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Recent developments

Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General* (*LEGABIBO as* amicus curiae)

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Summary

This case discussion examines the recent judgment in Letsweletse Motshidiemang v The Attorney-General *in which the High Court of Botswana decriminalised consensual same-sex sexual acts between adults. While many elements of the decision will have far-reaching implications for LGBT rights in Botswana and beyond, this note highlights three areas or themes in respect of which the judgment makes a significant jurisprudential contribution: (i) Its purposive approach to the interpretation of constitutional provisions gives expression to the underlying values of the Constitution, among others, democracy, pluralism, inclusivity, tolerance and diversity. The Court determines the scope of the rights in a way that upholds and relies upon constitutional values. (ii) The Court engages meaningfully with the state's justification for limiting rights and freedoms; particularly meaningful is the Court's rejection of bare assertions of or speculation about public morality and the extent to which the Court seeks to limit the role that public opinion plays in this inquiry. (iii) It used the participation of an* amicus curiae *to assist*

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the Court in relevant matters of fact and law, thus allowing for enrichment of the quality of public-law jurisprudence. The participation by the amicus curiae *was shown to be useful, especially since it could demonstrate to the Court the impact that laws criminalising consensual same-sex sexual acts have on the lives of those not in Court as litigants. The judgment also makes a significant contribution to the discourse about consensual anal sexual intercourse being merely a variant of human sexuality. Moreover, it clearly and unambiguously dispels the myth that homosexuality is in any way 'un-African'. The judgment should serve as a highly persuasive precedent to courts across the African region supporting that the rights of LGBT people must be recognised, protected and respected, and that archaic laws that are colonial in origin and discriminatory in tenor cannot persist in the twenty-first century in states that declare themselves founded upon the principles of dignity, tolerance and diversity, but deserve to be relegated to the archive.*

Key words: *Botswana; gay; transgender; dignity; decriminalisation; homosexuality; equality; public morality; public opinion; LGBT*

1 Introduction

The Botswana Constitution is a living embodiment of progressive rights, founded on the values of dignity and inclusivity and capable of adapting to the evolving needs of Batswana society. This much the Court of Appeal of that country acknowledged in its judgment in *Attorney-General v Dow*:[1]

> The Constitution ... cannot be allowed to be a lifeless museum piece ... the courts must continue to breathe growth and development of the state through it … I conceive it that the primary duty of judges is *to make the Constitution grow and develop* in order to meet the just demands and *aspirations of an ever developing society, which is part of the wider and larger human society governed by some acceptable concept of human dignity.*

Consistent with the approach in *Dow*, in a landmark unanimous decision of three judges on 11 June 2019, the High Court became only the second African court, after the South African Constitutional Court,[2] to decriminalise same-sex sexual conduct or acts among consenting adults. Sections 164, 165 and 167 of Botswana's Penal Code outlawed 'carnal knowledge of any person against the order of nature', attempts to commit carnal knowledge and acts of 'gross

1 (1992) BLR 119 CA, para 166 (A-E) (my emphasis); see also *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as* amicus curiae*)* MAHGB-000591-16 para 72 (*Motshidiemang*).

2 See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC). In this case the South African Constitutional Court found that the common law offence of sodomy was unconstitutional as it breached several rights of gay men, including the right to equality, dignity and privacy. See also H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 221.

indecency', respectively. Section 167 was updated in 1998 to apply to same-sex acts between women as well as those between men. These provisions have been interpreted to outlaw or criminalise sexual intercourse and/or attempts at such intercourse between persons of the same sex.[3] The provisions carried with them the threat of up to seven years' imprisonment for those found to have contravened them.

Sections 164, 165 and 167 are a remnant of laws the former colonial power, Great Britain, introduced. Their continuing existence is controversial since in 1967 the Wolfenden Committee Report recommended the decriminalisation of consensual same-sex intercourse in the United Kingdom, which led to the removal of punitive laws from its own statute books.[4] Yet, these laws and their harmful effects continue to act upon behaviour in several former British colonies. Such laws violate the rights of lesbian, gay, bisexual and transgender (LGBT) persons across Africa and inhibit the realisation of their full human potential. The Botswana High Court found that those provisions perpetuate social and structural stigma and that they fuel intolerance, discrimination and persecution on the basis of sexual orientation and gender identity. Botswana's prominent human rights advocacy group, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), was permitted to enter the fray as *amicus curiae* ('friend of the court'). LEGABIBO submitted evidence that demonstrated that the impugned provisions had a range of harmful effects on the daily lives of LGBT persons, including causing them to experience high levels of violence and inhibiting their access to healthcare and other services.

From the judgment it is apparent that the High Court consistently adopted and applied the approach in *Dow* and interpreted the scope and contents of rights in a way that promotes and gives expression to the underlying constitutional values and aspirations of an open and democratic society, founded on basic human dignity,[5] democracy, pluralism, inclusivity, tolerance and diversity. The High Court's approach is captured by Leburu J as follows:[6]

> [O]ur Constitution is a dynamic, enduring and living character of progressive rights; which reflect the values of pluralism, tolerance and inclusivity. Minorities, who are by the majority perceived as deviants or outcast are not to be excluded and ostracised. Discrimination has no place in this world.

