

BEFORE DR DINGAKE J.

IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA

HELD AT LOBATSE

CASE NO: MAHLB-000836-10

In the matter between:

**EDITH MOSADIGAPE MMUSI**

1st Applicant

**BAKHANI MOIMA**

2nd Applicant

**JANE LEKOKO**

3rd Applicant

**MERCY KEDIDIMETSE NTSHEKISANG**

4th Applicant

and

**MOLEFI SILABO RAMANTELE**

1st Respondent

**THE PRESIDING OFFICER,**

2nd Respondent

**CUSTOMARY COURT OF APPEAL**

(herein represented by the Attorney-General of Botswana)

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**APPLICANTS' SUPPLEMENTARY HEADS OF ARGUMENT**

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## INTRODUCTION

1. Since the submission of the Applicants' heads of argument, this Honourable Court requested submissions from the Attorney General in an order dated 14 May 2012.
2. The 2nd Respondent, represented by the Attorney General, filed heads of argument on 12 June 2012 although she was invited to do so on or before the end of May 2012.
3. Our supplementary heads of argument will only address the new issues raised by the 2nd Respondent. They will not address issues already covered in our heads of argument. The issues covered in the supplemental heads of argument are: the current state of Botswana society with regards to sex discrimination; the relationship between sections 3 and 15; and the role of international law.

## CURRENT STATE OF BOTSWANA SOCIETY WITH REGARDS TO SEX DISCRIMINATION

### *Reliance on Kanane v the State*

4. The 2nd Respondent erroneously relies on *Kanane v the State*,<sup>1</sup> in her submissions as *Kanane* is clearly distinguishable from the present issue.

4.1 In *Kanane*, the Court of Appeal addressed whether sexual orientation should be included as a protected class under sections 3 and 15 deserving equal protection and protection from discrimination

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<sup>1</sup> [2003] 2 BLR 67 (CA).

respectively. This line of inquiry was necessary given that sexual orientation was not listed as a prohibited ground under either section 3 and 15.

4.2 In deciding whether sexual orientation was a protected ground, the Court looked to whether “*the time has arrived when society in Botswana*” is ready to include sexual orientation as a prohibited ground for protection under sections 3 and 15.<sup>2</sup>

4.3 The Court of Appeal in *Kanane* did not take into account Botswana society’s values when determining whether the public interest limitation under section 3 was applicable in the context of decriminalizing same-sex consensual relationships, as the 2nd Respondent contends, but whether Botswana society was ready to include sexual orientation as a prohibited ground. The Court of Appeal never reached the question of whether the infringement was justified under the public interest limitation as the Court of Appeal never found an infringement of section 3.

5. In this case, there is no issue regarding whether sex is a protected ground under section 3. Section 3 specifically states: *Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race....creed or sex....*” Sex is clearly a prohibited ground under section 3.

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<sup>2</sup> [2003]2 BLR 67 at 78G.

6. As the issue here is not whether sex is a prohibited ground under section 3, the readiness of Botswana society as per *Kanane*, is not relevant to this inquiry.

*Botswana's commitment to ending sex discrimination*

7. However, even if this Honourable Court were to find that the current state of Botswana society is relevant, it is clear that Botswana society has for decades established its commitment to ending sex discrimination in all areas of law unlike the case in *Kanane*.
8. Sex was included in section 3 as a prohibited ground when the Constitution was enacted by the Government of Botswana in 1966. Since the enactment of the Constitution, Botswana society and government have routinely expressed their commitment to eradicating discrimination on the basis of sex.
9. Courts have regularly found that Botswana society is ready to address sex discrimination by striking down laws and actions which discriminate on the basis of sex.

9.1 In 1992, in the most famous case of sex discrimination, the Court of Appeal in *Attorney General v Dow* struck down parts of the Citizenship Act of 1984 for being discriminatory on the basis of sex in violation of sections 3 and 15.<sup>3</sup>

9.2 Approximately 2 years later, the Court of Appeal in *Student Representative Council v Attorney General*, held that university

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<sup>3</sup> [1992] BLR 119 (CA).

regulations which required pregnant students to leave the University for a period of time violated sections 3 and 15 of the Constitution.<sup>4</sup>

9.3 More recently, in 2002, the Industrial Court in *Moatswi and Another v Fencing Centre (Pty) Ltd* held that an employer's termination of two women's employment was unlawful on the basis that it constituted discrimination on the basis of sex.<sup>5</sup>

10. It is not just the courts which have conveyed this commitment, but the executive as well.

10.1 In 2008, the Government of Botswana noted that it "*has demonstrated strong political commitment to eliminate all forms of discrimination against women..[including creating] a fully fledged Women's Affairs Department (WAD) in the Ministry of Labour and Home Affairs (MLHA).*"<sup>6</sup>

10.2 With particular respect to customary law, the Government further states, "*[w]hile Botswana society has been shaped by customs and traditions, the society is equally aware of some traditional practices that perpetuate sex roles stereotyping and prejudice... While it is not the intention of the Government to undermine culture the Government is committed to protecting women from discriminatory practices.*"<sup>7</sup>

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<sup>4</sup> [1995] BLR 178 (CA).

