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Editorial Note

We are glad to present Volume 6 Issue 1 of the Saipar Case Review (SCR). This edition of the SCR involves discussion of 4 cases.

First, *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others: Digashu* marks the first time the Namibian Supreme Court recognized same-sex relationships, even if it restricted that recognition to cases where the parties contracted a same-sex marriage outside Namibia.¹ This landmark decision, therefore, sought to shift how Namibians should understand equality. To a certain extent, it validates and protects these relationships, in any event laying the foundation bricks, albeit shaky, on which future courts could advance LGBTQ+ rights in Namibia.

Second, *Sinyolo Muchiya v The People*: The decision by the Court of Appeal is progressive and must be celebrated as it shows sensitivity towards women, who are often the victims of sexual assault. It represents a remarkable appreciation of the Golden Triangle in the criminal justice system. The Golden Triangle emphasizes the need for fairness on all the three facets of the criminal justice: the accused, the victim, and the public.² That is, the Court must triangulate the accused's right to a fair trial; the need to protect victims from re-victimisation; and the public interest to ensure fair trial and protection of victims. It is a recognition that while the rights of the accused are paramount to secure a fair trial, it is also crucial that the rules of evidence operate to protect and support victims of crime from secondary victimization.

Third, *James Kapembwa v The People Appeal*: This is a case which implores judges from the traditional and mechanical application of the law and critically engage with the purpose for which the law against sexual offences such as defilement was created. However, this engagement should not be done in isolation but must be at *idem* with the social structure. By doing this, judges will remain cognizant of the fact that their judgments have the power to reconstruct the entrenched conceptions around the nature of sexual offences and deter would be perpetrators of sexual offences.

Fourth, *Liebherr Zambia Limited v. Cleopatra Ng'andu Mandandi*: This is a case in which the Court of Appeal missed a golden opportunity to provide critical guidance on an aspect of employment law, particularly in terms of the recently enacted Employment Code Act which in my view transforms the common law normal measure of damages due to the abolishment of the common law right to terminate with notice and for no reason.

We hope you enjoy this edition of SCR.

O'Brien Kaaba and Kafumu Kalyalya
Editors

¹ *ibid* [134].

² John Hatchard and O'Brien Kaaba, *Principles of the Law of Evidence in Zambia* (Juta, 2022) 14

Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023)

Dunia P. Zongwe¹

This controversy is about a powerful court that sided with a noble cause but that nonetheless decided the case so clumsily that it strengthened the adversaries' otherwise weak counterarguments. In the groundbreaking *Digashu* case, the Supreme Court of Namibia recognized same-sex marriages contracted abroad. However, this decision relied so heavily on European and North American jurisprudence that it unintentionally fuels the impression and the accusations of those who claim that such recognition imposes Western values on the Namibian people.² Moreover, in its efforts to recognize same-sex marriages, the Namibian apex court sacrificed the accuracy of its analysis by grossly distorting international law – both private and public – and the separation of powers doctrine.

The litigation arose when the Immigration Selection Board, an organ of the Namibian Home Affairs Ministry, refused to grant two same-sex couples permits to work and permanently reside in Namibia. The two foreign spouses (i.e., Mr. Daniel Digashu and Ms. Anita Seiler-Lilles) appealed, but the Board turned down their appeals, stating that Namibian law does not recognize same-sex marriages. In their consolidated case before the High Court, Mr. Digashu and Ms. Seiler-Lilles called for broader definitions of 'spouse' and 'family'. The court empathized with them but felt obligated to abide by an adverse dictum of the Supreme Court pronounced more than two decades ago in *Frank*.³ Conversely, the Supreme Court ruled for the couples; it distinguished the *Digashu* case from *Frank* and interpreted the terms 'spouse' and 'marriage' to include same-sex couples married abroad⁴ – in this case, South Africa, and Germany.

Handed down on May 16th, 2023, this verdict marks the first time the Supreme Court recognized same-sex relationships in Namibia, resulting in an unprecedented constitutional, political, and social crisis;⁵ and sparking an almost immediate backlash. Indeed, not only did

¹ Associate Professor, School of Law, Alliance University, India; and Adjunct Associate Professor, Department of Legal Studies, Walter Sisulu University, South Africa. J.S.D. (Cornell); LL.M. (Cornell); Cert. (Univ. Montréal); LL.B. (Univ. Namibia); B.Juris (Univ. Namibia).

² See notably Justice Bryan O'Linn's dictum in *Immigration Selection Board v Frank & another* 2001 NR 107 (SC) 141-142 (hereinafter referred to as the '*Frank*' case).

³ *Frank* (n 2).

⁴ *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023) [15] (hereinafter the '*Digashu*' case).

⁵ For examples of people who celebrated the *Digashu* judgment, see Mahima Balaji, 'A Win for LGBT Rights in Namibia' (*Verfassungsblog: On Constitutional Matters*, 29 May 2023) <<https://verfassungsblog.de/a-win-for-lgbt-rights-in-namibia/>> accessed 7 July 2023; Kelvin Vries, 'A Slippery Slide Back to Parliamentary Sovereignty? The Namibian Parliament Looks to Override the Supreme Court's Decision to Recognise Same Sex Marriages' (*Oxford Human Rights Hub*, 19 June 2023) <<https://ohrh.law.ox.ac.uk/a-slippery-slide-back-to-parliamentary-sovereignty-the-namibian-parliament-looks-to-override-the-supreme-courts-decision-to-recognise-same-sex-marriages/>> accessed 7 July 2023; and Pierre de Vos, 'On the Quiet Radicalism of the Namibian Same Sex Marriage Judgment' (*Constitutionally Speaking*, 18 May 2023) <<https://constitutionallyspeaking.co.za/on-the-quiet-radicalism-of-the-namibian-same-sex-marriage-judgment/>> accessed 7 July 2023. For examples of people who decried the judgment, see Shirley Magazi, 'The Supreme Court of Namibia Failed the Nation' *New Era* (30 June 2023) <<https://neweralive.na/posts/opinion-the-supreme-court-of-namibia-failed-the-nation>> accessed 7 July 2023; and Sisa Namandje, 'Contextual History of the Institution of Marriage' *The Namibian* (4 June 2023) <<https://ww2.namibian.com.na/contextual-history-of-the-institution-of-marriage/>> accessed 7 July 2023.

the verdict divide the court itself (since Mainga JA dissented from the majority), it also prompted the government and the ruling party to publicly pledge to take action and pass laws within the framework provided by the Constitution to undo that ‘disconcerting’ recognition.⁶ The dissenting judge depicted his colleagues as making sweeping interpretations’ prematurely.⁷ Mainga JA insisted that same-sex couples and any other union constitute a ‘complex area of considerable social, political and religious controversy where [Namibian] society is widely divided’⁸ – an area therefore best addressed by the legislature, not the courts.⁹

When the court sought Western validation, it overlooked the chance to draw from Namibian values and African perspectives. This is quite unfortunate and unwise, especially considering that Namibian ethos and African perspectives, such as Ubuntu, would have sounded far more convincing and legitimate in advocating for the recognition of same-sex relationships. Instead of articulating an argument from an authentic Namibian or African voice, the Court veered towards a discourse anchored in the doctrines of foreign jurisdictions.

Despite those flaws, the *Digashu* decision has laid the foundation for evolving LGBTQ+ rights¹⁰ in Namibia. The court did precisely that when it elevated dignity to underpin the right to equality. Dignity constitutes an ideal entry point to infuse a judgment with the ‘contemporary norms, aspirations, expectations, and sensitivities’ of Namibians.¹¹ Still, this Commentary reveals the major cracks in the *Digashu* judgment’s praiseworthy foundations.

Facts

The *Digashu* appeal concerned two consolidated cases that involved two applicants in same-sex relationships who had married in South Africa and Germany two Namibian citizens. One applicant (i.e., Mr. Daniel Digashu, a South African national) applied to the Namibian Immigration Selection Board for a work permit; the other applicant (i.e., Ms. Anita Elfriede Seiler-Lilles, a German national) for a permanent residence permit.¹² They both lodged their applications in terms of the Immigration Control Act 7 of 1993. Mr. Digashu applied for a work

⁶ SWAPO Party Press Statement on the Outcome of the Extraordinary Meeting of its Central Committee Which Was Held on Saturday, 17 June 2023 on the Recent Supreme Court Judgment on the “Recognition” of Same-Sex Marriage for Purposes of Section 2(1)(c) of the Immigration Control Act, Which Was Delivered on 16 May 2023, para 7 (hereinafter the ‘SWAPO Press Statement’).

⁷ *Digashu* (n 4) [184].

⁸ *ibid.*

⁹ *ibid* [181]. See also *ibid* [185] where Mainga JA urged parliament to break its silence and regulate the issue of same-sex relationships.

¹⁰ The acronym “LGBTQ+” stands for ‘lesbian, gay, bisexual, transgender, and queer/questioning’. The “+” symbolizes inclusivity and represents other identities and orientations that fall under the broader LGBTQ+ umbrella.

¹¹ See the seminal case of *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) 188 (hereinafter the ‘*Corporal Punishment*’ case) (proclaiming that construing the right to dignity entails that the interpreting court makes a value judgment, objectively articulated and identified, that mirrors “the contemporary norms, aspirations, expectations and sensitivities of the Namibian people”).