Weighing the purpose of the impugned provisions against the underlying values of the Constitution, Botswana's National Vision

3 See the Court of Appeal in *Kanane v The State* 2003 (2) BLR 67 (CA) (*Kanane*).

4 See *Motshidiemang* (n 1) para 57. See also The Sexual Offences Act 1967, an Act of Parliament in the United Kingdom.

5 As demonstrated later in this article, Botswana Courts have adopted this approach in a line of decisions. See eg *Attorney-General v Rammoge* Court of Appeal of the Republic of Botswana, Civil Appeal CACGB-128-14 (2016); and *ND v Attorney-General* MAHGB-000449-11 (unreported, delivered on 29 September 2017).

6 *Motshidiemang* (n 1) para 210.

2036 (which builds and follows on Vision 2016) and societal aspirations, the High Court noted that 'no solace and joy'[7] is derived from retaining them. Furthermore, they 'do not serve any useful public purpose'[8] in a society that embraces diversity. Instead, the High Court found that they impose an unconstitutional burden on the applicant's fundamental rights to liberty,[9] privacy, dignity[10] and non-discrimination.[11]

While many aspects of the decision will have a far-reaching impact on LGBT rights in Botswana and in Africa, this article highlights three areas or themes where the judgment makes a significant jurisprudential contribution:

(1) Its purposive approach to the interpretation of constitutional provisions gives expression to the underlying values of the Constitution; among others democracy, pluralism, inclusivity, tolerance and diversity. The Court determines the scope of the rights in a way that upholds and relies upon constitutional values.

(2) The Court engages meaningfully with the state's justification for limiting rights and freedoms; particularly meaningful is the Court's rejection of bare assertions of or speculation about public morality and the extent to which they seek to limit the role that public opinion plays in this inquiry.

(3) It used the participation of an *amicus curiae* to assist the Court in relevant matters of fact and law, thus allowing for the enrichment of the quality of public law jurisprudence. The participation by the *amicus curiae* was shown to be useful, especially since it could demonstrate to the Court the impact that laws criminalising consensual same-sex sexual acts have on the lives of those not in Court as litigants.

Over and above these three aspects, the judgment makes a significant contribution to the discourse about consensual anal sexual intercourse being merely a variant of human sexuality.[12] It unambiguously dispels the myth that homosexuality is in any way 'un-African'. The judgment should serve as a highly persuasive precedent to courts across the African region that the rights of LGBT people must be recognised, respected and protected, and that archaic, colonial and discriminatory laws cannot persist in societies, founded on dignity, tolerance and diversity, and should be relegated to the archive.

I will deal with the three aspects of the *Motshidiemang* judgment in part 3. Before doing so, in part 2 I first provide an overview of judicial developments that had significantly contributed towards recognition,

7 *Motshidiemang* para 214.
8 *Motshidiemang* para 207.
9 Sec 3 Constitution of Botswana 1966.
10 Secs 3 & 9 Constitution of Botswana.
11 Sec 15 Constitution of Botswana.
12 See *Motshidiemang* (n 1) para 190.

inclusion and affirmation of LGBT rights and freedoms in Botswana, prior to the country's decriminalisation of consensual same-sex sexual acts between adults in private.

2 Overview of Botswana's judicial developments towards the recognition of LGBT rights before *Motshidiemang*

Sixteen years before the *Motshidiemang* judgment in 2003, in *Kanane v The State*,[13] the Court of Appeal took a rather different approach. The Court of Appeal found that the time had not yet arrived to treat gays and lesbians as a group deserving of inclusion and that section 15(3) of the Constitution, which protects persons from discrimination, did not extend to the class of LGBT persons. It went on: '[T]he time has not yet arrived to decriminalise homosexual practices, even between adult consenting males in private.' Yet, the Court of Appeal did not close the door to the courts ultimately revisiting the issue 'in order to meet the just demands and aspirations of an ever-developing society'.[14] It simply said that in 2003 the circumstances and the time for the decriminalisation of same-sex sexual acts had not yet arrived.

In the years following *Kanane* a line of cases followed in the courts dealing with sexual orientation and gender identity and highlighting the universality of rights and their equal application to every person, including LGBT persons. That development led to the Court of Appeal's progressive decision in *Attorney General v Rammoge*, in which the Botswana Court of Appeal ordered the government to register LEGABIBO as a non-governmental organisation (NGO) that promotes the rights of the LGBT community in Botswana.[15]

The *Rammoge* decision followed after the government of Botswana for several years had refused to register LEGABIBO as the first LGBT organisation in Botswana. The government sought to justify its refusal essentially on three bases. First, the Constitution of Botswana does not recognise 'homosexual persons' and, therefore, they are excluded from the definition of a 'person' in the Constitution. Because of this assertion, the government argued that LGBT individuals were not recognised under the protective rights provisions in the Constitution.[16] Second, they argued that the objectives of LEGABIBO were incompatible with peace, welfare and good order in Botswana. Third, the government asserted that LEGABIBO's intended advocacy, which included reforming the Penal Code to decriminalise consensual same-sex sexual conduct, in effect would popularise criminal offences

