



**REPORTABLE**

CASE NO: SA 15/2011

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**PROSECUTOR GENERAL**

**Appellant**

and

**PROTASIUS DANIEL**

**First Respondent**

**WILLEM PIETER**

**Second Respondent**

**ATTORNEY GENERAL**

**Third Respondent**

**GOVERNMENT ATTORNEY**

**Fourth Respondent**

**Coram:** SHIVUTE CJ, MAINGA JA and STRYDOM AJA

**Heard:** 12 October 2011

**Delivered:** 28 July 2017

**Summary:** The first and second respondents in this appeal, with separate substantive applications approached the High Court seeking orders declaring the minimum sentences prescribed by sections 14(1)(a)(ii) and (b) of the Stock Theft Act 12 of 1990 (the Act) unconstitutional and invalid. They contended that the minimum sentences prescribed by

the impugned provisions violated Articles 8(2)(b) and 10(1) of the Namibian Constitution. The Prosecutor General (appellant in this court) opposed both applications and argued that the impugned provisions were not unconstitutional. The Prosecutor General further argued that the constitutional challenge brought by the first and second respondents was inappropriate. The Attorney-General and the Government of the Republic of Namibia, on the other hand, conceded that the impugned provisions violated Article 8(2)(b) but denied that both subsections challenged violated Article 10(1) of the Constitution. The court *a quo* granted the declarator and struck the words "*for a period not less than twenty years*" and "*for a period not less than thirty years*" from sections 14(1)(a)(ii) and 14(1)(b) of the Act.

*On appeal*, the Prosecutor General argued that it was not necessary or appropriate for the court *a quo* to decide the constitutional issue as the first and second respondents had the right to appeal against their sentences. Regarding the impugned provisions, the Prosecutor General submitted that the sections under attack do not violate Articles 8(2)(b) and 10(1) of the Constitution. The Prosecutor General further argued that the order fashioned by the court *a quo* failed to take into account the doctrine of separation of powers. The first and second respondents, on the other hand, contended that they were entitled to approach the court *a quo* with their respective applications. On the second issue, they maintained that the sentencing benchmark were inconsistent with Articles 8(2)(b) and 10(1) of the Constitution. They further contended that as both sections of the Act are unconstitutional and invalid, the order of the court *a quo* ought to be confirmed by this court.

Court on appeal *held* that the court *a quo* was entirely correct in entertaining the constitutional challenge by the first and second respondents despite that they also had the right to appeal against their sentences.

Court on appeal further *held* that that the minimum sentences under attack are unconstitutional because of their disproportionality. The court further *held* that in view of the findings relating to the unconstitutionality of the impugned provisions, there is no need to refer back the impugned provisions to the legislature for possible correction. Instead, Parliament in its discretion may craft a solution. Appeal dismissed with costs.

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## APPEAL JUDGMENT

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SHIVUTE CJ (MAINGA JA and STRYDOM AJA concurring):

### Background

[1] The first and second respondents, Messrs Daniel and Peter, approached the High Court as applicants with separate substantive applications which were later consolidated and heard together. They sought orders declaring unconstitutional the provisions of the Stock Theft Act 12 of 1990 (the Act) under which each one of them had been sentenced, namely ss 14(1)(a)(ii) and 14(1)(b) respectively. The Prosecutor-General, being the authority vested with the power to prosecute in criminal cases in the name of the State subject to the Constitution, was cited as the second respondent in those applications. The High Court granted the orders prayed for and it is against such judgment and orders that the Prosecutor-General now appeals.

[2] The first respondent is an offender serving a sentence of 20 years imprisonment following his conviction in the Regional Court of theft of nine goats valued at N\$4,450. Twenty years imprisonment is the mandatory minimum sentence prescribed by s 14(1)(a)(ii) of the Act for a first offender convicted of theft of stock valued at more than N\$500. The first respondent was aged 21 years old at the time. He pleaded guilty to the offence and gave poverty as the reason for the theft. The trial court referred to s 14(2) of the Act which provides that where the sentencing court finds that there are substantial and compelling circumstances which may justify the imposition of a sentence less than the minimum prescribed sentence, the court may impose such a lesser sentence. The trial court found that no such circumstances existed and sentenced the first respondent to 20 years imprisonment, as already mentioned.

