REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN- 2017/00393

In the matter between:

JACO KENNEDY	**FIRST APPLICANT**
KEVAN TOWNSEND	**SECOND APPLICANT**

and

MINISTER OF SAFETY AND SECURITY	**1st RESPONDENT**
THE COMMISSIONER-GENERAL:	
NAMIBIAN CORRECTIONAL SERVICE	**2ND RESPONDENT**
THE OFFICER IN CHARGE:	
WINDHOEK CORRECTIONAL FACILITY	**3RD RESPONDENT**
INSPECTOR-GENERAL: NAMIBIAN POLICE	**4TH RESPONDENT**
ATTORNEY-GENERAL:	
OF THE REPUBLIC OF NAMIBIA	**5TH RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**6TH RESPONDENT**

Neutral citation: *Kennedy v Minister of Safety and Security* (HC-MD-CIV-MOT-GEN- 2017/00393) 2020] NAHCMD 291(16 July 2020)

Coram: PARKER AJ

Heard: 6 December 2019, 7 February 2020 & 10 June 2020

Delivered: **16 July 2020**

Flynote: Constitutional law – Fundamental rights – Discrimination – What constitutes – Court held, not every differentia based on the enumerated grounds in art 10 (2) of the Namibian Constitution constitutes discrimination – Only differentia that unfairly or unjustly discriminate against complainant will be unconstitutional – Court held further, if a law deals with members of a well-defined class it is not open to the charge of denial of equal protection on the ground that the law has no application to persons outside the class.

Summary Constitutional law – Fundamental rights – Discrimination – What constitutes – Respondents' correctional facility practising differential treatment between unconvicted awaiting trial inmates and convicted inmates – Court finding that although treatment involved disparity of treatment of persons, the differentia did not amount to discrimination within the meaning of art 10 (2) of the Namibian Constitution.

Flynote: Constitutional law – Fundamental rights – Dignity – Cruel, inhuman or degrading treatment – Within meaning of art 8 of the Namibian Constitution and art 10 (1) of the International Convention on Civil and Political Rights (ICCPR) – What constitutes – Court held, putting unconvicted trial awaiting persons in mechanical restraints like handcuffs constitutes degrading treatment – Court held further, the rights guaranteed by art 8 are absolute, and therefore, they cannot be subjected to the touchstone of reasonableness or necessity. *Namunjepo and Others v Commanding Officer, Windhoek Prison, and Another* 1999 NR 277 (SC) applied.

Summary: Constitutional law – Fundamental rights – Dignity – Cruel, inhuman or degrading treatment – Within meaning of art 8 of the Namibian Constitution and art 10 (1) of the International Convention on Civil and Political Rights (ICCPR) – Criminal trial awaiting applicants put in handcuffs when being transported to court and when inside courtroom – Court finding such treatment degrading in any circumstances and, therefore, violates applicants' rights under art 8 of the Constitution and art 10(10 of the ICCPR..

Flynote: Constitutional law – Legislation – Constitutionality of – Discretionary power of administrative official to act – Court held that the statutory discretion

granted by the Correctional Services Act 9 of 2012, s 103 is constitutional on the basis that it is guided or limited discretion – Administrative official could only act where the prescribed objectively determinable facts exist – Court held further that where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution the court must concern itself with only that provision; the court must not concern itself with what the public body in question did or did not do to implement that statutory provision.

Summary: Constitutional law – Legislation – Constitutionality of – Discretionary power of administrative official to act – court finding that the statutory discretion is limited and guided – Administrative official could only act if the prescribed objectively determinable facts provided in Act 9 of 2012, s 103 (1) exist – Court finding that the power of an officer in charge of a correctional facility to confine an inmate in a designated cell is not unconstitutional because the power is not wide on the basis that it is limited and guided by subsec 1 of s 103 – The only objectional aspect is placing the inmate in mechanical restraint.

Order

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1. The application is dismissed as respects:

(a) para 1: ‘Interim relief’;

(b) para 3: ‘Interim relief’;

(c) para 1: ‘Main application’;

(d) para 2: ‘Main application’;

(e) para 3: ‘Main application’;

(f) para 9: ‘Main application’; and

(g) para 10.2: ‘Main application’.

2. The application succeeds as respects the following paragraphs, and I order in the following terms:

(a) Para 4: Main application , to this extent:

The words ‘with or without mechanical restraint’ in s 103 (3) of the Correctional Services Act 9 of 2012 are declared to be

inconsistent with the Namibian Constitution and are therefore invalid, and are, accordingly, severed from the provisions.

(b) Para 5: Main application, to this extent:
Paragraph (t) of s 132 (1) of the Correctional Services Act 9 of 2012 is declared to be inconsistent with the Namibian Constitution and is therefore invalid, and is, accordingly, severed from s 132 (1).

(c) Para 6: Main application, to this extent:
The practice of restraining trial awaiting persons in handcuffs while being transported is declared to be inconsistent with the Namibian Constitution.

(d) Para 7: Main application:
The practice of placing handcuffs on trial awaiting persons inside the courtroom is declared to be inconsistent with the Namibian Constitution.

(e) Para 8: Main application, to this extent:
Respondents are directed to provide applicants with adequate facilities for the preparation and presentation of their defence.

(f) Para 10.1: Main application:
It is declared that applicants are aggrieved persons within the meaning of art 25 (2) of the Namibian Constitution.

(g) Para 3: Interim relief:
The practice of placing handcuffs on applicants while being transported is declared to be inconsistent with the Namibian Constitution.

3. There is no order as to costs.
4. The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

Introduction

[1] Before the court is nothing more than a straightforward challenge – on constitutional grounds – of the validity and lawfulness of certain named actions of some administrative officials of first, second and fourth respondents; certain physical conditions of the cells at the Windhoek Central Correctional Facility (WCCF) where the applicants are kept as criminal-trial awaiting persons, as well and the situation of their lives at the WCCF.

[2] This matter started its life as far back as 30 October 2017, and papers filed of record indicate that a long time ago, the court ordered a set down hearing date of 6 November 2017. No hearing took place. The case went through judicial case management, including case management conferences, status hearings, sanctions proceedings, as well as the filing of further process. To crown it all, after a good nine months, second applicant filed an amended notice of motion, dated 12 July 2018.

[3] Ueitele J was the first judge to accept allocation of the file. Ueitele J did not dispose of the dispute and the file was allocated to Geier J. Geier J recused himself from the case for one reason or another, which does not concern us. The matter was thereafter allocated to me. On 5 December 2019 the court ordered a set down hearing date of 6 December 2019. Upon the urging of the parties' legal representatives, the hearing of the matter was postponed to 11 and 12 February 2020. Mr Nekwaya, acting *amicus curiae* represents first applicant, Ms Katjipuka second applicant, and Mr Khupe first to sixth respondents. Lest I forget, I should thank Mr Nekwaya for his service as such. The court is always grateful for such service given ex gratia by legal practitioners.

[4] Counsel approached the court to vacate that set down hearing date on the reason that they needed more time to file their heads of argument. Their reason? Just this. The case is very complex as it involves the Namibian Constitution and international human rights instruments. Speaking for myself, as I stated at the beginning of this judgment, before the court is nothing more than a straightforward challenge on constitutional grounds of the validity and lawfulness of certain named actions of some administrative officials of first, second and fourth respondents; certain physical conditions of the cells at the Windhoek Central Correctional Facility (WCCF) where the applicants are kept as criminal-trial awaiting persons, the situation of their lives at the WCCF. The new set down date was then put at 9 April 2020. As fate would have it, the hearing could not take place on 9 April 2020 due to the precautionary measures announced by the Government to contain the spread of the Covid-19 pandemic, including the closing down of State and private sector activities and services, save essential and critical activities and services.