13 *Kanane* (n 3).
14 *Dow* (n 1) para 166A-E; see also *Kanane* (n 3) 77.
15 Court of Appeal of the Republic of Botswana, Civil Appeal CACGB-128-14 (2016) (*Rammoge*).
16 See *Rammoge* (n 15) para 21(4).

or consensual same-sex sexual acts and encourage members of LEGABIBO to break the law.[17] Thus, essentially, the government's assertions were founded on the (misconceived) premise that the official recognition of an organisation that protects and promotes the rights of the LGBT community was incongruous in light of the criminalisation of consensual same-sex sexual acts.

In rejecting the government's assertions as unlawful and irrational, the Court of Appeal emphasised that 'an individual human being, regardless of his or her gender or sexual orientation, is "a person" for the purposes of the Constitution'.[18] It further held that 'once we [as a society] recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings … we must accord them the human rights which are guaranteed by the constitution to all persons, by virtue of their being human, in order to protect their dignity'.[19] The Court of Appeal found that the government's refusal to register LEGABIBO was unlawful and violated LGBT persons' rights to associate freely and participate in democracy. The Court of Appeal said that it did not matter that the views of the organisation are unpopular or unacceptable to the majority.[20]

The second in this line of cases was *ND v Attorney-General*[21] in which case the state was ordered to change the gender marker on a transgender man's identity card from female to male after the state initially refused to do so. Then, promoting the Constitution's underlying values and adopting a logic similar to that of the Court of Appeal in *Rammoge*, Nthomiwa J said that '[t]he state has a duty to uphold the fundamental rights of every person and to *promote tolerance, acceptance and diversity within our constitutional democracy*'.[22]

In both cases the courts persisted with a purposive approach that gives expression to the underlying values in the Constitution and to the shared values, vision and aspirations of the nation. For instance, in *Rammoge* the Court of Appeal highlighted the fact that Botswana is a 'compassionate, just and caring nation' and that

> members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.[23]

17 *Rammoge* para 21(3).
18 *Rammoge* para 58.
19 *Rammoge* para 60.
20 As above.
21 *ND* (n 5).
22 Cited with approval by the High Court. See *Motshidiemang* (n 1) para 151 (my emphasis).
23 See *Rammoge* (n 15) para 60.

Undoubtedly, these decisions advanced the realisation of fundamental rights and contributed to the social recognition and inclusion of LGBT persons in Botswana. Together with other progressive judgments, such as *Dow* and *Ramantele v Mmusi & Others*,[24] they helped to cultivate an environment in which the decriminalisation of consensual same-sex sexual acts was possible. What is more, the sustained work of LGBT activists who publicly advocated equal rights and insisted that they should not face discrimination because of their sexual orientation or gender identity, perhaps put even greater pressure on the courts to revisit *Kanane.* In addition, there was an increased recognition in government documents that the rights of LGBT persons need to be protected and respected. All these factors helped set the stage for the decriminalisation of consensual same-sex sexual acts between adult persons.

3 The decriminalisation case: *Letsweletse Motshidiemang v The Attorney-General*

3.1 Facts and background

In 2016 the applicant, a 24 year-old homosexual man, approached the High Court for declaratory relief that sections 164(a) and (c) and 165 of Botswana's Penal Code, which criminalised anal intercourse, were discriminatory against him as a gay man and violated his constitutional rights, including his right to equal protection of the law, the right to freedom from discrimination, the right to liberty and the right not to be subjected to inhuman or degrading treatment.[25]

According to the applicant the impugned proscription by these sections prohibited him from exercising, enjoying and engaging in anal sexual intercourse with a man which, as a homosexual person, was his only mode of sexual intercourse. Those provisions prohibited him from expressing love through the act of enjoying sexual intercourse with another consenting adult male between whom there is mutual attraction. If he did engage in such method of sexual

24 *Ramantele v Mmusi & Others* CACGB 104-12, 3 September 2013 (CAC), Kirby JP concurring judgment. In *Ramantele* the Botswana Court of Appeal held that four sisters were entitled to inherit the family home under customary law. The case was an appeal from an October 2012 High Court judgment which struck down a customary rule denying women the right to inherit the family home as violating the right to equality under sec 3(a) of the Constitution. When the case came before the Court of Appeal, the four sisters were challenged by the son of their half-brother, Molefi Ramantele, who argued that under customary law the family home was inherited by the youngest son and thus he was entitled to inherit as his father had received the property from the youngest son. At para 77 Lesetedi J noted that customary law was rarely inflexible, stating that customary law 'develops and modernises with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained'.