[3] The second respondent is also an offender who was separately convicted of theft of one cow in the High Court. He was convicted and sentenced together with three co-accused persons aged 20, 21 and 25. On account of the relatively minor roles that each co-accused played in the theft of the cow, the court below found that there were substantial and compelling circumstances in their situations justifying a departure from the prescribed minimum sentence and each was sentenced to 15 years' imprisonment, 5 years of which was suspended on the usual conditions. Mr Peter, aged 38 at the time of the sentence, had a previous conviction for stock theft committed some 11 years earlier. The trial judge did not find substantial and compelling circumstances justifying the imposition of a sentence less than the minimum in the case of Mr Peter and thus sentenced him to the prescribed minimum sentence of 30 years' imprisonment.

### Principal submissions in the High Court

[4] It was contended on behalf of both Mr Daniel and Mr Peter that the minimum sentences in the Act violated Art 8(2)(b) of the Namibian Constitution prohibiting cruel, inhuman and degrading punishment and Art 10(1) of the Constitution guaranteeing equality. It was averred that, in accordance with the precedent set by *S v Vries* 1998 NR 244 (HC), the minimum sentences set by s 14(1)(a)(iii) and s 14(1)(b) of the Act were disproportionate as the sentence given depends exclusively on whether the offender is a first or repeat offender and whether the stock was worth more or less than N\$500, excluding other salient factors such as the seriousness of the crime, the personal circumstances of the accused, the age of the accused (apart from juveniles who have been accounted for), and other relevant societal interests. More, the rationale for such disproportionate punishment was for the sole purpose of deterrence making those sentenced a means to an end rather than an end in themselves. It was argued that despite the discretion accorded to the courts to depart from the minimum sentence if 'substantial and compelling circumstances' exist, this does not cure the disproportionate nature of the two subsections as the disproportionate minimum sentence continues to provide a benchmark for such departure, limiting this discretion. In this way, it was submitted that this violated their right to human dignity and thus Art 8(2)(b) of the Constitution.

[5] It was also argued that such minimum sentences violated Art 10(2) because they were disproportionate to the sentences prescribed to other crimes whose nature was equally severe or more severe than stock theft. It was averred by counsel that it is against the constitutional guarantee of equality to afford property greater protection than that

afforded to human life. To support this statement, counsel alleged that offences such as theft, fraud and corruption are at least as serious as stock theft and do not have comparable minimum sentences. On the other hand, offences such as rape and murder are significantly more heinous given the impact on the victim, the ability for a victim to recover, and have similar or less harsh minimum sentences than stock theft.

[6] In this way, it was averred that article 7 of the International Covenant on Civil and Political Rights (ICCPR) as well as article 5 of the African Charter on Human and Peoples' Rights (the African Charter) to which Namibia is party were also violated.

[7] The Attorney-General and the Government of the Republic of Namibia, the third and fourth respondents respectively in the appeal, were cited as the first and third respondents in the proceedings in the High Court, while the Prosecutor General, as has already been mentioned, was cited as the second respondent in those proceedings. The Attorney-General conceded on behalf of all the respondents, including the Prosecutor-General, in the application of Mr Daniel and in respect of Mr Peter's application on behalf of the Attorney-General and the Government only, that the impugned provisions were unconstitutional as they violated Art 8(2)(b) of the Constitution. It would appear that it is for this reason that neither the Attorney-General nor the Government opposed the applications in the High Court or the appeal in this Court. This concession was justified on the basis that s 14(1)(a)(ii) and (b) of the Act were grossly disproportionate as they failed to distinguish between different kinds of stock, the actual value of the stock over

N\$500 or the quantity of the stock. It was also admitted that such subsections were inconsistent with article 7 of the ICCPR and article 5 of the African Charter.

[8] However, the Attorney-General did not concede to the argument made that both subsections challenged violated Article 10 of the Constitution because the guarantee of equality in the Constitution is with respect to people similarly situated. It was averred that as stock theft, murder and rape are different offences, those convicted of such offences cannot be said to be similarly situated for the purposes of Art 10(1).

