IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-128-14
HIGH COURT CIVIL CASE NO. MAHGB-000175-13

In the matter between:

THE ATTORNEY GENERAL OF BOTSWANA	APPELLANT
and	
THUTO RAMMOGE	1ST RESPONDENT
RONALD DADANI	2ND RESPONDENT
ATLANG POELETSO SETSHEGETSO	3RD RESPONDENT
RATANANG MOSWEU	4TH RESPONDENT
TEBOGO MOTSHWANE	5TH RESPONDENT
ODIRILE LETSATSI	6TH RESPONDENT
KATLEGO SAINT	7TH RESPONDENT
CHRISTOPHER BAREKI	8TH RESPONDENT
AMOGELANG SEKALE	9TH RESPONDENT
THOLEGO SHABANE	10TH RESPONDENT
TEBOGO MOATSHE	11TH RESPONDENT
TINAO SETAELO	12TH RESPONDENT
TEFO RALEBALA	13TH RESPONDENT
OABONA SEPORA	14TH RESPONDENT
ANITA TAU	15TH RESPONDENT
BEVAN NONOFO ASEKE	16TH RESPONDENT
TEFO NYEPETSI	17TH RESPONDENT
LEMMY MOKGOBYE	18TH RESPONDENT
OTENG AONE CHIMELA	19TH RESPONDENT
CAINE JASON YOUNGMAN	20TH RESPONDENT

Attorney Mr O.S. Rammidi for the Appellant

Attorney Mr D. Bayford (with Mr S. Phage) for the 1st, 4th, 5th, 6th, 11th and 20th Respondents

Attorney Ms L.N. Nchunga for the 2nd, 3rd, 7th, 8th, 9th, 10th, 12th, 13th, 14th, 15th, 16th, 17th, 18th and 19th Respondents

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JUDGMENT

CORAM: **KIRBY J.P.**
HOWIE J.A.
LESETEDI J.A.
GAONGALELWE J.A.
LORD HAMILTON J.A.

KIRBY J.P.

1. This appeal concerns the lawfulness or otherwise of a decision taken by the Minister of Labour and Home Affairs ("the Minister") to uphold the refusal of the Director of the Department of Civil and National Registration ("the Director") to register as a society the Lesbians, Gays and Bisexuals of Botswana ("LEGABIBO") in terms of the Societies Act Cap 18:01 ("the Societies Act").

2. The twenty respondents are some of a number of individuals who applied for such registration, while the Attorney General appears on behalf of the Minister (who is the appellant).

THE FACTS

3. On 16th February 2012 the respondents and other members of their group filed an application for the registration of LEGABIBO as a society. Accompanying the application was their draft

constitution. In this the objects of LEGABIBO were stated to be as follows:

"4.1 To integrate a legal, ethical and human rights dimension into the response to the sexual, reproductive and health rights of all people without discrimination on any basis whatsoever;

4.2 To strengthen the participation of lesbian, gay and bisexual people in the policy fora in Botswana and at an international level;

4.3 To assist in promoting and encouraging networking amongst NGOs and individuals with similar goals and/or objectives so as to facilitate joint initiatives at solving problems;

4.4 To promote a culture of self-reliance and encourage committed participation from LEGABIBO members and the community;

4.5 To carry out political lobbying for equal rights and decriminalisation of same sex sexual relationships;

4.6 To act on behalf of and to represent lesbian, gay and bisexual people in Botswana generally and individually;

4.7 To support public health interests by establishing an environment that enables lesbians, gays and bisexual people to protect themselves and others from the violation of their basic human rights;

4.8 To advocate for the establishment of a legal framework to reach those in society that are legally and socially marginalized such as lesbians, gays and bisexuals;

4.10 (sic) To educate the general public on issues of human rights within the context of sexuality and to facilitate the creation of stakeholders forums nationally to assist in the dissemination of information;

4.11 To research the human rights situation of lesbian, gay and bisexual people in Botswana and to network with stakeholders in the region in order to establish and maintain a response to human rights and legal challenges."

4. By letter of 12th March 2012 the Director responded, rejecting LEGABIBO's application for registration on the grounds that Botswana's Constitution does not recognise homosexuals, and that registration would violate section 7(2)(a) of the Societies Act. This provides that:

"7(2) The Registrar shall refuse to register and shall not exempt from registration a local society where –

(a) it appears to him that any of the objects of the society is, or is likely to be used for any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare, or good order in Botswana."

5. The respondents appealed to the Minister against that decision, as was their right under section 8 of the Societies Act.

6. They pointed out that homosexuality was not outlawed by the Constitution, nor by any other law. On the contrary, discrimination on the basis of sexual orientation was itself outlawed by section 23(d) of the Employment Act Cap 47:01, and national policies on HIV/AIDS recognized the LGBTI community as a vulnerable group requiring special attention in addressing the scourge. (LGBTI is an acronym for "Lesbian, Gay, Bisexual, Transsexual and Intersex"). LEGABIBO wished to contribute meaningfully to the fight against AIDS and to work towards the elimination of homophobia.

7. The Minister was not sympathetic. After a period of internal consultation he addressed a letter, under the hand of the Permanent Secretary and dated 5th October 2012, to the LEGABIBO coordinator upholding the decision of the Registrar of Societies. The letter ended with the advice that "You may appeal the decision of the Honourable Minister with the courts." This advice was given notwithstanding that no right of appeal

lies to the High Court against the Minister's decision, in terms of the Societies Act.

8. Before that letter was received (it was stamped for receipt at Dow and Associates on 24th October 2012), the respondents addressed a further letter to the Minister, dated 19th October 2012, adding more grounds of appeal. This letter was signed by attorney Unity Dow (as she then was), and its emphasis was on the respondents' claim that the Registrar's decision was unlawful on a number of constitutional grounds.

9. The Minister remained unmoved. In his response, through the Permanent Secretary and dated 12th November 2012, he upheld once again the decision of the Registrar, and added that:

> "The decision of the Hon. Minister is based on proper advice and if you are not happy with it you may appeal to the courts.
>
> Heterosexual activity between consenting adults is not an offence in this country but the subjects of your appeal will commit an offence even if their sexual act involve (sic) consenting adults.

> It is for this reason that we feel you may approach the courts if you feel the decision by this ministry is something you cannot put up with."

THE HIGH COURT APPLICATION

10. The respondents took up the Minister's invitation and launched the present proceedings by notice of motion filed on 25th March 2013. The notice was in the standard format of the Order 12 application procedure (Rules of the High Court) rather than in the Order 61 format (relating to reviews) or in the Order 70 format (relating to applications for constitutional relief). There has been some argument presented to us on the propriety of this, to which I will return later.

11. In their application the respondents sought the following relief, namely an order

> "(a) Declaring the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of section 3 of the Constitution of the Republic of Botswana insofar as the said decision denies (the respondents) equal protection of the law.

(b) Declaring the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of section 12 of the Constitution of the Republic of Botswana insofar as the said decision has the effect of hindering (the respondents) in their enjoyment of their freedom of expression.