25 See *Motshidiemang* (n 1) para 29.

intercourse, he would have been committing a crime that attracts a sentence of imprisonment for up to seven years.[26]

In August 2017 LEGABIBO approached the High Court requesting to be granted permission to intervene as *amicus curiae* on the basis that it has an interest in the case as an organisation that works on LGBT issues. It would seek to present factual and legal evidence that would assist the Court in making its determination. The evidence LEGABIBO in due course led sought to demonstrate that the continued criminalisation of consensual same-sex sexual acts perpetuates stigma, intolerance, homophobia and violence against members of the LGBT community in Botswana. In November 2017 the High Court of Botswana decided that LEGABIBO had an interest in the case and that its participation would be useful, assisting the Court in the determination of the constitutional issues. On that basis the Court admitted LEGABIBO as *amicus curiae*.[27]

3.2 Adopting a purposive approach in interpreting the scope of rights while promoting the underlying values of the Constitution of Botswana

The High Court reaffirmed the principle of constitutional interpretation that constitutional rights should be given a generous and purposive interpretation which will not unjustifiably erode fundamental rights and freedoms enshrined in the Constitution.[28] In *Dow*, Justice Amissah explained a generous and purposive approach to constitutional interpretation of the human rights provisions in the Constitution in the following terms:[29]

> Generous construction means in my own understanding that you must interpret the provisions of the construction in such a way as not to whittle down any of the rights and freedoms unless by clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration and aspirations of the basic concepts which the Constitution must forever ensure, in our case the fundamental rights and freedoms entrenched in section 3.

Persisting in this approach to constitutional interpretation, the High Court significantly expanded the scope of constitutional rights in so far as they relate to consensual same-sex sexual acts, including the right to privacy, dignity, liberty and non-discrimination. Notably, in determining and interpreting the scope of the constitutional rights in question, the Court sought to promote and uphold the constitutional values that underlie an open and democratic society and the shared

26 Sec 165 of the Botswana Penal Code provides that '[a]ny person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years'. See also *Motshidiemang* (n 1) para 27.

27 *Motshidiemang* (n 1) paras 8-20.

28 *Motshidiemang* para 77. See also *Clover Petrus & Another v The State* (1984) BLR 14 (CA).

29 *Dow* (n 1) para 165.

aspirations of the nation, namely, democracy, compassion, plurality, diversity, inclusivity and tolerance. In adopting this approach, the Court not only broadened the protection of LGBT persons, but also gave expression to the shared values and deeper aspirations of being a more compassionate, fairer, tolerant and just nation. This approach ultimately benefits the society as a whole. Leburu J framed this point in these terms:

> To discriminate against another segment of our society pollutes compassion. A democratic nation is one that embraces plurality, diversity, tolerance, and openmindedness. Democracy itself functions, so long as the differences between groups do not impair a broad substrate of shared values. Our shared values are as contained in our National Vision. Further, the task of the law is to bring about the maximum happiness of each individual, for the happiness of each will translate into the happiness for all.

This passage highlights the High Court's purposive and generous interpretation of specific constitutional rights and demonstrates how this approach gives expression to values that underpin the Constitution and the shared aspirations of the Batswana nation. In adopting this approach, the High Court has provided substantive content and significantly expanded the scope of the fundamental rights in question. I deal with the Court's interpretation of these rights below.

3.2.1 Right to privacy

The Botswana High Court based its decision on the general notion that the question of private morality and decency between consenting adults should not be the concern the law.[30] The High Court declared that sections 164(a) and (c) impaired the applicant's right to express his sexuality with his preferred adult partner. The High Court went on to state that the state has no business in regulating consensual sexual activity between two consenting adults and that when his conduct is not harmful to any person the applicant is entitled to a sphere of private intimacy and autonomy.

Drawing on historical sources and scholarly works, the High Court defined privacy as a multi-faceted fundamental right that includes the right to be left alone, the right to privacy of one's body and the right to choose one's intimate partner.[31] The High Court also explained that the right to privacy was protected in sections 3(c) and 9(1) of the Constitution and in many of the international treaties to which Botswana is a party.[32] Although at first glance the right to privacy framed in section 9 of the Constitution protects only against the search of one's person, property or entry by others onto their

30 *Motshidiemang* (n 1) para 217.

31 *Motshidiemang* paras 108-114.

32 *Motshidiemang* paras 115, 121. The High Court referenced the African Charter, several United Nations Conventions, the Arab Charter of Human Rights, the European Convention on Human Rights and the American Declaration of Rights, among others.

property, the High Court held that such a narrow interpretation not only would water down rights but ran afoul of a generous and purposive constitutional interpretation.[33]

Citing comparative jurisprudence from India, South Africa and the United States, the High Court held that the right to privacy also protected personal autonomy, decisional autonomy and the liberty to make certain crucial decisions regarding one's life and well-being without coercion or interference from state or non-state actors.[34] This protection includes the right to make personal choices relating to intimate sexual conduct and to engage in such consensual intimacy based on one's sexual orientation without interference by the state.[35] The High Court found that the impugned provisions violated the applicant's ability 'to express his sexuality in private' with his preferred consensual adult partner.[36] The applicant's exercise of his 'right to a sphere of private intimacy and autonomy' is not harmful to others.[37]