[5] I have undertaken a brief chequered history of this case in order to make these points. It would be wrong and unjustifiable for this court to revisit certain matters that the court has already dealt with, unless it is necessary and allowable to do so. Be that as it may, I note that all counsel filed comprehensive written submissions, and I am grateful to them for their commendable industry.

[6] First applicant, Mr Jaco Kennedy, and second applicant, Mr Kevan Townsend, are criminal-trial awaiting persons. They are held as such, as I have intimated previously, at the WCCF. On the papers, applicants claim what they call ‘Interim relief’ and ‘Main application’.

[7] From where I stand, I fail, with respect, to see the purpose and object of having two separate sets of relief, ‘Interim relief’ and ‘Main application’ in the manner formulated in the papers, seeing that what applicants have instituted is yet again nothing more than motion proceedings in terms of the rules of court. Applicants create the wrong and inexplicable impression that in motion proceedings, the word ‘relief’ and the word ‘application’ are synonymous. They are not. In civil matters, the generic word ‘relief’ denotes the remedy a party prays the court to grant in motion proceedings and action proceedings, and the word ‘application’ the procedure whereby the party has approached the court for remedy in motion proceedings. Of

course, on the same papers in a motion proceeding, that is, in one application proceeding, the applicant may pray for temporary relief on urgent basis under Part A of the application, pending the finalization of a hearing in due course of the main, that is, final, relief under Part B of the application. The procedure is followed most invariably in review applications. And the practice of dividing a notice of motion for judicial review into two parts serves a useful purpose. About the efficacy of the practice, Damaseb JP stated thus in *Kleynhans v Chairperson of the Council of the Municipality of Walvis Bay* 2011 (2) NR 437 (HC) para 56:

> 'It is a common practice in this court for a party who feels aggrieved by administrative decision-making and desires immediate relief to protect its 'immediate interest' while intending to have such decision-making reviewed and set aside to seek an urgent interdict *pendente lite*.'

[8] For the sake of clarity, I shall refer to this procedure as the '*Kleynhans* procedure'. It is worth noting that applicants have not approached the court by the use of the '*Kleynhans* procedure'. In my view, the dichotomy of the application into 'Interim relief' and 'Main application' is, with the greatest deference to applicants, inelegant and clumsy. It serves no purpose except to obfuscate the issues; and, *a fortiori*, it has intractable difficulty as I demonstrate.

[9] The orders prayed for in paras 1, 2, and 3 under 'Interim relief' are essentially on any pan of legal scales final orders, even if the formulation put forth is dressed in the garb of temporary relief. (See *Hendrik Christian t/a Hope Financial Services and Others v LorenzAngula Inc.* Case No. A244/2007, where the authorities on the difference between interlocutory orders and final orders are gathered.) Accordingly, I find that the subordinate clause 'pending the resolution of the main application' in each paragraph under 'Interim relief' does not make them temporary relief.

[10] We must not lose sight of the fact that, as I have mentioned previously, the proceeding that applicants have instituted is basically a constitutional challenge through and through, and they did not pray the court to determine the 'Interim relief' part on the basis of urgency following the *Kleynhans* procedure (see para 8 above). Moreover, the relief sought in para 1 under 'Interim relief' is substantially the same as the relief sought in para 3 under 'Main application'. By a parity of reasoning, the

relief sought in para 3 under 'Interim relief' is substantially the same as the relief sought in paras 6 and 7 under 'Main application'. If the court in due course were to refuse to grant the declaration sought in paras 3, 6 and 7 under 'Main application', it would be wrong and a total waste of time for the court to have granted – in the interim – paras 1 and 3 under 'Interim relief'. Indeed, it is worth noting emphatically that an action by a public authority cannot be lawful and valid in the interim and unlawful and invalid in the long run, and vice versa. Neither can a legislation be Constitution compliant in the interim and unconstitutional in the long run, and vice versa.

[11] In any case, if the court were to grant the so-called 'Interim relief' on the basis that there has been a prima facie infringement of applicants' rights, that would be wrong in law. It would be offensive of Namibia's constitutional imperative; that is, the imperative that onus of proof – ie conclusive proof – lies on the party alleging an infringement or threatened infringement of fundamental rights'. (*Premier Construction CC v Chairperson of the Tender Committed of the Namibia Power Corporation Board and Others* 2014 (4) NR 1002 (HC) para 13)

[12] The foregoing analysis impels me to the inevitable conclusion that it is proper and purposeful to deal only with the following paragraphs, namely, under 'Main application': paras 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and under 'Interim relief': para 2. A decision on these selected paragraphs is capable of disposing of the entire application; for, if, for example, as I have said previously, I decline to grant the declaration sought in paras 3, 6, and 7 under 'Main application', that decision should, as a matter of law and common sense, dispose of paras 1 and 3 under 'Interim relief'. I now proceed to consider the prayers in the aforementioned paragraphs, starting with an examination of the applicable principles and requirements.

Applicable principles and requirements

[13] The foundational point to underline at the threshold is what the court stated in *Disciplinary Committee for Legal Practitioners v Slysken Makando and The Law Society, Slysken Makando v Disciplinary Committee for Legal Practitioners and Others* Case No. A216/2008 (Judgment on 8 October 2011):

'[9] In considering the first respondent's constitutional challenge based on art 12(1) and

art 18, I keep in my mental spectacle the following trite principles of our law concerning (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution has been breached must prove such breach (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC)) (as Mr Khupe submitted). And before it can be held that an infringement has, indeed, taken place, it is necessary for the applicant 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 that definition (*S v Van der Berg* 1995 NR 23). Under item (2), the enquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn and the correct interpretation thereof to see whether the legislative provision – in the instant case, art 12 (1) and art 18 of the Namibia Constitution – has in truth been violated in relation to the applicant (*Jacob Alexander v Minister of Justice and Others* Case No. A 210/2007 (HC)'.

[14] In that regard, where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution, the court must concern itself with only that statutory provision; the court must not concern itself with what the public authority concerned did or did not do to implement that statutory provision. (See *Slysken Makando* para 13 above)

[15] Furthermore, as regards the constitutionality of a subsidiary legislation, eg rules, regulations and bye-laws, the onus lies on the maker of such impugned subsidiary legislation to persuade the court that the regulation, rule, or bye-law is reasonably justified in a democratic State. (*Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC).) But it is not enough for a person to approach the court and allege simply and in general terms – without more – that in relation to him or her the subsidiary legislation is not Constitution compliant. Such a person bears the burden of establishing in the founding affidavit to the satisfaction of the court as to which particular right and under which particular provision of the Constitution the delegated legislation in question is inconsistent with and in what respect he or she claims the delegated legislation is not Constitution compliant. (*Trustco Insurance Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2010 (2) NR 565 (HC) para 27, where the court there held a similar burden

lies on the applicant who challenges the validity of an administrative action under art 18 of the Constitution). The principle must apply with equal force to situations where the validity of a subordinate legislation is challenged because apart from all else, it tells the respondent what case it is called upon to meet.

