



**REPORTABLE**

CASE NO: SA 7/2022

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MATSOBANE DANIEL DIGASHU**

**First Appellant**

**JOHANN HENDRIK POTGIETER**

**Second Appellant**

**L**

**Third Appellant**

and

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA  
MINISTER OF HOME AFFAIRS AND IMMIGRATION  
CHIEF OF IMMIGRATION**

**First Respondent  
Second Respondent  
Third Respondent**

**ACTING CHAIRPERSON OF THE IMMIGRATION  
SELECTION BOARD**

**Fourth Respondent**

**IMMIGRATION SELECTION BOARD**

**Fifth Respondent**

**IMMIGRATION TRIBUNAL**

**Sixth Respondent**

**OMBUDSMAN**

**Seventh Respondent**

**ATTORNEY-GENERAL OF NAMIBIA**

**Eighth Respondent**

CASE NO: SA 6/2022

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ANITA ELFRIEDE SEILER-LILLES**

**Appellant**

and

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**First Respondent**

**MINISTER OF HOME AFFAIRS AND IMMIGRATION  
CHIEF OF IMMIGRATION**

**Second Respondent  
Third Respondent**

**ACTING CHAIRPERSON OF THE IMMIGRATION  
SELECTION BOARD**

**Fourth Respondent**

**IMMIGRATION SELECTION BOARD**

**Fifth Respondent**

**IMMIGRATION TRIBUNAL**

**Sixth Respondent**

**Coram:** SHIVUTE CJ, DAMASEB DCJ, MAINGA JA, SMUTS JA and HOFF JA

**Heard:** 3 March 2023

**Delivered:** 16 May 2023

**Summary:** This consolidated appeal concerns two cases, both involving foreign nationals married to Namibians in same-sex marriages, which were jointly heard by a Full Bench of the High Court (the Full Bench) due to the similarity of the issues raised. The primary dispute revolves around the Ministry of Home Affairs and Immigration's (the Ministry) refusal to recognise spouses in same-sex marriages validly concluded outside Namibia for immigration purposes (ie in terms of s 2(1)(c) of the Immigration Control Act 7 of 1993 (the Act)). The Full Bench of the High Court determined that the Ministry's practice violates the parties' constitutional rights but found that it was bound by a decision of this Court in *Immigration Selection Board v Frank* 2001 NR 107 (SC) (*Frank*), which precluded it from granting relief to the appellants on constitutional grounds by reason of the doctrine of precedent reinforced by Art 81 of the Constitution.

The appeal raises several key questions: (1) whether the Full Bench of the High Court was indeed bound by the majority's views in *Frank*, or if those statements were merely *obiter dicta* (stated by the way) and thus not binding; (2) whether the majority's approach in *Frank* should be followed; (3) the implications of the conclusions reached on these issues for the two appeals at hand; and (4) whether the respondents' refusal to recognise lawful same-sex marriages from foreign jurisdictions (in this case South Africa and Germany) involving a Namibian and a non-citizen is compatible with the Constitution.

Held per SHIVUTE CJ *et* SMUTS JA (DAMASEB DCJ and HOFF JA concurring):

*Held that*, the doctrine of precedent and Art 81 of the Constitution require and bind not only subordinate courts but also this Court to follow its own decisions. Courts, including this Court, can depart from their own previous decisions only when satisfied that the decisions were clearly wrong. The binding authority of precedent is however confined to the *ratio decidendi* (*rationale* or basis of decision) – the binding basis – of a judgment and not what is subsidiary and termed *obiter dicta* ('considered to be said along the wayside').

*Held that*, according to the approach in *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) – the binding basis of the decision in *Frank* constitutes the reasons given in creating or following a legal rule, provided that they are firstly not merely subsidiary reasons for following the main principle, secondly that they were not merely a course of reasoning on the facts and thirdly that they were necessary for the decision in the sense that along the lines the court actually followed, the result would have been different, but for the reasons.

*Held that*, the opinions expressed under the heading 'The issue of the respondents' lesbian relationship and the alleged breach of their fundamental rights' of the majority in *Frank* were not necessary for the decision and went 'beyond the occasion' and sought to lay down rules which were entirely unnecessary for the purpose at hand. They constituted *obiter dicta* (statements made along the way) on an application of both the common law set out in *Levinson* and English law. They were peripheral and subsidiary to what was decided, and although they may have some persuasive efficacy, emanating from a majority of this Court, they have no binding authority. The Full Bench accordingly erred in regarding them as binding upon it.

*Held that*, the facts in these two appeals are distinguishable from the facts in *Frank* – the applicants in *Frank* were same-sex partners in a committed long term relationship. They had not concluded a lawful marriage in a jurisdiction recognising such a marriage. It was thus open to the Full Bench to distinguish *Frank* on the facts, given the fact that the respective appellants in these appeals had concluded valid marriages as provided for and recognised by statute in the respective jurisdictions where they were contracted.

*Held that*, the well-established general principle of common law that if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia. That principle finds application to these matters.

*Held that*, the value judgment to be made by a court when determining the ambit of the right to dignity would be with reference to the constitutional values, the aspirations, norms, expectations and sensitivities of the Namibian people as expressed in the Constitution. Further, whilst public opinion expressed by the elected representatives in Parliament through legislation can be relevant in manifesting the views and aspirations of the Namibian people, the doctrine of the separation of powers upon which our Constitution is based means that it is ultimately for the court to determine the content and impact of constitutional values in fulfilling its constitutional mandate to protect fundamental rights entrenched in the Constitution. That is the very essence of constitutional adjudication which is at the core of our Constitution.

*Held that*, the interpretation of s 2(1)(c) of the Act by the Ministry to exclude a spouse in a same-sex marriage from inclusion within that term has the effect of infringing that spouse's (and the other marriage partner's) right to dignity protected in Art 8.

*It is held further that*, the *obiter* approach to the term 'spouse', although not made with specific reference to s 2(1)(c) of the Act by the majority in *Frank*, is expressly disapproved and the approach of the High Court Full Bench on this issue is approved.

*Held that*, the unfairness of discrimination is to be determined with reference to the impact upon the victim(s) discriminated against, the purpose sought to be achieved by the discrimination, the position of the victim(s) in society, the extent to which their rights and interests have been affected and their dignity impaired. The court expressly disapproved of the *obiter* statement in *Frank* that 'equality before the law for each person does not mean equality before the law for each person's sexual relationships'. This approach is incompatible with the right to equality properly interpreted in a purposive right giving way, as has been repeatedly held to be the approach to interpretation held by this Court. It also fails to take into account the human worth and dignity of all human beings including those in same-sex relationships which is at the very core of the equality clause.

This Court accordingly found that the approach of the Ministry to exclude spouses, including the appellants, in a validly concluded same-sex marriage from the purview of s 2(1) of the Act infringes both the interrelated rights to dignity and equality of the appellants.

*Held that*, Mr Digashu and Ms Seiler-Lilles are to be regarded as a spouse for the purpose of s 2(1)(c) of the Act, given their validly concluded marriages in South Africa and Germany respectively. The term 'spouse' in s 2(1)(c) of the Act is to be interpreted to include same-sex spouses lawfully married in another country.

Held per MAINGA JA (dissenting):

*Held that*, the laws of Namibia do not recognise same-sex relationships. Therefore, whether the opinion of O'Linn AJA on the words marriage, spouse and family were *obiter dicta* or not, he was correct in the interpretation of the laws of Namibia, aspirations and ethos of the Namibian society. Therefore, the court below was bound by the *Frank* decision.

*Held that*, the common law principle relied on by the majority is sound in law, but Namibia is under no obligation to recognise a marriage inconsistent with its policies and laws for the reason that the said marriage is warranted by the municipal law of the country in which it was contracted. The appellants' same-sex marriages offend the policies and laws of Namibia.

*Held that*, the Ministry did not have to raise public policy, although if it did, it would have strengthened its case.

*Held that*, marriage or traditional marriage as defined in common law, other statutes of the Republic and historic understanding of marriage as enshrined in the Constitution was as old as creation itself and the protection of family life in the traditional sense was in principle a weighty and legitimate reason which might justify a difference in treatment.

*Held that*, to say that the Ministry relied on the unsound finding in *Frank*, obscured reality. *Frank* or no *Frank*, there is no statutory provision for same-sex marriages in Namibian law. The Ministry like any other Cabinet Ministry implements laws. It was not in the province of the Ministry to legislate or interpret laws. It has applied s 2(1)(c) consistent with the Act read with other statutes and the Supreme law of the country.

*Held that*, homosexuality was a complex issue that was better left in the Constitutional province of legislature. Parliament is better equipped to deliberate and evaluate the ramifications and practical repercussions of same-sex relationships or any other union.

Consequently, the minority would have determined the appeal on the review reliefs and confirmed the High Court's orders in both appeals, but for, para 5 of the High Court order in Mr Digashu's application. In respect of that order, the minority agreed with para [135](b)(i)(d) of the majority order in Mr Digashu's appeal. The minority would have made no order as to costs.

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## APPEAL JUDGMENT

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SHIVUTE CJ *et* SMUTS JA (DAMASEB DCJ and HOFF JA concurring):

### Introduction

[1] The central issue raised in these two appeals heard together concerns the refusal of the Ministry of Home Affairs and Immigration (the Ministry) to recognise a spouse in a same-sex marriage validly concluded outside Namibia as a spouse for the purpose of immigration legislation. A Full Bench of the High Court (the Full Bench) expressed the view that this practice conflicts with the constitutional rights of the parties but found that it was bound by a decision of the majority of this Court in 2001 in *Immigration Selection Board v Frank*<sup>1</sup> which it found prevented it from granting relief on constitutional grounds to the appellants. For determination in this appeal is whether the Full Bench was bound by the views of the majority in *Frank* or whether those

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<sup>1</sup> *Immigration Selection Board v Frank & another* 2001 NR 107 (SC) (*Frank*).

statements amount to *obiter dicta* (stated by the way) and did not constitute the binding basis of that court's decision and which would thus not be binding on that court. If those views are found to be *obiter*, the further question arises as to the relief, if any, to be granted in these appeals.

### Litigation history

[2] The two applications which form the subject of this consolidated appeal were heard together by a Full Bench of the High Court because similar issues were raised in them. The material facts in those two cases are largely not in issue and can be briefly summarised in each at the outset.

### Digashu appeal

[3] The first appellant in this appeal, Mr Digashu, is a South African citizen by birth. The second appellant, Mr Potgieter, is a Namibian citizen by birth. They entered into a long term committed relationship in 2010 in South Africa where Mr Potgieter was then living. They married each other in South Africa on 4 August 2015 under the South African Civil Unions Act 17 of 2006.

[4] The third appellant in that appeal is a minor, L. He is a cousin of Mr Digashu. During December 2014 when L was in pre-primary school, his mother died and he moved in with Mr Digashu and Mr Potgieter who were cohabitating and they treated him as their son. They commenced an adoption process which became protracted. In the meantime, a business which Mr Potgieter had set up in Namibia was requiring more of his time and energy in Namibia. The couple decided in 2016 to move to Windhoek with L. They decided to establish a further business with another partner

involving the hire of vehicles and camping gear in which Mr Digashu would be involved on a full time basis.

[5] The adoption process was however not yet finalised. Mr Digashu and Mr Potgieter approached the High Court in Gauteng, South Africa, which made an order on 3 March 2017 declaring them joint care givers of L and granted them joint guardianship as well as granting them leave to remove L from South Africa to relocate to Namibia. The court did so under the South African Children's Act 38 of 2005 on the basis that this was in L's best interests.

[6] They thereupon relocated to Namibia in April 2017 as a family unit. Mr Digashu approached the Ministry for a permanent residence permit but was advised that this would not be granted because the Ministry did not recognise their marriage, despite it having been validly concluded in South Africa. He was advised by the Ministry to apply for an employment permit. This he duly did. It was however rejected and he filed an internal appeal against that rejection which was also unsuccessful.

#### Seiler-Lilles appeal

[7] The appellant in this appeal is Ms Seiler-Lilles, a German citizen by birth. Her partner, Ms Seiler, is a Namibian citizen by birth. They entered into a long term committed relationship in 1988. On 2 February 2004, they entered into a formal life partnership in Germany under German law ('lebenspartnerschaft') where they were then living. On 28 November 2017, they concluded a civil marriage in Germany in accordance with German law.



[8] Ms Seiler-Lilles retired from her position in Germany with a view to living in retirement in Namibia with her spouse, Ms Seiler. To this end, Ms Seiler-Lilles purchased a home in Windhoek. Ms Seiler-Lilles applied for permanent residence on the basis of being self-supporting with sufficient means to maintain herself and also disclosed her marriage to Ms Seiler in her application to the Ministry. Her application was also refused.

#### Relief sought

[9] In separate proceedings, both sets of appellants applied to the High Court to review the refusal to grant the permits they had respectively sought.