¹² *Digashu and Others v Government of the Republic of Namibia and Others* 2022 (1) NR 156 (HC) [1]-[8] (hereinafter the ‘*Digashu* trial judgment’).

permit in terms of section 27(2)(b) of the Act in May 2017 and Ms. Seiler-Lilles in terms of the section 26(3)(d) in October 2016.¹³

In both cases, the Namibian Ministry of Home Affairs (through the Immigration Selection Board) rejected the applications. In Digashu’s case, the Immigration Selection Board (hereinafter referred to as ‘the Immigration Board’ or ‘the Board’) said on 4 July 2017 that the application did not meet the requirements of section 27(2)(b) of the Act because the market was saturated.¹⁴ When he appealed the Board’s decision to reject his application, the Board dismissed his appeal and reiterated its original reason for rejecting the application: market saturation.¹⁵ As for Ms. Seiler-Lilles, the Board told her that it rejected her application because it did not satisfy the requirements of section 26(3)(d) of the Immigration Control Act because “[her] marriage or partnership to a Namibian is not legally recognised in Namibia”.¹⁶

Procedural history

In two separate proceedings, Mr. Digashu and Ms. Seiler-Lilles approached the High Court of Namibia to question the decision of the Namibian Ministry of Home Affairs. Mr. Digashu sought an urgent interdict, and a review and declaratory (constitutional) relief.¹⁷ In the midst of her proceedings, Ms. Seiler-Lilles amended her notice of motion to introduce the same relief sought by Mr. Digashu.¹⁸

The respondents withdrew their opposition to Ms. Seiler-Lilles’ amendment of notice of motion, and agreed to the consolidation of Mr. Digashu’s application and hers.¹⁹ Hence, the High Court consolidated the two cases, which the applicants²⁰ filed against the Government of the Republic of Namibia (1st respondent), the Minister of Home Affairs and Immigration (2nd respondent), the Chief of Immigration (3rd respondent), the (Acting) Chairperson of the Immigration Control Board (4th),²¹ the Immigration Selection Board (5th), the Immigration

¹³ *ibid* [16] and [24]. Ms. Seiler-Lilles intended to apply for permanent residence, but instead of filling out the form prescribed for such application, she mistakenly completed the form prescribed for permanent residence in terms of section 26(3)(g), which – unlike section 26(3)(d) – only governs permanent residence applied for on the basis of marriage to a Namibian permanent resident, as opposed to a Namibian citizen. However, she corrected the mistake during the proceedings in the High Court. See *Digashu* trial judgment [30]-[31] and [36]-[27].

¹⁴ *ibid* [16]-[17]. Though the Immigration Selection Board had stated earlier that it also declined Mr. Digashu’s application because he had failed to attach to his work permit application any proof of his investment and registration of the tourism company, he later provided the missing documentation.

¹⁵ *ibid* [17].

¹⁶ *ibid* [27].

¹⁷ *ibid* [18].

¹⁸ *ibid* [31] and [36]-[37].

¹⁹ *ibid* [36].

²⁰ Mr Digashu’s Namibian partner, Mr. Johan Hendrik Potgieter, and cousin, “L”, appeared in the High Court as co-applicants and, in this appeal before the Supreme Court, as second and third appellants, respectively. Actually, as the Supreme Court noted in *Digashu* [4]-[5] Mr. Digashu and his partner had been treating L as their child after L’s mother died, and later they officially adopted him when the Gauteng division of the South African High Court declared Mr. Digashu and his partner L’s joint care givers and guardians.

²¹ From the High Court’s judgment document found on the official website of the Namibian judiciary, it appears that Mr. Digashu sued the *Acting* Chairperson of the Board whereas Ms. Seiler-Lilles sued the *substantive* Chairperson of the Board. See <[https://ejustice.moj.na/High%20Court/Judgments/Civil/Digashu%20v%20GRN%20\(HC-MD-CIV-MOT-REV-2017-00447\)%20Seiler-Lilles%20v%20GRN%20\[2022\]%20NAHCMD%2011%20\(20%20January%202022\).doc](https://ejustice.moj.na/High%20Court/Judgments/Civil/Digashu%20v%20GRN%20(HC-MD-CIV-MOT-REV-2017-00447)%20Seiler-Lilles%20v%20GRN%20[2022]%20NAHCMD%2011%20(20%20January%202022).doc)> accessed 4 July 2023. The Supreme Court’s judgment document indicates that the fourth respondent is the “Acting Chairperson

Tribunal (6th), and, in the case of Digashu only, the Ombudsman (7th respondent) and the Attorney-General of Namibia (8th).

The parties' arguments

The applicants claimed that officials of the Namibian Home Affairs Ministry discriminated against them on the basis of their sexual orientation by refusing to recognize their marriages validly concluded in other countries. Applicants argued that, in doing so, the Ministry breached their rights to equal treatment and dignity as outlined in Articles 10 and 8 of the Namibian Constitution, respectively. They submitted that Article 10(2) embodies the right to equal treatment on the ground of sexual orientation and that the word 'sex' and 'social status'²² in that provision included such right.²³

The applicants added that the Ministry's officials also discriminated against L, their adopted child, infringing on the applicants' right to found a family as prescribed in Article 14 of the Constitution.²⁴ Their lawyer, Mr. Heathcote, emphasized that the applicants did not seek to legalize same-sex marriages in Namibia but insisted on a broader interpretation of the term 'spouses' as used in the Immigration Control Act, and 'family' as stated in Article 14 of the Namibian Constitution.²⁵ Only if the court found that the word 'spouse' as used in s 2(1)(c) of the Immigration Control Act cannot be interpreted to include same-sex spouses would the applicant seek to have that section declared unconstitutional and rectified by reading into that section the words "including persons lawfully married in another country".²⁶

The applicants proposed that the Namibian government should grant to same-sex couples married overseas the same privileges as heterosexual foreign spouses of Namibian citizens.²⁷ These privileges entail exempting such same-sex married couples from applying for permanent residency or an employment permit under section 2(1)(c) of the Immigration Control Act.²⁸ The applicants submitted that the requirement for same-sex spouses to apply for a work permit and a permanent residence permit amounts to discrimination.²⁹ They cited the rejection of Ms. Seiler-Lilles' application for a permanent residence permit, despite 'meeting and exceeding' all the requirements of section 26 of the Immigration Control Act, as evidence of prejudice against same-sex couples lawfully married in foreign countries.³⁰

The respondents' arguments, on the other hand, revolved around the non-recognition of same-sex marriages in Namibia. They countered the applicants' claims on several grounds. Apart

of the Immigration Selection Board", suggesting that the High Court's judgment document may contain a slight mistake.

²² See *Digashu* (n 4) [114]-[115] where the Supreme Court decided to leave open the proposition that sexual orientation amounts to social status for the purposes of Article 10(2) of the Constitution, since the appellants failed to produce any authority or adduce any evidence, nor could the court find any such authority or evidence, to back up this proposition.

²³ *Digashu* trial judgment (n 12) [41].

²⁴ *ibid* [39] and [43].

²⁵ *ibid* [45].

²⁶ *ibid*.

²⁷ *ibid* [46]-[47].

²⁸ *ibid*.

²⁹ *ibid* [47].

³⁰ *ibid* [49].

from asserting that the applicants failed to provide enough facts to justify the constitutional relief they sought, the respondents maintained that the South African Civil Union Act of 2006, under which Mr. Digashu and Mr. Potgieter married in 2010 in South Africa, does not apply in Namibia, where the law does not recognize same-sex unions.³¹

The respondents cited section 22 of the Immigration Control Act, arguing that Mr. Digashu did not comply with the requirements for domicile in Namibia.³² Relying on Article 14 of the Constitution, the respondents disputed the applicants' family status as the Namibian Parliament has not enacted any law recognizing same-sex unions. They further contended that L is not a dependent of Mr. Digashu, insofar as it concerns section 2(1)(c) of the Act, for the purposes of legalizing and regularizing Mr. Digashu's stay in Namibia.³³

Mr. Madonsela SC, who represented the respondents, underscored the absence of legislation in Namibia recognizing same-sex unions, even those conducted abroad, arguing that the court should not exercise its discretion in favor of the applicants' claims.³⁴ He referred to Article 81 of the Namibian Constitution and the Supreme Court ruling in *Chairperson of the Immigration Selection Board v Frank and Another* (hereinafter '*Frank*'),³⁵ asserting that the decision in *Frank* binds the High Court.³⁶ In response, the applicants' lawyer pleaded with the court not to follow the decision in *Frank*, arguing that the Supreme Court's findings regarding same-sex relationships and the word 'sex' not including 'sexual orientation' were both erroneous obiter dicta.³⁷ Mr. Heathcote added that, in *Frank*, the Namibian Supreme Court wrongly interpreted international binding precedent to mean that 'sex' rules out 'sexual orientation' while the precedent speaks to the contrary.³⁸

Regarding Ms. Seiler-Lilles, Mr. Madonsela admitted that the Ministry's officials erred in referring to section 26(3)(d) of the Immigration Control Act instead of section 26(3)(g) in the rejection letter, but insisted that the error does not invalidate their decision.³⁹ Mr. Heathcote, the lawyer for Ms. Seiler Lilles, had pointed out that the applicants seemed to have rejected his client's application under a different section (i.e., section 26(3)(g)) than the one she applied under (i.e., section 26(3)(d)) of the Immigration Control Act – an about-turn that Mr. Heathcote claims 'exposes' the respondents' prejudice towards same-sex couples.⁴⁰ Though admitting the Ministry's error, Mr. Madonsela submitted that Ms. Seiler-Lilles nonetheless failed to demonstrate how the respondents violated Article 18 of the Namibian Constitution or the common law, or how the respondents acted unfairly or unreasonably in violation of the Immigration Control Act.⁴¹

The rulings of the High Court

³¹ *ibid* [50].

³² *ibid*.

³³ *ibid*.

³⁴ *ibid* [51].

³⁵ *Frank* (n 2).

³⁶ *Digashu* trial judgment (n 12) [52].

³⁷ *ibid* [57].

³⁸ *ibid*.

³⁹ *ibid* [55].

⁴⁰ *ibid* [49].

⁴¹ *ibid* [56].

The applicants pleaded their cases before a full bench of the High Court, composed of Prinsloo J, Sibeya J, and Schimming-Chase J. The court made several rulings. In particular, the court held that Article 81 of the Constitution mandates that the High Court must adhere to the decisions of the Supreme Court (i.e., *stare decisis*), even if the High Court perceived them as wrongly decided.⁴² This aligns with the rule of law and promotes certainty and judicial progress.⁴³ Still, if a court considered a decision as erroneous or outdated, the court could respectfully suggest a change to a court of a higher authority.⁴⁴ The court distinguished the current matter from the *Frank* case, pointing out that – unlike the present *Digashu* dispute – the issue of same-sex couples was neither present nor debated in *Frank*.⁴⁵ The court argued that rulings derived from same-sex couple matters in *Frank* were irrelevant and unnecessary.⁴⁶

The court also held that a functioning democracy should not irrationally deny human rights to its citizens due to their orientation, terming such behavior as ‘cherry-picking’ of human rights.⁴⁷ This argument referenced Article 8, advocating for the recognition of inviolable human rights. Further, the Supreme Court’s found incorrect the interpretation of international law in *Frank*, observing that ratified international conventions bind Namibia.⁴⁸ Specifically, the court used as authority the International Convention on Civil and Political Rights (ICCPR) ratified by Namibia in 1994, with the UN Human Rights Committee interpreting ‘sex’ in Article 2(1) of the ICCPR to include ‘sexual orientation’.