[16] Furthermore, the principle is that the international human rights instruments to which Namibia is a State Party, eg the International Covenant on Civil and Political Rights (ICCPR), 'are of course subject to the (Namibian) Constitution and cannot change the situation'. (*Müller v President of the Republic of Namibia and Another* 1999 NR 191 (SC) at 206E-F, per Strydom CJ). For this reason, where the applicants' challenge is based on certain provisions of the Constitution as well as the ICCPR, I have considered the challenge on the basis of the Constitution only because if an action is unconstitutional, most invariably it will offend the comparable provision of the ICCPR, too. The converse is also true.

[17] I note that nearly all the orders the applicants pray for are declaratory orders. The power of the court to grant declaratory orders is found in s16 of the High Court Act 16 of 1990, and it provides that the court has the power –

> '(d) ... 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 any relief consequential upon the determination.'
> [My emphasis]

[18] Thus, s16 of Act 16 of 1990 contains the power by which the court may grant a declaratory order and the requirements which the applicant must satisfy in order to succeed. 'The important element in this section is that the power of the court is limited to a question concerning a right.' (*Government of the self-Governing Territory of Kwazulu v Mahlangu* 1994 (I) SA 626 (T) at 634B, per Eloff JP) The crucial element in s 16 of Act 16 of 1990 is that the exercise of the court's power is limited to the question concerning a right – existing, future or contingent – which the applicant claims.

[19] Additionally, it is trite that a declaration is a discretionary order that ought to be granted with care, caution and judicially, having regard to all the circumstances of

case at hand. It will not be granted, for instance, where the relief claimed would be unlawful or inequitable for the court to grant. See *Halsbury's Laws of England*, 3rd ed. Vol. 22, para 1611, p 749-750 (applied in *Amupanda v Swapo Party of Namibia* (A215/2015) (2016) NAHCMD 126 (22 April 2016) para 59).

[20] It is equally important to mention that submissions by counsel do not constitute evidence; neither are authorities and precedent capable of supplying evidence. *Mokomele v Katjiteo* (I 3148/2013) [2015] NAHCMD 153 (26 June 2015) In that regard, it is equally important to repeat the trite principle that in motion proceedings, the affidavits constitute both pleadings and the evidence (*Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (Z) SA 184 (SCA). Therefore an applicant stands or falls by his or her affidavits.

[21] On the founding papers it is apparent that first applicant makes common cause with second applicant in the latter's founding papers. For this reason, I shall pursue the enquiry in respect of both applicants, and conclusions and decisions I make in respect of second applicant apply *mutatis mutandis* to first applicant, and vice versa, unless indicated otherwise. The words 'applicant' and 'applicants' are, therefore, used interchangeably where the context allows.

[22] Keeping the foregoing requirements and principles and the explanation in para 21 above in my mind's eye, I now proceed to consider the orders sought in the paragraphs of the amended notice of motion mentioned in para 12 above.

Para 1. 'Main application': Definition of 'offender'

[23] Applicants contend that the statutory definition of 'offender' in s1 of the Correctional Services Act 9 of 2012 ('the Act') is offensive of art 12 (d) of the Constitution (there is no 12 (d)) of the Constitution): It should be art 12 (1) (d). Article 12 (1) (d) in material parts provides: 'All persons charged with an offence shall be presumed innocent until proven guilty according to law'. A similar provision is found in art 14 (2) of the ICCPR. The applicants' reason for so contending is that the statutory definition of 'offender' in s 1 of the Act includes in its meaning 'trial awaiting persons', although, they argue, 'trial awaiting persons' are innocent until a court finds them guilty of the crime they have been charged with as provided in the

aforementioned provisions of the Constitution and the ICCPR. Based on this contention of theirs, applicants pray the court to declare 'the definition of offender, as provided in the Act, in so far as it included, (in their view), awaiting trial awaiting persons, as inconsistent with articles 8, 10 and 12 (1) (d) of the Namibian Constitution and article 9(3), 10(1) and 10(2) (a), as well as article 12(2) of the ICCPR'.

[24] The Act defines (in s 1) 'offender' thus:

> '"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 Services or under any law;…'

[25] Thus, as far as the Act is concerned, 'offender' means 'inmate'. And the Act defines 'inmate' in the following terms:

> '"inmate" means any person, whether convicted or not, who is lawfully detained in a correctional facility; …'

[26] An important canon of interpretation of a legal instrument, eg an Act of Parliament or a Constitution, is that a provision of the Constitution or the Act 'must be interpreted in context with the other provisions.' (*Müller v President of the Republic of* Namibia 1999 NR 190 (SC), per Strydom CJ, at 205 F-G.)

[27] Reading the meaning of 'offender' and the meaning of 'inmate' in s 1 of the Act intertextually and in context (see *Müller*, loc cit.), as I should, I conclude that in terms of the Act, an offender is any 'inmate' whether he or she is convicted or not. It need hardly saying 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' (see *International Underwater Sampling Ltd and Another v MEP Systems* (Pty) Ltd 2010 (2) NR 468 (HC) para 7).

[28] Accordingly, it is with firm confidence that 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'. The irrefragable result is this. I incline to conclude that 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, which, as I have held previously, is, upon authority, 'subject to the Constitution and cannot change the situation'. (*Müller v President of the Republic of Namibia and Another* 1999 NR 191 (SC) at 206E-F) With respect, Ms Katjipuka misreads the Act on the definition of offender. Counsel overlooks the canon of construction mentioned in para 26 and 27 above. With the greatest deference to Mr Nekwaya, counsel does not fare any better in his interpretation of 'offender'.

[29] It follows inevitably that the applicants' 'right to be presumed innocent', claimed by applicants, has not been violated. The formulation of the statutory definition of 'offender' is alive to that presumption. The *ipsissima verba* of the provision vindicate this conclusion.

[30] Based on the foregoing, the relief sought in para 1 under 'Main application' is accordingly refused. I now proceed to consider para 2 under 'Main application'.

Para 2. 'Main application': 'Adverse and differential treatment of awaiting-trial-persons vis-à-vis convicted persons'

[31] Applicants pray the court 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 articles 8 and 12 of the Namibia Constitution, as well as article 10 of the ICCPR'.

[32] 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 based on, according to applicants, 'social status inconsistent with arts 8 and 12 of the Namibia Constitution as well as art 10 of the ICCPR'. As I have said previously, upon the authority of *Müller* the provision in the Constitution that 'guarantees non-discrimination is art 10 (2)', not arts 8 and 12. The title of art 10 says so plainly and unambiguously; and art 10 says what it means.

Therefore, on this ground alone, the relief sought under the present paragraph stands to be rejected, on the basis that 'before it can be held that an infringement has, indeed taken place, it is necessary for the applicant 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 that definition' (see para 13 above). In any event, the relief stands to be rejected on other grounds.

[33] In our law the leading case on the proposition of the law on the kind of differentiation of treatment meted out to persons that would amount to discrimination and, therefore, unconstitutional in terms of art 10 (2) of the Constitution is *Müller v President of the Republic of Namibia and Another*. The treatment of the constitutional law on non-discrimination by *Müller* is, in my view, nonpareil. *Müller* should, therefore, be the beacon light on the judicial lighthouse that should assist us as we navigate towards the determination of the issue under this head.

[34] For the avoidance of doubt, it must be reiterated that the provision in the Constitution that 'guarantees non-discrimination' is art 10(2); of course, read with subart (1) of art 10) (see *Müller* at 200G). Thus, '[O]nce it is determined that a differentiation amounts to discrimination based on one of these grounds (ie the grounds that art 10 (2) provides), a finding of unconstitutionality must follow' (*Müller* at 200G-I). It is irrefragable, therefore, that not every differentiation based on the enumerated grounds will be unconstitutional but 'only those which unfairly or unjustly discriminate against a complainant on the lines set out above'. (*Müller* at 204E) (ie 'the Strydom steps').