(c) Declaring the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of section 13 of the Constitution of the Republic of Botswana insofar as the said decision has the effect of hindering (the respondents) in the enjoyment of their freedom to assemble and associate.

(d) Declaring the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of section 15 of the Constitution of the Republic of Botswana insofar as the said decision is discriminatory in itself and in its effect, against (the respondents), based wholly or mainly on the sexual orientation of the majority of (the respondents).

(e) Setting aside the decision of the Minister of Labour and Home Affairs.

(f) Declaring that (the respondents) are entitled to assemble and associate under the name and style of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO).

(g) Declaring that (the respondents) are entitled to have the group Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) registered as a society."

12. The supporting affidavits were brief, merely setting out the facts (as I have recounted these) supported by copies of the letters to which reference was made, and declaring that of the twenty respondents eighteen are of homosexual orientation.

13. The appellant filed a notice of opposition accompanied by an affidavit deposed to by the Minister, as the decision maker, and also filed a "RECORD OF PROCEEDINGS IN TERMS OF ORDER 61 RULE 1(b)(i)", which contained further copies of the correspondence to which I have already referred. It is clear from this that the respondent regarded the application as being one for review, despite its unusual form, and proceeded accordingly. There was no challenge raised to the procedure used. The Minister averred that "Provided (the respondents) are entitled to constitutional protection under sections 3, 7, 12, 13 and 15, a limitation of those rights through section 7(2)(a) of the Act is justifiable."

14. In their replying affidavit the respondents dealt with the latter averment, which was the only matter placed in issue by the Minister. The deponent denied specifically the Minister's claim that his denial of the respondents' right to associate was appropriate because

(a) the ministry had previously registered other organisations with similar objectives, in particular the Botswana Network on Ethics, Law and HIV/AIDS (BONELA), which had consistently promoted the rights of lesbian, gay and bisexual persons, and had among its objectives advocacy for the establishment of a legal framework to support marginalised groups, and to lobby for the inclusion of sex education and reproductive health awareness programmes amongst such groups including gays, lesbians and bisexuals;

(b) the Court of Appeal had held in **KANANE vs THE STATE (2003) 2 BLR 37 CA** that there was legally nothing to prevent "gay men and lesbians" from associating with each other subject to the law (that is, to the law forbidding certain sexual practices);

(c) in its 2009 Universal Periodic Review to the Human Rights Council of the United Nations, the Government of Botswana through the then Minister for Defence, Justice and Security, acknowledged that while Botswana law criminalises same-sex sexual activities, civil society organisations are free to advocate for change on this issue, among others (such as the death penalty and corporal punishment).

15. Full heads of argument were filed on both sides. The respondents dealt comprehensively with "THE GROUNDS FOR JUDICIAL REVIEW ON WHICH THE APPLICATION IS BASED", namely irrationality and unlawfulness (in the sense that the Minister's decision was unconstitutional). As to the latter they referred to the various sections of the Constitution alleged to have been contravened and offered authorities to support their arguments. No mention was made in their heads of section 18 of the Constitution, nor was there any suggestion that this was an application for relief under that section.

16. The appellant, in her heads in the court below, surprisingly sought to challenge the review proceedings on technical grounds which had not been raised in the pleadings. In the alternative, she argued that in any event no proper review grounds had been shown. Further alternatively, the appellant submitted that even if the application was treated as one brought under section 18 of the Constitution, it should still fail as the Minister's decision was lawful in terms of the exceptions

laid down in the various sections of the Constitution upon which the respondents relied.

17. In his judgment, Rannowane J, before whom the matter came, noted that in presenting oral argument counsel for the respondents had insisted (contrary to their heads) that this was actually an application brought in terms of section 18 of the Constitution. The learned Judge solved the conundrum by approaching the case first as a review application and then (lest he be wrong) as a constitutional application. In a lucid judgment, he found that on either basis the application must succeed.

18. The learned Judge held, *inter alia*, that:

- the objects of LEGABIBO were all *ex facie* lawful;
- it was not correct that 'the Constitution does not recognise homosexuals';
- advocacy for the decriminalisation of same sex sexual relationships could not be equated with encouraging the commission of criminal offences contrary to sections 164 and 167 of the Penal Code;

- the refusal to register LEGABIBO was grossly unreasonable and stood to be set aside on review;

- the refusal was also unlawful, as it was in breach of section 3, 12 and 13 of the Constitution, relating to equal protection of the law, freedom of expression and freedom of association.

19. He thus found it unnecessary to deal with arguments on section 15 of the Constitution relating to discrimination. He also dealt in some detail with the procedural issues, and concluded that although neither the review rules nor the section 18 rules had been adhered to, the application was in fact one brought under section 18 of the Constitution.

20. Judgment was granted in terms of prayers (a), (b), (c), (e), (f) and (g) of the notice of motion, as set out earlier in this judgment, so that the decision of the Minister to refuse registration of LEGABIBO was set aside, and five declarators were issued – three adding constitutional grounds for that decision, and two giving direction on its implementation. I will have more to say on the propriety of those orders presently.

THE APPEAL

21. The Attorney General appeals against each of the six orders made by the Court. She raises a number of grounds of appeal, which may be summarised as follows:

(1) The court *a quo* erred in holding that the application "bore all the hallmarks of a review" but then proceeding to deal with it as an application brought under section 18 of the Constitution, to the prejudice of the appellant;

(2) The court *a quo* erred in finding that a case had been made out for the review of the Minister's decision when no proper grounds for such review were pleaded or proved.

(3) The court *a quo* erred in failing to consider that a reasonable decision maker could have found the objectives of LEGABIBO to be unlawful in terms of section 7(2)(a) of the Societies Act as being contrary to good order, and also under section 7(2)(e) of the Act as potentially leading to the popularisation of acts criminalised by sections 164 and 167 of the Penal Code, and so being repugnant to the provisions of a written law.

(4) The court *a quo* erred in holding that homosexual persons were included in the definition of the word 'person' in section 3 and the other fundamental rights provisions of the Constitution, and were thus entitled to enjoy such fundamental rights. In this regard the court erred in holding that the appellant conceded that homosexual persons were entitled to these rights.

(5) ALTERNATIVELY, if the respondents were found to be entitled to such rights, the court *a quo* erred in finding that the Minister's decision was not a reasonably justifiable limitation of those rights in an open and democratic society, or was not validly made in terms of the limitations allowed by the sections in question.

(6) Finally, the court erred in attempting to distinguish the decision in **KANANE**'s case (supra), when it should have considered itself bound by that decision, and so have dismissed the application.

22. Before dealing with the law and addressing those grounds of appeal, I should clarify the proper approach to be adopted when breaches of the Constitution are alleged in an administrative decision which an applicant seeks to have reviewed and set aside. This is necessary because counsel for the appellant has added to the confusion by informing the Court that she no longer pursues the ground of appeal dealing with procedure, and accepts that this was a section 18 application. The view of counsel for the respondents is that either procedure would have been acceptable, and that technicalities should not be permitted to cloud the Court's decision on important constitutional issues.

WHEN IS A SECTION 18 CONSTITUTIONAL APPLICATION PROPER?