[9] The Prosecutor-General, on the other hand, makes it abundantly clear that she did not agree with the concessions of law made by the Attorney-General, that she had not been consulted in respect thereof, and was unaware that such concessions had been made.

[10] In the affidavit filed in the proceedings in the High Court, the Prosecutor-General makes a valid and incontrovertible point that in Namibia livestock plays a crucial role in the lives of many Namibians who rely on stock farming for consumption and income. Many farmers are dependent on livestock for livelihood and stock farming plays an important role in the economic development of the country. Cattle, in particular, are not just of economic benefit, but they are also of great importance to the social and cultural values of some Namibians. Farming with stock has become one of the most viable options for many inhabitants of the country. Regrettably, this form of business is threatened by what the Prosecutor-General describes as the high incidence of stock theft which poses

a real danger of impoverishing legitimate stock farmers and threatening the country's economic growth and food security. It is therefore not surprising that to counter some of these deleterious effects of the offence of stock theft on farming in the country, the legislature, as it was entitled to do, effected amendments to the impugned sections thereby introducing arguably some of the most robust sentencing regimes to date for offenders convicted of theft of stock of a certain value. This aspect is dealt with further below.

[11] The Prosecutor-General submitted that the executive and the legislative organs of the State have a real interest in the severity of the sentences in keeping with their constitutional obligation to protect society. In support of this proposition, the Prosecutor-General relied on a decision of the South African Constitutional Court in *S v Dodo* 2001 (3) SA 382 (CC) in which 'certain instructive principles' were referred to, namely that it is not for the courts to disregard the legislative branch's decision with regard to the severity of sentences. Moreover, the Prosecutor-General stated that the ss 14(1)(a)(ii) and 14(1)(b) do not require a court to impose a minimum sentence of 20 years or 30 years respectively if it would violate Art 8(2)(b) of the Constitution as the court is afforded the discretion to impose lesser sentences if there are 'substantial and compelling circumstances'.

[12] In respect of the alleged violation of Art 10 of the Constitution, the Prosecutor-General submitted the same argument as the Attorney-General.



### The decision of the High Court

[13] The court *a quo* held that the constitutional challenge was appropriate because the applicants sought a declaratory order in terms of Art 25(1) of the Constitution on the basis of constitutional issues only. Moreover, in accordance with s 16 of the High Court Act 16 of 1990, both applicants constituted 'interested persons' and had an 'existing, future or contingent right' to the determination of the constitutional question. Given both of these reasons and the overarching need for a conclusion regarding the constitutionality of the sentencing regime to be reached, the court *a quo* held that the challenge was appropriate.

[14] The High Court agreed with the first and second respondents' argument that the minimum sentencing regime created by s 14 of the Act was unconstitutional as it had set the levels of deterrence beyond what was fair and just to those convicted and sentenced under it. The court below found that the minimum sentences were grossly disproportionate in that they unfairly and unjustly punished those that are convicted as instruments of deterrence in violation of their rights and dignity.

[15] The court *a quo* emphasized the dual role that minimum sentences play in limiting the court's discretion to determine the appropriate sentence. In this regard, it referred to *S v Mwamvu* [2005] 1 All SA 435 (SCA) in which it was held that total disregard for the sentencing benchmark can amount to a material misdirection by the court. Such disregard would render useless the benchmark set by the legislature.

[16] The High Court observed that it was called upon to determine the constitutionality of s 14(1)(a)(ii) and s 14(1)(b) of the Act, and thus should not only look to the facts of the two particular cases before it, but also at hypothetical cases commonly arising. Given the reasons elaborated upon above, and the likelihood of such minimum sentences being disproportionate in many hypothetical cases in addition to the cases of Mr Daniel and Mr Peter, it was held that the two subsections of the Act violated Art 8(2)(b) of the Constitution.

[17] It accordingly made the following order:

- '(a) The words “for a period not less than twenty years” are struck from section 14 (1)(a)(ii) of the Stock Theft Act 12 of 1990, as amended;
- (b) The words “for a period not less than thirty years” are struck from section 14(1)(b) of the Stock Theft Act 12 of 1990, as amended;
- (c) The reference to “subsections (1)(a) and (b)” in section 14(2) of the Stock Theft Act 12 of 1990, is consequentially read down to mean “subsection (1)(a)(i)”;
- (d) The second respondent is ordered to pay both applicants’ costs of two instructed and one instructing counsel’.