[10] They both sought a declaratory order to the effect that the Ministry recognise their respective marriages. They also sought an order declaring that the respective appellants are spouses as envisaged by s 2(1)(c) of the Immigration Control Act 7 of 1993 (the Act) and in the event that the term 'spouse' could not be so interpreted, they sought an order that s 2(1)(c) be declared unconstitutional and that this conflict with the Constitution be rectified by reading into it the words 'including persons lawfully married in another country'. The constitutional and declaratory relief was not initially sought in *Seiler-Lilles*. A later amendment to that effect, which was opposed, was granted in the course of judicial case management.

[11] In *Digashu*, the appellants sought an order that L be declared their dependent child and an order recognising the order of the South African High Court to that effect (that they are joint care givers and guardians).

[12] In both appeals, an order was also sought declaring that the non-Namibian spouses are domiciled in Namibia.

### Statutory scheme

[13] The purpose of the Act is as set out in its long title – ‘to regulate and control the entry of persons into, and their residence in Namibia’. One of the principal means of regulating and controlling the entry into and residence of non-Namibian citizens in Namibia is by restricting entry and residence to those in possession of one of the range of permits provided for in Part V of the Act. Certain categories of non-Namibian citizens are however exempt from the permit system in Part V in terms of s 2 of the Act and can reside in Namibia without the need to obtain those permits.

[14] Under the heading ‘Application of Act’, s 2(1) of the Act provides:

- ‘(1) Subject to the provisions of subsection (2), the provisions of Part V, except sections 30, 31 and 32 thereof, and Part VI of this Act shall not apply to –
- (a) a Namibian citizen;
  - (b) any person domiciled in Namibia who is not a person referred to in paragraph (a) or (f) of section 39(2);
  - (c) any spouse or dependent child of a person referred to in paragraph (b), provided such spouse or child is not a person referred to in paragraph (d), (e), (f) or (g) of section 39(2);
  - (d) any person duly accredited to Namibia by or under the authority of the government of any sovereign state;

- (e) any person who under any law is entitled to any diplomatic immunities and privileges by reason of such person's association with an organization of which the Government of Namibia is a member;
- (f) any person who for the purpose of employment enters Namibia –
  - (i) under such conditions, excluding such provisions, as may be agreed upon between the State and such person;
  - (ii) under any convention or agreement with the government of any other state; or
  - (iii) in accordance with any scheme of recruitment or repatriation approved by the Minister;
- (g) any member of the official staff or of the household of a person referred to in paragraphs (d), (e) and (f); and
- (h) any member of a crew of –
  - (i) any public ship of a foreign state, while such ship is in port; or,
  - (ii) any aircraft or other public vehicle, while such person is or remains a member of such crew.'

[15] This sub-section thus has the effect of exempting persons falling into the categories listed in its sub-paragraphs from Part V of the Act which requires non-citizens to apply for permanent residence, employment and other permits in order to enter into and reside in Namibia. Pertinent to this enquiry is that s 2(1)(c) postulates that citizens or persons domiciled in Namibia who are exempted from the statutory requirements in Part V include the spouse or dependent child of a Namibian citizen, as provided in sub-paragraph (c) read with sub-paragraph (a).

[16] The spouse of a Namibian citizen is thus entitled to reside in and to work in Namibia without the need to obtain the permits otherwise required for non-citizens in Part V, including permanent residence, employment and other permits.

[17] The respondents required Mr Digashu and Ms Seiler-Lilles to apply for a permit to reside (or work) in Namibia under the scheme of provisions in Part V but thereafter proceeded to reject their respective permit applications. Mr Digashu's review of the rejection of his employment permit application was successful and there is no cross-appeal against that ruling. The *Seiler-Lilles* review application was dismissed by the High Court and is appealed against. In view of our approach on the constitutional relief sought, that review application need not be further addressed.

[18] That is because if Mr Digashu and Ms Seiler-Lilles are covered by s 2(1)(c) in that they are spouses for the purpose of that sub-paragraph, there would have been no need to make those permit applications as Part V would not apply to them. There would be no need to determine whether the review application in *Seiler-Lilles* should be set aside and be returned to the decision maker because such a permit would not be necessary. We accordingly do not further refer to the facts, argument and findings on this issue.

[19] The position of the respondents is that spouses in a same-sex marriage are excluded from the operation of s 2(1)(c) of the Act. They rely upon *dicta* contained in the majority judgment in *Frank* for their position of excluding spouses in same-sex marriages from the operation of s 2(1)(c). It matters not to the respondents that the

marriages were validly contracted outside Namibia in accordance with the law applicable where they were concluded. Had it not been for the fact that the appellants in both appeals were same-sex spouses, the Ministry would not have disputed that they were exempted from Part V by virtue of s 2(1)(c).

[20] The central issue for determination in this appeal is thus whether the refusal of the respondents to recognise lawful same-sex marriages of foreign jurisdictions (in this case South Africa and Germany) between a Namibian and a non-citizen is compatible with the Constitution.

[21] The Full Bench of the High Court unequivocally found that the approach of the Ministry is in conflict with the appellants' constitutional rights. But the court found that the *dicta* of the majority in *Frank* on same-sex relationships is binding upon it and for that reason declined the constitutional relief sought by reason of the doctrine of precedent reinforced by Art 81 of the Constitution. Before referring further to the approach of the High Court, it is apposite to refer to the judgment of the majority in *Frank* to determine its binding basis. In order to do so, the factual setting and findings in *Frank* are first set out.

### *Frank*

[22] In *Frank*, the applicants succeeded in the High Court with a review which set aside the decision of the Immigration Selection Board (the board) which had refused a permanent residence permit to the first applicant. The High Court (per Levy AJ) further directed the board to issue the first applicant with such a permit within 30 days of the court order.

[23] The facts of that matter are relevant for present purposes. The first applicant, Ms Frank, a German national, resided in Namibia since 1990. Ms Frank was since then in a committed same-sex relationship with a Namibian citizen by birth, Ms Khaxas, the second applicant. Ms Frank also took on the role as a second parent to Ms Khaxas' son as the couple cohabitated. Ms Frank's applications for a permanent residence permit in 1995 and again in 1997 were turned down by the board. Ms Frank had in her applications stated that she was in a long term committed lesbian relationship with Ms Khaxas. Ms Frank and Ms Khaxas were not legally married to each other when the review application was brought.

[24] In setting out its opposition to the review application in a rescission application, the board stated that it had considered their long term relationship but had concluded that it was not one 'recognised in a court of law' and that it did not assist the application for permanent residence. In the opposing affidavit to the review application, it was further stated that their relationship played no role whatsoever in the decision of the board. It was further stated that Ms Frank's sexual orientation was a private matter which had no bearing on the application. In view of this latter statement, Levy AJ remarked:

'When Mr Light on behalf of the applicants addressed this Court, he said that in the light of this categorical statement the applicant's sexual orientation was no longer an issue in these proceedings.'<sup>2</sup>

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<sup>2</sup> *Frank & another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 264F.

[25] The main thrust of the applicants' review challenge in the High Court turned on the question as to whether the applicants' rights under Art 18 (to administrative justice) had been adhered to.

[26] The board had declined to give reasons for its decisions to Ms Frank. In its answering affidavit reasons were eventually forthcoming and Levy AJ found that because irrelevant factors were taken into account by the board, which should not have been taken into account, concerning the employment market in Ms Frank's field of endeavour, the decision fell to be set aside 'because one does not know what part those incorrect factors played in making the decision'.<sup>3</sup>

[27] Levy AJ did however add that the applicants' lesbian relationship should have been taken into account by the board. He stated that a relationship of that nature which amounted to a universal partnership would enjoy recognition in law and should have been considered.

[28] Levy AJ further held that the matter should not be returned to the board as Ms Frank, in his assessment, qualified for permanent residence and directed the board to issue such a permit.

#### The appeal in *Frank*

[29] The board sought to appeal that decision. But it – and particularly its legal practitioner – were gravely dilatory in prosecuting the appeal which then lapsed. An application for condonation and reinstatement was directed to this Court.

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<sup>3</sup> At 269E.

[30] Strydom CJ, in a minority judgment, held that the delays in prosecuting the appeal were egregious and that because the appeal also lacked prospects of success, he would dismiss the condonation application. With reference to the merits, he found that Art 18 and the right to be treated fairly in accordance with a fair procedure required the board to accord Ms Frank with the right to be heard in the circumstances of her application. Strydom CJ found that the application of this rule is flexible and, in the context of the Act, meant that the board was required to act reasonably. This required it to afford an applicant in the position of Ms Frank the opportunity to respond to potentially prejudicial information so that it could be rebutted, if possible. This opportunity could be afforded in writing but the failure to do so, together with the failure to provide reasons for its decision, meant that the board's decision was, in his view, correctly set aside on review by the High Court. (The potentially prejudicial information related to the relevant employment market which had been taken into account by the board).

[31] The majority judgment was given by O'Linn AJA (with Teek AJA concurring).

[32] O'Linn AJA found that although there was gross negligence on the part of the Government Attorney, there were prospects of success on appeal which warranted granting condonation. The majority agreed with Strydom CJ that Art 18 required the board to afford Ms Frank the right to be heard in respect of potentially prejudicial information and assumptions held concerning the applicable employment market. This meant that Ms Frank should have been heard on this issue – either by letter or by way of a personal appearance before the board. The failure to do so on the part of the board vitiated its decision and required that it be set aside on review.



[33] The majority found that the High Court erred in directing the board to issue the permit and held that it should have referred the matter back to the board for determination of the application for a permanent residence permit. O'Linn AJA added that the board 'may, in the exercise of its wide discretion, consider the special relationship between (the respondents) and decide whether or not to regard it as a factor in favour of granting the application for permanent residence'.<sup>4</sup>

[34] The bulk of the very lengthy judgment of O'Linn AJA is however devoted to dealing with what was termed as 'The issue of the respondents' lesbian relationship and the alleged breach of their fundamental rights'.<sup>5</sup>

[35] According to O'Linn AJA, the respondents in the appeal had argued that the board should have accorded their relationship equivalent status to that of spouses in a lawful marriage between a woman and a man recognised by statute and as members of a family.

[36] O'Linn AJA proceeded to find that, as far as the Constitution was concerned, a marriage contemplated by Art 4(3) (qualifying a spouse of a citizen for citizenship) meant a marriage between a man and a woman and not a homosexual or lesbian relationship.<sup>6</sup>

[37] In reaching this conclusion, O'Linn AJA said that homosexual relationships would have been known to members of the Constituent Assembly when drafting the

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<sup>4</sup> *Immigration Selection Board v Frank & another* 2001 NR 107 (SC) at 157A-B.

<sup>5</sup> At 129E-157F.

<sup>6</sup> At 143G-H.

Constitution who had, so he held, chosen not to recognise those relationships as equivalent to heterosexual relationships.

[38] O'Linn AJA further stated that the term 'marriage' contemplated by the Constitution and the Act meant between men and women, and not between men and men and women and women. The latter relationships, he said, fell outside the scope of Art 14 of the Constitution relating to the protection of the family.<sup>7</sup>

[39] O'Linn AJA further stated that 'the family institution' in the African Charter, the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (the ICCPR) and the Namibian Constitution envisaged a formal relationship between a man and woman to procreate offspring and ensure the perpetuation and survival of the nation and the human race.<sup>8</sup>

[40] As to the claim of discrimination under Art 10 which entrenches the right to equality, O'Linn AJA expressed the view that, unlike in South Africa, discrimination on grounds of sexual orientation was not a ground specifically proscribed in Art 10.<sup>9</sup> O'Linn AJA further stated that a degree of differentiation was permissible under Art 10 if based upon a rational connection to a legitimate purpose, and proceeded to find that 'equality before the law for each person, does not mean equality before the law for each person's sexual relationships'.<sup>10</sup>

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<sup>7</sup> At 144C-D and 144G.

<sup>8</sup> At 146F-G.

<sup>9</sup> At 149I-150D.

<sup>10</sup> At 155F.

[41] The majority further stated that it was not open to a court to read in 'homosexual relationship' into the Act and that this would not be consonant with the canons of construction of statutes and would usurp Parliament's role by effectively amending the legislation in question.<sup>11</sup>

[42] O'Linn AJA however concluded this lengthy segment of his judgment by stating that 'nothing in this judgment justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution'.<sup>12</sup>

#### The approach of the High Court

[43] The High Court referred to the approach of both this Court and elsewhere concerning the doctrine of precedent and Art 81, requiring that subordinate courts are obliged to follow a decision of a superior court even if a decision were to be considered wrong.

[44] The High Court referred to the approach of the South African Constitutional Court in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another*<sup>13</sup> to the effect that where a court decides more than one issue in arriving at its ultimate disposition of the matter before it, it would not render the reasoning leading to any of those decisions as *obiter* (stated by the way), leaving lower courts free to elect whichever reasoning they prefer to follow. The High Court found that it was as a consequence bound by the decision of the majority in *Frank* in maintaining the rule of law which is the foundation of the doctrine of legal precedent. The High Court further

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<sup>11</sup> At 156D-F.

