Can there be a Constitutional Court-made law or principle having no roots in the language and scheme of the Namibian Constitution?

A critical look at the recent judgment of the High Court of Namibia on the crime of sodomy

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Dr Charles Mubita, Rector of the SWAPO Party School and the wonderful audience we have this morning, I received, with gratitude, the honour of delivering a public lecture on a very topical issue in our society. The timing is most appropriate. The manner in which the discussion will take place is similarly appropriate. This is because many times on issues of public importance, I dare observe, we have - regrettably so - facilitated and allowed our politics and public discourse to include and represent a considerable amount of insults used by some who cynically believe that insult is an apt and effective armoury of persuasion in modern society. This is a deep fallacy. We must all abhor and repudiate this manner of conversing. Perceived grievances and proposed remedies must be aired through responsible, informed and constructive discussion.

We must all be aware that the irresponsible and yet uninformed views persistently circulated these days, particularly on social media platforms, have the ability to invert the relative importance of matters of public importance, thus unfortunately dwarfing the well-meant thoughts and aspirations of our people. The consistent propagation of disparaging gratuitous comments and innuendos against others, including members of the Judiciary, increasingly trap us in an atmosphere of hate, anger, fear and chaos. We must all reject this culture - of dissemination of noxious doctrine

and utter non-sensical ideas. An occasion such as this one inevitably promotes a culture of civility in our public discourse. Civility in our engagement, as a collective, must be accompanied by fair dealing with one another.

> "*Civility in a constitutional sense involves more than just courtesy or good manners. It is one of the binding elements of a constitutional democracy. It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute.*" [1]

But, notwithstanding the insult-filled public discussion of matters of national importance in our country, we must not be naïve to pretend that we are unaware, or perhaps oblivious, of the fact that while the Judiciary in our country necessarily forms a somewhat secular priesthood over us, this does not mean that it (Judiciary) is entitled to "pontificate" in a manner that may be subversive of our nation's *boni mores*, sensitivities, norms, culture, values and aspirations as a sovereign nation.

On 16 May 2023 the Full Bench of the Supreme Court of Namibia, not speaking in one voice,[2] directed government to recognise same-sex

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[1] See *Masetlha v President of the Republic of South Africa and Another 2008* (1) SA 566 (CC) at para. 238.
[2] There was a dissenting judgment.

marriages concluded in foreign countries and made a declarator to the effect that in as far as it relates to the concerned foreign-recognised same-sex marriages, the definition of the term “spouse” in section 2(1)(c) of the Immigration Control Act, 7 of 1993, should include a foreigner as a “*spouse*” married to a Namibian citizen in a same-sex marriage recognised as valid in the country where such marriage was executed.

The question had since been: What if such foreign-recognised same-sex marriages are in conflict with our laws? Think about a foreigner who marries a Namibian under-aged girl or boy (in contravention of Namibian law) in his own country, where same-sex marriage may be valid. But then, marrying an underage girl or boy is unlawful in Namibia. Think about a foreigner or a Namibian marrying (in a same-sex marriage) a close blood relative outside Namibia where such a marriage may be valid but prohibited in Namibia. Should we simply be prisoners of the liberal fate and on the basis of common law[3] meekly recognize such a marriage?

The minority judgment in the above Supreme Court same-sex marriage judgment, on the contrary, found that government was entitled to reject the appellants’ same sex-marriage (as a marriage not recognised in

[3]“***lex loci celebrationis matrimonium***” which means, at common law, the validity of marriage is determined in accordance and with reference to the legal requirements of a country in which the marriage was solemnized/concluded.

Namibia) as Namibia was under no obligation to recognise a marriage inconsistent with its policies and laws.[4]

The Supreme Court same-sex marriage judgment immediately evoked powerful views and triggered an emotive debate lingering on to this date. As to what happens next, Parliament is now seized with this matter.

