>
> *The court in Malgas further held that the courts are a good deal freer to depart from the prescribed sentences than has been assumed in earlier cases. Itthen summarized the effect of section 51. The aspects of this summary that are relevant here are: the section imposing the minimum sentence limited but did not eliminate the courts' discretion in imposing sentence; If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing the sentence, it is entitled to impose a lesser sentence.'*
>
> *Therefore the challenged sections do not fail the disproportionate test in any of its manifestations. "*[71]

[63] As persuasive as Mr Coleman's arguments seemed at first glance they are too general as they overlook the so-called dual role that minimum sentences play[72]. From the approach laid down in both the *Malgas* and *Dodo* decisions, as endorsed by this Court in *Lopez,* it becomes apparent that, even where substantial and compelling circumstances are found to be present, the court does not become

70 at 249H-J

71 Heads of Argument at para 38 - 41

72 The first is that it prescribes the minimum sentences that must be imposed in the absence of substantial and compelling circumstances. The second is that, even where substantial and compelling circumstances are present, the court must still have regard to the benchmark set by the minimum sentences, in its determination of the appropriate sentence.

absolutely free to impose any sentence it considers appropriate, as it must still have regard to the benchmark set by the minimum sentences, in its determination of an appropriate sentence.

[64] This was confirmed by the South African Constitutional Court in the *Centre for Child Law*[73] case, in which the manner in which a minimum sentencing regime fettersa court's sentencing discretion even if substantial and compelling circumstances are found to exist was succinctly analysed as follows:

> *"The very nature of minimum sentences is to diminish the courts' power of individuation by constraining their discretion in the sentencing process. The Supreme Court of Appeal in Vilakazi has recently emphasized that under Malgas and Dodo 'disproportionate sentences are not to be imposed and that courts are not vehicles for injustice'. Nevertheless, in its very essence the minimum sentencing regime makes for tougher and longer sentences. While the hands of the sentencing courts are not bound, they are at least loosely fettered. As this court noted in Dodo, the very object of the regime is to 'ensure that consistently heavier sentences are imposed'.*
>
> *The minimum sentencing regime does this in three ways. First, it orientates the sentencing officer at the start of the sentencing process away from options other than incarceration. Second it de-inviduates sentencing by prescribing as a starting point the period for which incarceration is appropriate. Third, even when not imposed, the prescribed sentences conduce to longer and heavier sentences by weighing on the discretion. "*[74]

[65] In addition, the argument, mustered on behalf of the second respondent, also failed to keep in mind that it was found in *Mvambu,* that the total disregard of the sentencing benchmark by a court in the imposition of a sentence, it considers appropriate, constitutes a material misdirection. I respectfully consider the approaches as formulated and adopted by the SCA in Mvambu,and the *Centre for Child Law* cases as correct as otherwise the appropriate recognition of the legislated benchmark set by the minimum sentences would not be given as is required by the statute.

73 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC)
74 At paras 45 and 46

[66] Crucial to second respondent's submissions in support of the contention that sections 14(1)(a)(ii) and 14(1)(b). are not unconstitutional is the reliance placed on the following passage from *Dodo,* in which the Constitutional Court said:

> "[40] On the construction that *Malgas* places on the concept 'substantial and compelling circumstances' in s 51(3)(a), which is undoubtedly correct, s 51(1) does not require the High Court to impose a sentence of life imprisonment in circumstances where it would be inconsistent with the offender's right guaranteed by s 12(1)(e) of the Constitution. The whole approach enunciated in *Malgas,* and in particular the determinative test articulated in para I of the summary, 59 namely:
>
> > 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence'

makes plain that the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross. Thus the sentencing court is not obliged to impose a sentence which would limit the offender's s 12(1)(e) right. Accordingly s 51(1) does not compel the court to act inconsistently with the Constitution. It is necessary to emphasise the difference between the two tests, because they serve different purposes. The test in *Malgas* must be employed in order to determine when s 51(3)(a) can legitimately be invoked by a sentencing court to pass a lesser sentence than that prescribed by s 51(1) or (2). The test of gross disproportionality, on the other hand, must be applied in order to determine whether a sentence mandated by law is inconsistent with the offender's s 12(1)(e) right. It has not been suggested that s 51(1) compels the sentencing court to act inconsistently with the Constitution in any other way."

[67] The Constitutional Court in *Dodo* (at p393C-D) accepted the interpretation of the words substantial and compelling circumstances in *Malgas,* as summarized at para 25 of the latter judgment, as being an "overarching guideline" which is one that the Court endorsed "as a practical method to be employed by all judicial officers faced with the application of s 51" and continued:

> "It will no doubt be refined and particularised on a case by case basis, as the need arises. It steers an appropriate path, which the Legislature doubtless intended, respecting the Legislature's decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by s 51 and at the same time promoting 'the spirit, purport and objects of the Bill of Rights'."

