IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHGB-000591-16

In the matter between:

LETSWELETSE MOTSHIDIEMANG **Applicant**

and

ATTORNEY GENERAL **Respondent**
LESBIANS, GAYS AND BISEXUALS OF BOTSWANA (LEGABIBO) **Amicus Curiae**

Mr. Attorney G.R. Lekgowe (with him Ms. P. Ramaja & Mr. T.K. Thankane) for the Applicant
Advocate S.T. Pilane (with him Mr. G.I. Begani) for the Respondent
Mr. Attorney T. Rantao (with him Ms. E.P. Gadise) for the Amicus Curiae

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JUDGMENT

CORAM: TAFA J:
LEBURU J:
DUBE J:

LEBURU J:

INTRODUCTION

1. Topical and trending within this constitutional discourse is the interface between law and moral values. Law, it is trite, is a panoply and assemblage of signs, signals,prescripts and protocols that regulate human behaviour and activity. Moral values are standards of what is good, tolerable, bad or evil, which govern an individual or societal behaviour and choices, as may be influenced by different sources and perspectives, be they intrinsic or extrinsic. Juxtaposed together, law therefore ought to be a reflection of society's moral values.

2. Moral relativism informs us that what is morally good or bad to one person, within the realm of sexual orientation, choice and preference, may not necessarily

be so to another person, hence a happy and shining reflection of our plurality, diversity, inclusivity and tolerance to both majority and minority rights.

3. Sections 164 (a) and (c) and 165 of the Penal Code proscribe and criminalise sexual intercourse and/or attempt thereof between persons of the same sex and/or gender. Section 167 proscribes both public and private gross indecency. What regulatory joy and solace is derived by the law, when it proscribes and criminalises such conduct of two consenting adults, expressing and professing love to each other, within their secluded sphere, bedroom, confines and/or precinct? Is this not a question of over-regulation of human conduct and expression, which has a tendency and effect of impairing and infringing upon

constitutionally ordained, promised and entrenched fundamental human rights?

4. Our bill of rights, as entrenched and enshrined in our Supreme Law (the Constitution), is a *manifestum* of progressive, long lasting and enduring rights, which yearn for judicial recognition and protection. Any limitation, in the enjoyment of such rights, therefore, ought to be reasonably justifiable within our hallowed democratic dispensation that subscribes to the rule of law, which recognizes and protects both the majority and minority rights and interests.

5. All the foreshadowed questions shall be de-mystified as we hereunder proceed to paint and portray the answers.

RELIEF SOUGHT

6. The applicant, Letsweletse Motshidiemang, in terms of his notice of motion, is seeking the following orders against the respondent, Attorney General, namely:-

(a) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01, Laws of Botswana) are ultra vires Section 86 of the Constitution in so far as the said sections are not made for the good order and governance of the Republic of Botswana;

(b) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires the Constitution in so far as Section 164 (a) and Section 164(c) are void for vagueness;

(c) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires Sections 3 and/or 15 of the Constitution in so far as the said sections discriminate against homosexuals;

(d) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires Section 5 of the Constitution in so far as the said sections interfere with the applicant's fundamental right to liberty;

(e) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires Section 7 of the Constitution in so far as the said sections interfere with the applicant's fundamental right not to be subjected to inhuman and degrading treatment or other such treatment;

(f) any such orders, writs or direction as the Court may consider appropriate for the purpose of enforcing or securing, the enforcement of the applicant's rights;

(g) that the respondent bear the costs of this application; and

(h) further and/or alternative relief.

7. On the date of the hearing, this Court refused an application for postponement made from the bar, by Mr. Begani for the respondent. The reason advanced for the postponement was that Senior Counsel, Mr. S.T. Pilane was appearing before Garekwe J. We refused the application because the date of hearing in this matter had long been set, almost four months prior. In any event, all the parties had filed comprehensive heads of argument. It was thus in the interest of justice that the hearing of this application was proceeded with and the application for postponement was refused, having profited from the dictum of Kirby JP, in the case of **NON-BANK FINANCIAL INSTITUTIONS REGULATORY**

AUTHORITY & ANOTHER v CAPITAL MANAGEMENT BOTSWANA (PTY) LTD & OTHERS – CACGB-071-18 (CA), (unreported, judgment delivered on 27 July 2018) wherein the Court of Appeal, inter alia, dismissed an application for postponement, made on the date of hearing and from the bar.