Nonetheless, aside from some minor relief, the High Court dismissed the applications. The court reasoned that:⁴⁹

From our discussion above and the provisions of art 81 it is clear that the applicants cannot obtain the declaratory and constitutional relief sought in this court. Only the Supreme Court can overturn its decision and we trust that we have provided some assistance in proper and due esteem to the Supreme Court.

With respect to the (minor) relief granted, the High Court of Namibia recognized the foreign judgment (i.e., the court order granted on March 3rd, 2017, by the Gauteng division of the South High Court) that declared Mr. Digashu and Mr. Potgieter the joint caregivers and guardians of L.⁵⁰ Curiously, the Namibian High Court also recognized L as a dependent of Mr. Potgieter, the Namibian citizen, but denied such recognition with respect to Mr. Digashu.⁵¹ The court also set aside the Ministry’s decision to refuse Mr. Digashu’s work permit application; the court remitted the matter back to the Ministry for reconsideration.⁵²

How the Supreme Court decided

⁴² *ibid* [94]-[103].

⁴³ *ibid* [103].

⁴⁴ *ibid*.

⁴⁵ *ibid* [109].

⁴⁶ *ibid* [110].

⁴⁷ *ibid* [117].

⁴⁸ *ibid* [118].

⁴⁹ *ibid* [136].

⁵⁰ *ibid* [150].

⁵¹ *ibid*.

⁵² *ibid*.

Five judges sat on the *Digashu* appeal: Chief Justice Peter Shivute, Deputy Chief Justice Petrus Damaseb, Sylvester Mainga, David Smuts, and Elton Hoff. Shivute CJ and Smuts JA wrote the majority judgment, with Damaseb DCJ and Hoff JA concurring; Judge Mainga dissented from his brethren.

The Namibian Supreme Court began its analysis by quoting section 2(1) of the Immigration Control Act, which appears under the heading ‘Application of Act’:

- (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) ...
 - [...]
 - (g) ...; and
 - (h)

The court stated that the above provision has the effect of exempting persons falling into the categories listed in its sub-paragraphs from Part V of the Act, which requires noncitizens to apply for permanent residence, employment, and other permits in order to enter into and reside in Namibia.⁵³

The Supreme Court needed to answer several key questions, including whether the *Frank* case’s majority opinion bound the High Court and whether refusing to recognize same-sex marriages violated the Constitution. In its ruling, the majority held that courts are bound by their own decisions due to the doctrine of precedent and the Article 81 of the Constitution,⁵⁴ which reads as under:

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.

Nevertheless, the court stressed that courts could depart from their own decisions if they find them to be clearly wrong.⁵⁵

Moreover, Supreme Court confined that the binding authority of a precedent to the *ratio decidendi* (rationale or basis of decision) and not the *obiter dicta* (side comments).⁵⁶ Crucially, the majority ruled that the opinion in *Frank* concerning the respondents’ lesbian relationship

⁵³ *Digashu* (n 4) [15].

⁵⁴ *ibid* [60].

⁵⁵ *ibid* [62].

⁵⁶ *ibid*.

constituted *obiter dicta*.⁵⁷ It sought to create rules that it did not need to decide the *Frank* case.⁵⁸ Shivute CJ and Smuts JA concluded that the High Court erred in treating these comments as binding.⁵⁹

The Supreme Court also noted that the facts of the two current appeals differed from the *Frank* case because, unlike *Frank*, the appellants in *Digashu* had valid marriages recognized by the jurisdictions where they contracted them.⁶⁰ Then the court affirmed that:⁶¹

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.

Shivute CJ and Smuts JA observed that the Immigration Control Act does not define the terms ‘spouse’ and ‘marriage.’⁶² They quoted *The New Shorter Oxford English Dictionary*⁶³ as approved in the South African case *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*⁶⁴ to render the term’s ordinary meaning as connoting “a married person; a wife; a husband”.⁶⁵

Likewise, the two learned judges interpreted the term ‘marriage’ as ‘contemplating’

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.⁶⁶

The two judges ascribed this meaning to section 2(1)(c) of the Immigration Control Act.⁶⁷ In doing so, they remarked that the Home Affairs Ministry had not raised any reason based on public policy as to why the appellants’ marriages should not be recognized based on that general principle of common law, ‘[n]or did the Ministry question the validity of the appellants’ respective marriages.’⁶⁸ ‘On that basis alone, Shivute CJ and Smuts J inferred, the Ministry should have recognized the appellants’ marriage for the purpose of section 2(1)(c) of the Act and it should have treated Mr. Digashu and Ms. Seiler-Lilles as a spouse for the purpose of that section, thus exempt from Part V of the Act.’⁶⁹

⁵⁷ *ibid* [75].

⁵⁸ *ibid* [76]-[79]

⁵⁹ *ibid* [79].

⁶⁰ *ibid* [81] and [108].

⁶¹ *ibid* [82].

⁶² *ibid* [83].

⁶³ *The New Shorter Oxford English Dictionary*, vol 2 (Clarendon Press 1993) 3001.

⁶⁴ *National Coalition for Gay & Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 25.

⁶⁵ *Digashu* (n 4) [83].

⁶⁶ *ibid*.

⁶⁷ *ibid*.

⁶⁸ *ibid* [84].

⁶⁹ *ibid* [85].

The Court held that the Ministry's approach to excluding same-sex spouses infringed on the interrelated rights to dignity and equality.⁷⁰ The court relied on its earlier judgment in *Muller* to connect dignity and equality,⁷¹ and ruled that the adjective 'inviolable' in Article 8 of the Constitution does not permit any exceptions.⁷²

Shivute CJ and Smuts JA asserted the role of the judiciary in protecting and construing constitutional rights, even when those rights concern unpopular or marginalized groups. While public opinion and legislation may reflect the nation's aspirations, the doctrine of separation of powers ensures that courts are ultimately responsible for defining the content and implications of constitutional values.⁷³ Citing South Africa's *Makwanyane* case where the court determined that the death penalty offended the right to dignity in the Interim Constitution,⁷⁴ the two Namibian judges stressed that constitutional interpretation cannot be left solely to the majority or a referendum, as this could erode minority rights and return to parliamentary sovereignty.⁷⁵ They underlined with approval the following holding from *Makwanyane*:⁷⁶

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.

Shivute CJ and Smuts JA added that the duty of the courts to exercise their constitutional mandate and determine the applicants' allegations of the rights entrenched in Chapter 3 of the Constitution is '[i]nherent in the doctrine of separation of powers and constitutional adjudication'.⁷⁷ They thus described Judge Mainga's reluctance to engage with arguments on dignity, discrimination, and equality as 'an abdication' of the judiciary's fundamental duty.⁷⁸

The Court ruled that the Ministry's interpretation of the Act to exclude a spouse in a same-sex marriage infringed on the rights to dignity protected in Article 8 of the Constitution.⁷⁹ The Court disagreed with the obiter approach in *Frank* – that 'equality before the law for each person does not mean equality before the law for each person's sexual relationships' – and approved of the High Court's stance on this issue.⁸⁰ The majority judgment determined that Mr. Digashu and Ms. Seiler-Lilles should be considered spouses under the Immigration Control Act due to their valid marriages in South Africa and Germany, respectively.⁸¹ Thus, the term 'spouse' in the Act should include same-sex spouses legally married in another country.⁸²

Accordingly, the majority of the Supreme Court ordered that the respondents recognize the appellants' foreign marriages and declared the applicants 'spouses' in terms of section 2(1)(c)

⁷⁰ See *ibid* [128]. Specifically, see [96]-[108] for the court's examination of the right to dignity and [109]-[127].

⁷¹ *Müller v President of the Republic of Namibia & another* 1999 NR 190 (SC) 202.

⁷² *Digashu* (n 4) [99].

⁷³ *ibid* [103].

⁷⁴ *S v Makwanyane & another* 1995 (3) SA 391 (CC) [88].

⁷⁵ *Digashu* (n 4) [103].

⁷⁶ *Makwanyane* [88].

⁷⁷ *Digashu* (n 4) [104].

⁷⁸ *ibid*.

⁷⁹ *ibid* [108].

⁸⁰ *ibid* [125].

⁸¹ *ibid* [129].

⁸² *ibid*.

of the Immigration Control Act. The majority also recognized the South African court order in terms of which L is a dependent of Mr. Digashu and Mr. Potgieter.

The dissent

Mainga JA dissented from the majority opinion. He held that Namibian laws do not recognize same-sex relationships,⁸³ citing several statutes to back up his observation:⁸⁴

- the Combating of Domestic Violence Act 4 of 2003, specifically section 3, defines a domestic relationship as one involving individuals of different sexes;
- the Children's Status Act 6 of 2006 and Child Care Protection Act 3 of 2015 both provide a definition of marriage that excludes same-sex relationships; and
- the Married Persons Equality Act 1 of 1996 and the Recognition of Certain Marriages Act 18 of 1991 emphasize heterosexual marriage and family as fundamental to Namibian society, with the latter Act stating marriage becomes valid when two parties of different sexes agree to marry.