[35] The Strydom steps are set out in the following terms in *Müller* at 201A-D):

'The steps to be taken in regard to this sub-article (ie subart (2) of art 10) are to determine -

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

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

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

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

[36] The gravamen of applicant's challenge, as so powerfully articulated by counsel on the basis of the applicants' affidavit, is that as a result of the statutory definition of 'offender' in s1 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.

[37] I hold that the foundations on which applicants build the constitutional challenge under the present paragraph under 'Main application' crumbles under the sheer weight of the foregoing analysis and conclusions thereanent concerning the true meaning of 'offender' as defined in s1 of the Act (see para 23-28 above); and, *a priori*, the whole edifice of the aforementioned constitutional challenge must fall and fail; and it falls and fails. That being the case, applicants challenge under this head has no legal basis, and so, it must be rejected, and is rejected.

[38] Additionally, the challenge must be rejected for the following reasons. The right to freedom from discrimination does not prohibit every differentiation of treatment in the enjoyment of that right. Strydom CJ put it succinctly in *Müller v President of the Republic of Namibia and Another* at 204E in this way:

> 'It must therefore be accepted that not every differentiation based on the enumerated grounds will be unconstitutional but only those which unfairly or unjustly discriminate against a complainant….'

[39] The proper approach a count may take in order to determine an incidence of discrimination that is outlawed by the non-discrimination provision of the Constitution and, therefore, unconstitutional is that enunciated by the Supreme Court in *Muller*. See para 33 above.

[40] On the papers, I accept that the Act and the regulations made thereunder differentiate between convicted inmates and awaiting trial (ie unconvicted) inmates and mete out different treatment based on such differentiation. I do not see anything unconstitutional about it. Indeed, art 10(2) (a) of the ICCPR enjoins the separation of unconvicted persons and convicted persons and 'separate treatment appropriate to

their status as unconvicted persons'. The ICCPR does not – neither could it do so without attracting the charge of arbitrariness and unreasonableness – prescribe in specifies to States Parties to the ICCPR the kind of treatment that should be meted out to unconvicted persons.

[41] If a law (including a regulation, as is the case in the instant proceedings) deals with members of a well-defined class (in the instant matter, unconvicted inmates) 'it is not open to the charge of denial of equal protection on the ground that the law has no application to other persons outside the class' (in the instant matter, convicted intimates). (H.M. Seervai, *Constitutional Law of India*, 4th ed (1999) at 455, relying on *Bombay v F.N. Balsara* (1951) S.C.R. 682 at 709). Lest I forget, Seervai was commenting on arts 14 and 15 of the Indian Constitution whose provisions are *in pari materia* with the provisions of art 10 (1) and (2) of the Namibian Constitution. Consequently, I am not persuaded in the least that applicants have placed before the court cogent and satisfactory evidence that establishes that the differentiation between convicted and unconvicted inmates at the WCCF is unfair and unjust and, therefore, amounting to discrimination within the meaning of art 10 (2) of the Constitution.

[42] In sum and going by the Strydom steps (see para 33 above), I make the following crucial findings and arrive at the conclusions thereanent. There exists differentiation between unconvicted inmates and convicted inmates (step (i) of the Strydom steps). The differentiation is based on one of the enumerated grounds (ie social status) in subart (2) of art 10 of the Constitution (step (ii) of the Strydom steps). But the differentiation, as I have found previously, has not been shown to be unfair or unjust; and so, it does not amount to discrimination against applicants (step (iii) of the Strydom steps). That being the case, step (iv) of the Strydom steps does not arise.

[43] Accordingly, I come to the conclusion that, although involving disparity of treatment of persons, the differentiation of treatment of unconvicted awaiting trial inmates and convicted inmates did not discriminate against applicants, who are unconvicted awaiting trial inmates. The latter are outside the well-defined class of the former (see H.M. Seervai, *Constitutional Law of India*, loc cit).

[44] Based on the foregoing reasons under the present head, I decline to exercise my discretion in favour of granting the declaration sought in para 2 under 'Main application'. The applicant has not established a right within the meaning of s16 of Act 16 of 1990 which the court should protect by declaration. It will be unlawful and inequitable for the court to grant the relief. (See *Amupanda v Swapo Party of Namibia*, loc cit.) In the result, the relief in para 2 under 'Main application' is refused. 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 to discrimination.

Para 3. 'Main application': Denial of contact visits to applicants

[45] In this paragraph, applicants pray for a declaration that 'the denial of contact visits to applicants, as trial awaiting persons are inconsistent with arts 8 and 12 of the Namibian Constitution, as well as article 10 (1) and 14 (2) of the ICCPR'.

[46] Subarticle (1) of art 8 of the Constitution guarantees one basic human right; para (a) of subart (2) of art 8 one basic human right; and para (b) of subart (2) of art 8 four basic human rights. Thus, in total, art 8 guarantees to persons six distinct and disparate basic human rights. And art 12 guarantees nine distinct and disparate basic human rights. Thus, between art 8 and art 12 there are a total of 15 basic human rights guaranteed to persons by the Constitution, albeit at times the basic human rights may not be mutually exclusive. Nevertheless, the fact remains that each basic human right in the Constitution, and, indeed, in the ICCPR and other international human rights instruments has its own jurisprudential content. Applicants' papers are not clear as to which of the 15 basic human rights applicants allege the denial to them of 'contact visits', because they are unconvicted inmates, is inconsistent with. The court is at a loss as to what basic human right or rights under art 8 and art 12 applicants have come to court for the court to protect by declaration.

[47] In that regard, it is important to note that it is never the burden of the court – particularly where an applicant is legally represented – to trawl through all the 15 basic human rights that arts 8 and 12 guarantee between them to see which one or which ones applicants have approached the court to vindicate under the present

paragraph (ie Para 3). As I have said more than once, 'before it can be held that an infringement has, indeed, taken place, it is necessary for the applicant 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 that definition'. (see para 13 above.)

[48] It is not just enough for the applicants to approach the court and allege simply in general terms – without more – that their rights guaranteed to them by art 8 and art 15 of the Constitution have been infringed. The applicants bear the burden of establishing to the satisfaction of the court as to what particular basic human right or rights under art 8 and art 15 have, according to second applicants, been violated in relation to them, and in what manner that right or those rights have been violated. Is the denial of 'contact visits' to applicants inconsistent with each and every one of the 15 aforementioned basic human rights, as applicants appear to contend in the founding papers? If that is the case, the founding papers do not say so. This is bad for applicants. It cannot take their case any further.

[49] I find that applicants have failed to allege with satisfactory and reasonable particularity in their founding affidavit what particular basic human right or rights under art 8 and art 12 have been allegedly violated, and in what manner. The result is that they are out of court. The relief in para 3 under 'Main application' is, accordingly, refused on this ground alone.