<sup>12</sup> At 156G-H.

<sup>13</sup> *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC) paras 28-30.

cited *Camps Bay Ratepayers' and Residents' Association* in making it clear that if a lower court believed there were good reasons why a decision binding on it should be changed, then the way to go about effecting a change is to formulate the reasons for that change and urge the courts of higher authority to effect the necessary change.

[45] The High Court proceeded to criticise the approach of O'Linn AJA to same-sex relationships, pointing out that the respondents in that matter had not brought a constitutional challenge but had instead directed a complaint as to the manner in which their relationship was treated by the Ministry. The High Court criticised the approach of the majority in *Frank* which it considered irrationally and unjustifiably took away human rights from a segment of Namibian citizenry simply because of their sexual orientation.

[46] The High Court also considered that O'Linn AJA's interpretation of public international law on the issue was unsound. The High Court referred to the UN Human Rights Committee's finding that 'sex' as a proscribed ground of discrimination included sexual orientation. The Full Bench considered that to exclude sexual orientation as a proscribed ground when 'sex' and 'social status' were specified in Art 10(2) amounted to an unduly narrow approach to the equality clause and not a purposive one as is required in the interpretation of the basic rights protected in Chapter 3 of the Constitution.

[47] The Full Bench similarly disapproved of the approach taken by O'Linn AJA to Art 14 which it said was likewise not in keeping with a broad right-giving approach in the interpretation of the rights protected in Chapter 3. The court referred to developments in legal systems elsewhere where discrimination on the basis of sexual

orientation was increasingly no longer permissible. The Full Bench expressed the unequivocal view that human beings in homosexual relationships are worthy of being afforded the same rights as other citizens.

[48] The High Court concluded that it was precluded from granting the appellants the declaratory relief sought on constitutional grounds because it held that it was bound by the decision of the majority in *Frank* but urged this Court to revisit the issue in view of their approach.

[49] The Full Bench then proceeded to deal with the reviews raised in each matter. It set aside the decision in *Digashu* and dismissed the review application in *Seiler-Lilles*. The appellants in both appeals appealed against the High Court judgment.

#### Submissions on appeal

[50] The appellants contended that the facts in *Frank* are distinguishable from the two appeals in that Ms Frank was not legally married to her long term partner, Ms Khaxas. Counsel for the appellants pointed out that an important consideration for O'Linn AJA was that the relationship in that matter was not recognised by statute, whereas the marriages in these appeals were validly contracted in accordance with the law of the countries where they were respectively concluded.

[51] Counsel also pointed out, as was done by the Full Bench, that no constitutional challenge to legislation was made in *Frank*. It was however contended there that their constitutional rights were infringed because the Ministry had not accorded them the

same recognition legally accorded to legally married men and women, but not that the board had failed to deal with them on an equal basis with unmarried heterosexual couples in a long term relationship.

[52] Counsel for the appellants argued that the approach of the majority in *Frank* as to the meaning of the term 'spouse' as being confined to men and women in marriage was *obiter* but also wrong. A similar submission was made in respect of the majority's approach to the terms 'marriage' and 'family'. It was argued that these *obiter* statements are in any event to be confined to same-sex relationships and not marriage.

[53] Counsel for the appellants also contended that O'Linn AJA's *obiter* statement on the term 'spouse' so as not to include same-sex spouses was wrong on the basis of the general principle of common law that the validity of a marriage is governed by the law of the place where it is contracted.<sup>14</sup> Appellants' counsel further argued that the approach in *Frank* is not authority for the proposition that same-sex marriages validly concluded elsewhere are not 'marriages' and that same-sex spouses are not 'spouses' for the purpose of the Act.

[54] It was also argued that the Full Bench erred in considering that the findings in *Frank* as to the meanings to be accorded to 'marriage', 'spouse' and 'family' amounted to *ratio decidendi* and not *obiter dicta*.

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<sup>14</sup> *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307.

[55] Counsel for the appellants supported the approach of the High Court on the constitutional issues and urged this Court to adopt that approach and rule that the *obiter dicta* in *Frank* are in any event wrong and should not be followed.

[56] The appellants also relied upon their right to dignity entrenched in Art 8. Appellants' counsel also provided detailed argument on international instruments, particularly the ICCPR in submitting that the approach in *Frank* with reference to them was incorrect.

[57] Counsel for the respondents stressed the importance of the doctrine of precedent to the rule of law. Reliance was placed upon the articulate exposition of the principle set out in *Camps Bay Ratepayers' and Residents' Association*.<sup>15</sup> Counsel contended that the *dicta* in *Frank* were binding on the High Court and correctly found to be the case. It was argued that the majority in *Frank* decided the merits of Ms Frank's claim for recognition of her same-sex relationship. Respondents' counsel submitted that the majority in *Frank* was 'called upon to decide the import or effect of lesbian relationships in Namibian law'.

[58] Counsel contended that the term 'family' does not include homosexual marriages for the purpose of s 26(3)(g) of the Act. It was also submitted on behalf of the respondents that 'marriage' as contemplated by the Act and the Constitution is a union between a man and a woman and excludes same-sex relationships and that the term 'spouse' in the Act does not include those in a same-sex relationship. Counsel also supported the approach in *Frank* with regard to Art 10 and pointed out that, unlike as in the South African Constitution, sexual orientation is not a listed ground of proscribed discrimination in Art 10(2). Counsel also supported *Frank* with regard to the

<sup>15</sup> Paragraph 28.

approach to Art 10(1) in stating that equality before the law does not mean equality before the law for each person's sexual relationships.<sup>16</sup>

[59] Respondents' counsel forcefully pressed on us that the findings in *Frank* reflect the correct position in Namibian law and, even if they were found to be *obiter*, they should be affirmed. It was argued that both appeals should be dismissed. Counsel commendably contended that the approach of the South African Constitutional Court in constitutional challenges as set out in *Biowatch Trust v Registrar Genetic Resources & others*<sup>17</sup> should be applied and that no order as to costs should be made against the appellants.

Were the statements on same-sex relationships in *Frank* binding upon the High Court?

[60] The starting point in this discussion is an examination of the doctrine of precedent, also referred to as *stare decisis* (to stand by decisions previously taken). This well-established principle is a core component to the rule of law, which is in turn a foundational value in our Constitution, as expressed in Art 1. The doctrine of precedent is also strongly underpinned by Art 81 which provides:

'A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.'

[61] Its importance to the rule of law has been repeatedly stressed by the courts. As was recently restated by the South African Constitutional Court:

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<sup>16</sup> *Frank* at 155E-G.

<sup>17</sup> *Biowatch Trust v Registrar Genetic Resources & others* 2009 (6) SA 232 (CC) para 24 referred to by this Court in *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement & others* 2018 (3) NR 800 (SC) paras 124-126.



'I cannot but also borrow from the eloquence of Cameron JA:

“The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.”<sup>18</sup>

[62] The doctrine of precedent and Art 81 require and bind not only subordinate courts but also this Court to its own decisions.<sup>19</sup> Courts, including this Court, can depart from their own previous decisions only when satisfied that the decisions were clearly wrong. The binding authority of precedent is however confined to the *ratio decidendi* (*rationale* or basis of decision) – the binding basis – of a judgment and not what is subsidiary, termed *obiter dicta* – ('considered to be said along the wayside').<sup>20</sup>

[63] As was emphasised in *Camps Bay Ratepayers' and Residents' Association*, unwarranted evasion by subordinate courts of a binding decision undermines the doctrine of precedent and the rule of law. Where judges believe a decision binding upon them should change, it is open to them to formulate their reasons for their belief, showing due respect to the high court,<sup>21</sup> as was cogently done by the Full Bench of the High Court in this matter.

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<sup>18</sup> *Turnbull-Jackson v Hibiscus Coast Municipality & others* 2014 (6) SA 592 (CC) para 55 quoting Cameron JA's concurring judgment in *True Motives 84 (Pty) Ltd v Mahdi & others* 2009 (4) SA 153 (SCA) para 100.

<sup>19</sup> *S v Likanyi* 2017 (3) NR 771 (SC).

<sup>20</sup> *True Motives* para 101.

<sup>21</sup> Paragraph 30.

[64] The leading judgment which has been consistently followed concerning the means of distilling the distinction as to what is binding in a previous judgment and that which is said by the way or along the wayside, is that of Schreiner JA in *Pretoria City Council v Levinson*<sup>22</sup> where he explained:

‘. . . [W]here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts . . . and (c) (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.’<sup>23</sup>

[65] The exposition of the doctrine of precedent in English law, as set out in *Halsbury’s Laws of England*, cited by counsel for the appellants, is also instructive in distilling what constitutes the *ratio decidendi* and *obiter dicta* in a judgment. *Ratio decidendi* is thus explained in *Halsbury’s*:

‘The use of precedent is an indispensable foundation upon which to decide what is the law and its application to individual cases; it provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for or orderly development of legal rules. The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as precedent. This underlying principle is called the ‘*ratio decidendi*’, namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. What constitutes binding precedent is the *ratio decidendi*, and this is almost always to be ascertained by an analysis of the material facts of the case, for a judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-

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<sup>22</sup> *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317.

<sup>23</sup> *Turnbull-Jackson* para 61; *True Motives* paras 103 to 107 where *Levinson* and its application is lucidly explained. See also *Fellner v Ministry of the Interior* 1954 (4) SA 523 (A) per Greenberg JA at 537.

existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration.<sup>24</sup>

[66] On the other hand, *dicta*, are thus explained in the following para in *Halsbury's*:

'Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed "*dicta*"; they have no binding authority on another court, but they may have some persuasive efficacy. There are *dicta* and *dicta*, however, and three types may be distinguished:

(1) mere passing remarks of a judge are known as '*obiter dicta*', recognised legal term of art that is not readily reproduced by an English phrase and is used to describe judicial statements which are peripheral to the reason for the decision, the *ratio decidendi*;

(2) ...;

(3) ...<sup>25</sup>

(The two further forms of *dicta* set in (2) and (3) are not relevant for present purposes).

[67] As approved by Lord Denning in *Close v Steel Company of Wales Ltd*,<sup>26</sup> Lord Denning said with reference to the doctrine of precedent:

'Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.<sup>27</sup>

(Emphasis supplied).

<sup>24</sup> *Halsbury's Laws of England* 5 ed (2008 updated) vol II para 25.

<sup>25</sup> *Op cit* para 26.

<sup>26</sup> *Close v Steel Company of Wales Ltd* [1961] 2 All ER 953 (HL).

<sup>27</sup> At 960E-G.

[68] According to the approach of Schreiner JA in *Levinson*, the binding basis of the decision in *Frank* constitutes the reasons given in creating or following a legal rule, provided that they are firstly not merely subsidiary reasons for following the main principle, secondly that they were not merely a course of reasoning on the facts and thirdly that they were necessary for the decision in the sense that along the lines the court actually followed, the result would have been different, but for the reasons.<sup>28</sup> This approach has much in common with the approach in English law as helpfully explained in *Halsbury's* in distilling the *ratio decidendi* in a case and what is merely stated *obiter*.

[69] In the High Court, Levy AJ set aside the board's decision on review because irrelevant factors were taken into account in making the decision which should not have been. The High Court further found that the matter should not be returned to the board and directed the board to grant Ms Frank a permanent residence permit because Levy AJ held the view that Ms Frank had met the requisites for that permit.

[70] Levy AJ's statement that Ms Frank's lesbian relationship should have been taken into account by the board as it warranted legal recognition as a universal partnership was not necessary for the decision in the sense of not meeting the third disqualifying factor listed in *Levinson*. The result would have been no different but for that statement. It was also subsidiary to the main principle articulated in the judgment. It was thus plainly stated *obiter* – (along the way side), as was correctly pointed out by the Full Bench in this matter.

[71] In this Court, the majority in *Frank* found that the failure on the part of the board to accord Ms Frank her right to be heard as required by Art 18 (in respect of potentially prejudicial information) meant that the decision to refuse her a permanent residence

<sup>28</sup> *Levinson* at 317; *True Motives* (per Cameron JA) para 105.

permit was to be set aside on review. The majority further set aside the order of the High Court directing the board to grant to Ms Frank a permanent residence permit and directed that the matter be referred back to the board for determination. O'Linn AJA added that, in determining the application, the board 'may in the exercise of its wide discretion, consider the special relationship (between Ms Frank and Ms Khaxas) and decide whether or not to regard it as a factor in favour of granting the application for permanent residence', as was correctly pointed out by the Full Bench in this matter.

[72] In applying *Levinson*, the legal rule established in *Frank* (which was more eloquently articulated in the closely reasoned minority judgment of Strydom CJ which is preferred) was that Art 18, protecting the right to administrative fairness, required that an applicant in the position of Ms Frank was entitled to be heard in respect of potentially prejudicial information considered by the board. The failure to do so breached her right to be heard entrenched in Art 18, and vitiated the decision making. (Strydom CJ aptly went further in finding that the failure to provide reasons for the decision was unfair and also breached Art 18).