23. This question has engaged the Court in a number of cases over the years. It arises because, unlike some other Independence Constitutions of former British colonies and protectorates, the Botswana Constitution gives no guidance in the operative section namely section 18, on the use and availability of parallel remedies by statute and under the common law. Our section 18 provides as follows:

> "18(1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being, or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction –
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; or
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.

(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of section 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his or her opinion, the raising of the question is merely frivolous or vexatious.

(4) Parliament may confer upon the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section.

(5) Rules of court making provision with respect to the practice and procedure of the High Court for the purposes of this section may be made by the person or authority for the time being having power to make rules of court with respect to the practice and procedure of that court generally."

24. Section 18 gives the Court the discretion to decide whether or not to grant constitutional relief – "(the court) may make such

orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution." (my emphasis)

25. Some countries have an additional provision forbidding absolutely relief under the Constitution where adequate means of redress are available under any other law (e.g. Sierra Leone, section 28(2); Barbados, section 24(2); Jamaica, section 25(2); and Mauritius, section 17(2)). Others add a discretion to decline to award constitutional relief where an adequate alternative remedy is available (such as Fiji, section 41(4); St. Kitts and Nevis, section 18(2)). Still others have a similar section to our own, which contains no further limitations on the discretion to grant or refuse constitutional relief. Examples of these are Belize, section 20; Kenya, section 84; and Trinidad and Tobago, section 14.

26. The Privy Council, which was formerly Botswana's apex Court, has had occasion to interpret the Trinidad and Tobago section, which is *in pari materia* with our section 18. In **ATTORNEY GENERAL OF TRINIDAD AND TOBAGO v RAMMANOOP (2005) UK PC at para 337**, it was re-affirmed that the Court has a full discretion either to grant or to decline constitutional relief. That decision was endorsed by the full Court in **ATTORNEY GENERAL vs OATILE (2011) 2 BLR 2009 CA at 220**.

27. In 1992, when constitutional applications were rare in Botswana, Amissah P. held in **ATTORNEY GENERAL vs DOW (1992) BLR 119 at 156** that:

> "Under section 18(1) an applicant has the right to come before the courts for redress if he declares, with some foundation of fact, that the breach he complains of has been, is in the process of being or is likely to be committed in respect of him. Where a person comes requesting the aid of the courts to enforce a constitutional right, therefore, the question which has to be asked in order that the courts might listen to the merits of his case is whether he makes the required allegation with reasonable foundation. If that is shown the court ought to hear him. Any more rigid test would deny persons their rights on some purely technical grounds."

28. At that time, as it does now, the Order in the High Court Rules (now Order 70) dealing with applications under section 18 of the Constitution, gave (and gives) no guidance as to when constitutional relief should be refused. It dealt (and deals) only with procedural matters, and very briefly. Such applications are to be brought by notice of motion calling upon the respondent to show cause why the order sought should not be granted. Service is to be effected on the Attorney General, and the Rules regarding service and applications generally, are to be applied.

29. It was soon realised that a complete open door policy could lead to problems of parallel or collateral proceedings, where relief was also available under statute or under the common law. It was then held by the full Court in **KOBEDI vs THE STATE (2005) 2 CA 76 at 86** et seq. that complaints of breach of constitutional rights in relation to criminal proceedings should be raised in those proceedings or on appeal, and it was not permissible to bring a section 18 application thereafter based upon such a breach.

30. This was followed by **OATILE**'s case (supra) where a similar approach was adopted to cases in delict. It was held at p.220 that:

> "Because the jurisdiction (under section 18) is additional to, and in no way prejudices or replaces existing common law remedies, a constitutional application is not a substitute for an action in delict, although there may be some overlapping. Any duplication of compensation or parallel litigation is to be avoided ... As was laid down in **HARRIKISSOON v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO (1980) AC 265**, applications for constitutional relief should not be used as a substitute (or as a procedural shortcut) for actions in delict or for review proceedings. Lord Diplock held that:
>
> > 'Where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it inappropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process'."

31. Examples of cases where normal statutory and common law remedies might not be adequate to provide the necessary relief without resorting to a section 18 constitutional application could include, as examples, a challenge to a section of a statute as

being unconstitutional, an application for a writ of habeas corpus, or a prayer for special constitutional damages (as in **OATILE**'s case). There may be others. But by far the majority of individual wrongs can (and should) be addressed by legal proceedings in the ordinary course, notwithstanding that the wrongs in question may also (as they often do) involve an element of unconstitutionality as well.

32. Several decisions of this Court have also re-affirmed the principle that where a case, civil or criminal, can be determined without reaching a constitutional point – i.e by reference to the common law and to the statutes enacted by Parliament, or by proceedings for judicial review, that is the course which must be followed. See **RAMANTELE vs MMUSI & OTHERS CACGB-104-12** (unreported) full bench **para 41**; **STATE vs RODNEY MASOKO CLCGB-058-14** (unreported) full bench **para 18**; **STATE vs MHLUNGU & OTHERS 1995 (3) SA 865 CC at 985 E**; and **ATTORNEY GENERAL & OTHERS vs DICKSON TAPELA CACGB-096-14** (unreported) full bench.

33. **TAPELA**'s case, recently decided by this Court, was in some respects similar to the present one. There a decision to withhold anti-retroviral drugs from foreign prisoners suffering from HIV/AIDS was challenged as being *ultra vires* the Prisons Act and as being irrational. Declarations were also sought that such refusal was in breach of a number of sections of the Constitution conferring fundamental rights. Declarators were granted by the High Court, as prayed, but in this Court, on appeal, an order was made, on the above principles, reviewing and setting aside that decision as *ultra vires*, but eschewing any constitutional declarations. In this case too an order was sought (and granted) to set aside the Minister's decision to refuse registration of LEGABIBO, together with constitutional and consequential declarators. I shall consider whether those orders were appropriate in due course, but on the settled principles to which I have referred, it is clear that the application as brought in the court below was, despite certain deficiencies, one for judicial review. Rannowane J. was correct

when he described it as bearing "all the hallmarks of a review application."

THE LAW

34. As summarized in **TAPELA**'s case at para 49,

> "The headline grounds upon which administrative and quasi-judicial decisions may be reviewed and set aside in Botswana are illegality, irrationality and procedural impropriety. See **ATTORNEY GENERAL vs KGALAGADI RESOURCES (1995) BLR 234 CA**, in which the **COUNCIL OF CIVIL SERVICE UNIONS & OTHERS vs MINISTER FOR THE CIVIL SERVICE (1984) 3 All ER 935 HC** and **JOHANNESBURG STOCK EXCHANGE v WITWATERSRAND NIGEL 1988 (3) SA 132 AD** were applied. The word 'irrationality' is used in the sense of 'Wednesbury unreasonableness', as characterised by Lord Greene in **ASSOCIATED PROVINCIAL PICTURE HOUSES LTD vs WEDNESBURY CORPORATION (1947) 2 All ER 680 CA AT 683** as a "decision on a competent matter ... so unreasonable that no reasonable authority could ever have come to it", and by Corbett J.A. in the **WITWATERSRAND NIGEL** case **at p.152** as "(a decision) so grossly unreasonable as to warrant the inference that he (the decision-maker) had failed to apply his mind to the matter". The ground of illegality, or unlawfulness, embraces also the doctrine of *ultra vires* ..."