More recently, on 21 June 2024, the Full Bench of the High Court of Namibia found that the criminalisation of anal sexual intercourse in private between consenting adult males is outweighed by the harmful and prejudicial impact it has on gay men and that its retention in our law is not reasonably justifiable in a democratic society (the *Dausab* judgment).[5]

The High Court therefore proceeded and declared the common law offence of sodomy as unconstitutional. It also declared the common law unnatural sexual offences as unconstitutional. Unsurprisingly, an emotive debate also followed the delivery of the *Dausab* judgment.

Therefore, our public lecture topic today is to critically interrogate the question: "*Whether or not there can be a Court-made constitutional law or principle having no roots in the language and scheme of the Namibian*

[4] See *Digashu v Government of the Republic of Namibia and Others* 2023 (2) NR 358.
[5] *Friedel Laurentius Dausab v Minister of Justice and Others*, Case No. HC-MD-CIV-MOT-GEN-2022/00279; judgment delivered on 21 June 2024.

Constitution? – ***A critical look at the recent judgment of the High Court of Namibia on the crime of sodomy***."

Perhaps the most helpful way to start with this critical interrogation is to remind ourselves that our Constitution has been said to be not only a "***memorial of a bygone era but an ever-present compass, its constituent parts carefully composed of our People's collective experiences, values, desires, commitments, principles, hopes and aspirations, by which we seek to navigate a course for the future of our Nation in a changing and challenging world***"[6]. It articulates **a vision** of what it means to be a Namibian. We won our independence. Then, we defined ourselves and then proclaimed our sovereignty. Therefore who we are, is a question long settled by our founding fathers and mothers when they adopted our Constitution on 9 February 1990. Thus our constitutional patriotism is to the Namibian Constitution. We owe no patriotism to a foreign constitution materially different from ours and/or in different socio-political circumstances.

On 21 March 1990 our Constitution cheerfully announced its arrival: ***We*** *the people of Namibia, having finally emerged victorious in our struggle against colonialism, racism and apartheid, are determined to adopt a*

[6] *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC), para. 42.

*Constitution which **expresses** for ourselves and our children*, *our resolve to cherish and to protect the gains of our long struggle*.[7]

Hence, under Article 1 our Constitution proclaims that **all** power shall **vest in the people** of Namibia who shall exercise their sovereignty through the democratic institutions of the State.[8]

The Supreme Court of Namibia has appropriately, in this respect, stated that[9] the essence of democracy is practised through an electoral process by which the **sovereignty** and **power** of the Namibian people (as a body politic) are democratically converted into **representative** powers of State exercised by its institution under the Constitution. It (Supreme Court of Namibia) had also stated that the right accorded to people on the basis of equal and universal adult suffrage to freely assert their political will in elections regularly held and fairly conducted is a **fundamental premise** for the legitimacy of government in any representative democracy. It is by secret ballot - in elections otherwise transparently and accountably conducted - that the **socio-political will** of individuals and ultimately that of all citizens (as a political collective) is transformed into **representative government** – "***a government of the people, for the people***."

[7] Preamble to the Namibian Constitution.
[8] Article 1(2) of the Namibian Constitution. This includes the Judiciary.
[9] *Rally for Democracy and Others v Electoral Commission of Namibia and Others* 2013 (3) NR 664.

It is through the electoral process that policies of government are shaped and endorsed or rejected; that political representation in constitutional structures of government is reaffirmed or rearranged and the will of people is demonstratively expressed and credibly ascertained.

Hence, as we discuss this matter, it would be appropriate first to speak of and comment on the function of the Judiciary (Courts) in our country and the necessary limitations it has particularly when it comes to matters of constitutional importance which fall for its interpretation.