[73] A further legal rule decided by the majority in *Frank* was that the matter should be referred back to the board to exercise its discretion whether or not to grant the application and that the High Court should not have directed that the permit be granted, and in doing so, the board may in the exercise of its discretion consider the 'special relationship' between Ms Frank and Ms Khaxas and decide whether or not to regard it as a factor in favour of granting the application.

[74] The *ratio* for these legal rules is confined to the reasons that were necessary for these outcomes ‘in the sense the majority actually followed, the result would have been different but for those reasons’<sup>29</sup> and not other statements which amounted to subsidiary reasons.<sup>30</sup>

[75] The entire digression of the majority in *Frank* under the heading ‘The issue of the respondents’ lesbian relationship and the alleged breach of their fundamental rights’ was in no way determinative of the outcome and was not necessary in the sense that along the lines the majority actually followed, the result would otherwise have been different. (The result would thus have been no different but for this lengthy digression).

[76] The third disqualifying factor listed in *Levinson* would mean that this segment of the judgment would not constitute the *ratio decidendi* of *Frank*. Another disqualifying factor listed in *Levinson* would also rule out this segment of the judgment as being part of the *ratio decidendi* in that it was entirely subsidiary, extraneous and unnecessary to the legal rule established in that case.

[77] The majority in *Frank* unfortunately failed to heed the very sound salutary practice articulated by this Court in *Kauesa v Minister of Home Affairs & others*<sup>31</sup> that a court ought to decide no more than what is absolutely necessary for the decision of a case, particularly in constitutional matters.

[78] The facts relating to the relationship between Ms Frank and Ms Khaxas were also not material to the decision reached by the court in finding that Ms Frank’s Art 18

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<sup>29</sup> *Levinson* at 317, *True Motives* para 101.

<sup>30</sup> *Levinson* at 317.

<sup>31</sup> *Kauesa v Minister of Home Affairs & others* 1995 NR (SC) 175 at 184A-B.

rights had been breached. Nor were they material to the decision to set aside the direction to grant the application and instead refer it back to the board. When the majority expressed a contrary view to that of Levy AJ's *obiter* view concerning the recognition of a lesbian relationship by the law when it amounts to a universal partnership, that aspect remained *obiter* as it remained subsidiary to the determination of the matter.

[79] The opinions expressed in that segment were thus not necessary to the decision in *Frank* and went 'beyond the occasion' and sought to lay down rules which were entirely unnecessary for the purpose at hand. They constitute *obiter dicta* (statements made along the way) on an application of both the common law set out in *Levinson* and English law. They were peripheral and subsidiary to what was decided, and although they may have some persuasive efficacy, emanating from a majority of this Court, they have no binding authority. The High Court accordingly erred in regarding them as binding upon it.

[80] There is yet a further reason for the High Court not to follow the approach of the majority in *Frank*.

[81] The facts in these two appeals are in our view also distinguishable from the facts in *Frank*. As we have already pointed out, the applicants in *Frank* were same-sex partners in a committed long term relationship. But they had not concluded a lawful marriage in a jurisdiction recognising such a marriage. What was important to O'Linn AJA was the lack of statutory recognition of the relationship in question. It was thus also open to the High Court to distinguish *Frank* on the facts, given the fact that the

respective appellants in these appeals had concluded valid marriages as provided for and recognised by statute in the respective jurisdictions where contracted.

#### Recognition of appellants' marriages

[82] According to the well-established general principle of common law, if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia.<sup>32</sup> That principle finds application to these matters.

[83] The term 'spouse' is not defined in the Act. Its ordinary meaning connotes 'a married person; a wife; a husband'.<sup>33</sup> The use of the term in s 2(1)(c) would not contemplate a wider meaning than this, being a person who has entered a marriage. The term marriage is likewise not defined in the Act and would contemplate valid marriages duly concluded and ordinarily recognised, including those validly contracted outside Namibia in accordance with the law applicable where the marriage is concluded in accordance with the general principle of common law, already referred to. That is the interpretation to be given to the term 'spouse' in s 2(1)(c).

[84] The Ministry has not raised any reason relating to public policy as to why the appellants' marriages should not be recognised in accordance with this general principle of common law. Nor did the Ministry question the validity of the appellants' respective marriages.

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<sup>32</sup> *Seedat's Executors* at 307. *AS v CS* 2011 (2) SA 360 (WCC) para 34 which was concerned with the recognition of same-sex marriages concluded outside South Africa.

<sup>33</sup> The New Shorter Oxford English Dictionary (Clarendon Press 1993) vol 2 at 3001 as approved in *National Coalition for Gay & Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 25.



[85] On this basis alone, the appellants' respective marriages should have been recognised by the Ministry for the purpose of s 2(1)(c) and Mr Digashu and Ms Seiler-Lilles are to be regarded as a spouse for the purpose of s 2(1)(c) and thus exempt from Part V of the Act.

[86] We have had the privilege of reading in advance the dissenting judgment written by our brother Mainga JA. The reliance in the dissenting judgment upon *Wilkinson v Kitzinger & others*<sup>34</sup> (not raised by any of the parties) – by a single judge in the Family Division of the High Court in the United Kingdom – does not however support the stance adopted in the dissent. That matter concerned a challenge by a petitioner who sought a declaration of validity of her marriage under s 55 of the United Kingdom Family Law Act 1996 (the FLA). The petitioner and her same-sex partner who were domiciled in the United Kingdom were lawfully married in Canada. Upon her return to the United Kingdom, the petitioner instituted the proceedings in the United Kingdom. Section 11(c) of the Matrimonial Causes Act 1973 (the MCA) stood in her way. It provided that a marriage is void if it is between two persons of the same sex. Shortly after their marriage, the Civil Partnership Act 2004 (the CPA) was passed recognising same-sex unions. It provided<sup>35</sup> that any same-sex marriage entered into abroad shall be regarded as a civil partnership rather than a marriage. The petitioner sought an order that s 11 of the MCA was incompatible with Arts 8, 12 and 14 of the European Convention on Human Rights (the Convention) in seeking recognition of her marriage in the United Kingdom.

[87] The court rejected the primary basis of the challenge mounted with reference to the Convention rights asserted. Its approach stands in stark contrast to the approach

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<sup>34</sup> *Wilkinson v Kitzinger & others* [2006] EWHC 2022 (Fam).

<sup>35</sup> In s 215.

adopted by the House of Lords some two years before in *Ghaidan v Godin-Mendoza (FC)*<sup>36</sup> – although in relation to a different statutory question. *Ghaidan* concerned a challenge to legislation which protected the right of a partner in a marriage-like relationship to be a statutory tenant upon the death of his or her partner. A previous decision of the House of Lords had decided that this protection did not include persons in a same-sex relationship. This was challenged on the basis of the applicability of Art 14 of the European Convention protecting people from discrimination in terms similar to our Art 10. The House of Lords held by a majority of 4 - 1 that the exclusion of persons in a marriage-like same-sex relationship to be discriminatory and in conflict with the right to equality protected in Art 14 and that the protection provided by the statute was applicable to a surviving spouse in a same-sex relationship. As was stressed in her concurrence, Baroness Hale stated with reference to Art 14 that:

'131. . . .The state's duty under article 14, to secure that those rights and freedoms are enjoyed without discrimination based on such suspect grounds, is fundamental to the scheme of the Convention as a whole. It would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another.

132. Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom: see *Pretty v United Kingdom* (2002) 35 EHRR 1, 37, para 65. Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a

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<sup>36</sup> *Ghaidan v Godin-Mendoza (FC)* [2004] 3 All ER 411 (HL).

rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.'

[88] The court in *Wilkinson* also rejected an argument that it 'should develop the common law to recognise their marriage under English common law'.

[89] The application of the common law principles referred to in that matter differ, as well as the entirely different statutory setting. As the court acknowledged under the English rules of private international law, whereas the form of marriage is governed by the local law of the place of celebration (as in the common law of Namibia), the capacity of the parties to marry is generally governed by the law of each party's ante-nuptial domicile.<sup>37</sup> The court found that the express provisions of s 11(c) of the MCA precluding persons of the same-sex entering a valid marriage meant that the development of the common law contended for by the petitioners directly would be inconsistent with that statute. The court also found that it would run counter to public policy as expressed in s 215 of the CPA which expressly provided that a foreign same-sex marriage be treated as a civil partnership.<sup>38</sup> In Namibia, there are no statutory provisions relating to marriage which would preclude the operation of the common law principle. Nor were any raised.

[90] There are no similar provisions to s 11(c) of the MCA or s 215 of the CPA which apply in Namibia and which would preclude this Court from applying the common law principle in *Seedat's Executors*. Nor, as we have stressed, did the Ministry plead or

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<sup>37</sup> *Wilkinson* para 15. Dicey & Morris *The Conflict of Laws: A Review* 13 ed vol 2 at 651 and 671. *Padolecchia v Padolecchia* [1968] 314 at 318.

<sup>38</sup> Paragraphs 129-130.

argue that the interpretation sought for the definition of spouse on s 2(1) of the Act would run counter to public policy.

[91] Apart from this distinguishing feature, it is also to be noted that the CPA was in 2013 replaced in the United Kingdom by the Marriage (Same-Sex Couples) Act 2013. It came into force in March 2014. It provides that same-sex couples married abroad who were treated as civil partners under the CPA, are under the 2013 Act recognised as being married.

[92] The reference in *Wilkinson* to the general move towards legal recognition of same-sex marriages, cited in the dissent, as well as the position subsequently as at 2010, referred in *Schalk and Kopf v Austria*<sup>39</sup> by the European Court of Human Rights also cited in the dissent (and also not raised by any of the parties), have undergone further change since.

[93] In *Schalk and Kopf*, the court decided by a 4 – 3 majority that there was no violation of Convention rights where Austria had shortly before the hearing in 2010 passed the Registered Partnership Act (Text No. 135/2009), providing same-sex couples with a formal mechanism for recognition and giving effect to their relationships. In the course of their judgment, the majority referred to the growing trend prior to the hearing in 2010 of European Union State affording legal recognition to same-sex couples,<sup>40</sup> concluding:

‘In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the

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<sup>39</sup> *Schalk and Kopf v Austria*, Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010.

<sup>40</sup> *Schalk and Kopf* para 93.

purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.<sup>41</sup>

[94] That trend has since 2010 gathered further momentum. That court acknowledged in 2015 in *Oliari & others v Italy*<sup>42</sup> that ‘the movement towards legal recognition of same-sex couples . . . has continued to develop rapidly in Europe since the Court’s judgment in *Schalk and Kopf*. To date a thin majority of CoE<sup>43</sup> States (twenty-four out of forty-seven . . .) have already legislated in favour of such recognition and the relevant protection. The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia . . .’.<sup>44</sup> In the subsequent case of *Orlandi & others v Italy*<sup>45</sup> decided in 2017, it was noted that 27 of the 47 CoE Member States had by then enacted such legislation.

[95] On 26 June 2015, the United States Supreme Court held that same-sex couples may exercise the fundamental right to marry in all States in the United States, and that there was no lawful basis for a State to refuse to recognise a lawful same-sex marriage performed in another State on the ground of its same-sex character.<sup>46</sup>

#### The rights to dignity and equality

[96] The appellants have raised their constitutional rights to dignity and equality in support of the declaratory relief sought to be included in the meaning of spouse in s 2(1)(c) and that the refusal to do so amounts to a violation of those rights. This Court

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<sup>41</sup> *Ibid* para 94.

<sup>42</sup> *Oliari & others v Italy*, Application nos. 18766/11 and 36030/11, Council of Europe: European Court of Human Rights, 21 July 2015.

<sup>43</sup> The Council of Europe.

<sup>44</sup> Paragraph 178.

<sup>45</sup> *Orlandi & others v Italy*, (Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, Council of Europe: European Court of Human Rights, 14 December 2017.

<sup>46</sup> *Obergefell v Hodges* 576 U.S. 644 (2015). Also see *Orlandi* para 115.

has made it clear that the rights to equality and dignity are closely related<sup>47</sup> and as the claim is made that both rights have been breached, it is convenient to deal with them in a related manner. This is also how challenges entailing dignity and equality have been approached by the Constitutional Court in South Africa<sup>48</sup> and by the Supreme Court in Canada.<sup>49</sup>

[97] The constitutional right to dignity is entrenched in Art 8 which stipulates:

‘Respect for Human Dignity

- (1) The dignity of all persons shall be inviolable.
- (2) (a) 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.  
  
(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.’

[98] As was made clear by this Court already in 1991, Art 8 embodying the right to human dignity is to be read ‘within the context of a fundamental humanistic constitutional philosophy introduced in the preamble to and woven into the manifold structures of the Constitution’.<sup>50</sup> Indeed, the first sentence of the preamble to the Constitution proclaims the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’ as ‘indispensable for freedom,

<sup>47</sup> *Müller v President of the Republic of Namibia & another* 1999 NR 190 (SC) at 202C-D.