Therefore, for Mainga JA, the *Frank* decision binds the High Court. For him, whether the majority opinion of O'Linn AJA in *Frank* on the words 'marriage', 'spouse' and 'family' amounted to obiter dicta or not, O'Linn nevertheless correctly interpreted the words, in a manner that mirrors the laws of Namibia, and the aspirations and ethos of its people.⁸⁵ For that reason alone, Mainga JA enthused, the High Court was bound by *Frank*.⁸⁶

The dissenting judge underlined that the common law principle (i.e., *lex loci celebrationis*)⁸⁷ – 'the law of the place [where the parties] solemnized the marriage) did not oblige Namibia to recognize a marriage that contradicts its policies and laws.⁸⁸ Next, Mainga JA said that the common law definition of marriage as a voluntary union for life of one man and one woman and the protection of the family in the traditional sense strongly and legitimately justify why the state treats same-sex couples differently.⁸⁹ He argued that issues related to homosexuality were best left to the legislature, which is better equipped to deliberate on the ramifications of same-sex relationships.⁹⁰ For those reasons, Mainga JA concluded that the Namibian Ministry of Home Affairs and Immigration did not discriminate against the appellants.⁹¹

Significance of the case

⁸³ *ibid.*

⁸⁴ *ibid* [146].

⁸⁵ *ibid* [148] and [181]. See also *ibid* [169](concluding that the finding of Shivute CJ and Smuts JA based on the common law principle "trashes the historical, social and religious convictions of the Namibian people").

⁸⁶ *ibid* [149].

⁸⁷ The High Court also invoked this principle in its decision. See *Digashu* trial judgment (n 12)[116].

⁸⁸ *Digashu* (n 4) [170] and [181].

⁸⁹ *ibid* [181].

⁹⁰ *ibid.*

⁹¹ *ibid* [182].

Digashu marks the first time the Namibian Supreme Court recognized same-sex relationships, even if it restricted that recognition to cases where the parties contracted a same-sex marriage outside Namibia.⁹² This landmark decision, therefore, sought to shift how Namibians should understand equality. To a certain extent, it validates and protects these relationships, in any event laying the foundation bricks, albeit shaky, on which future courts could advance LGBTQ+ rights in Namibia.

However, this groundbreaking judgment also signified an unprecedented level of tension between the judiciary and the executive. For the first time, the executive – and the ruling party – publicly vowed to nullify a Supreme Court decision. Specifically, the SWAPO party instructed the government to pass a law and take administrative action to unequivocally clarify that ‘spouse’, for the purposes of section 2(1) of the Immigration Control Act, refers to a husband or wife in heterosexual marriage.⁹³ This prospective reversal – that the Parliament will enact under Article 81 of the Constitution – directly challenges the authority and independence of the judiciary,⁹⁴ straining the separation of powers within Namibia’s political structure.

At the same time, to reach its particular outcome, the Supreme Court in *Digashu* misapplied international law, both private and public, demonstrating the court’s difficulty⁹⁵ to put Namibia’s jurisprudence on a trajectory that international law experts, both foreign and local, will accept as faithfully translating the rules of this field of law. In other words, even if the government does not carry out its threat to defeat the recognition of same-sex foreign marriages in *Digashu*, the Supreme Court will nonetheless have to ‘rectify’ its false and embarrassing holdings on private and public international law. Paired with a seeming disregard for African and Namibian ethos, the *Digashu* judgment comes across as uprooted from the cultural and societal environments in which the court evolves. The decision not only failed to define what ‘dignity’ should ‘really’ (i.e., substantively) mean for Namibians⁹⁶ but it also drew intensely on case law that, except for South Africa, originates from courts in Western Europe, North America, and Australia. The court opted for such largely Eurocentric voices even though good – some would say, better – grounds exist in both Namibian ethos and the pan-African Ubuntu to arrive at a similar outcome. In proceeding in that manner, the Supreme Court unintentionally reinforced the false impression that the recognition of same-sex relationships imposes on Namibians some distinctively foreign values.

⁹² *ibid* [134].

⁹³ SWAPO Press Statement (n 6) para 12 and 14 (observing that several laws in Namibia “overwhelmingly” provided for marriage as union between a man and a woman and directing the government to take executive and legislative action “immediately”).

⁹⁴ The ruling party pointed out that, in contradicting the Supreme Court and “notwithstanding its concern and disappointment over the judgment”, “reiterat[ed] and affirm[ed] [its] commitment to the constitutional provisions under Article 78(3), that is, non-interference with the Judiciary and the protection of the dignity and effectiveness of Courts.” See SWAPO Press Statement (n 6) para 13.

⁹⁵ For more information on the Namibian judiciary’s mixed record on public international law, see Dunia P Zongwe, *International Law in Namibia* (Langaa 2019) 87-102; and Dunia P Zongwe, ‘A Chronicle of How Judges Have Internalised International Law in Namibia’ (2021) 44 South African Yearbook of International Law 1.

⁹⁶ For more information on the Namibian Supreme Court’s jurisprudence, see Dunia Prince Zongwe and Bernhard Tjatjara, ‘Making Dignity Supreme: The Namibian Supreme Court’s Dignity Jurisprudence Since Independence’ in Tapiwa Victor Warikandwa and John Baloro (eds), *Namibia Supreme Court at 30 Years: A Review of the Superior Court’s Role in the Development of Namibia’s Jurisprudence in the Post-Independence Era* (Konrad Adenauer Foundation 2022)(observing that, since Independence, no judge has ever ‘really’ defined the concept of ‘dignity’ and, as a consequence, courts have unwittingly applied Western conceptions of dignity).

Nevertheless, the greatest achievement of the Supreme Court in *Digashu* is that it opened up a pathway for judges in future cases to develop a jurisprudence more in tune with Namibian and pan-African values. Indeed, it did so by linking dignity and equality, and by prioritizing dignity as a grounding for the right to equality. This approach resonates strongly with the pan-African humanistic philosophy of Ubuntu⁹⁷ and coincides with values centered on mutual respect and common humanity, even though the court did not explicitly frame its angle in this context.

Mis-framing the core issues: private or public law?

In *Digashu*, the Supreme Court mischaracterized the central issues. The cause of action resulted from the decision of the Immigration Selection Board, an entity within the Home Affairs Ministry, to deny the permits applied for by the appellants. The issue at hand was not about the actions of private individuals but rather revolved around the actions of a public body exercising public authority. By the way, the nature of the respondents, such as the Attorney-General and the Ombudsman, alludes to this fact. Therefore, invoking the *lex loci celebrationis* principle, a component of private international law, mischaracterized the core issues and amounted to an improper use of judicial power.

Notably, the *lex loci celebrationis* principle forms part of the common law, yet this alone does not suffice to justify its application in this case. ‘Common law’ does not refer to a substantive area of law, but a formal source of law. The realm where *lex loci celebrationis* applies belongs to a country’s private law,⁹⁸ not its public law. Thus, the Namibian Supreme Court wrongly employed this principle in the *Digashu* judgment. Unlike the issue of recognizing the South African court order that declared Mr. Digashu and his partner joint caregivers and guardians of L, the decision by immigration authorities to deny permits due to non-compliance with national law does not fall under the ambit of private international law.

The court treated the *Digashu* matter as if it involved the validity of the applicants’ same-sex marriages contracted abroad. However, as acknowledged by Shivute CJ and Smuts JA, the respondents never questioned the validity of these marriages.⁹⁹ The officials of the Immigration Board simply stated that Namibia (or its laws) did not recognize the same-sex relationships.

The counsel for the respondents highlighted the administrative law nature of the case when he submitted that, by denying the appellants’ applications, the respondents did not contravene Article 18 of the Constitution,¹⁰⁰ which enshrines the right to administrative justice. The Supreme Court, however, misleadingly framed the case as a challenge to the validity of the

⁹⁷ See *Digashu* (n 4) [98] (holding, quoting the *Corporal Punishment* case with approval, that the right to dignity in Article 8 derives its meaning “within the context of a fundamental humanistic constitutional philosophy introduced in the preamble to and woven into the manifold structures of the Constitution.”)

⁹⁸ See also CF Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (5th edn, Juta 2012) 5 (remarking that, while people take the adjective ‘international’ in the phraseology ‘private international law’ to link it with public international law, this field is “simply a particular branch of each national legal system regulating the legal relations between individuals, like the law of contract); and VC Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* (Oxford University Press 2019) 1 (noting that private international law is an integral part of a country’s private law).

⁹⁹ *Digashu* (n 4) [84].

¹⁰⁰ See *Digashu* trial judgment (n 12) [56].

applicants' marriages.¹⁰¹ This misguided framing ultimately led to the application of a principle of private law transactions, *lex loci celebrationis*, in a public law situation.

And, contrary to what the majority opinion ruled,¹⁰² the respondents or their lawyer did not need to raise objections based on public policy before the court could envisage excluding foreign law (i.e., South African and German law): The moment a court recognizes that the cause of action does not arise from a private transaction, it should refrain from applying the rules of private international law in the first place, obviating the necessity for any party to register any objections against such application.

Distorting international law and the separation doctrine

The *Digashu* judgment falls short in the sense that, to arrive at its final outcome, it grossly distorted the rules of public international law and the separation of powers doctrine. Firstly, the court inaccurately claimed that Namibia is bound by the decisions of the UN Human Rights Committee – a false claim made earlier by the applicants' lawyer and the judges in the High Court. Any expert in international law can affirm that, while a state that has ratified a treaty, such as the 1966 International Covenant on Civil and Political Rights (ICCPR), is bound by it, that state shoulders no duty to follow the views' – as the ICCPR expressly call them¹⁰³ – made by the ICCPR-based Human Rights Committee are binding on any state party to the ICCPR. (It is one thing for the Supreme Court to assert or hope that Namibian judges should view these 'views' as binding on Namibia; quite another thing to say that international law, as opposed to the subjective perspectives of individual judges or legal systems, renders such views binding on states parties.) Luckily, the Supreme Court will rectify this misinterpretation in future judgments.

Furthermore, the court misapplied the separation of powers doctrine by neglecting the fact that the distribution of state power into three spheres is confined by the system of 'checks and balances'. The court should have qualified its statement that the separation doctrine makes the courts 'ultimately responsible for defining the content and implications of constitutional values.' In fact, the idea undergirding the doctrine not only consists in constraining that state power by dividing it into three distinct branches – the legislative, the executive, and the judiciary – it also ensures that these branches control and balance one another. In the Namibian context, Article 81 of the Constitution expressly authorizes the legislature to lawfully enact a law to 'contradict' a Supreme Court decision and thereby deprive it of its binding effect. The court's oversight of this aspect in the *Digashu* judgment brings up questions as to how far the apex court has internalized this pillar of democracy.

