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THE DAY SODOM[Y] FELL, AGAIN

On Friday, 21 June 2024, a full bench (three judges) of the High Court delivered a unanimous judgment in a matter where a lone applicant sued five government respondents for the declaration of the common law offences of sodomy and unnatural sexual offences, and the statutory provisions which incorporate them, unconstitutional. The five respondents are the Minister of Justice, the Minister of Home Affairs, Safety and Security, the Minister of Defence and Veterans Affairs, the Prosecutor General and the Attorney General. The judgment was handed down in the matter of *Dausab v The Minister of Justice*[1] (*Dausab*).

The judgment marked the end of centuries old common law crimes of sodomy and unnatural sexual offences. I say centuries old crimes because, apart from Biblical references, sodomy was introduced to these parts of the world in the 1600s. In respect of the former, I have always wondered whether sodomy has anything to do with the Biblical Sodom and it turns out that it does. According to Britannica,[2] sexual acts attributed to the Sodomites gave the city's name to the contemporary term sodomy. The term is understood in history, literature, and law in several senses, including anal intercourse and other sexual activities between adult males. Therefore, the story of sodomy is as old as humanity but while the city of Sodom fell a long time ago, sodomy did not. It remained for generations that followed. To deal with it, many countries passed laws to regulate it.

In Namibia, sodomy only fell on Friday, the 21st of June 2024. Before that, it was a crime. According to statistics obtained by the Law Reform and Development Commission (LRDC), 115 cases of sodomy were reported and sixty-four arrests were made between 2003 to 2019 but there has been no prosecution since independence. Sodomy was defined as unlawful intentional sexual relations per *anum* between two human

[1] (HC-MD-CIV-MOT-GEN-2022-00279) [2024] NAHCMD 331 (21 June 2024).
[2] https://www.britannica.com/place/Sodom-and-Gomorrah/Religious-views accessed on 23 June 2024 at 14h31.

males. The offence criminalised such sexual conduct between males, whether committed with or without consent and in public or in private. Unnatural sexual offences on the other hand covered mutual masturbation, sexual gratification obtained by friction between the legs of another person and other unspecified sexual activity between men.[3]

You may ask, why seek to declare the crimes of sodomy and unnatural sexual offences unconstitutional now, after so many centuries? Arguments were being thrown around that no one bothered or bothers about what people do in private anyway.

We need to briefly go back in history to answer this.

For Namibia, the story of sodomy began in the 1600s when Dutch settlers introduced Roman-Dutch law to the Cape of Good Hope which provided a prohibition on sodomy. After the British annexation of the Cape of Good Hope, the prohibition was interpreted in accordance with the concepts underlying the colonial British penal code which was modified and implemented across British colonies in Africa, including South Africa.[4] According to the LRDC,[5] the law that criminalises sodomy in Namibia was not enacted by democratically-elected representatives of the Namibian people. It, like many other laws, was inherited from South Africa at independence through the body of laws which morphed into common law over centuries. In terms of Article 66 (1) of the Namibia Constitution, all laws in force at independence, including common law, remains in force until repealed by Parliament or declared unconstitutional by court. The latter is what happened on Friday, effectively bringing down a crime that had existed for more than four hundred years. Surely, a lot has changed in four hundred years!

As you can imagine, social media went ablaze with comments on the judgment. Many questions linger, especially in light of the *Digashu* judgment of the Supreme Court of May last year[6] and the Private Member Bills that followed. The one Bill seeks to amend the word spouse to exclude same-sex spouses and the other Bill seeks to amend the Marriage Act, 1961 to prohibit same sex marriages and introduce criminal offences related to solemnisation of such marriages.[7] The Bills were swiftly passed with minimum amendments by both houses of parliament in July 2023 and sent to the President for assent. It was recently reported that the President is still consulting on the Bills.

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[3] *Dausab v The Minister of Justice* at page 9 paragraph 17.
[4] LRDC at page 4.
[5] *Ibid* at page 13.
[6] *Digashu and Another v GRN and Others Seiler Lilles and Another v GRN and Others* (SA 62022 SA 72022) 2023 NASC 14 (16 May 2023).
[7] The Bills are the Definition of Spouse Private Members' Bill and the Marriage Amendment Private Members' Bill.

To some, the judgment is simply unacceptable. To others, it means freedom and progress. The difference lies in religious and traditional beliefs versus personal convictions as to sexual orientation. We are yet to see the full effect of the judgment on the Namibian society but for now the judgment remains in force. Sodom[y] fell, again.

One might further ask; how did we get here?