[18] The order under (c) above was made because the Court below reasoned that to leave reference to subsections 1(a) and (b) in subsection 14(2) of the Act would leave a lacuna in the structure of the section and so, in terms of Art 25(3) of the Constitution, it also made a consequential change to the subsection in question.

[19] As a violation of Art 8 had been found, the court *a quo* deemed it unnecessary to analyse the contended potential violation of Art 10.

Issues to be decided

[20] The appellant has raised three main issues which stand to be decided by this Court, namely:

- (a) Whether or not it was necessary to consider and decide the constitutionality of the impugned sections seeing that Messrs Daniel and Peter also had the right to appeal against their sentences;
- (b) Whether or not the impugned provisions are unconstitutional as they create residual discretionary overlay for the sentencing court; and
- (c) Whether or not the Courts are precluded from interfering with the sentencing benchmarks imposed by the Legislature and, if they are not so debarred, whether it is appropriate for the Courts to remove the benchmarks or whether the matter should rather be referred to the Legislature for the latter to deal with it.

[21] Each issue will be dealt with in turn.

Was it necessary or appropriate to decide the constitutional issue?

[22] Counsel for the appellant argued that it was not necessary or appropriate to decide the constitutional issue as the respondents had the right to appeal against their sentences and that had they exercised that right, the merits of each sentence would have been decided thereby resulting in tangible benefits to them. The outcome of the constitutional challenge would not result in real benefit for them, because even if they were successful

their sentences would still remain intact. The appellant presented some argument in respect of the merits of the sentences imposed on the respondents to show, it would appear, that had they appealed against their sentences instead of lodging applications for a declaratory order, the merits of the appeal enjoyed good prospects of success. Counsel points out that in the case of Mr Daniel, it appeared as if the Regional Court Magistrate simply mentioned to the unrepresented Mr Daniel that he must put forth 'substantial and compelling circumstances' without explaining to him what that entailed and without assisting him as he was obliged to do. In the case of Mr Peter, so the argument went, the sentence can be criticised as being based on a misdirection of taking into account an 11 year old previous conviction that predated the minimum sentence regime. In any event, so counsel contended, the trial courts may be criticized for having applied the concept of 'substantial and compelling circumstances' too restrictively. Counsel concluded his argument on the point by submitting that the constitutional challenges were inappropriate and should have been struck from the roll, alternatively should have been treated as appeals. Relying on the *dictum* of this Court in *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 184A, counsel submitted that a court should decide no more than what is absolutely necessary to determine a case and constitutional law should be developed cautiously, judiciously and pragmatically.

[23] Counsel for the respondents, on the other hand, contended that the respondents were entitled to approach the High Court with their respective applications seeking a decision on the constitutionality of the impugned provisions. Counsel developed his argument by submitting that the applications before the High Court sought declaratory

orders in which a decision had been sought on the constitutionality of the impugned provisions.

[24] In the view I take of the matter, the respondents' counsel is correct in these submissions. The High Court was seized with a substantive application for a declaratory relief and could not therefore dispose of the matter without deciding the constitutional issues raised in the applications. The High Court was correct in its finding that there was no appeal before it in relation to this matter. As counsel for the appellant mentioned, it is true that Mr Daniel had lodged an appeal against the sentence, but that appeal was removed from the roll 'pending the outcome of the constitutional challenge' as is stated by the court order dated 10 July 2009. The respondents elected not to appeal against their sentences but to seek declaratory orders instead. This they are entitled to do. Counsel for the respondents further submitted that, in effect, the decision to bring the application for a declaratory relief was informed *inter alia* by the principle set out in cases such as *S v Sheehama* 2001 NR 281 (HC) at 285B-C and *S v Zemburuka* (1) 2003 NR 112 (HC) where it was held that in a matter such as the present, it was appropriate to approach the High Court in the form of a substantive application so that parties with an interest in the outcome (such as the Attorney-General<sup>1</sup> and the Government) are given an opportunity to be heard. In criminal appeals, where declaratory orders on the constitutionality or otherwise of a provision are sought, there are no means for other parties other than the Prosecutor-General, who, in his or her representative capacity, is a party in all criminal proceedings, to intervene and place before court relevant evidence.

