

Conclusion

The petition succeeded. The Court issued orders including an order of *mandamus* directing the Board to strictly comply with its constitutional duty under Articles 27 and 36 of the Constitution and the relevant provisions of the Non-Governmental Organizations Co-ordination Act.

Significance

This is one of the cases of “recognition of LGBTIQ organisations” that have appeared in Kenya and Botswana, and may reflect naming compromises being made by LGBT advocacy organizations in other African countries. Perhaps the significance of this case could be discerned from this dictum of the Court:

There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation [under a very different name] but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups. (para. 149)

Political recognition as citizens of a particular identity is the heart of the issue for both the NGO and the NGO Board. It is interesting that in both the Kenya and the Botswana cases, the contention of the government representatives was that LGBTIQ persons are somehow not citizens and that their Constitutions should not recognise LGBTIQ people as persons. In some countries, LGBTIQ organisations have been registered under non-controversial names, and governments have tolerated their carrying out of their objectives to advance rights of LGBTIQ persons. Indeed, “what’s in a name?” Perhaps the petitioners in this case and the Botswana LEGABIBO cases would respond, “Everything.” This could be an area of reflection for advocacy organisations: the significance of seeking such recognition rather than accepting a compromise.

Thuto Rammoge & 19 Others v. The Attorney General of Botswana
[2014] MAHGB-000175-13
Botswana, High Court

COURT HOLDING

The refusal of the government to recognise and register an organization founded to lobby for equal rights and decriminalisation of same-sex relationships violated constitutional rights to equal protection before the law, and freedom of expression, association and assembly, guaranteed under Sections 3, 12, and 13 of the Constitution, and was therefore unjustifiable under the Constitution.

Summary of Facts

The Applicants, belonging to an organisation called Lesbians, Gays and Bi-sexuals of Botswana (“LEGABIBO”), filed this application to challenge the decision of the Minister of Labour and Home Affairs (“Minister”) who rejected the Applicants’ registration of their organisation, LEGABIBO. The

Applicants first brought the application for registration before the Director of the Department of Civic and National Registration (“Director”), who rejected the application on two grounds: first, that Botswana’s Constitution (“Constitution”) did not recognise homosexuals, and second that it would violate Section 7(2)(a) of the Societies Act (“Act”). Section 7(2)(a) of the Act says that:

The Registrar shall refuse to register and shall not exempt from registration a local society 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 Applicants appealed the decision to the Minister, who upheld the decision of the Director. The Applicants based their application to the High Court on several grounds including that it infringed on their constitutional rights to equal protection before the law, freedom of expression, and freedom of assembly and association.

Issues

The issues for the Court to determine were as follows:

1. Whether in light of the objectives of LEGABIBO, the decision of the Minister rejecting registration of LEGABIBO on the grounds that its objectives were unlawful or its purposes incompatible with peace, welfare, and good order was justifiable under section 7(2)(a) of the Act; and
2. Whether the other ground for refusal for registration, which was stated as the assertion that the Constitution does not recognise homosexuals, could be sustained.

Court’s Analysis

The Court first dealt with the procedural issue of whether this was a judicial review or an application under Section 18 of the Constitution. Judicial review is a common law remedy which gives the courts the power to review the lawfulness of a decision or action of a public authority. Section 18 of the Constitution allows any person who alleges that constitutional rights have been infringed to make an application before the High Court without prejudice to any other action with respect to the same matter which is lawfully available. The Court decided to determine the matter under both mechanisms, i.e. judicial review and enforcement of constitutional rights.

The Court considered laws under which the Minister based his decision. First, the Director purported to base his refusal to register LEGABIBO, pursuant to Section 7(2)(a) of the Act, on the grounds that it appeared to him that the objectives of LEGABIBO were likely to be for an unlawful purpose, or any purpose prejudicial to, or incompatible with, peace, welfare, or good order in Botswana. Second, the Director based his decision on the assertion that the Constitution does not recognise homosexuals.