REASONS FOR ADMISSION OF AMICUS AND AMICUS CASE

8. On the 1st November 2017, this Court granted an order admitting Lesbians, Gays and Bisexuals of Botswana, (LEGABIBO) as amicus curiae and indicated that it will give reasons for such admission in the main judgment. What follows hereunder are brief reasons for such admission.

9. In the case of **GOOD v THE ATTORNEY GENERAL**(2) [2005] 2 BLR 333 (CA), it was held that a party seeking

admission or joinder as an amicus curiae must satisfy the following:-

(a) interest in the proceedings;

(b) whether the amicus' submissions and/or averments are relevant to the proceedings; and

(c) whether such submissions raise new contentions which may be useful to the resolution of the germane issues and not just mere repetition of submissions already traversed by the substantive parties to the dispute.

10. The court, it is trite, has a discretion to admit or not admit such an interested party. Such a discretion ought to be exercised judiciously, having regard to the relevant criteria outlined above. See, **DITSHWANELO & OTHERS v THE ATTORNEY GENERAL & ANOTHER** [1999] 2 BLR 56 (HC).

11. The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. The duty of an

amicus is to provide cogent and helpful submissions that assist the court. The amicus must not repeat averments already made, but must raise new contentions. See, **MINISTER OF HEALTH & OTHERS v TREATMENT ACTION CAMPAIGN** 2002 (5) SA 713 (CC) and **KEWAGAMANG & OTHERS v ACTING OFFICER COMMANDING NO.3 DISTRICT & OTHERS** [2016] 2 BLR 82 (HC); and **FOSE v MINISTER OF SAFETY & SECURITY** 1997 (3) SA 786 (CC).

12. An applicant, to be admitted as an amicus, must demonstrate, in his or her pathway to joinder as such, not just mere interest. Brand JA, in **THE LAW SOCIETY v DINGAKE & OTHERS** – CACGB-108-16, at page 10 para 11 of cyclostyled judgment, drove the point home in the following lucid and crisp terms:-

> "If interest alone were to be found sufficient, it may well open the flood gates of allowing amici to everyone

> who may show an interest in the case, of which there may be many, with the sole purpose of burdening the court with repetitive arguments it had heard before. If a party can show direct and substantial interest in the subject matter of the litigation, it can seek to be joined as an intervening party with the concomitant risk, of course, of being held liable for costs. But, as I see it, mere interest in the case should not in itself be sufficient to allow joinder as an amicus curiae."

13. See also, **KGAFELA II v THE ATTORNEY GENERAL & OTHERS:** In re: **GABAOKELWE v THE DIRECTOR OF PUBLIC PROSECUTIONS** [2012] 1 BLR 669 (CA), wherein the same requirements relating to admission of an amicus were traversed.

14. In the present matter, LEGABIBO's averments and submissions were subjected to the above formulation. Primarily LEGABIBO submitted that its vision is to create a tolerant social environment where diversity is appreciated. In terms of its constitution, its objectives, inter alia, are to strengthen the participation of lesbian,

gay and bisexual people in the formulation of policy in Botswana, to carry out political lobbying for equal rights and decriminalisation of same sex relationships, to act on behalf of and represent lesbian, gay and bisexual people and to support public health interests by establishing an environment that enables lesbian, gay and bisexual people to protect themselves and others from violation of their basic human rights.

15. The aforestated LEGABIBO objectives were stress-tested and judicially embraced by Rannowane J (as he then was, now the Chief Justice of this Republic) in the case of **RAMMOGE & OTHERS v THE ATTORNEY GENERAL** MAHGB-000175-13 (yet unreported) where he stated, with humility and sharpness, at page 26 para 58, as follows:

> "The objects of LEGAGIBO as reflected in the societies' constitution are all *ex facie* lawful. They

include carrying out political lobbying for equal rights and decriminalization of same sex relationships. Lobbying for legislative reforms is not per se a crime. It is also not a crime to be a homosexual."

16. With such judicial recognition and embrace, it is abundantly clear that LEGABIBO has a clear interest in the adjudication of the constitutionality of Sections 164 (a) and (c) and 165 of the Penal Code.

17. LEGABIBO, submitted that the impugned penal provisions are discriminatory in their effect; even though, ex facie, the said provisions may appear gender neutral. It was further submitted that the criminalisation of same-sex sexual conduct inhibits LGBT persons, from accessing medical treatment in the form, time and manner that is required. On that score, it was posited that such continued criminalization is in fact contrary to public interest and public health.