And, to quote Lord Diplock at p.951 of the **CIVIL SERVICE UNIONS** case,

> "(the ground of irrationality) applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

35. The ground of illegality encompasses the doctrine of *ultra vires* and the principle of unconstitutionality, so that an administrative or quasi-judicial decision may be reviewed and set aside as illegal where it is shown to be unconstitutional. Thus an unconstitutional application of any provision of an Act will be *ultra vires* that Act. This is so because Parliament is empowered to make laws by section 86 of the Constitution, but only where these are made 'for the peace, order and good Government of Botswana', and provided that such laws are 'subject to the Constitution'.

36. I agree with Rannowane J. when he held that:

> 'The Constitution is the supreme law of the land and any administrative acts, that contravene any of its provisions are legally invalid',

although I would add the words 'and may be liable to be set aside on review'. I say 'may be', because review is a

discretionary remedy (See: **BERGSTAN (PTY) LTD vs BOTSWANA DEVELOPMENT CORPORATION LTD (2012) 1 BLR 858 CA at 867**, where **OUDEKRAAL ESTATES (PTY) LTD vs CITY OF CAPE TOWN & OTHERS 2004 (6) SA 222 SCA at 246**, was approved and applied). Constitutional relief is also discretionary (See **OATILE**'s case (supra)). There will be many minor constitutional infractions during administrative action where justice does not demand the setting aside of the decision in question. But where, as here, a major and substantive breach of the Constitution is alleged in the application of an Act of Parliament then, if that allegation is proven, the decision will be reviewed and set aside as being *ultra vires* its governing Act.

THE SOCIETIES ACT

37. This case concerns an administrative decision taken under the Societies Act. The relevant extracts from sections of that Act are the following:

> "6(1) Every local society shall, in the manner prescribed and within 28 days of the formation thereof or of

the adoption thereby of a constitution or of rules, regulations or bye-laws, make application to the Registrar for registration or for exemption from registration under this Act.

(2) Subject to sections 7 and 11(7)

(a) upon application being made by a local society for registration under this Act, the Registrar shall register the society; and

(b) ____.(exemption)

(3) Before registering or refusing to register or granting or refusing to grant exemption from registration to a local society, the Registrar may require the society to provide him, in writing or otherwise, with such further information as he thinks is necessary to have for a proper consideration of the application for registration or for exemption from registration, as the case may be.

(4) ____ (certificates)."

(Section 7 deals with valid reasons for refusal of registration or exemption, while section 11(7) provides for the restoration of a deregistered society to the register). Section 6(2)(a) makes it clear that generally the Registrar is obliged to register a local society applying for registration unless he has valid reasons for not doing so. The onus is thus on the Registrar (or the Minister

in this case) to justify his reasons for refusal. Further, by section 6(3) if the Registrar has doubts about the propriety of the objects of a society seeking registration, he may seek further information from the applicant. That was not done in this case.

> "7(1) ___ (local branches of external societies)
>
> (2) The Registrar shall refuse to register and shall not exempt from registration a local society where –
>
> (a) it appears to him that any of the objects of the society is or is likely to be used for any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Botswana;
>
> (b) ___
> (c) ___
> (d) ___
>
> (e) it appears to him that the constitution, rules, regulations or bye-laws of the society are in any respect repugnant to or inconsistent with any written law;
>
> (f) ___
> (g) ___
> (h) ___."

The Minister here refused registration in terms of section 7(2)(a), although he did not state in what respect the objects

of LEGABIBO fell foul of that section, save to suggest in his final letter of rejection that:

> "Heterosexual activity between consenting adults is not an offence in this country but the subjects of your appeal will commit an offence even if their sexual act involve (sic) consenting adults."

In this the Minister was not strictly correct because, as was pointed out in **KANANE**'s case, sections 164 and 167 of the Penal Code outlaw certain practices by any persons, heterosexual or homosexual, and regardless of their sexual orientation.

> "11(1) The Registrar may at any time cancel the registration of a local society if he is satisfied that it is expedient to do so on the ground that –
>
> (a) ___
>
> (b) it is a society which, by virtue of section 7(2)(a), (d) or (e), he is entitled to refuse to register;
>
> (c) the society has, in contravention of section 12, changed its objects or pursues objects other than its declared objects; or
>
> (d) ___."

So, if in this case LEGABIBO were, for example, to misapply its stated objectives by actively promoting the commission of offences contrary to sections 164 and 167 of the Penal Code, the Minister would, if he had initially registered the society, be entitled to deregister it, after following the laid down procedures.

THE CONSTITUTION

38. Although the respondents have relied upon alleged breaches of a number of sections of the Constitution, it is necessary to make reference to only one – section 13, relating to the protection of freedom of assembly and association, in order to decide this case. The relevant parts of the section read as follows:

> "13(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions and other associations for the protection of his or her interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the rights and freedoms of other persons;

(c) (public officers)

(d) (trade unions)

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown to be not reasonably justifiable in a democratic society."

39. In this case the respondents claim that they are being hindered in their right to form an association for the protection of their interests. They fall squarely within section 13(1) of the Constitution. There is no challenge to any of the provisions of the Societies Act, so to the extent that these may limit the rights of freedom of assembly and association enjoyed by the respondents, that will be acceptable provided that those

limitations (or the decisions of persons acting under them) fall within the exceptions listed in section 13(2) of the Constitution. Both parties have made reference in their argument to the subject of public morality, but there is no reference at all in section 7 of the Societies Act to public morality. So to refuse registration on the ground of public morality alone would not be a valid exercise of discretion – it is sections 164 and 167 of the Penal Code which deal with public morality, not the Societies Act. This would be relevant only to the extent that a breach of public morality also constituted an unlawful purpose (section 7(2)(a) of the Societies Act), or was repugnant to a written law (section 7(2)(e) of the Act). It might also have relevance when considering Lord Diplock's definition of irrationality (supra) where he referred to a decision "outrageous in its defiance of logic or accepted moral standards."

40. It is unnecessary, in my judgment, to interrogate the other fundamental rights provisions of the Constitution where the breach complained of falls squarely within one of those

provisions – here section 13. A breach of any of the fundamental rights provisions will, by definition, be contrary to section 3 of the Constitution as well, since this is the overarching section of Chapter II thereof, and encompasses all of those rights. It is also true, as pointed out by counsel for both sides, and by the Judge *a quo*, that the various fundamental rights are closely interrelated, so that a breach of one such will frequently constitute a breach of the others as well. So a refusal to register LEGABIBO as a society might be argued to derogate from its members' right to freedom to disseminate their views on an organised basis contrary to section 12, or to constitute unjustified discrimination, contrary to section 15, or to offend against their right to equality before the law contrary to section 3. Those are interesting arguments, and the many international precedents called in aid by counsel for the respondents are also interesting, but it is not necessary to refer to them in order to decide this case, which turns squarely on whether the Minister's decision is reviewable on the grounds of irrationality, or for illegality, as being contrary to

section 13 of the Constitution. Any findings by Rannowane J. on any of those parallel issues are, for present purposes, *obiter dicta*, and it was unnecessary, on the authority of **TAPELA**'s case (supra), to make any constitutional declarators after reviewing and setting aside the Minister's decision. I will address this aspect when deciding upon the appropriate order to be made in this appeal.