The High Court recognised that the right to privacy was not absolute and that, in certain circumstances the right could be limited. However, any restriction or interference must be carried out under the aegis of a law. In other words, it must be in the interests of public morality,[38] must serve to protect the rights and freedoms of others or there must be another permissible justification for it.[39] Furthermore, it must be justifiable in a democratic society.[40] The High Court found that none of these possible justifiable limitations was satisfied and that limitations not covered by these elements were unconstitutional:

The respondent gave no justification as to why a person's right to privacy and autonomy ought to be curtailed in relation to consensual sexual acts performed in private. In any event, the curtailment of fundamental rights cannot be justified in our democratic dispensation nor does such abridgement satisfy the proportionality test.[41]

3.2.2 Right to dignity

The High Court maintained the approach in *Rammoge* and *ND,* which emphasised that LGBT persons, as all other persons, are entitled to respect for their dignity. In *Rammoge* the Court of Appeal stated that

33 *Motshidiemang* (n 1) para 116.
34 *Motshidiemang* para 122.
35 *Motshidiemang* paras 122-124. The Court attached particular weight to the Indian case of *Navtey Singh Johar & Others v Union of India, Ministry of Law and Justice* (Writ Petition 76 of 2016, (Supreme Court)) in which the Supreme Court declared sodomy laws unconstitutional, reasoning that a person's sexual orientation is an indispensable part of their privacy.
36 *Motshidiemang* (n 1) para 127.
37 As above.
38 *Motshidiemang* (n 1) para 119; see also sec 9(2)(a) of the Constitution of Botswana.
39 Sec 9(2)(b) Constitution of Botswana.
40 *Motshidiemang* (n 1) paras 118-119.
41 *Motshidiemang* para 224.

the protection of dignity was the foundation and core of all other rights in the Constitution: 'To deny any person his or her humanity is to deny such person human dignity and the protection and upholding of personal dignity is one of the core objectives of Chapter 3 of the Constitution.'[42]

Referring to the state's responsibility to promote the values underpinning the Constitution, the Court in *ND* emphasised that the 'state has a duty to uphold the fundamental human rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy'.[43] Judge Nthomiwa went on to state that

> [t]he recognition of the applicant's gender identity lies at the heart of his fundamental right to dignity … Legal recognition of the applicant's gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with.[44]

Expanding on the approach in both *Rammoge* and *ND*, the High Court held that '[t]he applicant's sexual orientation *lies at the heart of his fundamental right to dignit*y. It is his way of *expressing his feelings, by the only mode available to him*. His dignity ought to be respected, unless lawfully restricted.'[45]

Addressing the nature of the impact that the laws criminalising consensual same-sex sexual acts have on the applicant's right to dignity, the High Court referred to a body of domestic and foreign jurisprudence that emphasises that human dignity is grounded in one's feeling of self-respect and self-worth, as well as in physical and psychological well-being.[46] Adopting a similar line of reasoning, the High Court held that denying the applicant the right to sexual expression with his preferred adult partner 'violates his inherent dignity and self-worth'.[47]

3.2.3 Right to liberty

The High Court held that laws criminalising same-sex sexual practices violate the applicant's right to liberty as they deny him the ability to choose and express himself sexually with his preferred consensual sexual adult partner.[48]

In line with a purposive and generous interpretation of the right to liberty, the High Court found that that right went beyond mere freedom from physical restraint or detention. Rather, it includes and protects inherently private choices.[49] It found that 'sexual orientation is innate to a human being. It is not a fashion statement or posture. It

42 *Rammoge* (n 15) para 51.
43 Cited with approval by the High Court. See *Motshidiemang* (n 1) para 151.
44 *Motshidiemang* paras 151-152.
45 *Motshidiemang* para 153.
46 *Motshidiemang* paras 147-149.
47 *Motshidiemang* para 151.
48 *Motshidiemang* para 144.
49 *Motshidiemang* para 143.

is an important attribute of one's personality and identity' and that '[t]he right to liberty therefore encompasses the right to sexual autonomy'.[50]

3.2.4 Right to non-discrimination

The provisions are discriminatory in effect and amount to indirect discrimination

The state argued that sections 164 and 165 of the Penal Code were not discriminatory since they have equal application to all sexualities: The law criminalises anal sexual intercourse in the case of both heterosexual and homosexual persons.

Addressing this argument, the High Court turned to section 15(1) of the Constitution, which provides that '[n]o law shall make any provision that is *discriminatory* either of itself or *in its effect*'.[51] According to the High Court this type of discrimination, commonly referred to as indirect discrimination, occurs when conduct that may appear to be neutral and non-discriminatory nonetheless has a discriminatory result for certain groups.[52]

The High Court accepted that the state was correct in contending that the provisions were gender-neutral and that they applied to both heterosexual and homosexual persons, but nonetheless agreed with the submissions of the *amicus* that their effects were discriminatory and had a disproportionate impact on the lives of LGBT persons beyond that on heterosexual persons.[53] The *amicus* submitted expert evidence that demonstrated this.