[50] The relief under this head is refused on other grounds. On second applicant's own account in the founding affidavit, I note that the WCCF's policy rule on 'contact visits' is not an unbending and unblinking rule. Second applicant's founding affidavit says so, albeit not in so many words. As I read from second applicant's papers, I form the view that the relevant authorities have not closed the door totally to 'contact visits' to second applicant. The authorities exercise discretion on case by case basis whether to allow 'contact visits' to unconvicted inmates. Indeed, second applicant has taken advantage of the largesse and made applications therefor. And, if since April 2016 second applicant's applications to the relevant authorities to have 'contact visits' have been repeatedly refused, as Ms Katjipuka submitted, without reason, this court is not told why second applicant did not challenge the validity of the authorities' decision by having it set aside by a competent court. For our present purposes, I

should say, there is not enough on the papers in the instant proceedings that could enable the court to review and set aside the authorities' decision – a decision which, as far as this court is concerned, is valid and enforceable until it is set aside by a competent court in appropriate proceedings in terms of the rules of court (see *Unfindell t/a Aloe Hunting Safaris v Government of the Republic of Namibia and Others* 2009(2) NR 670 (HC); and *Minister of Finance v Merlus Seafood Processors (Pty) Ltd* 2016 (4) NR 1042 (SC)).

[51] Of course, second applicant could challenge the validity of the authorities' decision by declaration. But the founding affidavit does not contain necessary averments to sustain a challenge by declaration of the authorities' decision made, according to applicants, without reason; and, moreover, it does not lay the basis for such a case. (See *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC).) Furthermore, second applicant has not dragged respondents to court by the appropriate rules of court to challenge the validity of an administrative action of administrative bodies and officials (see *Inspector General of Namibia Police and Another v Dausab-Tjiueza* 2015 (3) NR 720 (HC) para 19). It follows irrefragably and inevitably that the WCCF authorities' decision remains valid and enforceable (see *Unfindell t/a Aloe Hunting Safaris v Government of the Republic of Namibia and Others)*. Second applicant has not established a right within the meaning of s16 of Act 16 of 1990 which this court could protect by declaration.

[52] First applicant on the other side does not tell the court if he is in a similar situation as second applicant. If he is, then the foregoing conclusion applies to him equally. If he is not, I shall say this. The policy rule on 'contact visits', as I have said previously, is not an unbending and unblinking rule. Therefore, the court is not prepared to pull the carpet under the feet of the public authority, to which the Parliament in its wisdom has given the power to administer the Act, and then act in place of the public authority. The court has not got the resources to determine whether in the particular situation of first applicant, it is fair and reasonable to make an order granting contact visits to first applicant.

[53] Based on these reasons, I reject applicants' relief in para 3 under 'Main application'. And recalling what I said in para 12 above, I state that this conclusion

applies with equal force to para 1 under ‘Interim relief’. I now proceed to consider para 4 under ‘Main application’.

Para 4. ‘Main application’: Declaring s103 of Act 9 of 2012 inconsistent with art 7 and art 11 of the Constitution, as well as art 9 (1) and (4) of the ICCPR

[54] In her submission, Ms Katjipuka attacks s103 on a ground different from Mr Nekwaya’s. For her, s103 offends art 7 of the Constitution which provides that no person shall be deprived of personal liberty except according to procedures established by law, and art 11 which provides that no person shall be subjected to arbitrary detention. Mr Nekwaya, on the other hand, attacks s103 primarily on the ground that that provision grants unfettered discretion to the responsible administrative official (ie the officer in charge at WCCF). According to Mr Nekwaya, these ‘powers are simply too wide’. Counsel concludes, ‘section 103 simply does not meet the constitutional muster in this respect’. I proceed to consider Ms Katjipuka’s submission first.

[55] In considering submissions by counsel, I keep in my mental spectacle that in motion proceedings, the affidavits constitute both pleadings and evidence. Submission by counsel does not constitute evidence; and authorities and precedent are not capable of supplying evidence (see para 20 above).

[56] Act 9 of 2012 provides:

> ‘**103. Confinement and restraint of offender**
>
> (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.'

[57] Second applicant contends that s103 of the Act violates his rights as entrenched under arts 7 and 11 of the Constitution and arts 9 (1) and (4) of the ICCPR. In the founding affidavit, second applicant describes himself as an adult male … and currently incarcerated in the Windhoek Central Correctional Facility as a trial awaiting person.

[58] It is important to note that nowhere in the founding affidavit covering 26 pages of A4 foolscap sheets do applicants allege that they are detained at the WCCF not 'according to procedures established by law' (see art 7 of the Constitution) or that their arrest and detention offend any provision of art 11 of the Constitution, or that their arrest and detention are offensive of art 9 (1) and (4) of the ICCPR. Furthermore, nowhere in the founding affidavit does second applicant allege that after his arrest and detention he has been denied the opportunity to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is unlawful in terms of art 9 (4) of the ICCPR. All these apply equally to first applicant; and I shall return to it in due course.

[59] But the matter does not end there. Ms Katjipuka submits as the Supreme Court, held, that arbitrariness is not to be equated with 'against the law', but must be interpreted more badly to include elements of 'inappropriateness, injustice and lack of predictability' (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC) para 86.) Thus, the means chosen must pass a proportionality test. In that regard, the Supreme Court in Alexander, para 93, held that the means chosen must be rationally connected to the objective and not be arbitrary, unfair or based on irrational

considerations; or impair the right as little as possible, and be such that their effects on rights are proportional to the objective. I shall call them the 'Alexander requirements'.

[60] Thus, the next level of the enquiry is to consider the provisions of s103 against the testing agent of the Alexander requirements. And in doing that, I must keep it firmly in my mental spectacle the principle I mentioned previously, namely, that where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution, the court must concern itself with only that statutory provision. The court must not concern itself with what the public authority in question did or did not do to implement the said statutory provision (see paras 13 and 14 above).

[61] The overarching chapeu in subsec (1) of s103 and the sub-chapeu in para (a) of subsec (1), together with subparas (b) and (c) of subsec (1), clearly lay out the appropriateness, justice and presence of predictability of the provisions of s 103. Cumulatively, they underscore the rationality of the provisions of s 103. In my view, the provisions of s103, read intertextually, as they should, demonstrate the manner in which the means chosen are rationally connected to the objective sought to be achieved as provided in the section. I find further that they are not based on irrational consideration; and so the provisions are not unfair, unjust and arbitrary. Looking at the entire provisions, I find that the adverse effects on the applicants' rights are proportional to the objective sought to be achieved. They are not offensive of the Alexander requirements. The only fly in the ointment is the provision that 'mechanical restraint' may be ordered by second respondent. In my view this provision containing the phrase 'with or without mechanic restraint' offends a requirement of the Alexander requirements, because the impairment of the rights of applicants in that regard is not proportional to the objective. See, in this regard, the enquiry in para 63 below regarding handcuffs.

[62] Based on these reasons, I conclude that s 103 (1) and (2) are Constitution compliant as regards the provision of confinement, but subsec (3) thereof is not, inasmuchas it provides for 'mechanical restraint'.

[63] Taking a cue from the Supreme Court in *Medical Association v Minister of Health and Social Service*s 2017 (2) NR 544 para 102, I think it is reasonable and permissible for this court to sever the phrase 'with or without mechanical restraint' from subsec (3) of s 103. What remains is workable and consistent with both the Constitution and the constitutionally legitimate objectives of the legislation. (*Medical Association*, para 103)

[64] I now turn to the challenge mounted by first applicant under the same head. The pith and marrow of Mr Nekwaya's submission is that s103 grants unfettered discretionary power to the responsible administrative official, ie the officer in charge. As authority, Mr Nekwaya relies on *Medical Association of Namibia and Another v Minster of Health and Social Services and Others* 2017 (2) NR 544 (SC), which in turn applied the South African Constitutional Court's decision in *Janse van Rensburg No and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC). In *Janse van Rensburg NO*, para 25, the South African Constitutional Court emphasized that in order to 'protect and fulfil the rights entrenched in the Bill of Rights…, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised'.