I wish to borrow from a Judge of the Supreme Court of Appeal of South Africa,[10] in this respect, when he once stated that:

> *"[140] . . . I am deeply conscious of the fact that this Court, consisting as it does of **unelected judges**, should not do anything which prejudices or even possibly pre-empts the decision Parliament takes on the matter. Important and wide-ranging policy issues have to be considered. Our conclusion, limited as it is to a consideration of but one of the available options, is based on juridical considerations. **The policy issues are for Parliament, not for us**. This is a result of the application of the doctrine of separation of powers, which, as the Constitutional Court has recently reminded us, must be respected by*

[10] *Fourie and Another v Minister of Home Affairs and Another* 2005 (3) BCLR 241 (SCA), (minority judgment).

the courts. . . . So too where there are a range of options open to the legislature to cure a defect. This Court ***should be slow*** *to make choices that are primarily to be made by the legislature'. . . ."*

It is thus necessary that when Courts decide difficult and impactful matters of constitutional importance, they not only need to abide by the principle that the function of making laws in Namibia lies primarily with the Legislature, but they are also enjoined to consider and respect the long-standing customs, cultures, norms and usages of the nation. These are customs, cultures, norms and usages morally binding upon all (or at least the majority) members of society and considered and regarded to be essential to its welfare and preservation.[11]

Additionally, care should be taken to avoid Courts using the purposive interpretation on matters not expressly provided for in our Constitution to usurp the legislative power of Parliament. Deputy Chief Justice Damaseb once cautioned that:

"*[55] The courts of the UK have also held that in purposively interpreting a statute, judges must respect the 'fundamental features' of the statute. On this approach, it is important to identify the particular statutory provision being interpreted and guard against interpretations that are devised to give effect to* ***an abstract purpose***

[11] *Ismael v Ismael* 1983 (1) SA 1006 at 1025 H.

in the statute. In addition, a purposive interpretation should not render any of the provisions in the statute redundant.

[56] It must follow that the court must not through purposive interpretation ***contradict*** *a provision in the statute which calls for interpretation,* ***for doing so would be to usurp the legislative function****. Purposive interpretation should not become the means by which courts* ***undermine the sovereign*** *will of Parliament.*"[12]

I therefore contend that every time a Court makes a decision, its judicial policy must at all times be that where its decision is likely to shape or refashion the existing societal norms and values, unless there are **pressing** social need and cognizable constitutional grounds, the ultimate decision must manifestly reflect the wishes (often unspoken) and the perceptions (often, but dimly discerned) of the people.

However interesting new questions of law may be, Courts should not undertake legislative adventures induced by judicial curiosity and activism.

Every nation has its own values and norms. While most of these values and norms are largely heritage from the past, it must be understood that that notwithstanding, they are a product of years' well-thought rules of

[12] See *Namibian Competition Commission v Puma Energy Namibia (Pty) Ltd* 2021 (1) NR 1 (SC) paras. 55 and 56.

engagement which rules have delivered unity of purpose, peace, and tranquillity for any particular nation.

Judge Corbett, a distinguished former Judge of South Africa, speaking of the common values and norms of any particular community, once stated that

> *" . . . to some extent too they are the product of the influence of other communities, of the interaction that takes place between people of all spheres of human activity, of the saying and the writings of the philosophers,* ***the thinkers****, the leaders which have a universal human appeal, of the living examples which other societies provide. It is these values and norms that the Judge* ***must apply*** *in making his decision. In so doing, he must become the* ***living voice of the people****. He must know us better than we know ourselves. He must interpret society to itself."*

Therefore, while Courts of law in our country could be influenced by international law or rather foreign law and the ever-changing legal and social norms in comparable legal systems around the world, their decisions must at all times be in conformity with our nation's notion of what justice demands.

The adoption of so-called global (particularly Western) social and legal norms and values must be slow and be well-reflected upon. In fact, just after independence our Supreme Court recognised this by stating that[13]

> *"It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and **sensitivities** of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share.*
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> *. . . In other words, the decision which this Court will have to make in the present case is based on a value judgment which cannot primarily be determined by legal rules and precedents, as helpful as they may be, but must take **full cognisance** of the social conditions, experiences and perceptions of the people of this country."*

It is with the above in mind that I turn to the recent High Court judgment in the *Dausab* matter on the constitutionality of the crime of sodomy.

[13] *Ex Parte Attorney-General, Namibia: In Re Corporate Punishment by Organs of State* 1991 (3) SA 76 (NmS) at 86 I and 96 B.