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<sup>1</sup> The Attorney-General's powers and functions are set out in Art 87 of the Namibian Constitution. In terms of Art 87(b) thereof the Attorney-General is the principal legal adviser to the President and Government. As such he would have direct and substantial interest in a constitutional challenge to a statutory provision.

[25] It seems to me that this is a relevant consideration and salutary practice which affords interested parties the opportunity to participate in the proceedings so as to assist a court to fully consider and decide matters of great public and constitutional importance. It would appear also from the next submission on behalf of the respondents that the then applicants found themselves on the horn of a dilemma in deciding on how to proceed, ie. whether to appeal against the sentences or to seek a declaratory order. Counsel for the respondents argued, correctly in my view, that in the event that the respondents were unsuccessful with their criminal appeals and subsequently launched applications for declaratory orders on the constitutionality of the impugned provisions, their appeals would have been decided, and in spite of being successful in challenging the constitutionality of the said provisions, no tangible benefits may accrue to them. There was a real possibility that the applications could be dismissed on the ground that they were of academic nature only.

[26] In my view, the appellant's reliance on this Court's *dictum* in *Kauesa* is misplaced, because the dictum was made in the context of the Court appealed from in that case producing what was characterized at 184A as 'a wide-ranging judgment dealing with matters that are not only extraneous and unnecessary to the decision but which have not been argued'. Citing the *dictum* of Bhagwati J (as he then was) in *M M Pathak v Union* (1978) 3 SCR 334 in relation to the practice of the Supreme Court of India, Dumbutshena, AJA who wrote the judgment of the Court then made the seminal remarks relied upon by counsel for the appellant. It is in any event correct that constitutional issues should be decided cautiously, judiciously and pragmatically as stated by this Court in *Kauesa*, but

this principle should not be misconstrued to mean that when a constitutional issue is squarely raised a court should avoid deciding it for the sake of pragmatism or concern for rapid development of constitutional law. Such an approach would be untenable and is certainly not what was meant in *Kauesa*. The issues raised in argument relating to the merits of the sentences imposed on the respondents are not before us. Accordingly, I refrain from expressing any opinion on arguments advanced by counsel for the appellant on those issues.

[27] For all these reasons, I am persuaded that the High Court was entirely correct in its holding that the constitutional challenge by the respondents was appropriate for it to exercise its discretion in entertaining the applications for the declaratory orders. It gave cogent reasons for so deciding and there can be no reason for disturbing the exercise of such discretion. The discretion to entertain the application was not predicated merely on the ground that the argument advanced by counsel for the appellant in the High Court 'loses sight of the fact [the] application is no appeal and that no relief akin to appeal is sought by the applicants' as counsel now appears to contend in his written heads of argument. In my view, the reasoning of the High Court in arriving at the conclusion it has reached on this aspect of the appeal cannot be faulted. Accordingly, the answer to the first issue raised in paragraph 20(a) above is that it was necessary and appropriate for the Court below to consider and decide the constitutionality of the impugned sections even though the respondents also had the right to appeal against their sentences.

### Constitutionality of the impugned provisions

[28] The next issue for consideration and decision is the constitutionality or otherwise of the impugned provisions. In order to understand the interpretation of s 14 of the Act, it is necessary to recite it in full. The section as amended reads as follows:

#### **14 Penalties for certain offences**

- (1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry-
  - (a) of which the value-
    - (i) is less than N\$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;
    - (ii) is N\$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine;
  - (b) shall be liable in the case of a second or subsequent conviction, to imprisonment for a period not less than thirty years without the option of a fine.
- (2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a less sentence than the sentence prescribed in subsection (1)(a) or (b), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.
- (3) A sentence of imprisonment imposed in respect of an offence referred to in section 11(1)(a), (b), (c) or (d), or an additional sentence of imprisonment imposed under section 17(1)(b) in respect of non-compliance with an order of compensation, shall, notwithstanding anything to the contrary in any law contained, not run concurrently with any other sentence of imprisonment imposed on the convicted person.
- (4) The operation of a sentence, imposed in terms of this section in respect of a second or subsequent conviction of an offence referred to in section 11(l)(a), (b), (c) or (d), shall not be suspended as contemplated in section 297(4) of the



Criminal Procedure Act, if such person was at the time of the commission of any such offence eighteen years of age or older.