<sup>48</sup> *National Coalition* para 31.

<sup>49</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 para 54 where the Supreme Court held that the equality clause’s ‘overriding concern with protecting and promoting human dignity’ and in para 53 where it was stated in this context that ‘human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits’.

<sup>50</sup> *Ex parte: Attorney-General In re: Corporal Punishment by Organs of State* 1991 NR 178 (SC) at 179E-G.

justice and peace'. This Court has made it clear that this recognition of the equal worth of all human beings is at the very root of the Constitution and that this is 'further echoed and implemented in various articles of Chapter 3, and others of the Constitution'.<sup>51</sup> The value attached to dignity is at the very heart of our constitutional framework and fundamental to it as a value of central significance. Although it is entrenched as a self-standing right in Art 8,<sup>52</sup> it relates to the protection of other rights and in particular, the right to equality.<sup>53</sup>

[99] This Court has moreover held that the protection of the right to dignity in Arts 8(1) and (2) does not permit limitations and that the term 'inviolable' does thus not allow for any exceptions.<sup>54</sup>

[100] It was asserted by counsel for the respondents that dignity is a value judgment to be decided by Parliament. A decision of this Court in *Namunjepo & others v Commanding Officer, Windhoek Prison & another*<sup>55</sup> was cited in support of this contention. It does not however support it. This Court in *Namunjepo* followed an earlier decision of this Court in *State v Tcoeib*<sup>56</sup> where it was held in the context of determining constitutional values in giving effect to the right to dignity in Art 8:

'No evidential enquiry is necessary to identify the content and impact of such constitutional values. The value judgment involved is made by an examination of the aspirations, norms, expectations and sensitivities of the Namibian people as they are expressed in the Constitution itself and in their national institutions.'<sup>57</sup>

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<sup>51</sup> *Müller* at 202C-D.

<sup>52</sup> *Dawood & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC).

<sup>53</sup> *Müller* at 202.

<sup>54</sup> *Attorney-General of Namibia v Minister of Justice & others* 2013 (3) NR 806 (SC).

<sup>55</sup> *Namunjepo & others v Commanding Officer, Windhoek Prison & another* 1999 NR 271 (SC).

<sup>56</sup> *S v Tcoeib* 1999 NR 24 (SC). See also *Ex parte: Attorney-General In re: Corporal Punishment by Organs of State* at 86.

<sup>57</sup> See *Tcoeib* in fn 11 at 33.

[101] This Court in *Namunjepo* amplified upon this by making it clear that the court would in this exercise be constrained by the actual words used in the Constitution and that the court in interpreting those words, especially where they concern fundamental rights and freedoms would do so to afford, 'the widest possible meaning so as to protect the greatest number of rights'.<sup>58</sup>

[102] The value judgment to be made by a court when determining the ambit of the right to dignity would be with reference to the constitutional values, the aspirations, norms, expectations and sensitivities of the Namibian people as expressed in the Constitution.

[103] Whilst public opinion expressed by the elected representatives in Parliament through legislation can be relevant in manifesting the views and aspirations of the Namibian people, the doctrine of the separation of powers upon which our Constitution is based means that it is ultimately for the court to determine the content and impact of constitutional values in fulfilling its constitutional mandate to protect fundamental rights entrenched in the Constitution. That is the very essence of constitutional adjudication which is at the core of our Constitution. We agree with the eloquent exposition of this principle by Chaskalson P (of the South African Constitutional Court) in the challenge to the death sentence on the grounds of offending the right to dignity in that country's Interim Constitution:

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<sup>58</sup> At 283C-E.



'Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.'<sup>59</sup>

(Emphasis supplied).

[104] Inherent in the doctrine of separation of powers and constitutional adjudication is the duty of the courts to exercise their Constitutional mandate and deal with and determine alleged violations of the rights entrenched in Chapter 3 of the Constitution when raised by litigants. The position taken in the dissenting judgment of not entering into 'the argument raised on dignity, discrimination and equality'<sup>60</sup> amounts to an abdication of that fundamental duty.

[105] Turning to the rights to dignity asserted in these appeals, in *Dawood & another v Minister of Home Affairs & others*,<sup>61</sup> the South African Constitutional Court was called upon to consider the right to human dignity of a foreign spouse to a South African citizen wanting to reside in South Africa with the citizen spouse. The immigration legislation permitted foreign spouses to be granted a temporary residence permit to

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<sup>59</sup> *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 88.

<sup>60</sup> Paragraph [183] of this judgment.

<sup>61</sup> *Dawood & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC).

reside temporarily in South Africa pending the outcome of their applications for permanent residence. A similar right was not afforded to non-spouses who were required to await the outcome of their applications outside South Africa. (This is unlike the position under the Act where no permit to reside is required for a spouse of a citizen and where no official has a discretion to refuse that right by virtue of s 2(1)).

[106] Speaking for a unanimous court, O'Regan J held that, (in the absence of the right to family in the South African Constitution), the right to dignity was engaged in protecting an individual's right to enter into and sustain permanent intimate relationships. O'Regan J emphasised the importance of marriage and family in these compelling terms:

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

[31] The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses . . . .'

[107] O'Regan J concluded that the challenged legislative provision infringed the right to dignity:

[37] The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.'

(Our emphasis)

[108] We agree with the approach of O'Regan J in *Dawood* that where legislation or its interpretation or application would significantly impair the ability of spouses to honour their obligations to one another, this would infringe the constitutional right to dignity of the spouses. The interpretation of s 2(1)(c) by the Ministry to exclude a spouse in a same-sex marriage from inclusion within that term has in our view the effect of infringing that spouse's (and the other marriage partner's) right to dignity protected in Art 8. The *obiter* approach to the term 'spouse', although not made with specific reference to s 2(1)(c) by the majority in *Frank*, is expressly disapproved and the approach of the Full Bench of the High Court on this issue is approved. The Ministry's reliance upon the unsound approach of the majority in *Frank* in support of its position cannot avail it. We however stress that these *obiter* statements in *Frank* do not in any event provide support to the Ministry's stance in these two appeals. That is because the *obiter* remarks in *Frank* can, if anything, only relate or be applied to a same-sex couple in a long term committed relationship, given the factual context of that case. We have already stressed that the statutory

recognition of a relationship was of importance to O'Linn AJA.<sup>62</sup> The position is thus plainly different in the context of a valid marriage of a same-sex couple. After all, as we have stressed, under our common law, the validity of a marriage is governed by the law of the place where it was contracted.<sup>63</sup>

[109] There is a further reason why the approach of the Ministry to exclude Mr Digashu and Ms Seiler-Lilles from the ambit of spouse in s 2(1)(c) is in conflict with the Constitution. It infringes their rights to equality entrenched in Art 10.

[110] Under the heading 'Equality and freedom from discrimination', Art 10 provides:

- '(1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

[111] This Court in *Müller v President of the Republic of Namibia & another*<sup>64</sup> made it clear that the tests to be applied in determining whether there is discrimination under the two sub-articles differ and succinctly summarised the test to be applied in respect of each sub-article in these terms:

'(a) Article 10(1)

The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose. (See *Mwellie's case supra* at 1132E-H and *Harksen's case supra* (54)).

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<sup>62</sup> At 155H-J.

<sup>63</sup> *Seedat's Executors* at 507.

<sup>64</sup> Footnote 46 above.

(b) Article 10(2)

The steps to be taken in regard to this sub-article 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.<sup>65</sup>

[112] Discrimination on the listed grounds enumerated in Art 10(2) is presumptively unfair along the lines set out in *Müller*, whilst unfair discrimination on any other grounds is also unlawful and unconstitutional under Art 10(1) if the differentiation is not based on a rational connection to a legitimate purpose.

[113] The proscribed grounds of differentiation in Art 10(2) contended for by the appellants' counsel in respect of the treatment of the appellants are those of 'social status' and 'sex', thus contending that the conduct of the Ministry offends against Art 10(2). It was argued that sexual orientation constitutes a social status for the purpose of Art 10(2).

[114] Appellants' counsel could refer to no authority in support of the proposition that sexual orientation amounts to a social status. Nor could we find any.

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<sup>65</sup> At 200A-D.

[115] In the absence of authority or evidence, we decline the invitation to find that sexual orientation constitutes social status for the purpose of Art 10(2) and thus leave that question open.

[116] Counsel for the appellants also argued that 'sex' as a proscribed ground of discrimination in Art 10(2) includes sexual orientation. Reliance was placed upon decisions of the UN Human Rights Committee to that effect in its interpretation of Arts 2 and 26 of the ICCPR. The Covenant in Art 26 prohibits discrimination on grounds similar to those contained in Art 10(2), also expressly prohibiting discrimination on grounds of sex but making no express mention of sexual orientation. The UN Human Rights Committee in adjudicating upon complaints submitted to it has made it clear that the reference to sex in Arts 2 and 26 'is to be taken as including sexual orientation'.<sup>66</sup> In subsequent decisions the UN Human Rights Committee has confirmed this approach in the context of pension benefits to a same-sex partner.<sup>67</sup>

[117] In view of the approach we take in respect of Art 10(1), it is not necessary to express ourselves on this submission except to note that the reference to public international law on this subject by the majority in *Frank* does not correctly reflect that position, as was also pointed out by the Full Bench.

[118] In *Mwellie v Ministry of Works, Transport and Communication*,<sup>68</sup> the court held that, in a challenge based upon Art 10(1), an applicant would bear an onus first to establish a differentiation provided for in a statutory provision (or in these appeals in

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<sup>66</sup> *Toonen v Australia* CCPR/C/WG/44/D/488/1992 (Working Group's rule 91 decision, dated 10 April 1992) para 8.7.

<sup>67</sup> *Young v Australia* CCPR/C/78/D/941/2000 (18 September 2003) para 10.4; *X v Columbia* CCPR/C/89/D/1361/2005 (14 May 2007) para 9.

<sup>68</sup> *Mwellie v Ministry of Works, Transport and Communication* 1995 (9) BCLR 1118 (NmH) (Per Strydom JP). See also *Müller* at 202.

the application of a statutory provision). The second stage of the analysis is for an applicant to show that the differentiation in question is not reasonable in the sense of not being rationally connected to a legitimate statutory object.<sup>69</sup>

[119] In these appeals, a differentiation has been established in the way in which the Ministry treats non-citizen spouses in a heterosexual marriage as opposed to those in a same-sex marriage for the purpose of s 2(1) of the Act. The Ministry interprets 'spouses' in s 2(1)(c) to contemplate those married in a heterosexual marriage and excludes those married in a same-sex union from the protection afforded by s 2(1)(c). The question arises as to whether it was established that this differentiation violates Art 10(1) by being unreasonable in the sense of not being connected to a legitimate statutory object.

[120] The appellants' case is that the differentiation satisfies the second stage of the enquiry and that the unfairness of the Ministry's approach is apparent from the disadvantage they endure as a consequence.

[121] This Court in *Müller* found with reference to the approach of the South African Constitutional Court<sup>70</sup> that in an enquiry as to whether a differentiation (based in that matter on a proscribed ground in Art 10(2)) amounted to unfair discrimination, various factors would play a role and their cumulative effect is to be examined.

'In this regard, the Court must not only look at the disadvantaged group but also the nature of the power causing the discrimination as well as the interests which have been affected. This enquiry focuses primarily on the "victim" of the discrimination and the impact thereof on him or her. To determine the effect of such impact consideration

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<sup>69</sup> *Harksen v Lane N.O. & others* 1998 (1) SA 300 (CC) para 45 approved in *Müller*.

<sup>70</sup> *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) paras 41 and 43; *Harksen* paras 51-53.

should be given to the complainant's position in society, whether he or she suffered from patterns of disadvantage in the past and whether the discrimination is based on a specified ground or not. Furthermore, consideration should be given to the provision or power and the purpose sought to be achieved by it and with due regard to all such factors, the extent to which the discrimination has affected the rights and interests of the complainant and whether it has led to an impairment of his or her fundamental human dignity. It was further made clear that these factors do not constitute a closed list but that other factors may emerge as the equality jurisprudence continues to develop. This latter remark would most certainly also be true of the development of this jurisprudence in Namibia.<sup>71</sup>

[122] The unfairness of discrimination is thus to be determined with reference to the impact upon the victim(s) discriminated against, the purpose sought to be achieved by the discrimination, the position of the victim(s) in society, the extent to which their rights and interests have been affected and their dignity impaired.<sup>72</sup>

[123] The impact of the differentiation upon Mr Digashu and Ms Seiler-Lilles (as spouses in a same-sex marriage) is far reaching and potentially devastating when compared to spouses in a heterosexual marriage. Instead of being entitled to cohabit in Namibia with their Namibian citizen spouse under s 2(1)(c), they are required by the Ministry to apply for one of the range of permits posited by Part V to provide them with permission to reside or be employed in Namibia. In the instance of Mr Digashu, the permit identified by the Ministry would be temporary and of a precarious nature which was in any event refused, as was the permanent residence application by Ms Seiler-Lilles.