In Kenya, when the question of decriminalising the crime of sodomy came before its High Court, the Court, when upholding its constitutionality amongst others **held** that:

(1) the Kenyan Constitution does not violate affected persons' rights to dignity and privacy;

(2) the Kenyan Constitution only recognises marriage between adult persons of opposite sex;

(3) the desires and wishes of the people of Kenya, whether in majority or in minority, are those that are reflected in the Constitution; and

(4) while Courts must not be dictated by public opinion, they would still be loath to fly in the face of such opinion.

The findings by our High Court in the *Dausab* judgment that the common law crime of sodomy is unconstitutional largely correlate with the interpretation it adopted on the provisions of Article 10[14] of the Namibian Constitution dealing with "*equality and freedom from discrimination"*.

Article 10(1) provides that "*all persons shall be equal before the law*." Article 10(2) provides that **no** person may be discriminated against on specified grounds, including sex.

[14] In particular Article 10(2).

"Sex" referred to under Article 10(2) is simply gender identity: in other words, men on the one side and women on the other side. It has nothing to do with emotional or affectionate choices or preferences of, or attraction to, a particular man or woman in a sexual context. The discrimination prohibited is the one made on the ground of gender identity. As simple as that.

The South African Constitution, on the other hand, is express and graphic on the exact nature of the discrimination prohibited. Unlike the Namibian Constitution, Section 9 of the South African Constitution partly provides as follows:

> *"9. Equality*
>
> *(1) Everyone is equal before the law and has the right to eq<u>ual</u>* ***<u>protection</u>*** *<u>and</u>* ***<u>benefit</u>*** *of the law.*
>
> *(2) . . .*
>
> *(3) The state may not* ***unfairly*** *discriminate <u>directly or indirectly</u> against anyone on one or more grounds, including race,* ***gender, sex****, pregnancy, marital status, ethnic or social origin, colour,* ***sexual orientation****, age, disability, religion, conscience, belief, culture, language and birth.*"

Evident from what is stated above is that **unlike** the Namibian Constitution, the South African Constitution (*in contra*) outlaws unfair **direct** or **indirect** discrimination against "***<u>anyone</u>***" on one or more grounds, namely:

(1) race,

(2) gender,

(3) sex,

(4) **sexual orientation**, etcetera.

The High Court of Namibia in the *Dausab* judgment rejected the government's contention that those who drafted the Namibian Constitution made a conscious and deliberate decision to exclude (unlike South Africa) sexual orientation from Article 10(2). It briefly dealt with the government's legal arguments by partly (but superficially) stating that:

> *"[36] . . . 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*[15] *to protect fundamental rights entrenched in the Constitution."*

After referring to some statements taken from judgments by the Supreme Court of Appeal of South Africa on the relevance of public opinion, our High Court then found that there was discrimination and that the law of

[15] But the Courts' mandate is to protect only fundamental rights **provided for** in the Constitution. Courts cannot wish for more rights not in the Constitution or create a new one.

consensual sodomy is arbitrary and unfair and was based on irrational considerations.[16]

With respect, constitutionalism is the idea that government should derive its power from a written Constitution and that its powers should be **limited** to those set out in the Constitution.[17] Reference to "*government*" in the definition of "*constitutionalism*" obviously, in context, should include the Judiciary. Therefore, the Judiciary too derives its power from a written Constitution and its duty to interpret it is limited to interpreting only in the light of the meaning that **can be justified** by the language and scheme of the Constitution.

The Judiciary cannot and should not go on a constitutional wish list so as to effectively undertake redrafting of the Constitution on the dictates of emerging habits in other parts of the world.