KANANE vs THE STATE

41. I should refer in more detail to **KANANE**'s case, since it is the leading authority to date in Botswana on gay and lesbian rights, and since it is relied upon by both sides in this appeal as supporting their respective arguments. The appellant claims that it is authority for their view that homosexual persons are not "recognised" as such by the Constitution, and that they are accordingly not persons entitled to the fundamental rights conferred thereby. The respondents argue that it confirms the right of gays and lesbians freely to associate with one another subject to the law. **KANANE**'s case also sets the scene for this

case, and provides some background on public attitudes in Botswana to the question of sexual orientation.

42. In that case two consenting males had been charged in 1994 with committing, in private, an "Unnatural offence, contrary to section 164(c) of the Penal Code", alternatively with committing "Indecent practices between males contrary to section 167 as read with section 33 of the Penal Code". The sections in question were challenged as being unconstitutional in that they discriminated against men on account of their gender and interfered with their enjoyment of their fundamental rights. At that time section 164(c) made it a criminal offence for any person to permit a male person to have carnal knowledge of him or her against the order of nature, while section 167 criminalised "acts of gross indecency" committed in public or in private by a male person with another male person. The Court held that "carnal knowledge against the order of nature" meant sexual intercourse *per anum*, regardless of the gender of the participants. On that basis it held that section 164(c) was non-

discriminatory on gender grounds and was thus constitutional. However, relying on **ATTORNEY GENERAL vs DOW (1992) BLR 119 CA** (full bench) which outlawed gender based discrimination as unconstitutional, it held that section 167 was discriminatory against men and was thus unconstitutional.

43. The Court noted, however, that subsequent to the charge, but prior to the Court of Appeal proceedings, sections 164 and 167 of the Penal Code had been amended by Act 5 of 1998 to render them gender neutral, and that that Act had widened the range of acts criminalised by those sections.

44. The Court then considered the argument that gays and lesbians should be considered to be a group deserving of protection against discrimination in terms of sections 3 and 15 of the Constitution, although, sexual orientation was not mentioned in either section 15, where 'sex' was not then included either among listed categories protected from discrimination, or in section 3 where 'sex' simpliciter was included. Tebbutt J.P.

approached this question against the background of the *dictum* of Amissah J.P. in **DOW**'s case at p.146, namely;

> "I do not think that the framers of the Constitution intended to declare in 1966 that all potential 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 far sighted 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 the most likely areas of possible discrimination.
>
> I am fortified in this view by the fact that other classes or groups with respect to which discrimination would be unjust and inhuman and which, therefore, should have been included in the definition, were not. A typical example is the disabled."

45. The Court concluded that the time had not yet arrived (as at July 2003) to treat gays and lesbians as a group deserving of inclusion in the section 15(3) definition of categories in respect of which discrimination was unlawful. The time was also not ripe to interpret the word 'sex' in section 3 of the Constitution

so as to include 'sexual orientation'. This was because Act 5/1998, so far from cutting down the range of sexual activities criminalised by the Penal Code, had in fact broadened this, and (in the Court's view) that was a response to the AIDS pandemic which was then reaching its zenith. (I note for the record, that by Act 9/2005, section 15(1) of the Constitution was later amended to add 'sex' to the list of categories in respect of which discrimination is prohibited).

46. In response to the argument that those criminal provisions (sections 164 and 167 of the Penal Code) unconstitutionally limited the rights of gays and lesbians to freely associate with one another Tebbutt J.P. responded, at p.81, with the statement that:

> "In my view, they do not. There is nothing to prevent them still so associating, subject to the law."

47. In **KANANE**'s case the Judge President traced (at pages 74-76) the process by which homosexuality had been progressively decriminalised in many of the nations of the world, including

South Africa, the United Kingdom, the United States of America, Australia, Germany, New Zealand and Canada, and he also referred to a split decision in Zimbabwe (**BANANA v THE STATE (2000) 4 LRC 621 (ZSC)**) in which that country declined to decriminalise homosexual activities. Those authorities are not relevant to the present case because sections 164 and 167 of the Penal Code, which have been interpreted to forbid same sex intimate relationships, are not challenged in this appeal. They do, however, show a more tolerant and compassionate attitude towards previously taboo subjects throughout the world, and also in Southern Africa.

48. The ratio of the **KANANE** case was that no evidence had been produced to show that public opinion, as demonstrated in the legislation passed by Parliament, had materially changed since the passing of Act 5/1998. The Court found that:

> "... the time has not yet arrived to decriminalise homosexual practices, even between adult consenting males in private."

49. By so holding the Court did not close the door to the Court ultimately revisiting the issue, but signalled that any change would normally come from legislation passed by Parliament. The Court endorsed the words of Lord Bingham in **PATRICK REYES v THE QUEEN (2002) WLR 1034 (PC) that**:

> "In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences."

and continued with the words

> "In making such a decision Parliament must inevitably take a moral position in tune with what it perceives to be the public mood. It is fettered in this only by the confines of the Constitution."

50. I would add to that reference a further citation. In **PRINCE v THE PRESIDENT, CAPE LAW SOCIETY AND OTHERS 2002 (2) SA 794 (CC) at p.835** the majority of the South African Constitutional Court (led by Chaskalson CJ) held at p.835 that:

> "In a democratic society the Legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the

Constitution, but if it does so the Courts must enforce the laws, whether they agree with them or not."

51. In the present case the respondents did not seek to impugn any law, only to ensure that the application of the Societies Act was in accordance with the legislative and constitutional imperatives. They were able, in my view, to lead compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights. Parliament itself has, by Act No. 10/2010 amended section 23(d) of the Employment Act Cap 47:07 to forbid the termination of an employee's contract of employment on grounds of sexual orientation; national policies on HIV/AIDS recognize gays and lesbians as a vulnerable group requiring special support; and organisations such as BONELA have been registered which openly campaign for the rights of the LGBTI community. This Court, too, can take notice of a far more open public debate on these issues in recent years. While strong dissenting views are still expressed by religious and other groups, some prominent politicians have begun to speak out in

support of gay and lesbian rights. This was a subject which only a few years ago was a virtual taboo for public discussion, unless to condemn homosexuality outright. The Minister's answering affidavit, too, is free of any homophobic nuance, and refers only to enforcement of the law as he sees it.

52. He encourages the respondents, in his correspondence, to have his decision tested by the Court if they disagree with it. In terms of timing, it may be that this general softening of attitude towards the LGBTI community has developed in the years that followed the adoption in 1997 of the national Vision 2016, and the widespread dissemination of the Vision document. One of the pillars of the Vision was that Botswana would be recognized as a "Compassionate, Just and Caring Nation."