18. LEGABIBO further submitted that since Section 141 of the Penal Code, which defines rape, is now gender neutral and applies to penetration of any sexual organ without consent, there was no basis and rationale to maintain Sections 164 (a) and (c) of the Penal Code, as non-consensual anal penetration is covered by Section 141 thereof.

19. Having considered the above submissions, such are sufficiently relevant to the issues presented herein and have further raised new contentions not raised by the substantive applicant.

20. The above reasons therefore underscore the decision of this court to admit LEGABIBO, as an *amicus curiae.*

THE APPLICANT'S CASE

21. The applicant is a 24 year old student of the University of Botswana, reading English; African Languages and

Literature. He is a homosexual. According to him, being homosexual is not something new in his life but that it is something that he has learnt to live with whilst growing up since the age of ten.

22. Whilst growing up, he knew that he was different and such difference has long been recognized by his parents. As a little boy he did not play with or do things that little boys like, such as playing with toys and other boyish games. At the time that he started to have sexual feelings at the age of 12-13, he was not interested in girls.

23. As he grew older, the applicant thought things would change and, that he would act like boys, but that never happened, even after he had reached puberty.

24. The applicant was taunted and called degrading names because of his disposition. It was at junior school, after he had managed to summon his guts and courage that he expressed his feelings to another boy and informed him that he loved him.

25. As an adult now, it is the applicant's averment that nothing has changed, he still loves men and he is sexually attracted to men. He does not know why he likes men and does not know why he is different from other men who love women. He has accepted to live with that condition and it has become his identity. Currently, he is in a sexually intimate relationship with a man.

26. The impugned Sections 164(a),(c) and 165, according to the applicant, proscribe and prohibit him from

exercising, enjoying and engaging in sexual intercourse with a man per anum; which as a homosexual is his only mode of sexual intercourse.

27. By virtue of one or more of the impugned provisions of the Penal Code, he avers that he is prohibited from expressing the greatest emotion of love, through the act of enjoying sexual intercourse with another consenting adult male, that he is sexually attracted to and who is sexually attracted to him, as consenting adults. If he engages in such method of sexual intercourse, he will be committing a crime that attracts a sentence of imprisonment for a term not exceeding seven years. Attempting to engage in such an act is also a crime that attracts a sentence of imprisonment for a term not exceeding seven years.

28. As a homosexual, and as long as the said provisions remain extant, he is prohibited from having anal intercourse and to that extent, he is forced to live in secrecy, under a shadow and not to openly and publicly declare his sexual affection and attraction to men or to solicit men he is interested in, for fear that the actions would be construed to be an attempt to engage in carnal knowledge against the order of nature.

29. The applicant submitted that the impugned provisions of the Penal Code are unconstitutional as they are not made for the peace, order and good government of Botswana. Furthermore, that such provisions are vague in that there is no clarity on the exact type of conduct that is criminalized.

30. He has further submitted that the said provisions violate his right and freedom to liberty, by prohibiting him from using his body as he chooses and sees fit, so long as he does not cause any disrespect and harm to the enjoyment of the freedoms by others. It is his view that such laws subject him to inhuman and degrading treatment in that they prohibit him from expressing sexual affection through the only means available to him as a homosexual. On the alleged violation of his privacy, he asserts that the impugned provisions interfere with an intimate and personal aspect of his life, that is not harmful to the public interest or public good.

31. On discrimination, it is the applicant's averment that although the law appears, at face value, non-discriminatory, its effect is discriminatory in that it perpetuates negative stigma against homosexuals.

Furthermore, he argues that in effect, the law is burdensome on him than it is on females who have other means of enjoying penetrative sexual intercourse.

32. On Botswana's readiness to embrace and tolerate homosexuality, he informed court that Batswana have, through their Members of Parliament, expressed their position that there shall be no discrimination based on sexual orientation in the Employment Act (Cap 47:01), Laws of Botswana. In terms of Botswana National Vision 2016, it was stated therein at Pillar 6 that Botswana must be a morally tolerant nation, and at Pillar 3, that Botswana shall be a compassionate, just and caring nation. In terms of the Afro-Barometer Study conducted by the University of Botswana, it is the applicant's argument that the Report posits that 43% of Batswana are not opposed to homosexuality.