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<sup>71</sup> *Müller* at 202H-203B.

<sup>72</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 27. See also *Ghaidan* especially per Baroness Hale paras 139-144 in the context of discrimination against same-sex couples in the context of a statutory tenant by succession.



[124] The result of the differentiation has led to a profound impairment of their fundamental human dignity at a 'deeply intimate level of their human existence'.<sup>73</sup> In the context of this form of discrimination it was acknowledged by Ackerman J in *National Coalition*,<sup>74</sup> and with whom we agree:

' . . . The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality.

It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.'

[125] The Ministry has raised no rational connection to a legitimate statutory object. The reliance for its approach is placed upon *obiter* statements in *Frank*, which as we have shown are unsound and in any event were of no application to the appellants given their valid marriages entered into. We expressly disapprove of the *obiter* statement in *Frank* that 'equality before the law for each person does not mean equality before the law for each person's sexual relationships'. This approach is incompatible with the right to equality properly interpreted in a purposive right giving

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<sup>73</sup> *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC).

<sup>74</sup> Paragraph 42.

way, as has been repeatedly held to be the approach to interpretation held by this Court. It also fails to take into account the human worth and dignity of all human beings including those in same-sex relationships which is at the very core of the equality clause.

[126] The purpose of prohibiting discrimination in Art 10 is after all the emphatic recognition in the Constitution that all human beings are to be accorded equal dignity which is impaired when a person is unfairly discriminated against.<sup>75</sup> As was stated by the Supreme Court of Canada with reference to that country's equality clause:

'Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity'.<sup>76</sup>

[127] The importance to be attached to equality with reference to the shared history of discrimination in South Africa was also emphatically stated by Ngcobo J in *Hoffmann*:

'Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era - it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place.'<sup>77</sup>

[128] We accordingly conclude that the approach of the Ministry to exclude spouses, including Mr Digashu and Ms Seiler-Lilles, in a validly concluded same-sex marriage

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<sup>75</sup> *Hoffmann* para 27.

<sup>76</sup> *Egan v Canada* (1995) 299 CRR (2d) 79 at 104-105; [1995] 2 SCR 513. See also *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 41.

<sup>77</sup> Paragraph 37.

from the purview of s 2(1) of the Act infringes both their interrelated rights to dignity and equality.

[129] They are spouses for the purpose of s 2(1)(c) of the Act, given their validly concluded marriages in South Africa and Germany respectively. The term 'spouse' in s 2(1)(c) is thus to be interpreted to include same-sex spouses lawfully married in another country. It is not necessary for an order to the effect that those words are to be read into the term 'spouse' because the interpretation to be given to the term 'spouse' by this Court in complying with the Constitution is to include same-sex spouses lawfully married in another country.<sup>78</sup>

[130] The appellants are entitled to the declaratory orders sought in paras (a) and (b) to their amended notices of motion as well as the consequential relief in relation to L. As we have said, it is not necessary for the respective reviews of the decision making to be further addressed in view of the declaratory relief granted.

[131] It is not necessary for the purpose of this judgment to address all of the *obiter dicta* in *Frank* made under the heading 'The issue of the respondents' lesbian relationship and the alleged breach of their fundamental rights'. We have confined ourselves to those portions relevant to this judgment and those which have been relied upon by the Ministry for its stance. Although not necessary for the purpose of the relief granted, we however find ourselves obliged also to express our disapproval of the statements expressed concerning the meaning and interpretations to be given to the terms 'family' and 'marriage' contained in *Frank*, particularly but not limited to the assertion that the term 'family institution' in the Constitution and other international instruments 'envisages a formal relationship between male and female', for the

<sup>78</sup> *National Coalition* para 75.

purpose of procreation.<sup>79</sup> We expressly disapprove of this construct for the reasons eloquently articulated by Ackerman J in *National Coalition*:<sup>80</sup>

‘From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.’

[132] This approach was expressly followed by the Constitutional Court in a subsequent matter,<sup>81</sup> with the court unanimously concluding on this issue that ‘the procreation argument cannot defeat the claim of same-sex couples to be accorded the same degree of dignity, concern and respect that is shown to heterosexual couples’ and ‘more particularly, in the context of the status, entitlements and responsibilities heterosexual couples receive through marriage’.<sup>82</sup>

[133] A similar approach was adopted by the Canadian Supreme Court with reference to same-sex couples.<sup>83</sup>

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<sup>79</sup> At 146F-H.

<sup>80</sup> Paragraph 51.

<sup>81</sup> *Minister of Home Affairs & another v Fourie & another (Doctors for Life International & others, Amici Curiae); Lesbian & Gay Equality Project & others v Minister of Home Affairs & others* 2006 (1) SA 524 (CC) para 86.

<sup>82</sup> *Ibid* para 87.

<sup>83</sup> *Canada (Attorney-General) v Mossop* (1993) 100 DLR (4<sup>th</sup>) 658 at 710C-E; [1993] 1 SCR 554. *National Coalition* para 52.

[134] It also remains for us to point out that the legal consequences of marriages are manifold and multi-faceted and are addressed in a wide range of legislation. This judgment only addresses the recognition of spouses for the purpose of s 2(1)(c) of the Act and is to be confined to that issue. The precise contours of constitutional protection which may or may not arise in other aspects or incidents of marriage must await determination when those issues are raised.

#### The order

[135] The following order is made:

- (a) The appeal succeeds with costs, such costs to include the costs of one instructing and two instructed legal practitioners;
  
- (b) The order of the High Court is set aside and replaced with the following:
  - (i) In respect of the application of *Digashu v Government of the Republic of Namibia* (HC-MD-CIV-MOT-REV-2017/00447):
    - ‘(a) The respondents are directed to recognise the civil marriage of Messrs Digashu and Potgieter concluded in terms of the South African Civil Unions Act 17 of 2006;

- (b) The applicant is declared to be a spouse as envisaged in s 2(1)(c) of the Immigration Control Act 7 of 1993;
  - (c) The applicants' application for the recognition of the court order granted on 3 March 2017 by the Gauteng Local Division of the High Court of South Africa is granted;
  - (d) The third applicant, L is declared a dependant child of the first and second applicants as envisaged in s 2(1)(c) of the Immigration Control Act 7 of 1993;
  - (e) The respondents are to pay the applicants' costs, jointly and severally, the one paying the other to be absolved.'
- (ii) In respect of the application of *Seiler-Lilles v Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2018/00427):
- '(a) The respondents are directed to recognise the civil marriage of Ms Anita Seiler-Lilles to Ms Annette Seiler concluded in Germany;
  - (b) The applicant is declared to be a spouse as envisaged in s 2(1)(c) of the Immigration Control Act 7 of 1993;
  - (c) The respondents are to pay the applicants' costs, jointly and severally, the one paying the other to be absolved.'

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**SHIVUTE CJ**

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**SMUTS JA**

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**DAMASEB DCJ**

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**HOFF JA**

MAINGA JA (dissenting):

Introduction

[136] This matter in my opinion is sufficiently complex and sensitive on both sides of the aisle of the Namibian society. In as much as judges are ‘oath bound to defend the Constitution . . . [they] do well to approach this task cautiously’<sup>84</sup> more so in this matter before us which is in the area of considerable social, political and religious controversy.<sup>85</sup>

[137] Mr Phillip Lühl in *The Namibian* newspaper of Thursday 6 April 2023 under the Opinion column penned an open letter to President Hage Geingob which was titled: ‘I Remember the Day of Independence, End State-Sanctioned Homophobia In Namibia’ and opines what I record *infra* (some parts of the letter I omitted), which in my opinion is a step in the right direction.

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<sup>84</sup> Per Chief Justice Earl Warren in *Trop v Dulles* 356 U. S. 86, 103-04 (1958).

<sup>85</sup> *Wilkinson* para 44.

'AN OPEN LETTER to President Hage Geingob:

Dear Mr President,

I remember Independence Day.

I was barely seven years old and had started primary school just a month earlier. We remained glued to our TV until midnight for the old South African flag to be lowered, and the new Namibian flag to be hoisted to deafening cheers. It was a big moment full of promise – that much I could understand.

Thirty-three years later I am fighting for the legal recognition of my family, because we are not equal citizens in the country of my birth, or what you like to call Namibian House.

I am a man, married to another man, and we have three beautiful children: This is our crime . . .

Despite the promise of our Constitution that all members of the human family are equal before the law, this is not true for the experiences of the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) community.

We hear of the assault of trans women by the police for expressing who they are; we read about men being beaten up for wearing a dress; we grieve for those who could not carry the burden of denying their true selves any longer; we experience harassment of same-sex spouses of Namibian citizens; we know of the deadly impact of the government not distributing condoms in correctional facilities; and of course we remember the founding president stating publicly that homosexuals should be imprisoned and deported.

But most importantly, we hear the deafening silence – and thus the consent – of your administration and Swapo amid continued discrimination of LGBTQI+ people in this country.

You were the chairperson of the historic Constituent Assembly which drafted Namibia's progressive Constitution: Why are you seemingly unwilling to give effect to the momentous promise of equality for all that was enshrined in the supreme law?



For 33 years, parliament, with its duty to make laws to give effect to the inclusive tenets of the Constitution, has failed to even repeal some of the most glaring unconstitutional laws inherited from apartheid, particularly the crime of sodomy.

Instead, current lawmakers insist that only domestic partnerships of the opposite sex are to be protected under domestic violence legislation.

Recently, the attorney general submitted that homosexuals undermine their own dignity by contravening (unsubstantiated) majoritarian morals.

Now it is becoming clear that the Supreme Court – guardian of the bill of rights – is unwilling to provide constitutional guidance on a substantive aspect of LGBTQI+ rights.

This is, despite all that your administration wants us to believe state-sanctioned homophobia.

We, the queers, are your sons, your daughters, your aunties and brothers. We are good enough to contribute to society, to be teachers, to provide shelter for orphans, to entertain, to serve at the highest levels of government, to be doctors, lawyers and architects; we're good enough to be gay best friends and co-workers, and above all we are good enough to be taxpayers.

But we are not good enough to be equal citizens.

We do not need historians to remind us that the Bible and homophobia, not homosexuality, are the original colonial import. Queerness has always existed, evidenced by indigenous terminology to express it.

The oppression of diverse identities and sexual practices in Africa was, like violence and dispossession, central to the colonial project.

Wisely, you and the drafters of our Constitution insisted that Namibia become a secular state. Christian morality is therefore welcome to stand alongside equal rights for sexual minorities, but not above. The long-standing intersectional and transcultural struggle of gender and sexually diverse persons is global and tolerance is growing the world over . . .

Legal equality must be extended to all, or there is no equality.'

[138] Compare the observations of the British High Commissioner to Namibia in the *Namibian Sun* newspaper of Wednesday, 1 March 2023, where he is quoted saying, ‘there is no persecution of gay people . . . in Namibia and that his government would not push Namibia to expedite processes required to realise full rights and equality of the country’s LGBTQI community’. He further said ‘the allegations of persecution of sexual minority groups in the country are devoid of truth. Legislation to allow same-sex marriage in England and Wales – some of the oldest democracies – was only passed by the UK Parliament in July 2013 and took effect in March 2014. It is a complex issue and we respect where Namibia is at the moment . . . Our own journey towards full LGBT rights and equality . . . took us decades’. He further added, ‘our own journey and challenges about LGBT rights and same-sex marriages, full equality across the board for the LGBT Community has been very long, emotive and painful. We have been through the same challenges that Namibia is going through . . . I’ve been very impressed since I’ve been here and I am a strong believer in LGBT rights and equality – but I am impressed that Namibia has tolerance for the LGBT Community. There is no persecution, they are free. They are not as yet equal as I would have them to be in terms of full equality, recognition of same-sex marriages, adoption of children and repealing of the sodomy law, but I fully respect where Namibia is on that scale at the moment . . .’.

[139] The observations by the British High Commissioner are candid revelations on the issue under discussion and on point.

[140] In the *Namibian Sun* newspaper of Wednesday, 8 March 2023, the Attorney-General (AG) is quoted to be defending a challenge to the crime of sodomy in our

statute books. In the same newspaper of Wednesday, 1 March 2023, the AG is quoted to have said, 'As the applicants accept, for many Namibians, homosexual conduct is immoral and unacceptable. I deny that the mere existence of the sodomy law promotes the stigmatization of gay men. If these men suffer any stigma, it is in consequence of their choice to engage in sexual conduct considered to be morally taboo in our society'.

[141] The AG is the chief advisor of government, what he stated in his answering affidavit to the sodomy matter currently pending before the High Court should be considered to be the instructions he received from government reflecting government's standpoint on the issue of sodomy.