53. That, then, is the current background against which this Court will address the grounds of appeal raised by the Attorney General, and it is to these that I now turn.

54. THE GROUNDS OF APPEAL

(1) The Court erred in treating the application as one under section 18 rather than as a review

In fact, as I have said, the Court below dealt with the application first as a review, and then as a section 18 application, before concluding that in reality it was a section 18 application because it did not meet all the requirements of a review under Order 61 of the High Court Rules. The appellant has now abandoned that ground and 'concedes' that this was a constitutional application. Notwithstanding the confusion on the part of both contestants in the case, I am satisfied that despite its procedural deficiencies, this was in fact an application for review. The main relief sought was the setting aside of the administrative decision of the Minister to refuse the registration of LEGABIBO. The Minister duly responded by deposing to an affidavit as the decision maker, and provided the record of proceedings leading to his decision (such as it was). There is no suggestion of any prejudice

to either party by the procedure used, nor was any objection raised on procedural grounds. Further, the application did not follow the 'show cause' format required in constitutional applications. In my judgment this is one of those cases where the Court should not intervene *mero motu* to raise procedural inadequacies, when the parties themselves are content to proceed on the papers as presented, and there is no prejudice to either. As Lord Woolf MR remarked in **RYE v SHEFFIELD CITY COUNCIL (1997) All ER 747 CA at 755**

> "... it is important to remember that there does not have to be an application to strike out even if it is considered that the wrong procedure has been adopted. Often the interests of justice and the parties will be better served by getting on with the action."

That passage was approved by this Court in **KAGISO TIRO vs ATTORNEY GENERAL CACGB-039-12** (unreported) at paragraph 27. I hold that in terms of the principles already

traversed this application had properly to be brought as a review application, and it was so brought.

Grounds of appeal (2), (3), (4), (5) and (6) (supra)

55. All of these grounds overlap to a greater or lesser extent, and address the review issue. I will deal with them together. They are to be considered as a response to the appellant's complaint against the Court's findings that the Minister's decision fell to be set aside as irrational and illegal as being in breach of the Constitution. In my view both irrationality and unconstitutionality were properly raised by the respondents in seeking to have the Minister's decision set aside. They argue that the Minister's primary reason for his refusal of registration, namely that Botswana's Constitution "does not recognize homosexuals" is illogical and fundamentally incorrect; and that he was also misguided in his second ground of refusal, namely that registration of LEGABIBO would violate section 7(2)(a) of the Act. As to constitutionality, they argue that the Minister's

refusal violates their rights (for the purposes of this appeal) under sections 3, 12 and 13 of the Constitution. For the reasons already stated it will be necessary here to deal only with section 13, the right to freedom of assembly and of association.

56. In supporting the Minister's argument that Botswana's Constitution "does not recognize homosexuals", counsel for the appellant relies on **KANANE**'s case (supra). That reliance is ill-conceived. First, as Rannowane J. found, there is no mention in the Constitution (nor for that matter in any other law in Botswana as far as I can ascertain) of either homosexuals or heterosexuals. It cannot logically be argued that either category is "not recognised by the Constitution", when the distinction between the two is not raised at all. There is no legislation in Botswana that prohibits anyone from being lesbian, gay or bisexual, and it would be difficult to formulate any logical basis for doing so. Sexual orientation has been defined and is understood universally to refer to

> "each person's capacity for profound emotional, affectional and sexual attraction to and intimate sexual relations with, individuals of a different gender or same gender or more than one gender."

(Preamble to the Yogyakarta Principles, internationally agreed by experts gathering at Jakarta in November 2006). There has been no suggestion or evidence produced by either party that sexual orientation can be learnt or imposed, or that it is anything other than a natural attribute of every human being. Certain sexual practices have been outlawed in Botswana by sections 164 and 167 of the Penal Code (which are not challenged in this case), but that has been done irrespective of the gender and sexual orientation of the perpetrator, as was pointed out in **KANANE**'s case.

57. Secondly, **KANANE**'s case did not, as I have explained in the analysis of that case, purport to exclude homosexuals from the ambit of "every person" as referred to in section 3 of the Constitution. It held only that the time has not yet arrived to include lesbians and gays among the categories of person in

respect of whom discrimination is specifically prohibited by section 15 of the Constitution.

58. Section 3 of the Constitution starts with the words:

> "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual ..." (my emphasis)

Nothing could be plainer. There are no exclusions whatever. Fundamental freedoms are to be enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others. Those rights can only be limited or curtailed to the extent allowed in the other provisions of Chapter 3 of the Constitution. That these rights are universal has been confirmed, if that is necessary, in such cases as **DOW** (supra) at p.133, where it was held that "the phrase 'every person' in section 3 means all people within Botswana's jurisdiction", and **ERIC GITARI v NON-GOVERNMENTAL ORGANISATIONS BOARD & OTHERS Petition No. 440 of**

2013 (KENYA HIGH COURT) – a case similar to the present one – where the judge found that it was "obvious" that "an individual human being, regardless of his or her gender or sexual orientation, is 'a person' for the purposes of the Constitution."

59. The application in the Court below was brought by twenty individuals, each on his or her own behalf. It is to be noted that fundamental rights and freedoms are accorded specifically to individuals and not to societal classes or groups of whatever description. Section 3 refers to 'every person', and the ensuing sections dealing with particular rights all either commence with the words "no person ..." or make it clear, when they do not do so, that the right is accorded to individuals. So, in section 4 "No person shall be deprived of his or her life intentionally ...", in section 5 "No person shall be deprived of his or her personal liberty ...", in section 6 "No person shall be held in slavery or servitude ...", in section 7 "No person shall be subjected to torture ...", and in section 13 "Except with his or her own

consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association ...." It follows that the Minister was irrational in holding that the Botswana Constitution 'does not recognize homosexuals' and using that as a reason for denying the registration of LEGABIBO. To the extent that he may have received legal advice to that effect, such legal advice was also irrational. Counsel's argument that homosexuals are not 'a class or group' recognised by the Constitution can similarly not be sustained.

60. I should also refer briefly to the argument advanced by counsel for the appellant before us that a homosexual is not a person at all for the purposes of the Constitution, and that the word 'person' in section 3 was erroneously equated by Rannowane J. to the word 'human'. He submitted also, that since the words 'sexual orientation' were not mentioned in that preamble, that was a further reason why homosexuals were excluded. Accordingly, he argued, a homosexual person enjoys no fundamental rights at all. These are, in my view, totally

unacceptable and irrational arguments. Fundamental rights are to be enjoyed by every person. 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. As was held in **GITARI**'s case (supra) at paragraph 104

> "... as a society, once we recognize 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."

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.

61. The Minister's second reason for the refusal of registration to LEGABIBO is that its objects run counter to the provisions of

section 7(2)(a) of the Societies Act. This provides that the Registrar shall refuse to register an organisation where

> "... it appears to him that any of the objects of the society is, or is likely to be used for any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare, or good order in Botswana."