33. The amicus case is as foreshadowed in the reasons for joinder, as such, save to add that the amicus, filed an expert's affidavit, in support of the application, by Alexander Muller, an Associate Professor, and a medical sociologist, at the Gender, Health and Justice Research Unit, in the division of Forensic Medicine, (Department of Pathology), in the Faculty of Health Sciences, University of Cape Town, South Africa.

34. The sum and effect of the medical sociologist's (expert) scientific criteria, is that lesbians, gays, bisexuals, transgenders and intersex people living in Botswana, experience higher levels of violence than have been reported; that such people experience sexual orientation and gender identity-related discrimination when accessing healthcare services; on account of the negative stigma attached to such persons, that Sections

164(a) and (c), 165 and 167 of the Penal Code, constitute examples of structural stigma; i.e. social stigma that is institutional or made into law.

35. According to the expert, the empirical research evidence presented, was informed by a cross-sectional quantitative study, (2016/17) conducted in Botswana, Lesotho, Kenya, Malawi, South Africa, Swaziland, Zambia and Zimbabwe. This study has been approved by the Review Board, Office of Research and Development; University of Botswana (UBR/RES/IRB/BIO/009) and the Ministry of Health and Wellness, Republic of Botswana (HPDME:13/18/1). The expert, in the study, is the International Principal Investigator.

RESPONDENT'S CASE

36. The respondent's case is amply captured in the answering affidavit of Morulaganye Chamme (May His Soul rest in eternal peace), the late former Deputy Attorney General of Botswana. The respondent has not filed any expert evidence to counter and rebut the one furnished by the amicus curiae.

37. The nub and substance of the respondent's case is that Sections 164 (a) and (c) of the Penal Code are not discriminatory as they are of equal application to all sexual preferences, and that the applicant, has other modes of sexual intercourse. Being homosexual, is not criminalized; rather it is certain sexual acts that are deemed to be against the order of nature, which are criminalized and not the sexual orientation.

38. It was argued by the respondent that Section 15 of the Constitution provides limitations on the enjoyment of fundamental rights.

39. On the vagueness argument, it is the Attorney General's submission that Sections 164(a) and (c), 165 and 167 are not ambiguous, nor do they lack clarity. Sexual intercourse against the order of nature simply meant anal penetration.

40. The respondent has further urged the court to exercise restraint and rather defer to Parliament, within the rubric of separation of powers, to make a pronouncement on the matter, and furthermore that there is a groundswell of support, amongst Batswana, against homosexuality and that Batswana are not yet ready to embrace homosexuality, as fortified by the case of **KANANE v THE STATE** [2003] (2) BLR 67 (CA).

41. The above sums up the competing submissions. In order to place such submissions into a sharper focus, it is only prudent to lay bare the classical and historical evolution of Sections 164 (a) and (c) and Section 165 of the Penal Code.

HISTORICAL EVOLUTION OF THE OFFENCE OF SODOMY (SEXUAL INTERCOURSE AGAINST THE ORDER OF NATURE)

42. The present offence of carnal knowledge against the order of nature, is traceable to the Bible; as depicted in the destruction of Sodom and Gomorrah by God; in the Book of Genesis.

43. According to Genesis 18, God and two angels visited, in the form of men, Abraham and Sarah at their tent at or near the Dead Sea. Unbeknown to Abraham and Sarah, they did not realise who they were. Subsequent thereto, Abraham and Sarah positively identified God. The

Almighty later related to Abraham the pervading grievous sin transpiring in Sodom and Gomorrah; and how He intended to proceed thereto to obtain first hand information.

44. Abraham's nephew, Lot, and Lot's family, were residents of Sodom. Abraham pleaded with God not to destroy Sodom if he found 10 righteous people there.

45. After the arrival of the said two angels in Sodom, still in the form of men, Lot invited them to spend the night in his home and gave them food. At verse 4, it is stated that "Before they had gone to bed, all the men from every part of the city of Sodom, both young and old, surrounded the house and called out to Lot. "Where are the men who came to you tonight? Bring them out to us so that we can have sex with them."

46. In response to the threatening chants, Lot emerged from the house and proceeded to the mob and told them, "No my friends, don't do this wicked thing. Look, I have two daughters who never slept with a man. Let me bring them out to you, and you can do what you like with them. But don't do anything to these men, for they have come under the protection of my roof".