<sup>5</sup> 2002(1) BLR 262 (IC).

<sup>6</sup> Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Combined Initial, Second and Third Periodic Reports of States Parties (Botswana), CEDAW/C/BOT/3 (20 October 2008), page 8.

<sup>7</sup> *Id.* page 9 (emphasis added).

11. Finally, Parliament itself has been seized of addressing sex discrimination in legislation for over the last two decades.

11.1 Following the commission of a review of all laws affecting the status of women in Botswana in 1998, Parliament amended a number of laws identified as being discriminatory against women.

11.2 The Employment Act of 1982 specifically prohibits termination of employment solely due to the employee's sex. The Employment Act of 1982 further tasks the Board, which makes recommendations to the Minister to take into account when formulating its recommendations "*the desirability of eliminating discrimination between the sexes in respect of wages for equal work*".<sup>8</sup>

11.3 In 2004, the Parliament passed the Abolition of Marital Power Act 34 of 2004, ending the treatment of women as minors and providing women equal access to property in marriage.

12. These are just a handful of examples which clearly show Botswana's commitment since the enactment of the Constitution to ending sex discrimination.

#### *Role of public opinion in judicial decisions*

13. In the alternative, we submit that for a court to take into account society's *mores* when determining whether there is a violation of fundamental

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<sup>8</sup> Section 138(2).

constitutional rights undermines the very purpose for which the courts were established.

13.1 In the South African Constitutional Court case, *S v Makanyane*,<sup>9</sup> a case addressing whether the death penalty was constitutional, Chasklason CJ noted the important role of the court in upholding constitutional principles despite strong public sentiment to the contrary. He stated: *“The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.”*

*Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution...The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this*

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<sup>9</sup> 1995 (3) SA 391 (CC).

*protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.”*<sup>10</sup>

14. Though a constitutional democracy was introduced in South Africa later and under different historical circumstances than Botswana, the fundamental principle of the role of courts to ensure the protection of those most marginalised against violation of fundamental rights applies equally in Botswana which also is a constitutional democracy.

#### RELATIONSHIP BETWEEN SECTIONS 3 AND 15

15. We will not restate the issues with respect to the relationship between sections 3 and 15, but merely direct this Honourable Court to paragraphs 39-42 in our heads of argument, outlining the long list of jurisprudence which finds sections 3 and 15 to be two separate stand-alone sections where the limitations in one section only apply to violations alleged under that section and not the other, as the 2nd Respondent contends.

16. Indeed this principle is so settled that even the 1st Respondent has concurred with this view.<sup>11</sup>

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<sup>10</sup> 1995 (3) SA 391 (CC), paras 87-88 (emphasis added).

<sup>11</sup> First Respondent Heads of Argument, para. 36.

17. The Industrial Court in 2004, perhaps, said it best, stating “[t]he *Dow case* settled the issue that the fundamental rights expressly conferred by section 3 of our Constitution could not be abridged by section 15”.<sup>12</sup>

18. In fact, in our view, the *Dow case* was also concerned with a matter of marriage or other matters of personal law which are an exception under section 15 (4) c of the Constitution, but the Court of Appeal did not hold that such discrimination is a limitation to the right under section 3(a) of the Constitution.

#### ROLE OF INTERNATIONAL LAW

19. We submit that Botswana’s international legal obligations should assist this Honourable Court when it is interpreting the scope and nature of constitutional rights where there is a lack of clarity.

20. In this case, Botswana’s international and regional legal obligations can assist this Honourable Court in determining the scope of the right to equal protection in section 3(a) of the Constitution and ascertaining the breadth of the public interest limitation contained in that right.

21. Given that, we refer this Honourable Court to Applicants’ heads of argument, para. 19-24.

#### CONCLUSION

22. For the aforementioned reasons, this Honourable Court should declare the customary law rule at issue in violation of section 3(a) of the Constitution.

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<sup>12</sup> *Moatswi and Another v Fencing Centre (Pty) Ltd*, 2002(1) BLR 262 (IC), para 13.

**THUS DONE AND MADE BY US ON THIS DAY OF JUNE 2012**

**RANTAO KEWAGAMANG ATTORNEYS**

**ON BEHALF OF THE APPLICANTS**

**Per: Tshiamo Rantao**

## **LIST OF AUTHORITIES**

### **Cases**

1. *Attorney General v Dow*, [1992] BLR 119 (CA)
2. *Kanane v State*, [2003] 2 BLR 67 (CA)
3. *Moatswi and Another v Fencing Centre (Pty) Ltd*, 2002(1) BLR 262 (IC)
4. *Student Representative Council v Attorney General*, 1995 BLR 178 (CA)

### **Foreign cases**

5. *S v Makanyane*, 1995 (3) SA 391 (CC)

### **International Jurisprudence**

6. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Combined Initial, Second and Third Periodic Reports of States Parties (Botswana), CEDAW/C/BOT/3 (20 October 2008)