Conclusion

If the ruling SWAPO party and its majority in parliament carried out their threat to pass a law to 'contradict' the Supreme Court's recognition of same-sex foreign marriages, this contradicting law would have the real effect of propelling O'Linn's holdings in *Frank* on same-

¹⁰¹ See *Digashu* (n 4) [108] (citing the case of *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 507 as authority for the *lex loci celebrationis* principle).

¹⁰² See *ibid* [84].

¹⁰³ See Article 42(1)(c), read with Article 41(1), of the ICCPR; and Article 5(4) of the Optional Protocol to the ICCPR.

sex relationships from obiter dicta to binding (statutory) law. It would also validate Mainga's point that, whether O'Linn's holdings constituted obiter dicta or not did not matter, because they – in any event – correctly channeled the laws of Namibia, and the values of its people.¹⁰⁴

At a fundamental level, the *Digashu* case reflects a tug-of-war with the coloniality of power, manifesting through the power dynamics between indigenous values in Namibia and the so-called 'global' trends proxied by the group of countries that legalized same-sex marriages, like South Africa, Canada, Australia, and about 30 European countries. On the one hand, the Namibian Supreme Court's decision to uphold the rights of same-sex partners, at least partially, reveals some elements of 'pluriversality'¹⁰⁵ and decolonial feminism. On this latter point, gender and coloniality intersect, and progressive jurists will rightly applaud the *Digashu* judgment as a decolonial feminist act that subverts heteronormative marriage norms.

On the other hand, the inability of the judges, in this case, to fully disengage from colonial structures and norms hints towards the continuing influence of coloniality in law and adjudication. This coloniality of power puts Namibia in a position of having to grapple with laws and norms that emerged from a Eurocentric vantagepoint.

Crucially, by leaning heavily on Western precedents and norms to guide the judgment, as opposed to the 'contemporary norms, aspirations, expectations, and sensitivities' of the Namibian people, the court failed to de-link or unplug from Western knowledge systems, subconsciously endorsing the myths of the superiority and universality of Western epistemologies. To Mr. Madonsela (the respondents' lawyer) who called on it not to follow foreign precedents¹⁰⁶ and those Namibians who urge it to level down,¹⁰⁷ the Supreme Court responded by whitening u

¹⁰⁴ *Digashu* (n 4) [148] and [181].

¹⁰⁵ On the notion of 'pluriversality', see Barik K Gills and SA Hamed Hosseini, 'Pluriversality and Beyond: Consolidating Radical Alternatives to (Mal-)development as a Commonist Project' (2022) 17 Sustainability Science 1183, 1185-1186 (defining 'pluriversality' as a totalizing notion invented in the critical social sciences to capture the nature of the promising yet chaotic landscape of transformative alternatives).

¹⁰⁶ See *Digashu* trial judgment (n 12) [51], where Madonsela submitted that the applicants' reliance on the jurisprudence of other jurisdictions in support of their principal and constitutional claim provided them with very little assistance and the court as the views on homosexuality worldwide diverged greatly.

¹⁰⁷ See Magazi (n 5).

Sinyolo Muchiya v The People Appeal No 139/2021 [24 August 2023]

O'Brien Kaaba¹ and Ndindase Chirwa²

Facts

It is not often that female complainants of sexual assaults are readily believed by criminal justice institutions. Often, they are re-victimised and turned into suspects instead of being seen as victims. The law itself is often blind to their plight and unique needs. Poor and insensitive investigations, cautionary rules of evidence, insensitive cross examination, among others, combine to condemn them to secondary citizenship in the criminal justice system. Often, the criminal justice system in sexual assault cases unfairly tilts in favour of an accused without considering the needs of victims (and their families) and the public.

Fortunately, in this case the Court of Appeal demonstrated remarkable understanding of the needs of victims of sexual assaults and balancing the rights of the accused and those of the victim. In this case, the Appellant was tried and convicted of rape in the Subordinate Court. The facts were that in April 2018, the complainant, a student at Rusangu University in Monze, went drinking at Tooters nightclub. She left around 23:00 hours and hired a taxi to take her back to the University. The version of the complainant was that she was raped on the way by the taxi driver, while the Appellant stated that the sexual intercourse was consensual, and that the complainant was his girlfriend and they had sexual intercourse together before.

Holding

The magistrate believed the version of the complainant, largely her credibility, her early reporting of the rape, her identification of the Appellant and bruises found on the Appellant which were consistent with her story that she had scratched his neck in the struggle.

The Subordinate Court convicted the Appellant of rape and committed him to the High Court for sentencing. The High Court sentenced him to 18 years of imprisonment. The Appellant appealed to the Court of Appeal, challenging both his conviction and sentence.

Significance

Although the Appellant launched many grounds of appeal, of interest to us is the argument that the sexual intercourse could not have been forced as there was tranquility as the complainant could have fled or asked for help had she felt threatened but chose to stay. It must be noted that the Courts have historically given credence to the unfounded belief that it can only be rape if the victim made efforts to flee or cried for help. Usually, the law has been used to make unwarranted negative claims against the 'silent' victim. The case of *The People v Golden Bola*, involving allegations of rape of a secretary by her supervisor is illustrative. In this case, the trial magistrate, in dismissing the case, made completely unwarranted accusations against the complainant:

It was highly questionable for an old woman to be forced into having sex on several occasions without revealing to anyone.... Silence raised concern and showed that she

¹ LLB (University of London), LLM (University of Zambia), LL.D (University of South Africa), Certificate in Constitution Building in Africa (Central European University), Certificate in Decentralisation (University of Western Cape and University of Addis Ababa)

² LLB (University of Zambia)

consented to the alleged offence... The complaint was baseless and the complainant had hallucinated showing that she was traumatized.³

This approach to treatment of female sexual assault victims has long historical roots and was imported as part of the common law heritage/baggage. As a result, the law as for long been used as a tool for tolerating, or perpetrating gender violence and re-victimising complainants, turning them into suspects. It is in this context that the decision of the Court of Appeal must be appreciated. The Court rejected the notion that if the woman did not flee or call for help then she consented. It asserted:

As regards the failure to flee or call for help, it is our view that the mere fact that the victim of a sexual assault does not flee or call for help, cannot lead to a conclusion that she consented to such assault.

The Court went further to state that such failure should be considered in context, as in this case, the victim's appearance soon after the act gave credence to her claim that she had not consented to the sexual intercourse.

The rejection by the Court of Appeal for the complainant to flee or cry for help is an outdated prejudiced view of women as liars when they complain about sexual assaults. As Holmes J stated in *Commonwealth v Cleary*, such a rule or requirement is simply a 'perverted survival of the ancient requirement that a woman should make hue and cry as a preliminary to an appeal of rape.'⁴

The decision by the Court of Appeal is progressive and must be celebrated as it shows sensitivity towards women, who are often the victims of sexual assault. It represents a remarkable appreciation of the Golden Triangle in the criminal justice system. The Golden Triangle emphasizes the need for fairness on all the three facets of the criminal justice: the accused, the victim, and the public.⁵ That is, the Court must triangulate the accused's right to a fair trial; the need to protect victims from re-victimisation; and the public interest to ensure fair trial and protection of victims. It is a recognition that while the rights of the accused are paramount to secure a fair trial, it is also crucial that the rules of evidence operate to protect and support victims of crime from secondary victimization. The Court of Appeal got the balance in this case and must be applauded.

³ As reproduced in Mulela Margaret Munalula, *Women, Gender Discrimination and the Law: Cases and Materials* (University of Zambia Press, 2005) 132

⁴ *Commonwealth v Cleary* (1898) 172 Mass 175

⁵ John Hatchard and O'Brien Kaaba, *Principles of the Law of Evidence in Zambia* (Juta, 2022) 14

James Kapembwa v The People Appeal No. 53/2022 (23 February 2023)

*Mwami Kabwabwa*¹

Facts

The appellant James Kapembwa was charged with defilement contrary to section 138 of the Penal Code Act chapter 87 of the Laws of Zambia. He was convicted of the offence and sentenced to 15 years imprisonment with hard labour by the High Court of Zambia. Unsatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal against his conviction and sentence. The grounds of appeal were as follows:

- 1) That the High Court was misdirected in its finding that the prosecution had proved its case beyond reasonable doubt despite not attending to the issues concerning the age of the victim;
- 2) The High Court was misdirected by not making a finding of fact that the victim owing to her conduct made Mr Kapembwa and any other reasonable man going through her Facebook Page believe that she was an adult above the age of 16; and
- 3) That the High Court should have resolved the issue of the victim's age in favour of the accused and it misdirected itself in believing the victim when she said she had told the accused that she was 15 years on her Birthday.

Holding

On 23rd February 2023, The Court of Appeal handed down its judgment in respect of the aforesaid application for leave to appeal against sentencing and conviction. It held that the appellant had known the victim for less than one year and that in such circumstances it couldn't be said that the appellant ought to have known the victim's age. The court further held that: -

we also hold the view that whether or not the prosecutrix mentioned to the accused that she was celebrating her 15th birthday was inconsequential as the said age could or could not be true. On the evidence of the record, we have no difficulties in finding that the prosecutrix held herself out as a person above the age of 16. We hold the view that the trial court abdicated its duty when it failed to note its ocular observation of the prosecutrix's features and make a finding regarding her physical appearance in view of the appellant's evidence. It is our view that had the trial court directed its mind on this issue, it would have found that the appearance of the prosecutrix coupled with her Facebook posts would have made any reasonable person believe that she was above the age of 16. We are satisfied that the defence of mistake as envisaged by section 138 of the Penal Code was available to the appellant.