47. The mob, unperturbed, kept threatening and the angels then struck them with blindness. Lot and his family then showed a clean pair of heels and fled Sodom, whereupon God destroyed Sodom and Gomorrah with fire and brimstone.

48. During the Middle Ages, it was widely accepted that the sin of Sodom which resulted in its destruction, was on account of homosexuality. It was homosexuality, on account of the mob of men who threatening to have

sexual intercourse with the angels they mistakenly believed to be men, hence the term "sodomy".

49. Again in the Old Testament, in Leviticus, Chapter 20 Verse 13, homosexuality is prohibited and labelled an abomination in the following terms:-

> "If a man---- lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you."

50. In the New Testament, in Romans Chapter 1 Verse 26-27, Paul said –

> "For this reason God gave them over to degrading passions; for their women exchanged the natural function for that which is unnatural, and in the same way also men abandoned their natural function of the woman and burned in their desire toward one another, men with men committing indecent acts and receiving in their own persons the due penalty of their error."

51. In the early ages after the creation of the United Kingdom, England incorporated into its common law an

offence of sodomy, for purposes of protecting the Christian principles upon which the Kingdom was founded. The same offence was subsequently incorporated into various criminal codes, e.g. in the Statute of 1533, the offence of sodomy was incorporated, under the description of the "detestable and abominable Vice of Buggery committed with mankind or beast." See **EDWARD COKE**, 1797, 3rd Part, Cap X of Buggery or Sodomy, p58).

52. William Blackstone, in his Commentaries on the Laws of England, also included the offence of sodomy. With the advent of colonialism, the offence of sodomy was henceforth imported into the British colonies during the 17th and 20th centuries. In this connection, two scholarly articles are instructive, namely: This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism (Human Rights Watch 2008); and Michael

Kirby, "The Sodomy Offence, England's Least Lovely Criminal Law Export. Journal of Commonwealth Criminal Law, (2011). In this latter journal, the learned author and former judge traced the origins of the offence of sodomy up to its present status and how several jurisdictions have decriminalized and/or retained same.

53. Within the British Empire, same sex activity was prohibited as it was deemed morally unacceptable to the British rulers. In the incorporation of the offence of sodomy in the colonies, such was not preceded by any consultation with the local populace.

54. According to Michael Kirby, cited above, the most copied code or template within the British Empire was the Indian Penal Code of Macaulay. In Chapter XVI, titled "Of Offences Affecting the Human Body," Section 377 provided as follows:

"377. Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to a fine."

55. It is common cause that Section 377 of the Indian Penal Code was copied in a large number of British territories, including Botswana.

56. With the passage of time, repeal and/or amendment bells of the sodomy laws rang loud. In the United Kingdom, a Committee was formed titled "Committee on Homosexual Offences and Prostitution" in 1957 which was chaired by Sir John Wolfenden. The said Committee recommended amendments to sodomy laws, including decriminalization of consensual same-sex intercourse, where at pages 187-8, stated thus:-

> "Unless a deliberate attempt is made by society; acting through the agency of the law, to equate the sphere of crime with that of sin, there must

> remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

57. Influenced by the said Wolfenden Committee Report, the United Kingdom Parliament changed the law of England and Wales when the Sexual Offences Act of 1967 was enacted, which decriminalized same sex sexual intercourse. Several countries have since decriminalised the offence of sodomy, for instance, Angola, South Africa, Mozambique, Canada, United States of America etc.

58. The repeal of the sodomy laws was greatly influenced, in large measure, by the inherent recognition of such laws as being discriminatory, invasive of personal dignity, privacy, autonomy, liberty and lastly, the absence of compelling public interest to intrude and regulate private sexual expression and intimacy between consenting adults.

59. In 1964, the sodomy laws found its way into Bechuanaland Protectorate through the enactment of our present Penal Code, which has since undergone several amendments. In 2008, Sections 164 and 165 were amended to make them appear, ex facie, gender neutral. Despite such amendments, the applicant and the amicus curiae, are hereby and now, challenging the constitutionality of such penal provisions.

60. Having set the scene and tone of our present discourse, the point of departure is thus the issue of constitutional adjudication.

CONSTITUTIONAL ADJUDICATION

61. According to the respondent, the applicant and the *amicus curiae*, should lobby Parliament for it to amend or repeal the impugned penal provisions, rather than