According to the High Court laws criminalising consensual same-sex sexual acts are discriminatory in their effect and are a form of indirect discrimination on at least two bases. First, anal sexual intercourse is the only means available to the applicant for sexual expression and the impugned provisions, therefore, deny him the right to such sexual expression as is available to him as a homosexual man, whereas heterosexual persons have the possibility to express their sexuality in other forms and in a manner that is natural to them.[54] In this respect, the High Court went on to remark that criminalisation has the effect of

> oppress[ing] a minority and then target[ing] and mark[ing] them for an innate attribute that they have no control over and which they are singularly unable to change. Consensual sex conduct, per anus … is merely a variety of human sexuality.[55]

50 *Motshidiemang* para 142.
51 My emphasis.
52 *Motshidiemang* (n 1) para 166. The High Court cited *City Council of Pretoria v Walker* 1998 (2) SA 363.
53 *Motshidiemang* (n 1) paras 162-170.
54 *Motshidiemang* para 169.
55 *Motshidiemang* para 190.

Second, the *amicus* submitted incontrovertible scientific evidence demonstrating the disproportionate negative impact that laws criminalising consensual same-sex sexual acts have on the LGBT community. Such negative effects include dissuading LGBT persons from accessing health facilities and their facing contempt and disdain when they do choose to access treatment and health care.[56] It perpetuates stigma against and shame in homosexuals and renders them recluses and outcasts.[57] The High Court acknowledged that these negative effects associated with criminalisation are detrimental to Botswana's public health, more broadly, including its efforts regarding HIV education, prevention and care.

The High Court proceeded to consider the decision in *Toonen v Australia*,[58] in which the UN Human Rights Committee – the body that interprets the International Covenant on Civil and Political Rights (ICCPR), to which Botswana is a state party – found that laws prohibiting consensual same-sex conduct were in effect discriminatory and therefore violated the right to non-discrimination.

Weighing these factors together with the underlying constitutional values that embrace diversity, the High Court found that the impugned provisions amounted to a form of indirect discrimination based on sexual orientation. In so holding, the Court said:[59]

> Any discrimination against a member of the society is a discrimination against all. Any discrimination against a minority or class of people is discrimination against the majority. Plurality, diversity, inclusivity and tolerance are quadrants of a mature and enlightened democratic society.

Turning to the state's argument that the High Court was bound by *Kanane*, the High Court found that *Kanane* differed fundamentally from this case and, therefore, might be distinguished.[60] According to the High Court, this was because in *Kanane* the Court of Appeal neither considered whether the impugned provisions were discriminatory in their *effect* upon homosexual men nor whether they violated their rights to dignity and privacy. What is more, the circumstances differ from those in *Kanane*. For instance, here expert evidence was adduced that demonstrated that the impugned provisions disproportionately and negatively affect the LGBT community.[61] They perpetuate stigma against homosexuals and render them recluses and outcasts.[62] None of the evidence demonstrating the impact of the criminal laws on LGBT persons had been placed before the Court in *Kanane*.

56 *Motshidiemang* para 135.
57 *Motshidiemang* paras 181 & 189.
58 Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).
59 *Motshidiemang* (n 1) para 173.
60 *Motshidiemang* paras 170-172.
61 *Motshidiemang* paras 170-171 & 181.
62 *Motshidiemang* para 189.

The High Court's acknowledgment of the negative effects of and the social and structural stigma associated with criminalisation undoubtedly was an important pillar in the judgment. This decision attempted to engage substantively with the lived experiences and realities of homosexual persons in Botswana.

The inclusion of sexual orientation as a ground for discrimination under the Constitution of Botswana

The enumerated grounds of discrimination in section 3 of the Constitution are not exhaustive and will expand as other vulnerable groups or classes needing protection emerge over time. This was acknowledged by Amissah P in *Dow*, writing for the majority:[63]

> I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3). I *do not think that they intended to declare that the categories mentioned in that definition were forever closed.* In the nature of things, as farsighted people trying to look into the future, they would have contemplated that with the passage of time *not only the groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change*. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination.

Taking its cue from *Dow*, the High Court found that constitutional provisions that protect vulnerable groups should not be limited to a literal application to the protected classes framed in 1966 when the Constitution was adopted.[64] Applying a generous and purposive and, indeed, common sense interpretation, the High Court expanded the word 'sex' in section 3 of the Constitution to include 'sexual orientation'. According to the High Court, Parliament itself had taken active steps to amend the language of the Employment (Amendment) Act of 2010 to make it more inclusive. As it now stands the Employment Act outlaws discrimination on the basis of sexual orientation, which makes it illegal to terminate a person's employment on account of their sexual orientation.[65]

By adopting an expansive approach to the word 'sex' to include 'sexual orientation', the High Court aligned itself with Botswana's international obligations. The High Court referred to *Toonen*[66] where the Human Rights Committee reached a similar conclusion, namely,

63 My emphasis. See *Motshidiemang* (n 1) para 158, the Court citing *Dow* with approval. See *Dow* (n 1) 146(H).

64 The Court reached this conclusion upon reflecting on the Court of Appeal's holding in *Dow.* See *Motshidiemang* (n 1) para 158.