[142] Against this background I turn to the matter before us. I have read the majority judgment. I agree with the judgment's summary of the facts, the issue to be determined, the litigation history of *Frank* and para (d) of the order in *Matsobane Daniel Digashu & another*. My dissent is on (1) my brothers' decision to resolve the disputes in these matters on the amended/alternative Constitutional reliefs sought by the appellants; (2) the consequent orders made and (3) the finding that the court below was not bound by the majority opinion in *Frank*.

[143] Was the court below bound by the majority opinion in *Frank*?

[144] In my opinion it was.

[145] The majority judgment holds that the court below was not bound by the majority opinion in *Frank*, firstly for the reason that the issue of the respondents' lesbian

relationship and the alleged breach of their fundamental rights was in no way determinative of the outcome of that case and therefore constituted *obiter dicta*. Secondly is that, the facts in the two appeals are distinguishable from the facts in *Frank*, in that in the present appeals the parties concluded lawful marriages in jurisdictions recognising such marriages, while in *Frank*, the parties were same-sex partners in a committed long term relationship.

[146] What this finding failed to consider is that the laws of Namibia (including the Constitution of the Republic) do not recognise same-sex relationships and marriages. There is a legion of indicators to that effect. The crime of sodomy on our statutes is one; pieces of legislation enacted by Parliament, namely, Combating of Domestic Violence Act 4 of 2003, s 3 defines domestic relationship excluding same-sex relationships, s 3(1)(b) and (f) particularly provides, 'they being of different sexes . . .'. (See also Mr Luhl's letter on domestic violence), Children's Status Act 6 of 2006, defines marriage excluding same-sex, including any marriage in terms of the law of any country other than Namibia, which marriage is recognised as a marriage by the laws of Namibia; Child Care Protection Act 3 of 2015, s 1 thereof replicates the definition of marriage as in the Children's Status Act; the Married Persons Equality Act 1 of 1996, which among other things, its purpose is to abolish marital power, amend the matrimonial property law of marriages in community of property and provide for domicile of married women and the Recognition of Certain Marriages Act 18 of 1991. The Schedule to this Act, which is the SWAPO Family Act, spells out any doubts to the meaning of the words, spouse, marriage and family. Article 1 provides for family relations of Namibians, to wit, marriage and matrimonial relations. Article 2 provides that marriage and family shall be the fundamental cells of our society. In Art 3, equality of men and women is one of the fundamental principles governing marriage and

family. Article 5 thereof further provides that, marriage shall be the community of lives of a man and woman regulated by statute and Art 8 provides that the marriage shall be valid when two parties of different sex state their agreement to marry . . . and public opinions from some founders of the Constitution. The list goes on. (The underlining is mine)

[147] In fact the partners of Mr Digashu and Ms Seiler-Lilles are Namibians. They chose to marry elsewhere, because the laws of Namibia do not recognise same-sex relationships or marriages. The above laws including the Immigration Control Act 7 of 1993 (the Act) were promulgated after the Constitution was long adopted. There can be no doubt that their provisions inclusive of s 2(1)(c) of the Act are consistent with the Constitution.

[148] Therefore whether the opinion of O'Linn AJA on the words marriage, spouse and family were *obiter dicta*, or not he was correct in the interpretation of the words as that opinion is consistent with the laws of Namibia, aspirations and ethos of the Namibian Society.

[149] For this reason alone, the court below was bound by the *Frank* decision.

[150] One of the values of *stare decisis* is to 'restrain judicial hubris, a reminder to respect the judgment of those who have grappled with the important questions in the past.<sup>86</sup> To leave open to the lower courts to make choices whether a decision of a Superior Court is binding or not is to invite legal chaos.

[151] I now turn to the main finding of the majority judgment.

<sup>86</sup> *Dobbs v Jackson Women's Health Organization* No. 19-1392, 597 US (2022).

[152] That finding has its basis on a well-established general principle of common law, that if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia and that, that principle finds application to these matters. The judgment relies on the ordinary meaning of spouse since s 2(1)(c) does not define the word. The judgment goes on to say that the Ministry did not raise any reason relating to public policy as to why the appellants' marriages should not be recognised in accordance with the general principle of common law; neither did the Ministry question the validity of the appellants' marriages. Further to that, on the basis of the common law principle, appellants' marriages should have been recognised for the purposes of s 2(1)(c) and Mr Digashu and Ms Siller-Lilles are to be regarded as spouse and thus exempt from Part V of the Act. The majority relies on the South African cases of *AS v CS* and *Seedat's Executors* for the finding.

[153] A careful reading of *AS v CS* reveals that even South Africa whose Constitution on Fundamental Rights prohibits discrimination on the ground of sexual orientation, had to pass the Civil Union Act 17 of 2006 to accommodate same-sex partnerships/marriages. The Preamble to the Civil Union Act, in paras 1, 2, 3 and 4 refers respectively to ss 9(1), 9(3), 10 and 15 of the Constitution and in para 6 it notes:

'AND NOTING that the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples.'

[154] Compare the observations of the former Chief Justice of Zimbabwe, Gubbay when he said:

'The mere fact that a given state has a justiciable declaration of rights in its constitution, no matter how well drafted, does not of itself guarantee the enjoyment of, or respect for, human rights. It is quite possible for two countries with identical declarations to have totally different experiences with the level of human rights that are actually enforced. For example, the Soviet Constitution of 1936 had a Declaration of Rights which one might wish. Yet that did not stop the Gullags, mass deportations, or other notorious human rights violations of the Stalinist era from occurring. The United States experienced a similar situation. For over two hundred years clauses of the Constitution of the United States have been substantially the same. Nonetheless, the institution of slavery was tolerated; women did not have contractual capacity or the ability to own property until 1848; women and African Americans did not have the right to vote until this century; sex and racial discrimination coexisted with the Equal Protection Clause of the Fourteenth Amendment for at least fifty years.'<sup>87</sup>

[155] In *AS v CS*, the same-sex partnership was solemnised in the United Kingdom (UK) both parties being South Africans. When the partnership failed the plaintiff returned to South Africa. The defendant later followed. Plaintiff instituted divorce proceedings. The matter was unopposed in motion proceedings. The judge presiding raised the question whether the court had jurisdiction to grant a decree of divorce in respect of a same-sex marriage (or similar union) solemnised in a foreign jurisdiction. Counsel appearing for the plaintiff did not have an immediate answer, the matter had to be postponed.

[156] When the matter came before Gamble J at a subsequent date in the motion court the learned judge granted a divorce order incorporating a settlement agreement by the parties. Gamble J undertook to file reasons for the order. At the hearing counsel for the plaintiff had provided a useful memorandum which facilitated the preparation of the judgment.

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<sup>87</sup> Human Rights Quarterly 19 (1997) 227-254 at 228 (c) 1997 by 'The Johns Hopkins University'.

[157] Gamble J in his judgment analysed the provisions of the Civil Union Act, which was a follow up on the decision in *Minister of Home Affairs & another v Fourie*<sup>88</sup> wherein the Constitutional Court had held the common law definition of marriage inconsistent with the Constitution, so were the provisions of s 30(1) of the Marriage Act 25 of 1961. When he turned to foreign same-sex partnerships he raised the question as to what is the status in South Africa of a same-sex marriage/partnership concluded outside of South Africa.

[158] For the reason of his finding in para 33 to the effect that:

[33] Notwithstanding the obvious shortcomings in the Act, I consider that it is correct to say that the present state of our law then is that a same-sex union concluded under the Act is fully cognizable as a marriage, whether the partners thereto choose to call it a marriage or a civil partnership, and that such union is capable of dissolution under the Divorce Act.'

He in para 34 restated the common law principle the majority is holding onto.

[159] In my opinion, this is because the same-sex partnership in terms of SA law was on the same level with the traditional marriage.

[160] What followed was an analysis of the UK Civil Partnership Act 2004 which he labelled as a formidable piece of legislation, which consists of some 490 pages, 264 sections with 30 Schedules. The Act itself and the Schedules thereto deal individually with civil partnerships concluded in England and Wales, Scotland, Northern Ireland and abroad.

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<sup>88</sup> *Minister of Home Affairs & another v Fourie & another (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project & others v Minister of Home Affairs & others* 2006 (1) SA 524 (CC).



[161] After that study he concluded in para 41:

'English civil partnership, having been lawfully concluded in that country, should be accepted as a valid and binding civil partnership in the Republic in accordance with the *lex loci celebrationis* principle, provided only that it does not otherwise offend South African public policy.' (The underlining is mine)

[162] The majority also relies on *Seedat's Executors v The Master (Natal)* for the common law principle but they however conveniently overlooks what the court said at pages 307–309:

'But there are exceptions to the widely accepted rule by which foreign courts recognize the validity of a marriage contracted in accordance with the local law. And one of them is based upon the principle that no country is under an obligation on grounds of international comity to recognize a legal relation which is repugnant to the moral principles of its people. . . .

In *Ngqobela v Sihele* (10 S.C. 346) it was held that Tembuland Courts would be justified under Proclamation 140 of 1885 in treating as valid native polygamous marriages celebrated before a certain date. But upon the wider question *De Villiers, C.J.*, remarked that "a marriage which is founded upon polygamy would not necessarily be recognized in other countries, although it might be warranted by the municipal law of the country in which it was contracted." In *Ebrahim v Mahomed Essop* (1905, T.S. 59) it was said that "if this marriage were a polygamous one it would not be recognized in this country, no matter whether it were recognized as valid in other countries or not. With us marriage is the union of one man with one woman, to the exclusion while it lasts of all others. And no union would be regarded as a marriage in this country, even though it were called and might be recognized as a marriage elsewhere, if it was allowable for the parties to legally marry a second time during its existence."

. . . It was a relationship recognized no doubt by the legal system under which the parties contracted, but forbidden by our own and fundamentally opposed to our principles and institutions. And it is impossible for our Courts when dealing directly with

the position of a party to such a union to say that she ever was a wife in the sense in which our law used that term. From which it follows that she cannot be recognized as a surviving spouse within the meaning of the statute. It is a hard result, no doubt, that a woman validly married in one part of the British Empire should not be treated as a wife in another part. But relief can only be properly sought from the Legislature, which is able to grant it subject to such conditions as the circumstances of the country may require. The difference between polygamous and monogamous unions is too vital to be eliminated by Courts of law on grounds of international comity.'

[163] In *Wilkinson*, the petitioner Susan Wilkinson and the first respondent Celia Clare Kitzinger contracted a form of marriage, lawful and valid by the law of British Columbia (Canada) which permits and recognises as valid marriages between persons of the same-sex. Upon their return to the United Kingdom, Wilkinson with the support of Kitzinger sought among other things a declaration that the marriage was a valid marriage under the law of England and Wales. At the time, the CPA had come into force.

[164] The alternative relief was that if the court found that the law in that jurisdiction cannot recognise the said marriage, the petitioner asked the court to declare that:

'(a) Being contrary to Article 8, 12 and 14 (taken together with Article 8 and/or Article 12) of the European Convention on Human Rights, the prohibition of marriage of two persons of the same sex in this jurisdiction is in breach of the petitioner's human rights; and

(b) Sections 11 (c) of the *Matrimonial Causes Act* 1973 and Section 1(1) (b) and Chapter 2 of Part 5 of the *Civil Partnership Act* 2004 are incompatible with the obligations imposed on the United Kingdom by the European Convention on Human Rights and that court will make a Declaration of Incompatibility in respect of the aforesaid sections under section 4 of the *Human Rights Act* 1998.'

(Articles 8, 12 and 14 are the equivalent of Arts 13 – Privacy, 14 – Family and 10(2) – Discrimination of the Constitution of Namibia, respectively).

[165] Counsel for the petitioner raised every conceivable argument including the common law principle relied upon in the majority judgment. Counsel even referred to the decision of *Halpern et. al. v Canada (Attorney General)* (2003) 169 O.A.C. 172 (CA) wherein a number of same-sex partners sought a declaration as to whether the exclusion of same-sex couples from the common law definition of marriage was a breach of the Canadian Charter of Rights and Freedoms and the Constitutional Court of South Africa's decision in the *Minister of Home Affairs v Fourie* in which the court held that the absence of provision in the law for same-sex couples to marry each other amounted to denial of equal protection under the law, and was unfair discrimination by the State against them because of their sexual orientation.

[166] The court described the judgment of Sachs J in *Fourie* as both moving and impressive, but continued to say, 'however, the decision of the court was reached on the basis of criteria provided for in a Constitution the provisions and requirements of which were in very different terms from those of the Convention and against a different historical ground and social history'.<sup>89</sup>

[167] On the common law principle, the court said, ' . . . this would be an inappropriate and ineffective exercise . . . to accept Ms Monaghan's suggestion would run counter to public policy, as expressed in the provisions of the CPA which require that a foreign same-sex marriage such as the Petitioner's be treated as a civil partnership'.<sup>90</sup> The court continued, ' . . . there is abundant authority that an English

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<sup>89</sup> *Wilkinson* para 126.