[29] Counsel for the appellant argued that there was a presumption of constitutionality of the statute being challenged and that the order of the High Court rendered s 14 of the Act as a whole illogical as a minimum sentence of two years is imposed for stock theft below the value of N\$500 but not for stock of greater value or for those who are repeat offenders. Counsel submitted that the impugned sections did not violate Art 8 of the Constitution because an avenue was created by s 14(2) of the Act to avoid the imposition of the mandatory minimum sentences once the sentencing court finds 'substantial and compelling circumstances' justifying the imposition of a lesser sentence than prescribed by statute exist. In support of this contention, reference was made to *S v Vries*, in which the previous s 14(1)(b) of the Act was declared unconstitutional as, unlike the sections now being challenged, the court was not granted discretion to depart from the minimum sentences.

[30] The respondents' reply to this argument was that the minimum sentence regime created by the section performed a dual function. First, it obliged the courts to impose the minimum sentences unless substantial and compelling circumstances justifying a departure from them exist. Second, it created a benchmark for the determination of sentences even when there were substantial and compelling circumstances justifying a departure from the minimum sentences. The respondents argued that both the minimum sentences and the benchmark they created required a court to impose sentences which were 'cruel, inhuman or degrading' within the meaning of Art 8(2)(b) of the Namibian

Constitution. This, the respondents contended, was so because the sentences were 'grossly disproportionate' to the offences for which they had been prescribed. They were also said to be shocking in the sense that they were 'so clearly excessive that no reasonable man would have imposed' them.

[31] In the submission of counsel for the appellant, Art 10(1) of the Constitution was not engaged as stock theft and rape or murder were not alike; differentiating between such crimes was rationally connected to a legitimate purpose. On the other hand, counsel for the respondents submitted that the minimum sentences and the benchmark they created violated the guarantee of equality contained in Art 10(1) of the Constitution because they singled out the offences to which they apply for harsh punishment which was out of kilter with the sentencing regime which applied to other equally more serious offences. Counsel concluded his submission on this aspect by arguing that the differentiation was irrational.

#### Analysis of the impugned provisions

[32] Counsel for the respondents has made a useful analysis of some of the characteristics of s 14 in his written heads of argument. Some of the contentions made in the analysis appear to me to be non-contentious and for that reason I will adapt them in the process of determining whether or not the impugned provisions are unconstitutional. Quite apart from the dual purpose the sentencing regime seeks to serve as counsel for the respondents submitted, in terms of s 14(1), minimum sentences must be imposed for all the offences in s 11(1)(a), (b), (c) and (d) that relate to stock other than poultry. Excluding poultry from the definition of stock, s 1 defines 'stock' as meaning,

*'any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, domesticated ostrich, domesticated game or the carcase or portion of the carcase of any such stock'.*

[33] The offences in s 11(1)(a), (b), (c) and (d) relate to 'stock' and 'produce'. Insofar as they relate to stock, they include the following offences: Theft or attempted theft of stock (s 11(1)(a)); receiving stock knowing it to have been stolen (s 11(1)(b)); inciting, instigating, commanding or conspiring with or procuring another person to steal or receive stolen stock (s 11(1)(c)); knowingly disposing or assisting in the disposal of stolen stock. The regime imposed by s 14, prescribes minimum sentences for all these offences. The applicable sentence depends in the first place on whether the accused is a first or repeat offender. It would be logical to consider the position of the minimum sentences for first offenders earliest in this analysis.