In *Grant v South-West Trains*[18] it was found that where discrimination is prohibited on the ground of "*sex*" such prohibition **does not** cover "*sexual orientation"*. It was stated that:

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[16] See para. 37 of the *Dausab* judgment.
[17] *President of the Republic of Namibia and Others v Namibia Employers' Federation and Others* 2022 (3) NR 825; para. 105.
[18] Case C-249.96; judgment delivered on 17 February 1998. Available at https://curia.europa.eu/juris

*"46. Furthermore, in the communication referred to by Ms Grant, the Human Rights Committee, which is not a judicial institution and whose findings have no binding force in law, confined itself, as it stated itself without giving specific reasons, to 'noting ... that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as **including** sexual orientation'.*

*47. Such an observation, which does not in any event appear to <u>reflect the interpretation so far generally accepted of the concept of discrimination based on **sex** which appears in various international instruments concerning the protection of fundamental rights, **cannot** in any case constitute a basis</u> for the Court to extend the scope of Article 119 of the Treaty. That being so, the scope of that article, as of any provision of Community law, is to be determined **only** by having regard to **its wording** and **purpose**, its place in the scheme of the Treaty and its legal context. It follows from the considerations set out above that Community law as it stands at present does not cover discrimination based on **sexual orientation**, such as that in issue in the main proceedings."*

The High Court, in the *Dausab* judgment, also (selectively) referred to parts of the minority judgment in the Zimbabwean case of *State v Banana*[19] in which the majority of the Court differentiated the Zimbabwean Constitution from the South African one.

The Zimbabwean Supreme Court found that the Zimbabwean Constitution (like that of Namibia) only prohibits discrimination on the ground of "*gender*" or "*sex*" and does not expressly create a right not to be discriminated against on the ground of sexual orientation. At page 934 of the ***Banana*** judgment the Zimbabwean Court persuasively stated that:

> *"(b) Section 23 of the Constitution:* ***protection from discrimination***
>
> *This is the section upon which the Chief Justice relied in coming to the conclusion that the criminalisation of consensual sodomy was: (a) discriminatory on the ground of gender; (b) not reasonably justifiable in a democratic society.*
>
> *I will not set out s 23 in full because it appears in the judgment of the Chief Justice.*
>
> *I make first the obvious point, which was made by the judge a quo, that the framers of the South African Constitution found it necessary to include '**sexual orientation**' as well as '**gender'** in the list of grounds on the basis of which discrimination is not permitted. Had our*

[19] *S v Banana* 2000 (3) SA 885 (ZS).

Constitution contained those words, there would have been no argument. But it does not.

*Discrimination on the basis of **gender** means simply that **women** and **men** must be treated in such a way that neither is prejudiced on the grounds of his or her **gender** by being subjected to a condition, restriction or disability to which persons of the other gender are not made subject.*

*It is important to bear in mind that what is forbidden by s 23 if discrimination between men and women. **Not between heterosexual men and homosexual men**.*"

And elsewhere the Court continued:

"*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 matter 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."[20]

The High Court of Namibia in the *Dausab* judgment opted to rather follow the South African reasoning, notwithstanding the remarkable difference in the language used in Article 10(2) of the Namibian Constitution and that of Section 9 of the South African Constitution. It, with respect, ignored the very persuasive reasoning by the majority judgment in the *Banana* case.

Albeit in different circumstances, in the case of *Bowers, Attorney General of Georgia v. Hardwick et al*[21] the Court found that the US Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. It also found that none of the fundamental rights involving family relationships, mariages or procreation bears any resemblance to the right asserted in respect of criminalisation of sodomy.

The Court warned that in adjudging constitutional matters there should always be great resistance by Courts to expand the reach of the due process to cover **new** fundamental rights. The Court reasoned that if that happens the Judiciary would be taking, upon itself, another authority to govern the country without constitutional authority. It stated the following in this respect:

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[20] *S v Banana* (*supra*) at p 33B-F.
[21] 478 U.S. at p. 672 at p. 191.

> *"Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' **own choice of values** on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for **heightened** judicial protection.*"

In the *Banana* case, referred to above earlier, the Court also stated:

> "*It seems to me that this is a relevant consideration, from two points of view. From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the Courts **must yield to that new perception** and declare the old law obsolete. Mr Andersen expressly disavowed any such argument. The Chief Justice does not dispute this. His view, if I may presume to paraphrase it, is that the provisions of the Constitution, properly interpreted, compel one to the conclusion that the criminalisation of consensual sodomy is actually contrary to those provisions.*[22]

I am of the firm view that the *Dausab* case before the High Court should have been **dismissed** simply on the basis that Article 10(2) of the Constitution is limited to prohibiting discrimination based on "*sex*" alone; in other words, discrimination on the ground of gender identity, not sexual preference or orientation. If the High Court in the *Dausab* judgment were to

[22] *S v Banana* (*supra*) at p33B-F.

have found that no such prohibition of discrimination (on the basis of sexual orientation) exists, there would have been no need for the High Court to rely on the right to dignity under Article 8 and the right to privacy under Article 13 as those rights would have been irrelevant in the absence of a proven discrimination.