<sup>90</sup> *Ibid* para 129.

court will decline to recognise or apply what might otherwise be an appropriate foreign rule of law, when to do so would be against English public policy: *Vervaeke v Smith* [1983] AC 145 at 164C'.<sup>91</sup>

[168] The petition was rejected so were the submissions on Arts 8 – the right to respect for private and family life, 12 – right to marry, 14 – prohibition of discrimination and the argument to develop the common law so as to recognise the petitioner's Canadian marriage as a marriage in English law.

[169] That being the case, the finding based on the common law principle is without a foundational basis and is clearly fundamentally wrong. In fact not only is it wrong, but it trashes the historical, social and religious convictions of the Namibian people.

[170] The Ministry was thus entitled to reject the appellants' same-sex marriages, it is marriages not recognised in Namibia. The common law principle relied on by the majority is sound in law but there are exceptions to the rule and Namibia is under no obligation to recognise a marriage inconsistent with its policies and laws for the reason that the said marriage is warranted by the municipal law of the country in which it was contracted.<sup>92</sup> The marriages of the appellants offend the policies and laws of Namibia. It would be wrong to understand and apply the common law principle *contra* the authorities and interpret s 2(1)(c) to include foreign same-sex marriages. The principle finds no application under the circumstances.

[171] Regard had to the preamble to the Civil Union Act of South Africa, the revelation by Chief Justice Gubbay, and the position in many other jurisdictions, the

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<sup>91</sup> *Ibid* para 130.

<sup>92</sup> *AS v CS* para 41 and *Wilkinson* paras 129 and 130.

fact that the laws of Namibia do not make provision for same-sex relationships, is not peculiar to Namibia only, it is worldwide. In the whole of the European Union, the question whether or not to allow same-sex marriage is left to be regulated by the national laws of the States to the Union.<sup>93</sup> At the time when *Schalk and Kopf* was decided (June 2010) only six out of forty-seven member States granted same-sex couples equal access to marriage, namely Belgium, the Netherlands, Norway, Portugal, Spain and Sweden.<sup>94</sup> Thirteen member States did not 'grant same-sex couples access to marriage, but had passed some kind of legislation permitting same-sex couples to register their relationships, ie Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom'.<sup>95</sup> Ireland and Liechtenstein reforms in that regard were pending or planned.<sup>96</sup> Croatia has a law on 'same-sex civil unions . . . for limited purposes, but does not offer them the possibility of registration'.<sup>97</sup>

[172] Most of the European Union States are old democracies but never had provision for same-sex couples in their laws. Baroness Scotland introducing the second reading of the Civil Partnership Bill in the House of Lords, said that the Bill was, 'shaped by consultation with stake holders and the public at large' she stated that:

'[It] offers a secular solution to the disadvantages which same-sex couples face in the way they are treated by our laws . . . This Bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite-sex couples. Civil partnership is aimed at same-sex couples who cannot marry.

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<sup>93</sup> *Schalk and Kopf* para 61.

<sup>94</sup> *Ibid* para 27.

<sup>95</sup> *Ibid* para 28.

<sup>96</sup> *Ibid* para 29.

<sup>97</sup> *Ibid* para 29.

However, it is important for us to be clear that we continue to support marriage and recognise that it is the surest foundation for opposite sex couples raising children . . . . (Hansard, HL 22 April 2004, Col 388).<sup>98</sup>

[173] In *Wilkinson*, Sir Mark Potter the President of the Family Division stated, while there has been a general move towards legal recognition towards same-sex relationships across Europe in recent years, only Netherlands, Belgium and Spain have passed laws providing for same-sex marriage. Outside Europe, it appears that Canada and the US State of Massachusetts and South Africa have given legal recognition to same-sex marriages.<sup>99</sup>

[174] As I have already stated Namibia is no exception. The revulsion of the Namibian people as mirrored in its Constitution particularly Art 23 is directed at past injustices. Homosexuality would not have been one of the injustices. In late 1989 and early 1990 when the Constitution of the Republic was being drafted, and adopted, marriage was clearly understood in the traditional sense of being a union between partners of different sex. When Art 14 of the Constitution grants men and women of full age the right to marry and found a family and entitles them to equal rights as to marriage, during marriage and at its dissolution it relates to partners of different sex. That is how the Married Persons Equality Act 1 of 1996 came into being, the policy of equal representation between men and women. The International Human Rights Conventions allows member States a wide margin of appreciation when it comes to general measures in issues like the one in question. That much is conceded by the appellants when in their heads of argument they stated, ‘ . . . under International Human Rights Laws States are not required to allow same-sex couples to marry . . . ’ and referred to the CCPR in particular.<sup>100</sup>

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<sup>98</sup> *Wilkinson* para 51.

<sup>99</sup> *Ibid* para 62.

<sup>100</sup> CCPR/C/75/D/902/1999 and 10 IHRR 40 (2003). See also *Schalk and Kopf* para 97.

[175] Both Mr Digashu and Ms Seiler-Lilles would have known the status of same-sex couples in this country, if they did not know they were informed at the time they applied for their respective permits. In fact, Mr Digashu in his application states that because the major consideration in refusing the employment permit was because gay marriages are not recognised in Namibia. In his very first application of a work permit which was in a letter form on 15 June 2017, he stated, 'I am well aware that our marriage as a same-sex couple is not recognised here in Namibia . . . '. In his penultimate paragraph he pleaded with the Ministry 'to keep this matter as private and confidential as possible to avoid any unnecessary exposure . . . '.

[176] It was stated that the Ministry did not raise any reason relating to public policy as to why the appellants' marriages should not be recognised in accordance with the general principle of common law, and that neither did the Ministry question the validity of the appellants' marriages. The Ministry did not have to raise reasonable public policy, although if it did, it would have strengthened its case. Marriage or traditional marriage as defined in common law, other statutes of the Republic and the historic understanding of marriage as enshrined in the Constitution is as old as creation itself<sup>101</sup> and the protection of family in the traditional sense is in principle a weighty and legitimate reason which might justify a difference in treatment.<sup>102</sup> In *Wilkinson*, the court went on to say, ' . . . marriage remains an institution which is widely accepted as conferring a particular status on those who enter it to accord a same-sex relationship the title and status of marriage would be to fly in the face of the convention as well as to fail to recognise physical reality – to the extent that by reason of the distinction it discriminates against same-sex partners, such discrimination has a

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<sup>101</sup> Genesis 2:24. See also *Sheffield and Horsham v The United Kingdom* 22985/93; 23390/94 [1998] ECHR 69 (30 July 1998) para 46.

<sup>102</sup> *Schalk and Kopf* para 77 and *Wilkinson* para 46.

legitimate aim, is reasonable and proportionate, and falls within the margin of appreciation accorded to Convention States'.<sup>103</sup>

[177] In *S v Banana*<sup>104</sup> the majority declined to decriminalise the crime of sodomy for the only reason that Zimbabwe is a conservative society in sexual matters. Writing for the majority McNally JA said:

'From the point of view of constitutional interpretation, I think we must also be guided by Zimbabwe's conservatism in sexual matters . . .

In the particular circumstances of this case, I do not believe that the "social norms and values" of Zimbabwe are pushing us to decriminalise consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matters of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal.

I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual freedom. Put differently, I do not believe that this Court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative.'

[178] McNally JA continued to say:

'I do not believe that it is the function or right of this Court, undemocratically appointed as it is, to seek to modernize the social mores of the State or of society at large. As Justice White said in *Bowers, Attorney-General Georgia v Hardwick et al* 478 US 186 (1986) (106 SCt 2841).

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<sup>103</sup> *Wilkinson* paras 112, 120 and 122.

<sup>104</sup> *S v Banana* 2000 (3) SA 885 (ZS) at 933C-F.



“The Court is most vulnerable and comes nearest to illegitimacy when it deals with Judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”<sup>105</sup>

[179] In *Schalk and Kopf* the court said, ‘. . . the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society’.<sup>106</sup>

[180] In *Johnston & others v Ireland* the court stated.

‘It is true that the Convention and its Protocols must be interpreted in the light of present day conditions. However, the court cannot, by means of an evolutive interpretation, derive from these instruments a right which was not included therein at the outset’.<sup>107</sup>

[181] The upshot of this all is that:

(a) The High Court was bound by the decision in the *Frank* matter.

(b) Whether the decision of the majority in *Frank* as to the meaning of the word spouse as being confined to men and women in marriage was *obiter*, makes no difference because that decision reflected the correct view of the laws of Namibia, which position is not only peculiar to Namibia, but throughout many democracies in the world.

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<sup>105</sup> *Ibid* at 935F-G.

<sup>106</sup> *Schalk and Kopf* para 62.

<sup>107</sup> *Johnston & others v Ireland* (1986) 9 EHRR 203 para 53. See *Wilkinson* para 62.

- (c) The common law principle relied on to find that the marriages of the appellants should have been recognised by the Ministry for purposes of s 2(1)(c) and that Mr Digashu and Ms Seiler-Lilles are to be regarded as a spouse for purposes of s 2(1)(c) is misplaced as their marriages run counter to the policies and laws of Namibia.
- (d) There is no statutory provision (including the Constitution) or court decision recognising same-sex marriages in Namibia and therefore the holding based on the common law principle, is in my opinion putting the cart before the horse. Gino J Naldi in his discussion of Art 10(2) of the Constitution of Namibia, states that 'although there may be room for a restrictive interpretation of Article 10(2), it is conceivable that issues of sexuality could arise under this section in addition to other provisions of the Constitution, eg Article 13 in relation to the right to privacy.'<sup>108</sup>
- (e) Homosexuality is a complex issue that is better left in the Constitutional, province of the Legislature. Parliament is better equipped to deliberate and evaluate the ramifications and practical repercussions of same-sex couples or any other union.
- (f) Marriage is as old as creation and the common law definition of marriage as a 'voluntary union for life of one man and one woman, to the exclusion of others' and/or the protection of family in the traditional sense is, in principle a weighty and legitimate reason which might justify a difference in treatment.

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<sup>108</sup> G J Naldi *Constitutional Rights in Namibia: Comparative Analysis with International Human Rights* (1995) at 59 in footnote 174.

[182] Viewed from the perspective I demonstrate above, the Ministry did not discriminate against the appellants. The Ministry applied the law as it is, currently in this country. To say the Ministry relied on the unsound finding in *Frank*, is to obscure reality. *Frank* or no *Frank*, there is no statutory provision for same-sex couples in the Namibian laws. The Ministry like any other Cabinet Ministry implements laws. It is not in the province of the Ministry to legislate or interpret laws. It has applied s 2(1)(c) consistent with the Act, read with other statutes and the Supreme law of the country. In any event, *Frank* is a decision of this Court and the Ministry had no reason not to rely on it. The *obiter dicta* the majority distances themselves from is widely accepted as the law on the word spouse and the Ministry had every reason to rely on it. The court below accepted it that way except for the criticism that *Frank* was narrowly interpreted. To the extent that there is no law protecting same-sex relationships, I would readily concede that the laws of Namibia and not the Ministry discriminate against same-sex relationships, but that fight should start with the Constitution.

[183] For the view I have taken of this matter, I find no reason to enter into the argument raised on dignity, discrimination and equality. This is a matter that should not have been decided on the Constitutional relief. Suffice to say, I associate myself with the sentiments expressed by the Constitutional Court of South Africa in *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 20, referred to with approval in *Müller v President of the Republic of Namibia & another*, when that court in 'dealing with s 8 of the Interim Constitution, ie the equality clause, stated that, that Court':

'should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely . . .'<sup>109</sup>

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<sup>109</sup> *Müller* at 1971-J.

[184] On the distinction made by the majority between this appeal and in *Frank*, it would mean that this is the first case of its kind to be heard in this Court. The appeal relates to a complex area of considerable social, political and religious controversy<sup>110</sup> where our society is widely divided. This Court should have been very cautious in making sweeping interpretations at this stage of the evolving right of same-sex relationships. The right has gained momentum of late, those that are associated with the right, against all odds, are ready or have come out in the open to declare who they are. That appropriate moment seeking to establish the right is nigh.

[185] Parliament cannot keep quiet for too long on the issue – it will have to regulate the issue in one way or another. The claim to same-sex relationships is now here and Parliament which is best placed to assess and respond to that need should arise and act in terms of its Constitutional mandate.

### Conclusion

[186] It is for the reasons above, I would have decided the appeals on the review reliefs confirming the orders of the High Court in both appeals except para 5 of the High Court order in Mr Digashu's application which I would have substituted as in para [135](b)(i)(d) of the majority order in the appeal of Mr Digashu. I would also have ordered no costs.

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**MAINGA JA**

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<sup>110</sup> *Wilkinson* para 44.

## APPEARANCES

## APPELLANTS:

R Heathcote (with him J Jacobs)

Instructed by Schickerling Attorneys

## RESPONDENTS:

T G Madonsela SC (with him T  
Muhongo)

Instructed by Government Attorney