The Court examined the objectives of LEGABIBO to determine whether they were indeed designed to achieve an unlawful purpose. The Court held that none of the objectives appeared to have such a design. For avoidance of doubt, the Court highlighted the objective which, it opined, influenced most the decision of the Director and this was: to carry out political lobbying for equal rights and

decriminalisation of same-sex relationships. The Court ruled that there was nothing inherently unlawful in lobbying or advocating for legislative reform to decriminalise same-sex sexual conduct, and neither was this incompatible with peace, welfare, and good order.

The Court then examined the second ground for refusal to register LEGABIBO, which was that homosexuals were not recognised under the Constitution. First, it noted that nowhere in the Constitution was it expressly stated that homosexuals or heterosexuals were not recognised. It further noted that homosexuality is to do with being sexually attracted toward same-sex persons and that this had nothing to do with the Constitution. The Court then stated that one's sexual orientation does not in itself constitute a crime, so that no one is a criminal for being gay. The Court faulted the decision of the Minister as it was made on the assumption that the objectives of LEGABIBO were to engage in homosexual relationships which was not what any of the objectives stated. The Court therefore held that the decision of the Minister to deny registration of LEGABIBO was unreasonable in law and would be reviewed.

The Court proceeded to review the issue under Section 18 of the Constitution. It first examined if the decision was contrary to Section 3 of the Constitution, which guarantees every person in Botswana fundamental rights without discrimination regarding race, place of origin, political opinion, colour, creed, or sex. The Court reminded itself that the Constitution is the supreme law of the land and that any administrative decision ought to be subject to the Constitution. Further, it referred to the case of *Att. Gen. v. Moagi* 1982 (2) BLR 124 and *Att. Gen. v. Dow* 1997 BLR 119 to emphasise that the language of the Constitution should be construed broadly and not be unduly restricted. Since Section 3 applies to every person, the Court stated that this applied to all persons equally, including homosexual and bi-sexual persons.

The Court also said that lobbying and advocacy are protected by the right to freedom of expression and freedom of association. Denying homosexual or bi-sexual persons the right to register to carry out advocacy and lobbying, the purposes of which are not intrinsically unlawful, was contrary to Section 3, which guarantees everyone the right to freedom of expression, assembly and association, and also infringed Sections 12 and 13 of the Constitution.

The Court then considered the argument of the respondents. The first was that the judicial review proceedings were instituted irregularly and ought to have been struck out. The Court agreed with the respondents about the irregularity. However, the Court ruled that it would proceed to hear the merits of the case despite the irregularity because this concerned allegations of infringement of constitutional rights, which the Court felt obligated to attend to in spite of the procedural irregularity. Further, the Court had recourse to Order 5 Rule 2(1) of the Rules of the High Court, which allowed it to continue to hear the merits of the case notwithstanding irregularity of procedure.

The second argument of the respondents was that homosexual persons were inclined to commit unnatural offences and indecent practices between persons, contrary to Sections 164 and 167 of the Penal Code respectively. The Court ruled that this argument could not be sustained as it presupposed that people should be punished for what they were capable of doing and not what they have actually done. Further, this was contrary to the principle that one is innocent unless proven guilty.

In their final argument, the respondents relied on *Kanane v. The State*, 2003 2 BLR 67, where the Court of Appeal was asked to declare Sections 164 and 167 of the Penal Code, which criminalise consensual homosexual sexual conduct, unconstitutional for contravening rights guaranteed under Section 3 of the Constitution. The Court of Appeal had rejected the petition. In the instant case, the respondents argued by analogy that the Director's decision to reject LEGABIBO's application for registration was therefore lawful. The Court rejected this reasoning and noted that the issues were dissimilar. It noted that the respondents' argument was based on conflating homosexual orientation and homosexual sexual conduct. It reiterated what it had stated earlier in its ruling, that being homosexual and engaging in advocacy and lobbying to make homosexual conduct legal was not in itself unlawful. It therefore upheld its ruling that the Director's decision was unconstitutional for infringing on the constitutional rights of the Applicants.

Conclusion

The decision of the Minister was set aside, and the Court declared that the Applicants were entitled to register LEGABIBO as a Society.