Furthermore, the High Court's undue emphasis on the question of rationality and its dismissive approach on the societal majority views and opinion on the necessity of the crime of sodomy are, with respect, mistaken. Chief Justice Burger in the *Bowers* case (*supra*), *inter alia*, stated:[23]

> *"Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on* ***notions of morality****, and if all laws representing* ***essentially moral choices*** *are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that*

[23] 478 U.S. at p. 672 at p. 196.

> *the sodomy laws of some 25 States should be invalidated on this basis."*

The High Court of Namibia also did not engage in a balanced consideration of the sentiments expressed by the Supreme Court of Namibia, during 2001, in the case of *Immigration Selection Board v Frank*[24] where, while speaking about the difference between Section 9 of the South African Constitution and Article 10(2) of the Namibian Constitution, it stated that:

> *"This decision followed on a prior decision by the South African Constitutional Court in which the law providing that* ***sodomy*** *is a crime, was declared unconstitutional on the ground that it infringed the fundamental rights prohibiting discrimination on the ground of 'sexual orientation' and the infringement of a person's dignity.*
>
> *Section 9(3) of the South African Constitution provides that:*
>
> > *'The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, sex, pregnancy, marital status, ethnic or social origin, colour,* ***sexual orientation****, age, disability, religion, conscience, belief, culture, language and birth'.*
>
> *Whereas the word* ***'sex'*** *can be defined as '****being male or female****', or 'males or females as a group', 'sexual orientation' could encompass*

[24] 2001 NR 107 at p. 149 E to 150 D.

in theory 'any sexual attraction of anyone towards anyone or anything.'(Oxford Advanced Learners Dictionary; Heinze op cit 46, 60 et seq.)

The prohibition against discrimination on the grounds of ***sexual orientation*** *is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private.*

Article 10 of the Namibian Constitution reads:

> *'(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.'*

In Namibia, as in Zimbabwe, the Constitution ***does not*** *expressly prohibit discrimination on the grounds of '****sexual orientation****'.*

If *Namibia had the same provision in the Constitution relating to* ***sexual orientation*** *and no provisions such as art 14 relating to the duty to protect the natural and fundamental group unit of society and also no provision equivalent to art 4(3), the result would probably have been the same as in South Africa.*

Ackermann J pointed out in the South African decision that in recent years there has been a notable and significant development in the ***statute law*** *of South Africa in the extent to which the Legislature had*

*given **express or implied** recognition to same-sex partnerships. He says:*

> *'A range of statutory provisions have included such unions within their ambit. While this is significant in evincing Parliament's commitment to equality on the ground of **sexual orientation**, there is still no appropriate recognition in our law of the same-sex life partnership to meet the legal and other needs of its partners.'*

. . .

*It is significant that the aforesaid 'legislative trend' flows from the provision in the South African Constitution prohibiting discrimination on the ground of '**sexual orientation**'.*

In Namibia as well as Zimbabwe, not only is there no such provision, but no such 'legislative trend.'"

While the High Court in the *Dausab* judgment under paragraph 6 referred to the Attorney-General's legal submissions (referring to the *Frank* judgment of the Supreme Court) it, with respect, did not engage in a serious deliberation over the legal issues raised by the Attorney-General. I am of the firm view that:

(1) **Firstly**, the Court is bound by the findings in the *Frank* judgment.

(2) **Secondly**, if I am wrong, and if it were to be found that those statements by the Supreme Court are *obiter*, I am of the view that the statements are clearly not wrong and are massively persuasive

The High Court therefore ought to have found that Article 10(2) has already been interpreted by the Supreme Court not to include a right not to be discriminated against on the ground of sexual orientation.