[65] The Supreme Court relied also on *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837; [2000] ZACC 8) para 47, where the Constitutional Court held that:

> '[I]f broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary power will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.'

[66] I should say, for my part, the principles in the two South African cases are good law, apart from the fact that the *Medical Association of Namibia and Another* binds the court. But these cases cannot assist first applicant, as I demonstrate, considering the words in the formulation of s 103. In our law, discretion may be wide, in the sense that it is full and not limited; or it may be limited, in the sense that its

exercise is guided. Thus, we have full, wide, unlimited, or unfettered discretion in contradistinction to limited, guided, or fettered discretion (see Ronald Dworkin, *Taking Rights Seriously* (2005) at 32). Provisions containing 'express constraints' (see *Dawood and Another*, para 65 above) are enact limited, guided or fettered discretion.

[67] I find that s 103 of Act 9 of 2012 grants guided or limited or fettered discretion in that s 103 provides 'express constraints' (*Dawood and Another* loc cit) or ' criteria guiding the exercise of a statutory discretion ' (*Janse van Rensburg NO and Another*). Professor Marius Wiechers, in his above par work *Administrative Law* (Translated by Gretchen Carpenter (1985)), calls such 'express constraints' or 'criteria guiding the exercise of a statutory discretion' 'prescribed objectively determinable facts' (see *Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* 2015 (1) NR 220 |9HO) para 11).

[68] The conclusion is, therefore, inevitable and compelling that the discretion provided in s 103 of Act 9 of 2012 is not unfettered discretion. Mr Nekwaya submits that it is unfettered discretion. Counsel is wrong. The provisions of s 103 provide limited, fettered, or guided discretion, as I have shown previously. Accordingly, I hold that the discretionary power provided by s 103 of Act 9 of 2012 is Constitution compliant. Consequently, the challenge by first applicant in that regard fails; and it is rejected.

[69] I recall what I said regarding the phrase 'with or without mechanical restraint' when I considered second applicant's constitutional challenge respecting s 103 of Act 9 of 2012. I said then that the placing of 'mechanical restraint' on second applicant is offensive of the Constitution. The same applies to first applicant's challenge regarding the discretionary power that s 103 grants.

[70] Based on these reasons, as respects second applicant's challenge, under the present head, I hold that the provisions of s 103 of Act 9 of 2012 are Constitution compliant; except that the phrase 'with or without mechanical restraint' cannot pass constitutional muster. Additionally, as respects the ground of challenge mounted by first applicant on the basis that the s 103 grants unfettered discretion to the public authority, namely, the officer in charge, based on the reason I have given previously,

I conclude that the discretion granted is not unconstitutional. Nevertheless, the power cannot include the power to order the restraint of persons 'with or without mechanical restraint'. Consequently, the phrase must be severed from the provisions of subsec (3) of s 103. On the court's power to sever statutory provisions from legislation, see para 63 above.

Para 5. 'Main application': Declaration that Regulation 257 (which provides for the segregation of prisoners) of the Namibian Correctional Service Regulations published in Government Notice 331 of 2013 is ultra vires the Correctional Facilities Act, as well as inconsistent with articles 7 and 11 of the Namibian constitution and articles 9(1) and (4) of the ICCPR

[71] In a constitutional challenge, it is not enough for the applicant for relief to sate in general terms that an Act or a subordinate legislation is inconsistent with so-and-so article of the Constitution and, as is in the instant proceedings, with so-and-so provision of an international human rights instrument to which Namibia is a State Party. The applicant must in his or her founding affidavit explain adequately to the satisfaction of the court in what manner applicant claims the Act or subordinate legislation is inconsistent with the particular constitutional provision or the provision of the particular international human rights instrument.

[72] In the instant proceedings, I do not see in the founding affidavit the manner in which applicants claim reg 257 (GN 331 of 2013) is inconsistent with art 7 and art 11 of the Constitution and art 9 (1) and (4) of the ICCPR. And, it must be remembered, the constitutional provisions and the ICCPR provisions do not outlaw segregation of inmates – convicted or unconvicted. It follows inevitably that the challenge based on those constitutional provisions and the ICCPR provisions is refused.

[73] But that is not the end of the matter. Applicants have a second string to their bow. Applicants allege that the said reg 257 is ultra vires the Act. Section 132 empowers the Minister to make regulations for the purpose of attaining specified objects set out in s1 (a)-(ae), and 'generally any other matter which is required by this Act to be prescribed or which the Minister considers necessary or expedient to prescribe in order to achieve the objects of this Act' (para (af) of subsec (1) of s132). The Minister exercises discretion; and in the instant proceeding, it is clear to me that

it is the Minister's opinion that it would achieve the objects of the Act to make regulations to segregate inmates when any of the conduct and behaviour mentioned in reg 257 (1) is detected.

[74] Ms Katjipuka agrees that s 132 empowers the Minister ' to make regulations pertaining to a variety of matters covered by the Act' , but, counsel submits, the power 'does not include an express power to make regulations of the segregation of offenders outside that provided (for) in section 87, 89 or 103'. Counsel's argument, with respect, has no merit. First, in our statute law, it is commonplace for an Act to grant a named executive authority or other authority the power to make regulations or suchlike subordinate legislation to attain certain named objects and also an omnibus provision which empowers the authority to make regulations to attain the objects of the Act generally. In the instant matter, I note that the discretion granted is limited, fettered, or guided. (See paras 65-68 above.)

[75] In that regard, see for example, s 34(1) of the Public Service Act 13 of 1999, which empowers the Prime Minister to make regulations relating to the matters adumbrated in paras (a) to (j); and, furthermore, the Prime Minister is empowered to make regulations –

' (k) Generally, any matter in respect of which the Prime Minister, on the recommendation of the Commission, considers it necessary or expedient to make regulations in order to achieve the objects of this Act.'

[76] Similarly, in terms of s 94 (1) of 23 of 1992, a local authority council may make regulations in relation to matters mentioned n paras (a) to (ar) –

'… and in general, in relation to any matter which the local authority council may consider necessary or expedient to prescribe or regulate in order to attain or further the objects of this Act'.

[77] In the instant matter, s 132 of Act 9 of 2012 is not subjected to ss 87, 89 or 103, and so, I fail to see the legal basis on which Ms Katjipuka argues that the Minister's power does not include an express power to make regulations for the segregation of offenders outside that provided (for) in section 87, 89 or 103'. With the greatest deference to Ms Katjipuka, counsel's argument is not legally correct. It is not

founded on law; and so, it is rejected. In statute law, s 132 is said to contain an omnibus provision, expressed in general terms. Nevertheless, in virtue of what I have said about the unconstitutionality of placing of persons in mechanical restraint, eg handcuffs, I hold that para (t) of subsec (1) of s 132 is offensive of the Constitution, and so, para (t) should be severed from the provisions of s 132 (1).

[78] Applicants have failed to establish to the satisfaction of the court why in their view the segregation of inmates is outwit the Minister's discretionary power under the Act and why applicants claim the segregation of inmates does not advance the object of the Act. And I have said previously that neither the Constitution nor the ICCPR outlaws segregation of inmates – convicted or unconvicted.

[79] Based on these reasons, I conclude that applicants have not made out a case for the entire relief sought in para 5 under 'Main application'. Of course they have made a case for relief regarding the unconstitutionality of the provisions regarding mechanical restraints. Accordingly, I decline to exercise my discretion in favour of granting the declaration sought in its entirety. Applicants have not established a right in all respects within the meaning of s16 of Act 16 of 1990, which the court should protect by declaration. It will be inequitable to grant the entire relief (see para 18 above). Consequently, the relief in para 5: 'Main application' is partly refused. I proceed to consider paras 6 and 7: 'Main application', and thereafter para 2: 'Interim relief'.