65 *Motshidiemang* (n 1) para 159.

66 Communication 488/1992, United Nations.

that the word 'sex' in articles 2 and 26 of the ICCPR are to be interpreted as including 'sexual orientation'.[67]

3.2.5 Justifiable limitation of fundamental rights

The bare assertion of 'public morality' or 'public interest' is not a basis to limit fundamental rights

The High Court reaffirmed the basic principle of constitutional interpretation that a state that seeks to limit fundamental rights bears an onus to prove that such a limitation is justified.[68] In line with the approach adopted in *Dow*, the High Court found that statutory provisions that limit constitutional rights fall to be construed narrowly, whereas provisions conferring such rights should receive a generous interpretation.[69]

The High Court found that the state provided no actual justification for limiting the constitutional rights of the applicant. It simply made 'bare assertions and/or speculations' that anal sexual intercourse is against public morality and public interest. The state submitted no evidence to substantiate its assertions. The High Court held that 'bare assertions or speculative assertions' of public morality do not qualify as evidence or justification in a court of law.[70]

In addition to providing justification for the limitation of rights the state must prove that there was no alternative, less restrictive, way of limiting the fundamental right. The High Court once again remarked that the state had not done so, instead offering bare assertions.[71] The High Court added that concrete evidence was particularly important in litigation where a law affects fundamental constitutional rights.[72] By contrast, the High Court found the expert report provided by the *amicus* to be credible evidence that assisted the Court in its interpretation.[73]

Apart from the fact that bare or speculative assertions have no force of law, the High Court further found that the state's public interest or public morality justification, in any event, would not be 'reasonable and justifiable in an open democratic society'[74] that embraces diversity. In fact, the High Court went on to state that criminalising consensual same-sex sexual acts between adults was not in the public

67 *Motshidiemang* (n 1) para 161.
68 *Motshidiemang* para 176.
69 As above.
70 *Motshidiemang* (n 1) para 180.
71 *Motshidiemang* para 181. The High Court cited with approval a Botswana Court of Appeal's decision in *Good v Attorney General* (2) 2005 (2) BLR 337 (CA).
72 *Motshidiemang* (n 1) para 181 where the High Court referred to Botswana Court of Appeal's decision in *Atttorney-General & Others v Tapela & Others* (CACGB-096-14).
73 *Motshidiemang* (n 1) para 182.
74 *Motshidiemang* para 191.

interest and served no 'useful public purpose'.[75] It is a victimless crime that disproportionately harms LGBT persons and contributes to social stigma against LGBT individuals and renders them to be recluses and outcasts. It stated:[76] 'The questioned penal provisions do not serve any useful public purpose. In other words, the means used to impair the right or freedoms articulated above are more than is necessary to accomplish the enforcement of public morality.'[77]

Weighing the state's argument that public morality is a justification for retaining the laws against the values embodied in the Constitution, the Court found that 'there is nothing reasonable and justifiable by discriminating against fellow members of our diversified society'.[78]

Public opinion (on it own) is not a basis to limit fundamental rights

Despite the state's failure to provide evidence that upholding public morality or public opinion is a justification for the existence of laws criminalising consensual anal sexual intercourse, the High Court, nevertheless (out of an abundance of caution), considered it appropriate to consider or test the validity of the state's claim.[79]

The Court explained that, while public opinion is a factor to consider when interpreting the Constitution, it merely is one component in the broader enquiry. It certainly is not decisive. It is the duty of the courts to interpret the provisions of the Constitution without fear or favour.[80] In adopting this line of reasoning, the High Court followed the example of *Ramantele* where Kirby JP stated that '[p]revailing public opinion, as reflected in legislation, international treaties, the reports of public commissions, and contemporary practice, is a *relevant factor* in determining the constitutionality of a law or practice but it is *not a decisive one*'.[81]

The High Court then turned to consider *S v Makwanyane*, in which, on the question of the relevance of public opinion (in this case concerning the death penalty), the South African Constitutional Court held:[82]

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.

75 *Motshidiemang* para 207.
76 *Motshidiemang* para 189.
77 *Motshidiemang* para 207.
78 *Motshidiemang* paras 108-191.
79 *Motshidiemang* para 183.
80 *Motshidiemang* paras 185-186. See the Court citing with approval *S v Makwanyane* 1995 (3) SA 391.
81 *Motshidiemang* (n 1) 185, citing with approval the concurring judgment by Kirby JP in *Ramantele* (n 24) para 20 (my emphasis).
82 *Motshidiemang* (n 1) para 186, the Court citing with approval *Makwanyane* (n 80) para 88.