I am afraid that the High Court inappropriately embraced South African law notwithstanding the difference between our respective Constitutions on the question posed. Our Supreme Court once stated:[25]

"[8] . . . Decisions of foreign courts that are found to be persuasive due to the similarity, of applicable principles, provisions, issues and other circumstances relevant to matters at hand may, of course, be followed by our courts on principle rather than precedent. As far as reliance on South African authorities in the interpretation of constitutional provisions is concerned, it should be borne in mind that there are differences between the wording of certain provisions of the Constitution and the corresponding provisions in the South African Constitution. Our courts have rightly held that South African case law ***is not to be followed*** *where there are material differences between*

[25] *AG of Namibia v Minister of Justice and Others* 2013 (3) NR 806; para. 8.

*the provisions in the respective constitutions. Furthermore, even where the wording in a foreign constitution is similar to that of a provision in the Constitution, caution should be exercised when considering the constitutionality of the provisions of a statute: ultimately the meaning and import of a particular provision of the Constitution must be ascertained with due regard to the **express** or **implicit** intention of the founders of the Constitution. Furthermore, as a general proposition, whilst foreign precedent is a useful tool to determine the trend of judicial opinion on similar provisions in jurisdictions which enjoy open and democratic societies such as ours, **ultimately** the value judgment that a Namibian court has to make in the interpretation of the provisions of the Constitution in as much as they may impact on the impugned provisions, must be based on the **values** and **aspirations** of the Namibian society."*

The High Court also did not comply with another canon of interpretation i.e., that ultimately the meaning and import of a particular provision of the Constitution must be ascertained with due regard to the **express** and **implicit** intention of the founders of the Constitution. This was emphasised by the High Court of Namibia in *S v Van Den Berg*:[26]

"Mr Maritz pointed out in his supplementary heads of argument:

[26] 1995 NR 23 at 39 H to J.

> *'However helpful decided cases in other countries may be in a comparative research of similar provisions in other constitutions, the ultimate question as to the meaning and import of a particular provision of the Namibian Constitution must be ascertained with due regard to the **expressed intention** of its founders.*

> *This approach has also been recognised in the Central Provinces case (1939) FCR 18 at 38 (as quoted by Seervai Constitutional Law of India 3rd ed at 104) in relation to the meaning of words used to confer federal and provincial powers:*

> > *"for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting and since no two constitutions are in identical terms, **it is extremely unsafe** to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases, for a word or phrase may take a colour from its content and bear different senses accordingly!"”*

I CONCLUDE by pointing out that constitutional principles (or laws) which have no discernible roots in the express language or scheme of the Namibian Constitution should not be developed by our Courts.

We must continue being reminded of Judge Mahomed's statement in *S v Acheson*[27] that:

> *"The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government."*

It is time for Namibian Courts in important constitutional matters to undertake a serious consideration of the nation's *boni mores*, values, cultures, aspirations and sensitivities before making a decision. The South African Constitution was not an appropriate legal reference in the *Dausab* judgment. The Kenyan Supreme Court has articulated this point even better by stating that:[28]

> "*In the development and growth of our jurisprudence, commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have* ***to avoid*** *mechanical approaches to precedent. It will not be appropriate to pick a precent from India, one*

[27] 1991 NR 1; at p. 10.

[28] *Jasbir Singh Rai & 3 Others v Estate of Tarochan Singh Rai & 4 Others* (2013) JELR 103854 (SC)

day, Australia , another day, South Africa another, the US yet another, just because they seem to suit the immediate occasion. Each of those precedents ***has its place in the jurisprudence of its own country***."

We are encouraged by the fact that our judiciary is one of the **best**, **independent** and **competent** in Africa, if not in the world.

It has done **exceptionally well** for the last 34-years. **But**, we as citizens, are entitled to constructively comment on judgments. This must be done without impugning the **integrity** and **authority** of our Courts or that of individual judges many of whom have themselves fought for and defended our fundamental rights and freedom.

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