Para 6. 'Main application': Declaration that the practice of restraining trial awaiting persons in handcuffs at their back during transport at the back of police/prison vans with no safety features or seats is inconsistent with article 8(2)(b) of the Namibian Constitution as well as articles 7 and 10 (1) of the ICCPR

Para 7. 'Main application': Declaration that handcuffing of trial awaiting persons (or any persons) inside the court room in violation of article 8 of the Namibian Constitution and in violation of the Commissioner's directive 04/2005 dated 11 April 2005

[80] Applicants complain that whenever they were transported to court for proceedings, their hands were 'cuffed behind' their backs, and the cuffs were not

removed until their case was called. There is no contrary evidence placed before the court by the respondents. Therefore, I have no good reason not to accept applicants' evidence on handcuffs.

[81] I hold that the conduct of placing unconvicted trial awaiting persons in chains and other mechanical restraints like handcuffs is unconstitutional on the basis that it is, 'under any circumstances', offensive of art 8 (2) of the Constitution. I find the treatment degrading because it is capable of arousing in applicants feelings of fear, anguish and inferiority capable of humiliating applicants and outraging the community in their sense of dignity. (See *Ireland v United Kingdom* (Judgment 18 January 1978) (No. 25) 2 E. H. R. R. 25.) I should have said so, if I had not looked at the authorities, but when I look at *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC), I feel no doubt that I should in the exercise of my discretion grant the relief of declaration sought in paras 6 and 7 under 'Main application'. This decision applies equally to para 3 under 'Interim relief'.

[82] Indeed, I had a great sense of déjàvu when I looked at *Namunjepo and Others*. One of the respondents there is the third respondent in the instant proceedings (wearing a new official title, though). The conduct of putting unconvicted persons in handcuffs in the manner and at the locations described by second applicant in the founding papers or in any suchlike manner or at any suchlike location is unconstitutional. The practice, under any circumstances, serves no purpose except to degrade and humiliate (see *Namunjepo and Others*, per Strydom CJ on chains and iron-leg, at 286 G-H).

[83] And, what is more; the rights guaranteed by art 8 are absolute; and so, they cannot be subjected to the touchstone of reasonableness or necessity. Indeed, any decision contrary to the law laid down by the Supreme Court in *Namunjepo and Others* is *per incuriam* and, therefore, not good law. It must be said; I did not think for a moment that this practice would survive *Namunjepo and Others*, even if this case concerned chains and leg irons. I now proceed to consider para 2: 'Interim relief'.

<u>Para 2: 'Interim relief'': To direct respondents to transport the applicants to and from court (including for their criminal trials) in vehicles containing safety features, such as seats and seatbelts, pending resolution of the main application</u>

[84] The basis for asking for this relief, according to applicants, is art 9 of the ICCPR because, according to them, the treatment violates their right to the security of person. But art 9 of the ICCPR deals with the right to liberty and security of person; and more specifically, it is a right against arbitrary arrest and detention and procedural remedies and compensatory remedies for any violation of that right. The issue at hand cannot be resolved by art 9 of the ICCPR. It should be remembered that it is rudimentary in our rule of practice that for proper pleading it is essential to know the substantive law on which the pleading is based. (I. Isaacs, *Beck's Theory and Principles of Pleading in Civil Action*, 5th ed (1982) para 209) Applicants falter on this count.

[85] With the greatest deference to applicants, I shall not waste my time to consider this relief any further. Applicants must fall by their founding papers. And they fall. They rely on provisions which are not applicable to the issue which they seek to raise.

[86] The relief in para 2 above 'Interim relief' is, accordingly, refused. I now proceed to consider para 8 under 'Main application'.

Para 8. 'Main application': Declaration that the failure or refusal of the prison authorities to afford applicants adequate facilities for the preparation and presentation of their defence inconsistent with article 12 (1)(e) of the Namibian constitution as well as article 14 (2) of the ICCPR

[87] Applicants contend that while on paper s72 of the Act purports to implement art 12 (1)(e) of the Constitution, in practice, the facilities available for applicants to consult sufficiently in private with their legal representatives are not adequate within the meaning of art 12(1)(e) of the Constitution and art 14(2) of the ICCPR. In the founding affidavit, it is averred that there is a space, that is, 'the programme area' where convicted persons receive their 'contact visits' that would be adequate for them to have consultation with their legal representatives.

[88] I note that none of the two persons, who filed answering affidavits, Commissioner-General Hamunyela and Senior Correctional Officer Hamukwaya, did

answer adequately the allegations raised by applicants in the founding affidavit. The lone tangential reference to ‘legal practitioners’ is made by Senior Correctional Officer Hamukwaya to the effect that second applicant (and others) ‘were also regularly visited by their legal practitioners’. He does not deal directly with second applicant’s specific allegations. The result is that I have no good reason to reject second applicant’s evidence on that item.

[89] Based on the pleadings which are unchallenged and these reasons, I am inclined to grant a declaration that the facilities granted to applicants for the preparation and presentation of their defence are not adequate in terms of art 12 (1) (e) of the Namibian Constitution. However, I am not prepared to prescribe to the respondents which specific place in the WCCF should be made available to applicants for ‘adequate’ consultation. That would be inequitable and unreasonable to do. Pursuant to art 25 (3), what the court is prepared to do is to order respondents to provide applicants with adequate time and facilities, including being able to consult adequately reasonably with their legal representatives, for preparation and presentation of their defence.

[90] Different considerations would apply, of course, if applicants had alleged and proved that the authorities turned away their legal representatives, without any reason, from entering the WCCF with the purpose of consulting their clients. I pass to consider para 9: ‘Main application’.

Para 9. ‘Main application’: Declaration that the food provided to inmates without special dietary needs at the Windhoek Correctional Facility in accordance with the meal plan, to be inconsistent with the requirements of a diet of adequate nutritional value, consisting of a reasonable variety, provided for in the legislative framework

[91] Applicants’ averments, as I understand them, are essentially that the meals they are fed on at the WCCF have got ‘inadequate nutrition’ based, according to them, on the following: (a) the menu does not indicate what meal plan it is ‘benchmarked against’ in terms of average calorie intake per day, the balance of protein versus carbohydrates contained in the daily rations or how it compares to the daily recommended fruit and vegetable intake. (b) The menu does not meet the standard recommended by WHO. (c) There is no reasonable variety of the diet. (d)

‘The only inmates whose diet approximates a healthy diet are those suffering from diabetes and aids.’ Ms Katjipuka’s submission takes in refrain these averments. I shall now consider each plank of the averments (ie subparas (a) to (d)).

Subparas (a)

[92] Applicants do not tell the court why they claim they have a right to such ‘benchmark’; and what is more, no scientific evidence was placed before the court to establish applicants’ averments. Accordingly, I do not find that applicants have established a right within the meaning of s16 of Act 16 of 1990, which the court may protect by declaration.

Subparas (b)

[93] The WHO standards, which applicants are so much enamoured with, are nothing more than recommendations. They are not provisions of some treaty binding on Namibia. Applicants cannot, therefore, stand on the WHO recommendations and claim a right. They, simply, have no right within the meaning of s16 of Act 16 of 1990, which the court may protect by declaration.