The Minister gave no reason for this conclusion, either in his letters to the respondents, or in his opposing affidavit. The nearest he came was in his third letter (under the hand of the Permanent Secretary), when he stated that:

> "heterosexual activity between consenting adults is not an offence in this country but the subjects of your appeal will commit an offence even if their sexual act involve (sic) consenting adults."

This was obviously a reference to sections 164 and 167 of the Penal Code and, although it was not, as explained above, strictly accurate, it makes it clear that the Minister based his refusal on his belief that the objects of LEGABIBO, or at least one of these, was to promote the commission of criminal acts by its members. Counsel for the appellant advanced similar arguments in his heads of argument. That, if there was a basis

for it, would be a valid reason for refusal, since it would mean that one of the objects of LEGABIBO was or was likely to be used for an unlawful purpose.

62. Like Rannowane J, I have carefully gone through the objects of LEGABIBO, listed earlier, and can find no indication whatever of an intention to pursue anything other than lawful and proper objectives. LEGABIBO's intention is to advance the interests of gay, lesbian and trans-sexual persons in Botswana and generally to educate the public on human rights aspects of sexual orientation. They are concerned with public health issues, such as HIV/AIDS, and seek to enable members of their community to protect themselves and others from violation of their human rights. That cannot, in my view, be seen as encouraging illicit same sex sexual relationships. Members of the LGBTI community are as vulnerable as anyone else to the dangers of rape or sexual violation, and the protection of prison inmates from HIV infection is a concern expressed in the National HIV/AIDS Policy. LEGABIBO seeks to network

regionally and internationally to promote their interests, and also to be an advocacy group to lobby politically "for equal rights and decriminalisation of same sex relationships". This refers to the fact that sections 164 and 167 of the Penal Code, while being gender neutral themselves, do have the practical effect of limiting sexual activity, even in private, between consenting same sex partners. It is not, however, and never has been, a crime in Botswana to be gay.

63. There is no indication that contraventions of sections 164 and 167 are prevalent in Botswana. In fact, I am not aware of any prosecutions under those sections since **KANANE**'s appeal was heard in 2003, and that involved an act committed in 1994, more than twenty years ago. Certainly no appeals in relation to offences against those sections have reached this Court in recent years. That notwithstanding, those offences remain on the statute book and both the executive and the citizenry must respect and uphold the law. The real question is whether there is anything unlawful or offensive about advocating for a change

in these laws so as to decriminalise the forbidden aspects of same-sex relationships.

64. I think it is clear, as Rannowane J. found, that there is nothing unlawful about advocating for a change or changes in the law. That is the democratic right of every citizen. Politicians do it every day on behalf of their constituents. Advocacy against criminalisation of abortion, or against the death penalty, are typical examples. There is no suggestion, and nor should there be, that those advocating for such a change are potential abortionists or murderers themselves. The respondents have made it clear that they respect the law, and there is no suggestion whatever in the objects of LEGABIBO that they will encourage their members to commit offences against sections 164 or 167, or that they will indulge in "outreach", to use the expression of the appellant's counsel, to recruit others to commit such offences. Further, there exist already organisations and individual politicians who advocate for gay

and lesbian rights, and there has been no suggestion that any of those is breaking the law.

65. The Minister's apparent suspicion that offences may be committed provides no basis, in my judgment, for refusing registration of a society in order to prevent its members committing or promoting the commission of criminal offences. There was no evidence before him at all of such a tendency, and he did not request further information, as he was entitled to, to allay his fears. As Tebbutt JP held in **GOOD vs ATTORNEY GENERAL (2) (2005) 2 BLR 337 CA at 349**

> "It would be irresponsible in the highest degree for this court to make findings based on speculative submissions and on perceptions which may or may not be held by the public without any reliable factual material to support them."

66. It was, as the court *a quo* held, entirely unreasonable to refuse registration on the ground that LEGABIBO, in terms of its objects, was likely to be used for unlawful purposes. There was likewise no evidence, nor any suggestion that the objects

of LEGABIBO could or would be used for any purpose incompatible with peace, welfare or good order in Botswana.

67. Although that was not the section relied upon by the Minister, counsel for the appellant suggested that the Minister could equally (and rationally) have refused registration in terms of section 7(2)(e) of the Societies Act. Since he did not, in terms of the evidence, rely upon that section, the rationality or otherwise of the Minister's decision cannot be judged against it. However, the effect of that section is, in practice, the same as that of section 7(2)(a). Subsection (2)(e) enjoins the Registrar to refuse to register a society if it appears to him that its constitution, rules, regulations or bye-laws are in any respect repugnant to or inconsistent with any written law. In this case the effect is similar because counsel points again to the objects of LEGABIBO as being repugnant to sections 164 and 167 of the Penal Code. His argument is the same – that those objects promote or encourage disobedience of those sections, and are thus repugnant to them. This they do, he argues, by

'popularising' the acts criminalized by those sections. As I have said, there is no evidence whatever of this, and the argument fails for the same reasons.

68. I turn now to the appellant's challenge to the High Court's finding that the Minister's decision was illegal or unlawful as being contrary to section 13 of the Constitution, and thus stood on that ground too to be reviewed and set aside. Section 13 confers rights upon each of the twenty respondents in his or her individual capacity. It provides, as I have said, that:

> "13(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly or association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests." (my emphasis)

That is precisely what the respondents sought to do – to register a society for the protection of their interests, so that they could freely assemble and associate with each other and with others who support their aims. That right is protected not only by the Constitution, but also by the three main

international human rights instruments to which Botswana is a party, namely the African Charter on Human and Peoples Rights (Article 10), the Universal Declaration of Human Rights (Article 20) and the International Covenant on Civil and Political Rights (Articles 21 and 22). These serve further to reinforce the respondents' rights under section 13 of our Constitution.

69. It is clear that the Minister's decision interferes in the most fundamental way with the respondents' right to form an association to protect and promote their interests. That decision will only be constitutionally acceptable, and thus lawful, if it is a proper decision in terms of section 7 of the Societies Act and is also justified by one of the limitations placed by section 13 of the Constitution on the right to freedom of association and assembly. Those limitations are expressed, as I have said, as follows:

> "13(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purposes of protecting the rights and freedoms of other persons;

(c) (public officers)

(d) (trade unions)

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society." (my emphasis)

70. It is accepted by both parties that the provisions of the Societies Act are unobjectionable in constitutional terms. There is also no section thereof which entitles the Registrar (or the Minister) to refuse to register a society on grounds of public morality. I do not take him to have done so. His concern was that registration might lead to or encourage the members of LEGABIBO to break the law. I have already held that that concern or reason for refusal was irrational on the evidence before us, so there can be no question of his decision being necessary in the interests of public order.