The High Court also considered the decision of the Privy Council in *Patrick Reyes v The Queen-PC* where it held that it

> has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right, in the light of evolving standards of decency, that mark the progress of a maturing society.[83]

Notwithstanding the High Court's finding that public opinion is relevant but not decisive in constitutional adjudication, it found that there was compelling evidence to suggest that there has in recent years been a more tolerant and compassionate attitude towards previously taboo subjects such as LGBT rights and that attitudes in Botswana have somewhat softened towards LGBT people. The High Court indicated that legislative and policy actions could represent the will of the people. For instance, in amending the Employment Act to protect the LGBT community against discrimination, Parliament articulated the will of the people of Botswana to protect the LGBT community.[84] Botswana's National Vision 2036 also supports social inclusion and aspires to protect human rights.[85] Similarly, Botswana's National Vision 2016 aspires for Botswana to be 'a Moral and Tolerant Nation'.[86]

3.2.6 The High Court's use of an amicus curiae *to assist it 'in this weighty matter'*

The Botswana courts have a wide discretion whether or not to admit an interested party as *amicus curiae*.[87] In exercising this discretion, the High Court chose to admit LEGABIBO as *amicus curiae*.[88] LEGABIBO was allowed to participate in the proceedings and to assist the Court.

The judgment demonstrates that the participation of an *amicus* in constitutional proceedings might well be useful and provide assistance to the Court, especially in cases where the Court's decision is far-reaching. It allows for an opportunity to draw the Court's attention to relevant matters of fact and of law that might otherwise not have been addressed.[89] In this case the involvement of the *amicus* was shown to be particularly useful when the High Court was required to determine the constitutionality of laws that may have an impact beyond the litigants that were before the Court.

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83 *Motshidiemang* (n 1) para 187, citing with approval *Patrick Reyes v The Queen-PC,* Appeal 34 of 2001 (2002) UKPC II para 26.

84 *Motshidiemang* (n 1) para 195.

85 *Motshidiemang* para 199.

86 *Motshidiemang* para 197.

87 *Motshidiemang* para 10. See also the High Court citing with approval *Ditshwanelo & Others v The Attorney-General & Another* (1999) 2 BLR 56 (HC).

88 *Motshidiemang* (n 1) paras 8-20.

89 *Motshidiemang* para 11.

The High Court found that the *amicus* was useful and assisted the Court 'in this weighty matter'.[90] The *amicus* was in a position to place credible expert evidence (or facts) before the High Court on the harmful effects of the criminalisation of consensual adult same-sex sexual acts. This evidence included submissions by an expert which demonstrated that LGBT persons living in Botswana experienced high levels of violence and discrimination when accessing healthcare services.[91] This evidence placed the High Court in a better position to determine the effects of the laws and, more specifically, their negative impact on the LGBT community in Botswana: *In casu* the *amicus*

> was a friend in need and a friend indeed. It produced evidence on how the said penal provisions impact negatively on the LGBT community. Such evidence was never controverted.[92]

Such concrete evidence has been held to be particularly important in litigation where a law affects fundamental constitutional rights.[93] The evidence submitted by the *amicus curiae was* shown to be particularly useful as it was able to draw the High Court's attention to the way in which the impugned provisions negatively impact on the *broader* LGBT community in Botswana. It thus allowed and created the space for the High Court meaningfully to engage with the ongoing lived realities and experience of LGBT persons in Botswana beyond the litigants that were before the High Court. The High Court's utilisation of an *amicus curiae* assisted the Court in arriving at an appropriate decision, thus contributing to the growth and enrichment of the quality of public law judicial jurisprudence 'in ways that enhance promotion and protection of the rights protected under the Constitution'[94] of Botswana.

4 Conclusion

This case represents a significant development in the advancement of LGBT rights in Africa and beyond. By adopting the approach in the line of decisions represented by *Dow*, *Ramantele, Rammoge* and *ND,* among others, the High Court not only recognised and sought to protect the fundamental rights of LGBT persons within the normative framework of the Constitution, but also gave expression to underlying constitutional and democratic values and aspirations. This approach

90 *Motshidiemang* para 227.
91 *Motshidiemang* para 34.
92 *Motshidiemang* para 181.
93 *Motshidiemang* para 181.
94 See eg O Jonas 'The participation of the *amicus curiae* institution in human rights litigation in Botswana and South Africa: A tale of two jurisdictions' (2015) 59 *Journal of African Law* 349-350. The author argues that enhanced participation by *amici curiae* in Botswana could contribute to the quality of its public law jurisprudence. See also JC Mubangizi & C Mbazira 'Constructing the *amicus curiae* procedure in human rights litigation: What Uganda can learn from South Africa' (2012) 16 *Law, Democracy and Development* 214.

benefits society as a whole. In this sense, the judgment constitutes a milestone in the promotion of universal fundamental rights of all persons, including the pivotal right to dignity. Significantly, the judgment reaffirms a fundamental principle of constitutional interpretation. If a state seeks to limit the rights of any person, it must prove that the limitation of those rights is proportionate and reasonably justifiable in a democratic society. A failure to do so is an unjustifiable limitation of the right. Moreover, the state must provide evidence to justify the limitation of the right of any person and that there is no alternative or lesser means than the limitation of the right. Bare assertions by the state to limit fundamental rights simply are not enough. Through sound legal reasoning and constitutional interpretation the High Court of Botswana has set an example for other courts in the region and in Africa, generally, on the important role that courts can and should play in protecting and promoting the human rights of all persons, including those of marginalised and vulnerable groups.