Well, it all started when the Constituent Assembly drafted a 'world-class' constitution. In that constitution is Chapter 3 containing fundamental rights and freedoms, the full extent of which I submit, could not even be imagined then. It would take years of litigation and law reform to fully unravel the full extent of those fundamental rights and freedoms. 11 years after independence, the learned O'LINN AJA remarked in *Chairperson of the Immigration Selection Board v Frank* and Another 2001 NR 107 SC that:

> '.....Namibia only became a sovereign independent country in March 1990.... The result is that the whole of Namibia is undergoing a learning process. How the Namibian Constitution and the multiplicity of old and new laws must be interpreted and applied, remains a mystery to many and at best a difficult problem, not only to most people in Government and officials in the Administration but even to legal representatives and presiding judicial officers in Courts of law.'

I submit that we are still undergoing that learning process 34 years later and when it comes to LGBTQ+ rights, the country is taking a crash course. It has been particularly difficult to imagine that our constitution makes provision for LGBTQ+ rights as demonstrated by the fact that the Attorney General relied on the *Frank* judgment to point out that our nation's leaders and founding fathers have said that not only is homosexuality inconsistent with the moral fabric of our society, but also that the framers of the Constitution did not have in mind the repeal of such laws when they drafted our Constitution. That argument was emphatically rejected by the Supreme Court in *Digashu*. The High Court also dismissed that argument in *Dausab* and provided reasons why it cannot stand under our constitutional dispensation.

If anything, *Frank* sparked the litigation fire, as it were. In March 2023, I reported for Africa Legal that litigation on LGBTQ+ rights was gaining momentum in Namibia.[8] In that month alone, the courts were faced with an unprecedent four matters on LGBTQ+ rights, including the *Dausab* matter in which judgment was delivered on Friday. *Frank* was precedent until the Supreme Court overturned it in *Digashu*. However, both matters did

[8] https://www.africa-legal.com/news-detail/litigation-on-lgbtq-rights-gains-momentum//, accessed on 23 June 2024 at 15h09.

not deal with the constitutionality of common law crimes of sodomy and unnatural sexual offences. *Dausab* did.

It is *Dausab* that brought us here.[9] Now that we are here, it is important to understand the judgment. It is important to do so because, in my view, it is not about right or wrong, it is about the rule of law. It is about the supremacy of the Namibian constitution which we must all protect, respect, and uphold as citizens. Without this, we descend into a lawless nation. The same constitution that protects your rights to what you hold dear, for example, your property, protects the rights of another to what they hold dear, for example, their sexuality, even if you do not agree with them. Simply put, constitutional protection does not depend on our approval of what must be protected. The protection is embedded in the constitution, and it only takes one grievance at a time to reveal the protection, through the courts, of course. What has been revealed by *Dausab* is that it is discriminatory for men to face criminal sanctions for consensual sexual activity with one another while men who have the same consensual sexual activity with women do not.

In the end, it does not matter what our private moral views are as the court *held further that* the enforcement of the private moral views of a section of the community (even if they form the majority of that community), which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate governmental purpose, on the basis of which differentiation may be permitted. The court was furthermore not convinced that, in a democratic society such as ours, with a Constitution which promises the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family and the pursuit of individual happiness, it is reasonably justifiable to make an activity criminal just because a segment, maybe a majority, of the citizenry consider it to be unacceptable.

In conclusion, I wish to refer to what another full bench of the High Court held in an earlier matter:[10]

> *'Held further* that in a functioning democracy, founded on a history such as our own, coming from a system of unreasonable and irrational discrimination, to obtain freedom and independence, and then to continue to irrationally and unjustifiably take away human rights of another segment of Namibian citizenry, simply because of their orientation – amount[s] to cherry-picking of human rights, and deciding whose rights are more "human", and to be protected, more than others. This is not what our democracy was founded upon.'

[9] In addition to the work of the LRDC, Legal Assistance Centre and other stakeholders.
[10] *Digashu v Government of the Republic of Namibia (HC-MD-CIV-MOT-REV-2017/00447) and Seiler-Lilles v Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2018/00427) [2022] NAHCMD 11 (20 January 2022).

If you accept that Namibia is a democratic country premised on the rule of law as per the supreme constitution, then you must accept that the law protects everyone and everything, including those you do not agree with or things with which you do not agree. It means accepting the fall of sodomy and unnatural sexual offences as declared by the High Court. To do the opposite, especially those in power, would be going against the very thing that many claim to have fought so hard for, democracy, and all it entails. I submit that just as our judiciary displayed maturity in *Digashu* and *Dausab,* the other branches of government should follow suit because they too are subject to the same constitutional imperatives.

Fedden Mainga Mukwata – Legal Pundit