#### The minimum sentences for first offenders

[34] Section 14(1)(a) prescribes the minimum sentences for first offenders. It distinguishes between them on the basis of the value of the stock involved. If it is less than N\$500 the minimum sentence is two years imprisonment. If it is more than N\$500 the minimum sentence is 20 years imprisonment. The following features of the provision are significant: The section proceeds from the premise that a significant custodial sentence of at least two years imprisonment is appropriate for first offenders guilty of stock theft. The minimum sentence increases from two years to twenty years imprisonment as soon as the value of the stock exceeds N\$500. The section does not distinguish between the isolated cases of theft of a sheep on the one hand and the theft of a herd of cattle by an organised gang of cattle rustlers on the other. It prescribes the

same minimum sentence for all of them. The minimum sentence regime for repeat offenders is equally difficult to justify. It is to it that I now turn.

#### The minimum sentence for repeat offenders

[35] Section 14(1)(b) prescribes a minimum sentence of 30 years imprisonment for any second or subsequent conviction of stock theft. It differs from the approach to first offenders in two important respects. First, it makes no distinction between less and more serious offences as is done in the case of first offenders. The minimum sentence of 30 years is prescribed for all repeat offenders, irrespective of the number or value of stock that they had previously been convicted of having stolen. Second, the court may not ameliorate the minimum sentence by suspending it or any part of it unless the offender was below 18 years of age at the time of the commission of the offence as provided by s 14(4) of the Act.

#### Is there scope for the unconstitutionality of the impugned provisions in the presence of a discretionary overlay?

[36] Counsel for the appellant contended that there was no precedent in Namibia or South Africa where legislation prescribing a minimum sentence with the residual discretionary overlay was declared unconstitutional and pointed out, as stated above, that in *S v Vries*, the High Court declared unconstitutional s 14(1)(b) of the Act as it provided prior to the 2004 amendment, but that it was due to the fact that the provision then did not grant the courts a discretion to impose a lesser sentence if it had been found that 'substantial and compelling circumstances' existed. Counsel is undoubtedly correct in this submission. Counsel relies on decisions of South African courts establishing the principle

that a statutory provision cannot be unconstitutional once there is a discretionary overlay giving the sentencing court discretion to impose a sentence other than the minimum. This is normally expressed as is the case with the impugned provisions that where a court finds the existence of substantial and compelling circumstances, the court may impose a sentence other than the minimum. Counsel is correct that in *S v Dodo*, the South African Constitutional Court declined to confirm the declaration of constitutional invalidity of s 51(1) of that country's Criminal Law Amendment Act 105 of 1997 prescribing life imprisonment as a mandatory minimum sentence for murder and rape under certain circumstances if no substantial and compelling circumstances were found to be present.

[37] The court in *Dodo* set out a number of principles relating to sentencing. First, the executive and legislative branches of State have a real interest in the severity of sentences. Second, the Executive has a general obligation to ensure that law-abiding persons are protected if need be through the criminal laws from persons who are bent on breaking the law.<sup>2</sup> Third, in order to discharge its obligation to protect the citizens, the executive and legislative branches must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.<sup>3</sup> Fourth, it is not for the courts to judge the wisdom of the legislature with respect to the gravity of various offences and the range of penalties which may be imposed. Parliament has a broad discretion in proscribing conduct as criminal and determining proper punishment.<sup>4</sup> On a proper construction of the concept of 'substantial

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<sup>2</sup> Para 24

<sup>3</sup> Para 25

<sup>4</sup> Para 30

and compelling circumstances' as enunciated in *S v Malgas* 2001 (2) SA 1222 (SCA), the court found that s 51(1) did not require the High Court to impose a sentence of life imprisonment in circumstances where it would be inconsistent with the offender's right guaranteed by s 12(1)(e) of the South African Constitution.<sup>5</sup> Section 12(1)(e) of the South African Constitution is equivalent to Art 8(2)(b) of the Namibian Constitution.

[38] The general principles set out in the cases relied upon by counsel for the appellant relate to specific crimes. In *Dodo*, for example, the sentence in question was life imprisonment in respect of murder, which is proportional to the serious crime. The principle is not of application to a situation such as here where an offender subsequently convicted of theft of a carcase of stock potentially may be sentenced to 30 years imprisonment. I agree that a court is entitled to take into account not only the facts of the case before it but also cases that may arise in the future as stated by the High Court in *S v Vries* at page 252 of the judgment.