[68] The Constitutional Court did not go further by specifically considering in more detail the

requirement set by *Malgas* at para. [25J], namely that "...the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided." This requirement is expressed in more detail earlier in *Malgas* (at p1235E) when the Supreme Court of Appeal said that when a lesser sentence is imposed the courts are "...to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

[69] The more disproportionate the standard set by the Legislature becomes through the benchmark set, the more difficult it becomes for the courts to pay "due regard" to the benchmark, until a stage is reached where it becomes intolerable. At such a stage any professed regard being paid to the bench mark would indeed be mere "lip service". In my view such a stage has been reached with respect to a large number, if not the majority of stock theft cases where the value of the stock is above N$500. I am not referring here to serious cases where a large number of animals are stolen or slaughtered or where the total value is much higher than N$500. Forexample, in the recent case of *Erastus Munongo v The State* (High Court Case No. CA 104/2010, unreported judgment dated 2 December 2010), which involved the theft of a single goat valued at N$600, the Court held (at para. [24]) on the facts of that case that "...it would be an injustice to impose such severe sentences as the bench mark, simply because the value of the livestock brings the case within the ambit of the prescribed minimum of not less than twenty years imprisonment." Eventually the Court, having found that there were substantial and compelling circumstances, imposed a sentence of 2 years and 5 months imprisonment, a far cry from the prescribed sentence of 20 years imprisonment.

[70] It becomes clear that any appropriate lesser sentence imposed in such circumstances can therefore never be divorced entirely from the minimum sentences ordained by the legislature. If this obligatory regard to- and mandatory linking of an appropriate lesser sentence to the benchmark set by the minimum sentencing regime nevertheless results in a 'shocking' or 'disproportionate' sentence'[75], a violation of an accused's Article 8 right would have occurred[76]. While it is accepted that all this is relative, as this ultimately depends on how high the benchmark has been set, it does not

75 ie. a sentence that is so excessive that no reasonable man would have imposed it ...
76 S *v Vries* at 250 I -J

take much to imagine that a violation of the Article 8 rights of accused persons, with respect to 'hypothetical cases which can be foreseen as likely to arise commonly', will occur, if the benchmark in question, were set too high. Mr Coleman, fairly and correctly, in my view, conceded this possibility, when this was put to him by the Court.

[71] This is however precisely also the situation that arises in the present case for the various reasons and examples advanced by Mr Trengove and as also the Daniel and Peter cases illustrate.

[72] More particularly Mr Daniel was 21 years old. He was convicted of the theft of nine goats worth N$4450.00. He was a first offender without any previous convictions. He admitted that he had stolen the goats and explained that he had done so because, *"I am an orphan, both parents are deceased. I committed this offence to survive that is all".* He was sentenced to 20 years' imprisonment.

[73] Mr Peter's co-accused 3, 4 and 5 were young first offenders of 20, 21 and 25 years respectively. They were convicted of participation in the theft of a single cow. The court found that there were substantial and compelling circumstances not to impose the minimum sentence because of their relatively minor roles in the theft. It nonetheless sentenced each of them to 15 years imprisonment of which five years were conditionally suspended.

[74] Mr Peter was a 38 year old man. He was convicted of participating in the same theft of a single cow. He played a more active role than his co-accused. He was not the principal perpetrator. He had a previous conviction for stock theft committed 11 years earlier. The court held that there were no substantial and compelling circumstances and sentenced him to 30 years' imprisonment.

[75] Although the Peter and Daniel examples make the point I keep in mind that the constitutional validity of the two minimum sentences in question are the only issue before the court and that I am not called upon to determine the fate of theparticular applicants. The constitutional validity of the minimum sentences under attack is therefore not determined on the facts of the particular cases before the court, but on the basis of the hypothetical cases that can be foreseen as likely to arise

commonly. It is in this respect that regard is had to the examples referred to in paragraphs 31, 35 and 36 above. All these hypothetical examples show that the resultant sentences, because of the height of the bench mark set in the Stock Theft Act, would in themselves be grossly disproportionate to the severity of the crimes for which they would be meted out, and that they would be irrationally severe if compared to the sentences for other equally and more serious offences.[77] They would thus be rendered 'shocking' and 'disproportionate' in the constitutional sense because of the level to which the bench mark in the Stock Theft Act was raised by the amendment to section 14 brought about by Act 19 of 2004.

[76] It is for these reasons alone that the minimum sentences set by section 14(1)(a)(ii) and 14(1)(b) of the Stock Theft Act do not pass muster.

