

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

under Section 7(2)(e) of the Act as potentially promoting acts criminalised by Sections 164 and 167 of the Penal Code of Botswana (the “Penal Code”);

- The lower court erred in holding that homosexual persons were included in the definition of the word “person” in section 3 of the fundamental rights in the Constitution of the Republic of Botswana (the “Constitution”), and were thus entitled to enjoy such fundamental rights;
- Even if the lower court had found that the respondents were entitled to such fundamental rights, the lower court had erred in finding that the Minister’s decision was not a justifiable limitation on those rights; and
- The lower court erred when it distinguished the decision in *Kanane v. The State* 2003 (2) BLR 67 (CA) (*Kanane*) when it should have been bound by it.

Issue

Whether the decision to refuse registration of LEGABIBO was unconstitutional, as it unjustifiably infringed on the right to freedom of association and assembly protected under Section 13 of the Constitution.

Court’s Analysis

The Court restated the law on review of administrative action and affirmed that administrative action may be reviewed on the grounds of illegality, irrationality, and procedural impropriety. It further stated that the ground of illegality encompassed the doctrine of *ultra vires* (exceeding powers granted by the law) and the principle of unconstitutionality. If an administrative decision was shown to be unconstitutional, it would also be unlawful against the legislation that granted the administrative powers to the decision-making authority.

The Court reviewed the relevant sections of the Act, and amongst others referenced Section 6(2) (a), which obligates the registering authority (the “Registrar”) to register a local society applying for registration unless there were valid reasons not to do so. The Act places the onus on the Registrar (or the Minister) to justify reasons for refusal. According to Section 7(2)(a) of the Act, the Registrar could refuse registration of a local society where the objects of the society were or were likely to be used for any unlawful purpose. Section 7(2)(e) empowers the Registrar to refuse registration if the constitution, rules or regulations, or bye-laws of the society were repugnant to or inconsistent with any written law.

The Court observed that the Minister refused registration in terms of Section 7(2)(a) but did not state the reasons. The Court however noted that the letter of rejection contained the following statement:

Heterosexual activity between consenting adults is not an offence in this country but subjects of your appeal will commit an offence even if their sexual act involves consenting adults.

Apart from noting that this reasoning was flawed, the Court addressed the Registrar’s anxiety by reminding him that the Act provided for cancellation of registration of a society if it were found to be pursuing unlawful objectives subsequent to its registration.

Turning to the respondent's claim that constitutional rights were infringed, the Court preferred to focus on Section 13 which recognises and secures freedom of assembly and association, which the respondents claimed was infringed upon by the administrative action of the Minister when he refused registration of LEGABIBO. Section 13(2) provides for lawful limitation to the right to assembly and association which should be provided under relevant law. The Court noted that Section 7 of the Act did not include public morality as a ground for refusing registration, and was of the opinion that public morality alone would not be a valid exercise of discretion.

While the Court recognised that failure of registration infringed upon other interrelated rights, such as freedom of expression, the right to non-discrimination and equality, it decided to base its decision on whether the Minister's decision was reviewable on the grounds of irrationality or illegality contrary to Section 13 of the Constitution.

The Court then addressed the Attorney General's contention that the lower court should have been bound by the decision in *Kanane*. After reviewing the *Kanane* case, the Court observed that attitudes toward gay and lesbian rights were softening. It noted that Parliament itself had amended the Employment Act, Cap 47:07, to prohibit termination of an employee's contract on the grounds of sexual orientation; national policies acknowledged and addressed issues amongst the gay and lesbian population; and organisations have been registered in Botswana that openly campaign for gay and lesbian rights. The Court further noted that despite strong dissenting views about gay and lesbian rights, prominent politicians had begun speaking out in support of gay and lesbian rights.

The Court found the Appellant's reliance on *Kanane* to support its position that the Constitution did not recognise homosexuals to be ill-conceived because there was no mention of homosexuals or heterosexuals in the Constitution. The Court did not find any legislation in Botswana that prohibited anyone from being lesbian, gay, or bisexual. The Court referenced the definition of sexual orientation in the Preamble to the Yogyakarta Principles⁹² and accepted the position that sexual orientation could not be learnt or imposed, and that it was a natural attribute of every human being.

The Court refused to accept the reasoning that the *Kanane* case had purported to exclude homosexuals from Section 3 of the Constitution, so the wording "every person in Botswana" in the constitutional provision included everyone and excluded no one.

The Court also noted that fundamental rights and freedoms are accorded specifically to individuals and not groups or classes. The Court therefore found that the Minister was irrational in holding that the Constitution did not recognise homosexuals, and in using that argument as the basis to refuse registration of LEGABIBO.

The Court also found the argument that a homosexual person does not enjoy fundamental rights to be totally unacceptable and irrational. It affirmed the position that fundamental rights are enjoyed by all persons, and that to deny any person their fundamental rights emasculated their dignity, the protection of which is the core objective of Chapter 3 of the Constitution.