Significance

A report on the legal challenges of addressing the case of child sexual abuse in Zambia, published by the Danish Institute of Human Rights revealed that the most alarming and

¹ LLB (University of Cape Town); Southern African Institute for Policy and Research (SAIPAR).

prevalent form of child sexual abuse in Zambia is defilement.² With such a finding, it is imperative to note that judges play an important role in the adjudication of sexual offences and the protection of young girls from sexual exploitation. This is because it is during this adjudication process that the law that criminalizes sexual offences such as defilement intersects with the gendered social structures of society and the lived realities of victims of defilement or indeed other sexual offences.³ For this reason, judgments relating to sexual offences must reflect a level of awareness and a sense of responsibility on the part of judges that how they adjudicate sexual offences and or the failure to expand on the law that criminalizes sexual offences such as defilement has a direct impact on lived realities of young girls who more often than not are the victims of the sexual offence of defilement. This requires judges to refrain from the traditional and mechanical application of the law and critically engage with the purpose for which the law against sexual offences such as defilement was created. However, this engagement should not be done in isolation but must be at idem with the social structure. By doing this, judges will remain cognizant of the fact that their judgments have the power to reconstruct the entrenched conceptions around the nature of sexual offences and deter would be perpetrators of sexual offences.

Section 138 (1) of the Penal Code Act⁴ provides as follows:

Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for life; Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe, and did, in fact, believe, that the girl was of or above the age of sixteen years

With respect to the above proviso relating to the defence of mistake of age, the case of *Nsofu v The People*⁵ guided that for this defence to succeed an accused person must satisfy the court of two key elements. Firstly, the accused had reasonable cause to believe that the girl was of or above the age of sixteen and secondly that the accused did, in fact, believe this. (Emphasis author's). From the facts of this case, the appellant stated that the prosecutrix's Facebook account indicated that she was eighteen years old and that she once told him that he was not noticing her. From this, the appellant made up his mind to propose love to the prosecutrix. In the trial court, the appellant told the court that the girl's body looked mature, her breasts and her hips were big and her height. It was also not in dispute that the appellant was not a stranger to the prosecutrix and her family, he did some piece work at their home for about less than a year.

From the foregoing, the court made the finding/holding as stipulated hereinbefore. However, in its judgment, the court did not provide guidance or an explanation on what exactly constitutes a reasonable belief and whether this reasonable belief has anything to do with the conduct and or behaviour of the victim or the perpetrator. Whether reasonable belief demands

² Matakala Lungowe (2012). *The Legal and practical challenges of addressing the case of child sexual abuse through Zambia's informal and traditional justice system*. Danish Institute for Human Rights.

³ Moreland Stacy (2014) *Talking about Rape and why it matters: Adjudicating Rape in the Western Cape High Court*. South African Crime Quarterly No 47.

⁴ Penal Code Chapter 87 of the Laws of Zambia.

⁵ (1973) ZR 287.

that there must be evidence of steps taken if any by the accused person to ascertain the true age of the girl before proceeding to have sexual intercourse with the girl. Addressing these issues as far as they relate to what constitutes reasonable belief is an important aspect of dealing with sexual offences such as defilement and is part of transformative and responsible adjudication that is alive to the role of the court in protecting young girls from sexual abuse and the vulnerability of young girls to sexual abuse.⁶

In determining what constitutes reasonable belief on the part of the accused, the court should have addressed its mind to what reasonable steps if any did the accused take in order to satisfy himself that the girl was above the age of sixteen. According to a Cambridge study on criminal science and sexual offences⁷ ‘the existence or non-existence of reasonable grounds to believe that a girl was indeed above the age of sixteen and whether the accused did in fact believe is a question of fact for the court, and the court must be satisfied that the accused actually directed his mind to the question’. In the present case, it is not clear how the court satisfied itself that the accused person had in fact directed his mind to the true age of the girl neither is it clear from the evidence what steps the accused took to address his mind as to the true age of the girl. In determining how the statutory defence of defilement ought to be applied, the Malawian case of *Kamowa v R*⁸ held as follows:

The operative words are, ‘if it shall be made to appear to the court ...that the person so charged had reasonable cause to believe and did, in fact, believe that the girl was of or above the age sixteen years,’ (Judge’s emphasis). This means that the court must be satisfied that the offender has provided the mind of the court with good reason to believe that the girl was above sixteen years old. We must find out how the offender satisfied or convinced the court about his belief of the girl’s age. (emphasis author’s)

From the facts of the present case, the appellant’s reasonable belief stemmed from the fact that he relied on her age as per her Facebook account that she was eighteen and her physical appearance which showed that she was mature when he had sex with her. In the appellant’s testimony, he further stated that he was surprised at the prosecutrix’s skills in bed and wondered whether girls went to school to school to learn sex.

From the foregoing, the testimony of the appellant and the basis of his reasonable relief was not only dangerous but problematic and I believe it was the responsibility of the court to address these problematic issues. Firstly, the appellant did not produce any evidence either medical or otherwise to show that there is a direct correlation between a girl’s age and her skills in bed during sex and that you can ascertain the age of a girl based on her skills in bed. Secondly, the appellant did not discharge his responsibility of taking steps to enquire into the true age of the girl to fully satisfy himself that the girl with whom he was having sex was above the age of sixteen. A judgment by the East African Court of Appeal in the case of *R v Coetzee*⁹ held as follows:

A man who had carnal knowledge of a young girl whose appearance

⁶ David M Doyle, *Reasonable Belief and Unlawful Carnal Knowledge: A Historical Perspective* (2016) Irish Jurist Vol.47 p 49-75.

⁷ Cambridge Department of Criminal Science (1957) *Sexual Offences*. London: MacMillan , p.330.

⁸ (Criminal Appeal 12 of 2016) [2017] MWHC 26 (6 January 2017).

⁹ 1943 10 E.A.C.A 56.

suggested that she was of or about the age of consent and ran a decided risk and it was his business to address his mind to the question of age and assure himself on reasonable grounds that he was not committing a breach of the law. (author's emphasis)

The appellant is said to have been a general worker working for the guardians of the girl. If the appellant had truly addressed his mind as to the age of the girl, he should have at least enquired from either of the guardians the true age of the girl. Perhaps had he done so it could be said that he did, in fact, address his mind and took steps to ascertain the true age of the girl. This case review does not suggest that there must be proof that an accused person undertook a comprehensive investigation to assure /satisfy himself of the age of the girl as doing so would circumvent the scope of the defence in section 138, which Parliament in its legislative wisdom bestowed in the absence of the qualification of enquiry. However, there must be proof that reasonable steps were taken by the accused. Perhaps cases like this present an opportunity for the judiciary to call upon the legislature to amend provisions of the law such as section 138 of the Penal Code to expressly include the qualification of enquiry to protect young girls from sexual exploitation. Doing this ensures that any amendments made to the current law in section 138 of the Penal Code is an act of parliament/the legislature and not necessarily a judicial decree which would be perceived as the judiciary usurping the functions of the legislature.

As part of responsible and transformative adjudication of sexual offences such as defilement, judges have a responsibility when writing judgments to clearly state and demonstrate that young girls should not be robbed of the protection of the law based on how quickly their bodies mature. Through their judgments, judges have the power to admonish the legislature to rectify the unfortunate reality of the implication of the section 138 defence which is phrased in a manner that falls short of protecting young girls whose bodies mature more quickly than others. It is unfortunate that several defilement cases have been adjudicated without the courts condemning the adverse effects of this statutory defence on young girls who must suffer the consequences of something that they absolutely have no control over such as the manner in which their bodies develop.

When adjudicating cases of defilement, it is imperative that judges always bear in mind the purpose behind the law in section 138 of the Penal Code which is the social necessity and or importance of protecting young girls from sexual exploitation and the advancement of deterrence. It must be noted that if the Section 138 defence of mistake is not amended to be phrased in a restrictive manner and if it is improperly applied in the adjudication of defilement cases, there is a high risk of subjugating the fundamental objective of protecting young girls from sexual exploitation. Over the years, the courts have adjudicated defilement cases, particularly the defence of mistakes in a manner that is rooted in traditional and stereotypical conceptions of girls and women. This is happening not only in the Zambian jurisdiction but also in other jurisdictions that have a similar defence. Several scholars have criticized the courts for this approach. Learned authors Isabel Grant and Janine Brendet aptly captured the criticism in the following terms:

How a girl dresses, whether she wears make-up, whether she is out late at night, whether she consumes alcohol or smokes cigarettes and whether she appears to have prior sexual experience are all considered relevant in the determination of whether a man was mistaken about her age. In some cases, these stereotypes are so powerful that the

accused is required to do absolutely nothing, beyond observing the complainant, to meet the requirement that he took *all* reasonable steps to ascertain her age.¹⁰

The effect of continuing to subscribe to stereotypical conceptions is twofold. Firstly, it makes it extremely challenging to successfully prosecute sexual offences such as defilement. And secondly, it makes it difficult to deter would-be perpetrators of defilement and or other forms of sexual abus

¹⁰ Isabel Grant and Janine Brendet *Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law* (2019) *The Canadian Bar Law Review* Vol 97.

Liebherr Zambia Limited v. Cleopatra Ng'andu Mandandi CAZ Appeal No. 182/2021

*Chanda Chungu*¹

Facts

Cleopatra Ng'andu Mandandi (the employee' or 'Ms. Mandandi' or 'the Respondent') served Liebherr Zambia Limited ('the employer' or 'Liebherr' or 'the Appellant') on multiple one-year contracts from October 2016 to July 2018.

Liebherr and Kalumbila had a service level agreement where Liebherr would provide certain services to Kalumbila Mine. In 2018, she was appointed by Liebherr on a permanent contract of employment as Service Administrator to provide services to Kalumbila Minerals Limited. Clause 1.3. of her contract of employment expressly provided that:

...the duration of her employment is directly related to the services provided to Kalumbila Minerals Limited (KML) at Kalumbila Sentinel Mine in Kalumbila.

The above clause made Ms. Mandandi's employment subject to the service level agreement between Liebherr and Kalumbila Mine. In 2019, Kalumbila requested Liebherr to reduce service administrator support. As a result, Liebherr terminated Ms. Mandandi's contract of employment by making a payment in lieu of notice and paying all her leave days.

Ms. Mandandi contended that her termination was invalid and unlawful and, in the alternative, Ms. Mandandi pleaded that her termination was by redundancy and unfair as Liebherr did not follow the procedures relating to redundancy and subsequently advertised for the position of Receptionist which was similar to hers save for the name.

Liebherr on the other hand contended that the termination was not a redundancy but based on their operational requirements guided by the Service Level Agreement with Kalumbila. As a result, Liebherr contended that because Kalumbila was paying for her role. Further, they contended that her contract had a clause that stated her role was dependent on Kalumbila, there was no redundancy but based on Liebherr's needs with Kalumbila, they could not sustain her employment. Further Liebherr contended that the role of Receptionist, which was advertised, was different to the one held by Ms. Mandandi.