71. The other constitutional possibilities are, subject to the comment in para 77 below, that his decision was reasonably required to protect the rights and freedoms of others, or that his refusal was reasonably justifiable in a democratic society. The appellant's counsel cited as an example of a proper application of those grounds, the case of **MELZER v BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK 02-7338 (2nd Cit. 2003)**. Melzer was a teacher, and an acknowledged paedophile. He was dismissed when it was discovered that he was a member of NAMBLA (The North American Man/Boy Love Association) which advocated, through an explicit bulletin, for the abolition of laws restricting sexual relations between men and underage boys. There was no evidence that he had himself been guilty of any unlawful acts. The Court found, while upholding his constitutional right to freedom of association, that this was a case where the public interest (expressed as 'public concern') trumped his individual rights, the exercise of which, in the manner shown, would disrupt the smooth and proper running of the school where he

was employed. His dismissal was upheld. I have no doubt that the same result would follow were a similar case to arise in Botswana, since section 146(3) of the Penal Code forbids sexual relations with minors, and public morality in our society would not tolerate the corruption of young children by adults. But that is a far cry from the present case, where there is no evidence whatever, that LEGABIBO or its members would do otherwise than to obey the law of the land.

72. A more relevant precedent is that relied upon by the respondents, namely the Kenyan case of **GITARI** (supra). There too the refusal to register a society formed to promote the interests of what were referred to there as 'gay, bisexual, transgender, intersex and queer groups' was successfully challenged. The Court held at paras 88-89 that:

> "In a representative democracy, and by the very act of adopting and accepting the Constitution, the State is restricted from determining which convictions and moral judgments are tolerable. The Constitution and the right to associate are not selective. The right to associate is a right that is guaranteed to, and applies, to everyone. As submitted by the petitioner, it does not matter if the views of certain groups or related associations are

> unpopular or unacceptable to certain persons outside those groups or members of other groups. If only people with views that are popular are allowed to associate with others, then the room within which to have rich dialogue and disagree with government and others in society would be limited."

73. The test of what is reasonably justifiable in a democratic society is an objective one. (See, for example, **KIVUMBI v ATTORNEY GENERAL (2008) UGCC 4 at 9**) and, as I have said, where the Minister seeks to rely on one of the limitations to the fundamental rights provisions of the Constitution, the onus is upon him to prove that it squarely applies to the law or action taken under that law which is in question. That is not an onus which is easily discharged, because clauses which derogate from constitutional rights are to be narrowly construed, while clauses conferring such rights receive generous construction. In the oft-quoted words of Amissah J.P. in **DOW**'s case (supra) at p.31:

> "... the very nature of a Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions, that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution, and that where rights and freedoms are

> conferred on persons by the Constitution, derogations from such rights and freedoms should be narrowly or strictly construed."

74. To discharge that onus, the Minister must first identify the social ill which he regards as being of sufficient importance to justify the derogation, or against the dangers of which he considers that it is sufficiently important to safeguard the rights and freedoms of others. Having identified that social ill, the action he takes to counter that social ill must be subjected to what has become known as the proportionality test, to ensure that it passes constitutional muster. That test has been well described by Dickson C.J. in the Canadian case of **R v OAKES (1986) 1 SCR 103**. After holding at **p.105 D** that:

> "the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation",

he continued, at **p.139 C-F**, to lay down the stages of the test as follows:

> "There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational

> considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... Third, there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as being of sufficient importance."

75. Normally that test would be applied to legislation seeking to limit or cut down a constitutional right, but it applies equally to action taken by a public functionary under any law which may have a like effect.

76. Here the social ill sought to be addressed by the Minister could not have been homosexuality as such. That is not unlawful in Botswana and thus cannot be seen as a social ill, at least in the eyes of the law, although some religious and other groups may take a different view. The social ill sought to be addressed or prevented must thus be criminal conduct in contravention of sections 164 and 167 of the Penal Code, and the other persons whose rights and freedoms are to be protected, must be the victims of such crimes (to the extent that there can be said to

be a 'victim' of illegal acts committed between consenting adults). That social ill is addressed by the provisions of the Penal Code in question, and these are normally to be applied by the law enforcement agencies of Government, in the event of a complaint being received by them of a contravention of the law. In my judgment the refusal of registration of a society to further address that social ill could only be justified if it could be shown clearly that the society proposed to actively participate in or to encourage the commission of crimes against those sections. That is not the case. Nor can it be said to be proportional if a society formed to pursue a number of honourable objectives, including advocacy, public health and education, was refused registration purely because, in the subjective view of the Registrar (or of the Minister), it was suspected of being likely to promote unlawful activities. There must, as I have said, be some evidential basis for such a conclusion. Here there was none.

77. Returning to the provisions of section 13(2) of the Constitution, I should add that the application of any of the exceptions or limitations listed in (a), (b), (c) or (d) thereof is only to be triggered by an authorising section or provision of a law –

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ... (for the specified limitations) ... and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society." (my emphasis)

Neither the Constitution, nor section 7 of the Societies Act, nor any other law to which we have been referred, confers upon the Minister (or on any other functionary) an unrestricted power either to refuse something on the ground that such refusal is reasonably justifiable in a democratic society, or to decide what is reasonably required for the purpose of protecting the rights and freedoms of other persons. For section 13(2) to apply there must, it seems, be a specific law which confers the relevant authority. As explained above, section 7 does not authorise what was done here. No

foundation has accordingly been laid for any qualification in this case to the full protection conferred by section 13(1) of the Constitution.

78. For these reasons, it cannot be gainsaid that in Botswana all persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests. The refusal of the Minister to allow the registration of LEGABIBO was unconstitutional and stands to be reviewed and set aside on the ground of illegality as well.

79. It follows that all the appellant's grounds of appeal are unsuccessful and that the appeal must be dismissed. But in dismissing it, this Court will follow the course set in **TAPELA**'s case, and will confine itself to orders setting aside the Minister's decision and facilitating the registration of LEGABIBO. It is not proper to add to these constitutional declarators as well, and

we will not do so. To that extent, the order in the Court below will be adjusted.

80. In the Court below there was no prayer for costs made in the notice of motion, and no award was made. Before us, the appellant sought both the costs in the Court below and the costs of the appeal, in the event of her being successful. The respondents countered by filing a cross-appeal, seeking costs in the Court below. They also sought costs in the appeal.

81. Since no costs were sought in the Court below, it would not be right to order these now. However there is no reason why the respondents should not have their costs of appeal, since they are the successful parties.

I accordingly make the following Order:

(1) The appeal is dismissed with costs.

(2) The Order in the Court below is replaced by the following Orders:

(a) The decision of the Minister (and of the Director/Registrar) refusing the registration of LEGABIBO as a society is set aside.

(b) The Registrar of Societies is to take such steps as may be necessary to register LEGABIBO as a society in terms of the Societies Act Cap 18:01.

DELIVERED IN OPEN COURT AT GABORONE THIS 16th **DAY OF** March **2016.**

I.S. KIRBY
JUDGE PRESIDENT

I AGREE

C.T. ROWIE
JUSTICE OF APPEAL

I AGREE

I.B.K. LESETEDI
JUSTICE OF APPEAL

I AGREE

M.S. GAONGALELWE
JUSTICE OF APPEAL

I AGREE

LORD HAMILTON
JUSTICE OF APPEAL