Subparas (c) and (d)

[94] Applicants do not establish by satisfactory and cogent evidence, particularly scientific evidence, to support their averments. They do not say they have any expertise in the subject. And they do not say they are suffering from diabetes or Aids. Consequently, they are not entitled to the meals given to those suffering from diabetes or Aids. And it is reiterated that the WHO standards are nothing more that recommendations. See para 91 above. I do not, therefore, find that applicants have established a right within the meaning of s16 of Act 16 of 1990 which the court may protect by declaration.

[95] Based on these reasons in respect of para 9 under ‘Main application’, I conclude that applicants have not established a right within the meaning of s16 of Act 16 of 1990, which the court may protect by declaration. The next relief to consider is in para 10: ‘Main application’

Para 10. ‘Main application’: Declaration that the applicants –

10.1 are aggrieved persons in terms of Article 25(2) of the Constitution; and

10.2 are entitled to monetary compensation in respect of the damage suffered by applicants in consequence of the denial and violation of their fundamental rights embodied in the Constitution, provided for in Article 25.

Para 10.1

[96] From the papers, I find that applicants are aggrieved persons within the meaning of art 25(2) of the Constitution.

Para 10.2

[97] Applicants seek the series of relief that I have considered above. On top of those, applicants seek what applicants call ‘monetary compensation’. Respondents have raised a preliminary challenge to the effect that ‘monetary compensation as damages is procedurally not permissible and inappropriate ‘through these application proceedings’. I do not see why such relief is ‘not permissible and inappropriate’ in these proceedings, and Mr Khupe did not make any submission thereanent.

[98] Applicants’ application is a constitutional challenge, as I have said more than once. Applicants claim also ‘monetary compensation’ for any proved violation of their constitutional basic human rights. In *Minister of Safety and Security v Makapa* (SA 35-2017) [2020] NASC (5 February 2020), the High Court had not decided the issue of constitutional damages sought by the applicant. On appeal, the Supreme Court referred the matter back to the High Court for that court to determine the claim for constitutional ‘damages’.

[99] The Supreme Court decision in *Makapa* was made in action proceedings. But I see no good reason, and none was advanced by respondents, why that decision should not apply with equal force to motion proceedings, considering the aforementioned art 25 (4) of the Constitution. In my view, in deserving proceedings – action or motion – the court is entitled ‘to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful

denial or violation of their fundamental rights and freedoms, 'w*here it considers such award to be appropriate in the circumstances of particular cases*'. (Italicized for emphasis) (See *Makapa*; and art Art 25 (4) of the Constitution.) Thus, the only qualification is that the court may order monetary compensation only if in the court's view 'monetary compensation' is appropriate in the circumstances of the case.

[100] The 'monetary compensation' must be in respect of 'any damage (that is, loss) suffered by aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms'. And the Supreme Court, per Hoff JA, tells us that the onus of proof of any claim of damages or compensation by the respondent (that is, the party making such claim) rested with the respondent. (*Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 (SC) para 98)

[101] In the instant case, applicants have not placed satisfactory and cogent evidence before the court, or at all, to establish 'any damage suffered' by them 'in consequence of" the unlawful denial or violation of their fundamental rights and freedoms under art 8(2) of the Constitution regarding being put in handcuffs. I find that there is, therefore, no foundation upon which this court could consider monetary compensation. Applicants have failed to discharge the onus of proof. Consequently, I conclude that any award of monetary compensation will be unreasonable, unfair, and inequitable. (*Gaseb,* loc cit) Consequently, the court refuses to order monetary compensation.

[102] I hasten to add that, not that applicants have no remedy which the court could grant. The court is inclined to grant an order, which in the court's view, is 'necessary and appropriate to secure' applicants 'the enjoyment of the rights and freedoms conferred' on them by the Constitution in accordance with art 25 (4) of the Constitution whose breach has been proved.

[103] The conclusions I have reached are unaffected by any issue of striking out certain matters from affidavits. They are also unaffected by respondents' averment that second applicant's complaint in respect of s 103 of Act 9 of 2012 and reg 257 is *lis pendens*' as far as second applicant was concerned, and applicants' failure to exhaust domestic statutory remedies. The applicants' challenge concerned primarily

questions of law which could only be resolved by the application of legal principles, as the court has done.

[104] Based on all these reasons –

(1) I decline to grant the relief sought in the following paragraphs:

(a) para 1: ‘Interim relief’;
(b) para 2: ‘Interim relief’;
(c) para 1: ‘Main application’;
(d) para 2: ‘Main application’;
(e) para 3: ‘Main application’;
(f) para 9: ‘Main application’; and
(g) para 10.2: ‘Main application’.

(2) I incline to grant the relief sought in the following paragraphs:

(a) para 4: Main application, to the extent appearing in the order below;
(b) para 5: Main application, to the extent appearing in the order below;
(c) para 6: ‘Interim relief’;
(d) para 7: ‘Main application’;
(e) para 8: ‘Main application’, to the extent appearing in the order below; and
(f) para 10.1: ‘Main application’.
(g) para 3: ‘Interim relief)

Costs

[105] It remains to consider the matter of costs. Applicants applied for a sizeable number of orders; 14 in total. They have been successful totally in only four of them, and partially in three. In my view, where an applicant approaches the court for a multiplicity of essentially disparate orders and he or she is successful in a few of them, it cannot be said that he or she has chalked substantial success. In that regard, such applicant cannot have his or her costs. Indeed, in such a situation it should be the respondent who has been substantially successful in challenging the application; and so, should, under normal circumstances, have his or her costs. But

seeing that in the instant case, applicants are private persons and the respondents the State, and applicants, who are awaiting trial persons are in custody, constitutional brought the application to vindicate their rights, even if they were largely misguided, I think it is a proper case where it would be fair and just not to award costs to any party.

[106] In the result, I make the following order:

1. The application is dismissed as respects:

(a) para 1: ‘Interim relief’;

(b) para 3: ‘Interim relief’;

(c) para 1: ‘Main application’;

(d) para 2: ‘Main application’;

(e) para 3: ‘Main application’;

(f) para 9: ‘Main application’; and

(g) para 10.2: ‘Main application’.

2. The application succeeds as respects the following paragraphs, and I order in the following terms:

(a) Para 4: Main application , to this extent:
The words ‘with or without mechanical restraint’ in s 103 (3) of the Correctional Services Act 9 of 2012 are declared to be inconsistent with the Namibian Constitution and are therefore invalid, and are, accordingly, severed from the provisions.

(b) Para 5: Main application, to this extent:
Paragraph (t) of s 132 (1) of the Correctional Services Act 9 of 2012 is declared to be inconsistent with the Namibian Constitution and is therefore invalid, and is, accordingly, severed from s 132 (1).

(c) Para 6: Main application, to this extent:

The practice of restraining trial awaiting persons in handcuffs while being transported is declared to be inconsistent with the Namibian Constitution.

(d) Para 7: Main application:
The practice of placing handcuffs on trial awaiting persons inside the courtroom is declared to be inconsistent with the Namibian Constitution.

(e) Para 8: Main application, to this extent:
Respondents are directed to provide applicants with adequate facilities for the preparation and presentation of their defence.

(f) Para 10.1: Main application:
It is declared that applicants are aggrieved persons within the meaning of art 25 (2) of the Namibian Constitution.

(g) Para 3: Interim relief:
The practice of placing handcuffs on applicants while being transported is declared to be inconsistent with the Namibian Constitution.

3. There is no order as to costs.
4. The matter is finalized and is removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

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RESPONDENTS:	MC Khupe Of Office of the Government Attorney Windhoek