The Court affirmed that members of the gay, lesbian, and transgender community 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.

The Court then addressed the second reason the Minister gave for refusing registration which was that the objects of LEGABIBO run counter to the provisions of Section 7(2)(a) of the Act. The Court noted that the Minister gave no reason for this conclusion save the reference to criminalisation of same-sex sexual conduct under Sections 164 and 167 of the Penal Code. The Court further noted that the Minister was under the belief that the objectives of LEGABIBO included to promote unlawful acts. The Court, like the lower court, found nothing unlawful about the objectives of LEGABIBO. It found that the Minister's suspicion that offences may be committed lacked evidence and were unfounded.

The Court then addressed the question of whether the High Court erred in finding that the Minister's decision was illegal or unlawful and contrary to Section 13 of the Constitution. The Court affirmed that Section 13 of the Constitution protects the right of every person to freely assemble and associate. The Court also referenced Article 10 of the African Charter on Human and Peoples' Rights, Article 20 of the Universal Declaration of Human Rights, and Articles 21 and 22 of the International Covenant on Civil and Political Rights to buttress the rights under Section 13 of the Constitution. The Court found that the Minister's decision interfered in the most fundamental way with the respondents' right to form an association and to protect and promote their interests. His decision would therefore be unlawful in terms of Section 7 of the Act unless it was justifiable as a limitation under Section 13 of the Constitution. The Court also reminded the Minister that the onus was on him to justify the limitation of the rights of the respondents under Section 13 of the Constitution.

The Court reiterated its finding that the Minister refused registration based on suspicion that LEGABIBO would promote unlawful objectives. There was no evidence for this conclusion. As far as the Court was concerned, the Minister did not proffer any legitimate grounds in law for the limitation of the rights under Section 13 to refuse registration of LEGABIBO. It therefore held that the refusal of the Minister to allow the registration of LEGABIBO was unconstitutional, and would therefore be reviewed and set aside on that ground as well as the ground of illegality.

The Court however differed from the lower court in that it did not think it proper to make constitutional declarations. It therefore restricted itself to orders setting aside the Minister's decision and facilitating the registration of LEGABIBO.

Conclusion

The appeal was denied and dismissed. The order of the High Court was replaced by an order setting aside the decision of the Minister. The Court also ordered the Registrar to take the necessary steps to register LEGABIBO in terms of the Act.

Significance

In the Court's words:

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.

This is a very progressive statement coming from a tribunal in a region where homophobic attitudes are very prevalent. Gays and lesbians are discriminated against because of their sexual orientation. Indeed, the outrageous reasoning by counsel for the Appellants that homosexuals are not human beings worthy of respect of their fundamental rights and dignity is unfortunately common amongst societies in the African region. People are condemned for being homosexual when, as the Court recognised, homosexuality is not learned or imposed, but a natural attribute of being human.

This decision builds on the growing jurisprudence around LGBTI persons in the region. The Court referenced Kenyan decisions in similar circumstances when organisations were refused registration due to discrimination on the grounds of sexual orientation or gender. The Kenyan courts had also affirmed the human rights of LGBTI persons. It is indeed important for tribunals to protect and promote human rights especially of victimised groups such as LGBTI persons. This decision is to be savoured because it forcefully rejects irrational homophobic attitudes and affirms that everyone, including LGBTI persons, is worthy of human dignity, and their fundamental rights ought to be respected.

The People v. Paul Kasonkomona
[2015] HPA/53/2014
Zambia, High Court

COURT HOLDING

The respondent's actions of publicly advocating for homosexual rights did not infringe Section 178(g) (*Nuisances and Offences Against Health and Convenience - Idle and disorderly persons*) of the Penal Code Act. Rather, the accused's actions fell within his right to exercise his freedom of expression.

Summary of Facts

This case concerns an appeal to the Zambian High Court by the Appellant against the acquittal of the respondent by the Magistrate's Court. The respondent, a human rights activist, was invited to engage in a discussion on homosexual rights in Zambia in a television programme, "The Assignment," aired by Muvi Television Studios. The respondent was accused of "soliciting for immoral purposes," arrested, and subsequently charged with the offence of idle and disorderly conduct under Section 178(g) of the Penal Code, Cap. 87 of the Laws of Zambia.

The Magistrate's Court considered the three legal elements for an offence under Section 178(g) of the Penal Code and the evidence submitted by the Prosecution. The three elements were (1) definitions in regards to "soliciting," (2) "public space," and (3) "immoral purposes." The Magistrate's Court acquitted the respondent on the grounds that the Prosecution had failed to prove the offence.

The government appealed the Magistrate Court's decision on the following two grounds: (1) the trial magistrate erred in law and fact by limiting the term "soliciting" to a conduct that is persistence only, and (2) the trial magistrate erred in law by acquitting the accused when there was sufficient evidence to put him on defence, in accordance with Section 206 of the Criminal Procedure Code.