The High Court held that the termination of Ms. Mandandi amounted to a redundancy and Liebherr's failure to follow the redundancy procedures rendered her termination unfair and wrongful. The High Court awarded Ms. Mandandi two months' salary for each year worked as redundancy package and ordered that she should receive her salaries from the date that she was terminated up until she received her redundancy package in full. The High Court also awarded her one (1) month salary as damages for unfair and unlawful dismissal.

Liebherr subsequently appealed the decision to the Court of Appeal

Holding of the Court of Appeal

¹ LLB, LLM (University of Cape Town); MA (Oxford); lecturer in law, University of Zambia

The Court of Appeal discussed whether the Employment Code Act applied to the termination of Ms. Mandandi. The Employment Code Act came into effect on 9th May 2019 but there was a transitional provision of one (1) to give employers a chance to rectify contracts of employment that were materially inconsistent with the new law. The Court held that the Employment Code Act applied as there was no inconsistency between the contract of employment and the new law.

On the question of whether the termination of the contract of employment was by redundancy or for operational requirements, the court stated that the issue of redundancy was pleaded in the alternative, and it was imperative to first determine if the termination was unfair and wrongful before deciding if it was by redundancy, which was Ms. Mandandi's alternative claim. According to the Court of Appeal:

It is trite that an alternative claim is considered only upon the failure of the main claim

The Court then dealt with whether the termination was unfair and/or wrongful. In this regard, the Court of Appeal held as follows:

...the concern of this court is not why or the reasons for the termination of the respondent's employment, but rather how the termination was done. In our view, the termination of employment was unlawful/wrongful based on other grounds by the employer when it ought to have been redundancy in view of the reduced service for the respondent's role of administrator support. The duration of her employment, having been directly related to the services provided to Kalumbila Minerals Limited (KML) and her services being no longer required.

We therefore hold that the termination of employment was unlawful in the circumstances in this case. Therefore, the court below erred in law and fact by holding that the termination was by way of redundancy. The court below further erred by considering the alternative relief of redundancy when the main claim was for a declaration that her employment was unlawfully terminated.

Based on the above, the court found that the termination of Ms. Mandandi was unlawful and set aside the High Court's finding that the termination amounted to an unlawful redundancy. The court thus set aside the award of two (2) months' salary as redundancy package and confirmed the award one month salary as damages as Ms. Mandandi did not prove any trauma.

Significance

The Court of Appeal missed a golden opportunity to provide clarity on three critical issues, namely: transitional provisions relating to a statute, guidance on the distinction between termination for operational requirements and termination by redundancy and the law relating to damages.

As it relates to the first issue on transitional provisions, the Act was assented to on 11th April 2019 and the commencement order in relation to the same, bringing it into force was 9th May 2019.

Regulation 5(2) and (3) of the Fourth Schedule provides that

(2) A written contract of employment entered into under the law for the time being in force in any other country, attested by a government officer of that country and performed within the Republic, is deemed to have been entered into under this Act, and the provisions of this Act shall, apply to the contract in relation to its performance in the Republic.

(3) Despite sub-paragraph (1), where a contract of employment made prior to the commencement of this Act is materially inconsistent with the provisions of this Act, an employer shall comply with the provisions of this Act within one year of the commencement of this Act.

From the above, all contracts of employment in Zambia are deemed to have been entered into terms of the provisions of the Employment Code. This was subject to the provision that an employer being given one (1) year to comply with the provisions of the Act.

As it relates to the procedural aspects of the law such as the need to give valid reasons (which was carried over from the repealed Employment Act), the need to give an opportunity to be heard prior to any dismissal based on conduct or capacity and the provisions relating solely to procedure. In *Zambia Consolidated Copper Mines v. Jackson Munyika Siame and 33 Others* the Supreme Court held that:

We accept that it is a well-settled principle of law that there is always a presumption that any legislation is not intended to operate retrospectively but prospectively and this is more also where the enactment would have prejudicial effect on vested rights. According to the learned authors of Maxwell on Interpretation of Statutes (6) "Nova Constitutio futuris foruam imponere devet, non praeteritis - upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operations." Side by side with this presumption of prospective application is the well-established principle of law that all statutes must be construed as operating only on the cases where or on facts which came into existence after the statutes were passed unless a retrospective effects are clearly intended. But there is another well-established principle of law which is that any enactments which relate to procedures and practice of the court have retrospective application, vide the Halsbury's Laws of England (5).

The Supreme Court made it very clear that procedures and practice of a statute take effect immediately, and actually have retrospective effect. The issue of whether a contract of employment is materially consistent or not and the one-year transition, on the other hand relates solely to the substantive aspects of the Act such as those relating to employee benefits. This was so given that the law did not intend to ambush employers but give them time to adjust to the potentially costly introductions and adjust their budgets accordingly.

As it relates to the second issue relating to redundancy and operational requirements, the Court of Appeal missed an opportunity to score an open goal that would have settled the issue. If anything, the Court of Appeal left the reader confused as to the basis on which it found the termination of Ms. Mandandi unlawful. For ease of reference, I will recast the holding of the Court of Appeal:

...the concern of this court is not why or the reasons for the termination of the respondent's employment, but rather how the termination was done. In our view, the termination of employment was unlawful/wrongful based on other grounds by the employer when it ought to have been redundancy in view of the reduced service for the respondent's role of administrator support. The duration of her employment, having been directly related to the services provided to Kalumbila Minerals Limited (KML) and her services being no longer required.

We therefore hold that the termination of employment was unlawful in the circumstances in this case. Therefore, the court below erred in law and fact by holding that the termination was by way of redundancy. The court below further erred by considering the alternative relief of redundancy when the main claim was for a declaration that her employment was unlawful terminated.

The above excerpt from the Court of Appeal is unclear as it can get. Firstly, the Court of Appeal held that 'the concern of this court is not why or the reasons for the termination of the respondent's employment, but rather how the termination was done'. With due respect to the Court, this is only the case when the court is examining if the dismissal or termination is wrongful. Where the dismissal or termination is either unlawful or unfair, the court is mandated to look at the reasons, merits, or substance of the decision – this is crucial because for unfair and unlawful termination or dismissal, a court has to ascertain if the reason given was valid, substantiated or justified. As such, on this score, the general statement made by Court of Appeal, with all due respect was not wholly correct.

The Court then makes the following statement 'In our view, the termination of employment was unlawful/wrongful'. With all due respect, this conflates two important and distinct concepts of employment law. As already stated, wrongful dismissal or termination related to the form of the dismissal and whether such dismissal/termination complied with the procedure in the contract of employment. Unfair or unlawful dismissal or termination relates to where the reason given was invalid, unjustified or unsubstantiated or contrary to the law.

Despite holding that the concern of the court is not why or the reasons for the termination but how it was done, the Court went on to examine the reasons for the termination. The Court stated that:

In our view, the termination of employment was unlawful/wrongful based on other grounds by the employer when it ought to have been redundancy in view of the reduced service for the respondent's role of administrator support. The duration of her employment, having been

directly related to the services provided to Kalumbila Minerals Limited (KML) and her services being no longer required.

We therefore hold that the termination of employment was unlawful in the circumstances in this case. Therefore, the court below erred in law and fact by holding that the termination was by way of redundancy. (Emphasis author's)

It is difficult to make out exactly what the Court of Appeal is trying to communicate here. On the one hand the Court of Appeal seems to be suggesting that the termination was unlawful and wrongful on the grounds given by Liebherr as the termination was a redundancy due to the reduced need for Ms. Mandandi's role of administrator support. However, in another breath, the Court of Appeal states that the termination was not by way of redundancy, and the High Court/court below erred in that regard. This is incredibly difficult to understand.

In my opinion, the Court of Appeal should have first sought to determine what the mode of termination was and thereafter whether the reason given was appropriate. Under Zambian law, an employer can only initiate the termination of employment of an employee for a limited number of reasons: misconduct, capacity which is poor performance or ill-health, operational requirements, or a redundancy. This is based on sections 52 (1) and (2) and section 55 of the Employment Code Act.

In the circumstances before the Court of Appeal, the termination could only have been for operational requirements or redundancy. The Court of Appeal missed a golden chance to clarify if operational requirements or redundancy are two different reasons or the same ground, as this has been a topic of some debate, and the nature and scope of the two.

The distinction between redundancy and termination for operational requirements in Zambia is thus very important. When a redundancy takes place, the position that the employee held must be abolished or diminished in the entity. In *Frida Kabaso Phiri (sued as Country Director of Voluntary Services Overseas Zambia) v. Davies Tembo*,² the Supreme Court in a judgment delivered by Malila JS (as he was then) confirmed that:

We accept the submission of the learned counsel for the appellant that a redundancy takes place when an employer decides that the employee's position and/or services are no longer required and, therefore, the position must be abolished.

By declaring an employee redundant, the employer announces to the world that he does not need or require the employee to do that job. On the other hand, with termination for operational requirements, the employer continues to exist, and the role of the employee has neither ceased nor diminished but the employer cannot sustain that employee in its enterprise. In such situations, the employer is justified in terminating the services of the employee based on operational requirements as required by section 52 (2) of the Employment Code Act.

Once an employer declares an employee redundant, he risks legal action if he replaces the employee whom he declares redundant with another employee because the action of declaring an employee redundant is an announcement to the world that he does not need anybody for the

² SCZ Appeal No. 04/2012.

job. As explained in *Frida Kabaso*, the redundancy means the employee's position no longer exists and/or his services are no longer required.

For these reasons, if an employer is facing challenges such as the ability to sustain its workforce due to financial problems or seeks to reorganise its affairs to make them more efficient, if it does not result into a redundancy situation contemplated by section 55(1) of the Employment Code Act, a redundancy has not occurred. In such circumstances, the employer is warranted in terminating employment based on operational requirements in terms of section 52(2) of the Employment Code Act. Such a termination based on operational requirements.

