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)

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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. 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*. 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 abroad – in this case, South Africa, and Germany.

Handed down on May 16<sup>th</sup>, 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; and sparking an almost immediate backlash. Indeed, not only did

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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).
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

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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’).
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.\(^\text{14}\) 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.\(^\text{15}\) 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”\(^\text{16}\).

**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.\(^\text{17}\) In the midst of her proceedings, Ms. Seiler-Lilles amended her notice of motion to introduce the same relief sought by Mr. Digashu.\(^\text{18}\)

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.\(^\text{19}\) Hence, the High Court consolidated the two cases, which the applicants\(^\text{20}\) filed against the Government of the Republic of Namibia (1\(^\text{st}\) respondent), the Minister of Home Affairs and Immigration (2\(^\text{nd}\) respondent), the Chief of Immigration (3\(^\text{rd}\) respondent), the (Acting) Chairperson of the Immigration Control Board (4\(^\text{th}\)),\(^\text{21}\) the Immigration Selection Board (5\(^\text{th}\)), the Immigration Control Board (4\(^\text{th}\)),\(^\text{21}\) the Immigration Selection Board (5\(^\text{th}\)), 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> 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’ in that provision included such right.

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. 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. 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”.

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. 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. The applicants submitted that the requirement for same-sex spouses to apply for a work permit and a permanent residence permit amounts to discrimination. 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.

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

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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 Digasha 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. This aligns with the rule of law and promotes certainty and judicial progress. 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. 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*. The court argued that rulings derived from same-sex couple matters in Frank were irrelevant and unnecessary.

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. 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. 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:

> 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. 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. 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.

**How the Supreme Court decided**

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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

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53 *Digashu* (n 4) [15].
54 ibid [60].
55 ibid [62].
56 ibid.
constituted *obiter dicta.* It sought to create rules that it did not need to decide the *Frank* case. Shivute CJ and Smuts JA concluded that the High Court erred in treating these comments as binding.

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. Then the court affirmed that:

> 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.’ They quoted *The New Shorter Oxford English Dictionary* as approved in the South African case *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* to render the term’s ordinary meaning as connoting “a married person; a wife; a husband”.

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.

The two judges ascribed this meaning to section 2(1)(c) of the Immigration Control Act. 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. ’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.

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57 ibid [75].
58 ibid [76]-[79]
59 ibid [79].
60 ibid [81] and [108].
61 ibid [82].
62 ibid [83].
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. The court relied on its earlier judgment in *Muller* to connect dignity and equality, and ruled that the adjective ‘inviolable’ in Article 8 of the Constitution does not permit any exceptions.

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. Citing South Africa’s *Makwanyane* case where the court determined that the death penalty offended the right to dignity in the Interim Constitution, 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. They underlined with approval the following holding from *Makwanyane*:

> 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.

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. 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. 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. Thus, the term ‘spouse’ in the Act should include same-sex spouses legally married in another country.

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)

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70 See ibid [128]. Specifically, see [96]-[108] for the court’s examination of the right to dignity and [109]-[127].
71 *Muller 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, citing several statutes to back up his observation:

- 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. For that reason alone, Mainga JA enthused, the High Court was bound by Frank.

The dissenting judge underlined that the common law principle (i.e., lex loci celebrationis – ‘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. 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. 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. For those reasons, Mainga JA concluded that the Namibian Ministry of Home Affairs and Immigration did not discriminate against the appellants.

Significance of the case

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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. 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. This prospective reversal – that the Parliament will enact under Article 81 of the Constitution – directly challenges the authority and independence of the judiciary, 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 difficulty 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 Namibians 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”, “reiterate[d] 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 Ubuntu 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, 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. 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, which enshrines the right to administrative justice. The Supreme Court, however, misleadingly framed the case as a challenge to the validity of the

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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.\textsuperscript{101} This misguided framing ultimately led to the application of a principle of private law transactions, \textit{lex loci celebrationis}, in a public law situation.

And, contrary to what the majority opinion ruled,\textsuperscript{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.

\textbf{Distorting international law and the separation doctrine}

The \textit{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 them\textsuperscript{103} – 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 \textit{Digashu} judgment brings up questions as to how far the apex court has internalized this pillar of democracy.

\textbf{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 \textit{Frank} on same-

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

\textsuperscript{102} See ibid [84].

\textsuperscript{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.\textsuperscript{104}

At a fundamental level, the \textit{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’\textsuperscript{105} and decolonial feminism. On this latter point, gender and coloniality intersect, and progressive jurists will rightly applaud the \textit{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 precedents\textsuperscript{106} and those Namibians who urge it to level down,\textsuperscript{107} the Supreme Court responded by whitening u

\textsuperscript{104} \textit{Digashu} (n 4) [148] and [181].

\textsuperscript{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).

\textsuperscript{106} See \textit{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.

\textsuperscript{107} See Magazi (n 5).