[39] Moreover, the court in *Malgas* held at para 34 that despite the discretion afforded, 'the sentence to be imposed in lieu of life imprisonment should be assessed with due regard to the bench mark which the legislature has provided', thus reiterating the fact that the court's discretion remains limited. In this way, even while exercising its discretion, a court may be constrained to impose a sentence that is disproportionate to the crime, consequentially violating the offender's rights under the Constitution.

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<sup>5</sup> *S v Dodo*, para 39

[40] The sentences prescribed in the impugned sections are disproportionate to the crime. The legislature effectively obliges a sentencing court to impose sentences that are grossly disproportionate, especially in cases in which there are no substantial and compelling circumstances but nevertheless the crime does not warrant such a severe sentence which can be easily envisioned in many hypothetical cases as well as the facts in the cases at hand. Such sentences amount to cruel, degrading and inhuman treatment. There is no correlation between the crime and the sentence, particularly the value of stock. Further, the discretion granted to the court clearly does not permit the court to evade all possible violations of an offender's constitutional rights as this discretion is limited. The Attorney-General was thus justified in conceding that the sentences breached article 7 of the ICCPR and article 5 of the African Charter. I am of the opinion that they also breach Art 8(2)(b) of the Namibian Constitution.

Ability of courts to interfere with sentencing benchmarks imposed by the Legislature and appropriate remedies

[41] Counsel for the appellant submitted that checks and balances constitute an integral part of the separation of powers principle; they prevent one separate arm of the State from becoming too powerful in the exercise of the powers allocated to it. Counsel contended that although the Constitution recognises a separation of powers between the different organs of the State, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons. Thus in the process of determining the appropriate order, courts should refrain

from trespassing onto that part of the legislative field which has been reserved by the Constitution for the legislative arm of the State.

[42] Counsel submitted that the order fashioned by the court *a quo* did not pay due deference to the Legislature by trespassing onto its area of competence, thus not respecting the constitutional principle of the separation of powers. Counsel supported this argument by reference to a decision of South African Constitutional Court in *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) in which it was held that what is a just and equitable order would depend on the circumstances of the case, yet the principle of the separation of powers is one 'of the considerations that must be kept in mind by a court in making orders in constitutional matters'.

[43] The reaction on behalf of the respondents was that the impugned provisions of the Act were inconsistent with an accused's right not to be sentenced to a punishment which was cruel, inhuman or degrading as envisaged by Art 8(2)(b) and Art 10(1) of the Constitution guaranteeing equality. Counsel submits that as both sections 14(1)(a)(ii) and (b) are unconstitutional and invalid, the court *a quo* was correct in making an order as it did. I agree. The benchmark set by the minimum sentences makes the impugned provisions of the Act unconstitutional as it creates sentences that are far too draconian thereby abridging the fundamental rights conferred on persons by Art 8(1) of the Constitution. Although property is worthy of protection, it is inimical to the constitution and



the values underpinning it to afford property greater and more aggressive protection than that afforded to human life.

Should the benchmarks be struck or should the matter be referred to Parliament?

[44] Article 25(1)(a) of the Namibian Constitution provides as follows:

‘Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid.’

[45] In terms of Art 25(1)(a), there are two options available to a court, namely:

- (a) Instead of declaring a law or action invalid, the legislature in an appropriate case, should be allowed to cure the defects in the impugned legislation; or
- (b) To declare such law or action invalid, and in that event, the impugned law or action is not referred back to the legislature for possible correction.

[46] In the present case, I would propose the latter option in terms of which the offending words are struck as the High Court has done. It follows that the appeal is to be dismissed and the order of the High Court to be confirmed. No reason has been given and none has arisen why the costs should not follow the result. I would accordingly make the following order.

Order

1. The appeal is dismissed and the order of the High Court is confirmed.
2. The appellant is ordered to pay the costs of the appeal and of the proceedings in the High Court. Such costs to include the costs of one instructed counsel (where one was employed) and one instructing counsel.

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**SHIVUTE CJ**

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**MAINGA JA**

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**STRYDOM AJA**

## APPEARANCES

APPELLANT:

G B Coleman

Instructed by LorentzAngula Inc, Windhoek.

FIRST AND SECOND

N Tjombe

RESPONDENTS:

of Tjombe-Elago Law Firm Inc, Windhoek.