The Supreme Court has on two occasions sought to distinguish between a redundancy and a termination for business or operational needs, but these were completely ignored by the Court of Appeal. The first decision of the Supreme Court that somewhat dealt with the difference between a redundancy and termination for operational requirements was *ZESCO Limited v. Patricia Kabwe Lungu*³ where it was held that:-

It is also our understanding that where the termination is prompted by the need to reduce staff, abolish the office or post, or to retrench generally, the employer would in effect be scaling down in respect of that particular position and would be declaring the affected employee or employees redundant. As such, the expectation would be that the employer would not re engage another person or other persons in that position or positions.

On the other hand, where an employer is terminating the service of an employee for purposes of reorganization or in order to facilitate improvements in efficiency or organization, the view we take is that the employer can reemploy in those positions because the positions will not have been abolished.

Based on the above, the Supreme Court confirmed that a redundancy only occurs where an employee's position has been abolished and services no longer required. Where the position will not be abolished, but the employer wants to improve efficiency or has other operational needs, the employer is justified in terminating an employee for restructuring needs. This is an important distinction that could have been brought out and applied by the Court of Appeal to clarify the issue especially considering the enactment of the Employment Code Act.

In the subsequent Supreme Court case of *Derek Mukokanwa v. Development Bank of Zambia*,⁴ the employer undertook a restructuring or retrenchment exercise that led to the employee being informed that he would no longer be retained. The Supreme Court examined the communication from the employer, as well as the redundancy scenarios provided for in the legislation and confirmed that the employee could not claim a redundancy as the position from

³ SCZ Appeal No. 236/2013.

⁴ SCZ Appeal No. 120/2014.

which he was removed continued to exist and was filled by someone else. The Supreme Court stated:

The appellant's termination of employment was not a redundancy as the position of Manager Information and Communication Technology continued to exist and was filled by someone and, therefore, this section is inapplicable to the facts of this case.

The Supreme Court confirmed that the termination was not a redundancy, and the employee was only entitled to adequate notice and all his dues under the law and his contract of employment. Further, the Supreme Court in *Derek Mukokanwa* was of the view that:

there can be no doubt that the respondent adduced sufficient evidence to justify undertaking a retrenchment exercise. Consequently, we also find no merit in the appellant's argument that there was no evidence of the respondent's board resolution to carry out a retrenchment exercise. Furthermore, the appellant's contention that there was no evidence of authorisation from the labour officer is, in our view, inconsequential as the retrenchment was triggered by the restructuring exercise embarked upon by the respondent. This did not require the respondent to obtain prior permission from any external body.

Considering the above, the Supreme Court held that because the position continued to exist, an employer is justified, subject to the production of cogent evidence to terminate an employee for a reason other than redundancy. The *Derek Mukokanwa* decision is crucial because it underlies the basis for termination for operational needs, as and when it is necessary, provided the employer has a sufficient basis for doing so and there is evidence to justify that decision.

For the avoidance of any doubt, based on the above authorities, this author is of the view that termination for operational requirements is based on a bona fide, commercial reason that doesn't involve an employee's position or services no longer being required whilst a redundancy is triggered by an event that results in an employee's services no longer being required or due to an adverse, alteration of their contract of employment. This is underscored by the point that section 3 of the Employment Code Act confines a redundancy to one of the situations mentioned in section 55. Section 55(1) of the Employment Code reads as follows:-

- (1) An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to—
 - (a) the employer ceasing or intending to cease to carry on the business by virtue of which the employees were engaged;
 - (b) the business ceasing or diminishing or expected ceasing or diminishing the requirement for the employees to carry out work of a particular kind in the place where the employees were engaged; or
 - (c) an adverse alteration of the employee's conditions of service which the employee has not consented to.

Therefore, if a termination does not result from the situations highlighted above in terms of section 55, it cannot be termed to be a redundancy. Clearly as can be seen from the above, when a redundancy takes place, the position that the employee held must be abolished or diminished in the entity.

The Judgment of the Court of Appeal however failed to appreciate that there may be a different between the two modes of termination, despite correctly capturing this important legal issue as raised by Liebherr's legal representatives. On the one hand the Court of Appeal held and determined that the dismissal was unlawful because 'it ought to have been redundancy in view of the reduced service for the respondent's role of administrator support.' However, on the other hand the Court held that 'The court below further erred by considering the alternative relief of redundancy.' The Court of Appeal's unnecessary and complication of the mode of termination and whether it was unlawful was unhelpful and does not provide the much-needed guidance that would have closed the chapter on the valid reasons for termination and dismissal under Zambian law. As such the failure of the Court of Appeal in failing to distinguish between the two modes of termination is an important consideration and that will have an impact on the labour market going forward.

The Court of Appeal held that the termination was unlawful without venturing to explain why that was the case. The Court should have clarified that the termination was unlawful because it was either invalid or unsubstantiated, with an explanation as to why it arrived at that decision. However, as it stands, both parties to the dispute are unsure as to the basis upon which the dismissal was found unlawful, especially considering the Court asserting that it was not an unlawful redundancy but merely an unlawful termination.

I wish to point out that luckily, the Court of Appeal in the recent case of *Grace Phiri Kayula (Suing as the administrator and beneficiary of the estate of Robert Chewe Kayula) v. Workers Compensation Fund Control Board* which held, albeit obiter dicta that:-

...we note that the recent pronouncement by the Apex Court in the case of *Derek Mukokanwa v. Development Bank of Zambia* established that the two processes (redundancy and retrenchment) are substantially different. (Emphasis author's)

The above seems to confirm that the two processes, redundancy and retrenchment are distinct. However, I still lament the Court of Appeal's failure in the *Liebherr* case from making this distinction and addressing the same despite it being a core issue in the matter.

The last issue which the Court of Appeal failed to clarify is that of damages. Despite finding that the dismissal was unfair, the Court of Appeal only awarded one (1) month salary because according to the court, there was no proof of trauma. This defies the guidance of the Supreme Court in *Care International v. Misheck Tembo* where it was held that unfair and unlawful termination justifies a higher award because of the infringement of the employee's statutory rights.

Further, there is a repeated insistence on proof of trauma to justify a higher award. I am of the view that not all trauma can be proved with medical evidence. Courts should take judicial notice of the fact that any employee whose rights have been infringed, typically in an oppressive and traumatic manner will suffer anxiety, stress, inconvenience, and mental anguish. Whilst medical evidence would aid, it is not clear why issues relating to unfair or wrongful deprivation of an income causing stress need proof in the strict sense.

The Court of Appeal missed the opportunity to interpret section 57 of the Employment Code Act which reads as follows:-

Where, within nine months from the date when the notice of termination of employment under section 55 takes effect, the circumstances leading to the redundancy of an employee have changed and an employer wishes to fill a vacancy occasioned by that redundancy, the employer shall offer a contract of employment, in respect of the vacancy, to the employee previously declared redundant, before considering any other applicant.

The provisions of Section 57 above are clear. A redundancy abolishes the position held by an employee and the need for his/her services as held in the cases of *Frida Kabaso Phiri (sued as Country Director of Voluntary Services Overseas Zambia v. Davies Tembo)*, and *Zesco Limited v. Patricia Kabwe Lungu*, which were cited by the Complainant in her submissions. Hence, a redundancy cannot be said to have been carried out in good faith or for a genuine reason as required by the law if an employer is allowed to employ another person to replace the employee declared redundant. As such, based on section 57 above, an employer is not permitted to appoint another employee to the position that a redundant employee held within nine (9) months of the termination.

It would have been helpful for the Court of Appeal to provide detail and guidance on this provision for employers, especially as it was alleged by Ms. Mandandi that she was replaced and the employer merely disguised her position, Service Administrator, as Receptionist to avoid retaining her in employment. The Court of Appeal missed an opportunity to provide clarity on how employers are proscribed from replacing employees under a redundancy by disguising their employment by merely changing the job title. Of course, in the case of termination for operational requirements, an employer can replace an employee provided there is lucid evidence of the need to do so. This guidance should have come from the Court of Appeal, as it was an issue before the court, even by way of obiter dictum.

Lastly, the insistence on the notice period being the normal measure of damages could have been evaluated. Precisely, court could award damages equivalent to the notice period as the “normal measure” because the employer enjoyed the common law right and option to terminate at will and the notice period encompassed the loss to be suffered by an employee. Under the common law, an employer could terminate or dismiss for no reason, and this reflected in the common law remedy of damages equivalent to the notice period. This common law approach was adopted in Zambia and worked well up until an amendment was made to the legislation.

It is submitted that the introduction of the requirement to give valid reasons prior to the termination or dismissal of an employee means that the common law position no longer applies. The position now is that an employer must accompany any termination with a valid reason, even when terminating with notice or payment in lieu of notice means that the orthodox normal measure of damages does not apply. This should have been brought out by the Court of Appeal.

For the above reasons, where an employer is guilty of wrongful or unfair dismissal or termination, compensation with notice pay would not be justifiable as an employer is no longer at liberty to terminate the contract without a reason, as was the case before. Therefore, the removal of the right to dismiss or terminate without a reason has equally taken away the common law normal measure of damages being salary equivalent to the notice period.

Further, it is trite that the court should explain the reasons and rationale for the award of damages granted. In *Josephat Lupemba v. First Quantum Mining and Operations Limited*, the Court of Appeal stated that:-

...the principles of awarding the measure of damages will be the same depending on the circumstances of each case...It is a requirement that the trial Judge gives reasons for awarding a measure of damages, either as the period of notice, when the award is within the common law measure or justification for award it exceeds the common law measure.

In the circumstances of the case at hand, the Court of Appeal failed to justify the one (1) month salary as damages against the principles relating to damages under Zambian law. These principles, for the avoidance of doubt are:

- the conduct of the employer was oppressive;
- that his/her employment was terminated in a traumatic fashion;
- was the result of the blatant infringement and/or disregard of their rights, the rules of natural justice and/or their contract of employment;
- caused mental anguish, anxiety, inconvenience and stress; and
- the employee's future job prospects and the economy when awarding these damages.

Overall, the Court of Appeal missed a golden opportunity to provide critical guidance on an aspect of employment law, particularly in terms of the recently enacted Employment Code Act which in my view transforms the common law normal measure of damages due to the abolishment of the common law right to terminate with notice and for no reason.