[77] There is however a further important consideration which underscores the constitutional invalidity of these sections. It has already been found in *Vries* that Parliament has deemed it fit to introduce minimum sentences 'in *order to attempt to counter the prevalence of stock theft and the effects thereof.'* These minimum sentences were subsequent to *Vries* dramatically increased to their current particularly high level. Deterrence therefore remains the cardinal feature of this minimum sentencing regime. Human dignity and the de-individuation of any sentence to such a degree that it loses the proportionality between the offence and the periodof imprisonment can, of course, not be sacrificed on the altar of deterrence in a constitutional dispensation, which has been held to embrace a 'broad and universalist human rights culture[78] and which subscribes to the inherent dignity of all members of the human family.[79]

[78] This was also recognised in *Dodo* were it was held that the concept of proportionality *"goes to the-heart of the inquiry as to whether punishment is cruel, inhuman or degrading"*[80] and were the court went on to elaborate as follows:

77 Such as Theft, fraud, corruption, assault to do grievous bodily harm, robbery, rape and murder for instance
78 *Government of the Republic of Namibia v Cultura* 2000 1994 (1) SA 407 (NmSc) at 412 C-D
79 See Preamble to the Namibian Constitution
80 At para 37

> *" ... To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence... , the offender is being used essentially as a means to another end and the offender's dignity is assailed. "*[81]

[79] This point is also made by Justice Sachs in *Mohunram v National Director of Public Prosecutions* [82] who formulated this principle as follows :

> *'Deterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals. To do otherwise would be to breach the constitutional principle of dignity.* [83]

[80] It follows therefore that Mr Trengove's argument to the effect that "the minimum sentences under attack in these applications are unconstitutional as the legislature has resorted to minimum sentences which are grossly disproportionate in that they unfairly and unjustly punish those who are caught and convicted, not because their crimes deserve the sentences meted out to them, but to deter others from committing the same crime and that the people who fall foul of the minimum sentences are thus used as instruments of deterrence in violation of their right to recognition of and respect for their innate human dignity and that they are therefore used as a means to an end and not as an end in themselves as the Constitution requires, is correct and must be upheld.

[81] The conclusion is inescapable that the minimum sentencing regime created by section 14 of the Stock Theft Act has simply set the levels of deterrence beyond what is fair and just to those caught up in it.

81 At para 38
82 2007 (4) SA 222 {CC)
83 At para 146

[82] For the aforegoing reasons both sections 14(1)(a)(ii) and (b) of the Stock Theft Act are found to be unconstitutional and invalid.

THE QUESTION OF RELIEF

[83] The parties were *ad idem* that the constitutional invalidity of both these sections would be cured by merely striking out the periods of the minimum sentences they prescribe while keeping intact their prescription of imprisonment without the option of a fine, as such approach would leave intact the underlying principle, that the perpetrators of stock theft should be incarcerated.

[84] I agree that this would be the correct approach as the essence of the sections would remain intact, and as "this approach would at the same time give recognition to the intention of Parliament while also recognising the ordinary citizen's innate right to dignity and the right not to be subjected to 'cruel and/or degrading punishment"[84]. That is not to say that in appropriate cases very lengthy periods of imprisonment may not be imposed. All the other sentiments and grounds as expressed in motivation of this apposite type of relief by Frank J in *Vries*[85] are also of direct application herein.

[85] As the logical consequence of only striking out the periods of the minimum sentences referred to

84 At 255H - 256A
85 At 255H - 256A

in sections 14(1)(a)(ii) and 14(1)(b), while leaving the cross reference to section 14(1)(a) and 14(1)(b) as contained in section 14(2) unqualified, would cause an obvious and irreconcileable discrepancy to the entire structure of section 14, it has become necessary to also effect, at the same time, a consequential

qualification of the affected provisions of section 14(2). This power is exercised in terms of Article 25(3) of the Constitution.

[86] In the result the following order is made:

a) the words *"for a period not less than twenty years"* are struck from section 14(1)(a)(ii) of the Stock Theft Act 12 of 1990, as amended;

b) the words *"for a period not less than thirty years"* are struck from section 14(1)(b) of the Stock Theft Act 12 of 1990, as amended; the reference to *"subsections (1)(a) and (b) "* in section 14(2) of the Stock Theft Act 12 of 1990, is consequentially read down to mean *"subsection (1)(a)(i)";*

c) the second respondent is ordered to pay both applicants costs of two instructed and one instructing counsel.

GEIER, AJ

I agree.

VAN NIEKERK, J

ON BEHALF OF THE APPLICANT:	MR. W. Trengove, sc Assisted by Mr N. Tjombe
INSTRUCTED BY:	Legal Assistance Centre
ON BEHALF OF FIRST & THIRD RESPONDENTS:	MR. N. N. Marcus Government Attorneys

ON BEHALF OF SECOND RESPONDENT:	MR. G.B. Coleman
INSTRUCTED BY:	Lorentz Angula Inc