Significance

Gays and lesbians in Africa continue to face discrimination and violence for their non-heterosexual sexual orientation. For instance, students have been suspended from schools merely on the suspicion that they are homosexual. The respondents' arguments in this case reflect how societies tend to conflate homosexual orientation with homosexual sexual conduct. Erasing this distinction has the effect that was clearly illustrated in the instant case; persons are condemned for being who they are, for being homosexual. This is an important distinction because persons who identify as homosexual have been discriminated against for this reason, including being denied employment when sexual orientation has nothing to do with their capacity to undertake that particular employment. Registration of a society was rejected not because there was anything wrong with the objectives, but merely because the persons who wanted to form the society were of homosexual orientation.

This case also shows the powerful influence of the so-called "anti-sodomy" provisions that proscribe consensual same-sex sexual conduct. In referring to the *Kanane* decision to argue that registration of the society should fail because the Court of Appeal in *Kanane* upheld the constitutionality of anti-sodomy provisions, the respondents actually demonstrated the logical conclusion of maintaining such laws in criminal codes. The respondents were implying that if homosexual conduct was lawfully proscribed, then it logically followed that every homosexual be treated with suspicion, lawfully. Much as the Court had faulted the reasoning that homosexuals were condemned before proven guilty, the continued presence of such legislation operates to sustain prejudice against persons of homosexual orientation. The Court appeared intent on dealing with the substance of the case, sidestepping a procedural irregularity that could have been a barrier to addressing the substantive issues in the judicial review. For instance, in *Oloka-Onyango and Nine others v. Attorney General*, Petition no. 08 of 2014, the Constitutional Court of Uganda had avoided delving into the allegations of human rights violations and preferred to constrain itself to the procedural question. In contrast, the Botswana Court was not dissuaded by claims of procedural irregularity when the matter raised allegations of human rights violations.

This was also an important decision for Botswana, considering that a previous decision of the Court of Appeal, in *Kanane*, had failed to apply human rights principles to the question of consensual same-sex conduct. Rather, the Court of Appeal had decided to side with popular anti-homosexuality sentiments. The *Rammoge* decision is progressive because it subjected discriminatory administrative action to human rights scrutiny, and in the process addressed the prejudicial thinking against homosexual persons. It went a long way toward affirming persons with same-sex orientation as subjects of law and human rights, on equal terms to everyone else.

Furthermore, apart from just allowing that LEGABIBO to be registered, the Court affirmed the lawfulness of advocating and lobbying to decriminalise sodomy laws. Arguably, the *Kanane* decision must have had a chilling effect on advocacy when it pronounced that society was not ready to reform anti-sodomy laws. In contrast, the *Rammoge* decision is a positive development in the struggle to reform laws that criminalise same-sex relationships and discriminate against persons with a same-sex orientation.

Finally, it is noteworthy that the Court confined itself to national laws and did not refer to any international human rights instrument or comparative jurisprudence. In a way, it is rare that the Court could rely only on its national laws to arrive at the decision it did.

Attorney General of Botswana v. Thuto Rammoge & 19 Others

[2016] CACGB-128-14

Botswana, Court of Appeal

COURT HOLDING

The refusal of the Minister to allow the registration of LGBTI organisation LEGABIBO was unconstitutional as it infringed on the respondents' right to freedom of assembly and association.

The refusal of the Minister to register LEGABIBO was illegal as it had no basis in law.

Summary of Facts

The 20 respondents had initiated proceedings in the High Court of Botswana (*Thuto Rammoge & 19 Others v. The Attorney General of Botswana* [2014] MAHGB-000175-13) against the Minister of Labour and Home Affairs (the "Minister") who upheld the decision of the Director of the Department of Civil and National Registration (the "Director") to refuse the registration, as a society, of the Lesbians, Gays, and Bisexuals of Botswana ("LEGABIBO") under the Societies Act, Cap 18: 01 (the "Act"). The High Court overturned the decision of the Minister and ordered that LEGABIBO be registered. The decision, *Thuto Rammoge & 19 Others v. The Attorney General of Botswana*, is summarised above. The Attorney General of Botswana raised several grounds of appeal including procedural and substantive grounds. Only the substantive grounds are recounted here. These were:

- The lower court erred in failing to have found that the objectives of LEGABIBO were unlawful in terms of Section 7(2)(a) of the Act as being contrary to good order, and also