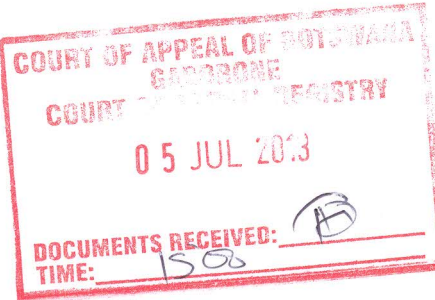


**IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA HELD AT  
GABORONE**

**CASE NO: CACGB- 104 /12**

In the matter between:

**MOLEFI SILABO RAMANTELE**



**APPELLANT**

AND

**EDITH MODIPANE MMUSI**

**1<sup>st</sup> RESPONDENT**

**BAKHANI MOIMA**

**2<sup>nd</sup> RESPONDENT**

**JANE LEKOKO**

**3<sup>RD</sup> RESPONDENT**

**MERCY KEDIDIMETSE NTSHEKISANG**

**4<sup>TH</sup> RESPONDENT**

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**FILING NOTICE**

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**FILED HEREWITH:**

1. The Attorney General's head of arguments
2. List of Authorities

**DATED AT GABORONE THIS 5<sup>TH</sup> DAY OF JULY 2013.**

  
**For Attorney General  
Attorney General's Chambers  
Civil Litigation Division  
Government Enclave  
Private Bag 009  
GABORONE  
(AGC3/2/137B 1)**

**TO: The Registrar of the Court of Appeal  
Court of Appeal  
GABORONE**

**AND TO: Rantao Kewagamang Attorneys  
Respondent's Attorneys  
Plot No. 119, Gaborone International Commerce Park  
GABORONE**

**AND TO: Minchin and Kelly (Botswana)  
Appellant's Attorneys  
Plot 688, khwai Road  
Off Botswana Road  
P.O. Box 1339  
Gaborone**

<b>RANTAO KEWAGAMANG ATTORNEYS</b>
08 JUL 2013
RECEIVED BY: <i>Mngapula</i>
TIME: <i>09:59 am</i>

<b>MINCHIN &amp; KELLY RECEIVED</b>
2013-07-05 <i>1530</i>
TIME: .....
SIGNATURE: <i>Kelly Moshara</i>

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**LIST OF AUTHORITIES**

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1. CONSTITUTION OF BOTSWANA
2. ABOLITION OF MARITAL POWER ACT
3. UNITY DOW V ATTORNEY GENERAL 1992 Botswana Law Reports 119
4. KAMANAKAO I v THE ATTORNEY GENERAL 2001 (2) Botswana Law Reports 662
5. GOOD V THE ATTORNEY GENERAL 2005 (2) 337 (CA)

6. HLOMISA V UNGERS NEWSPAPERS LTD 1990 (2) SA 300(W) 007 D -  
608 A

7. MINISTER OF EDUCATION v SYSTRETS TRUST LTD 2006 (4) SA 205

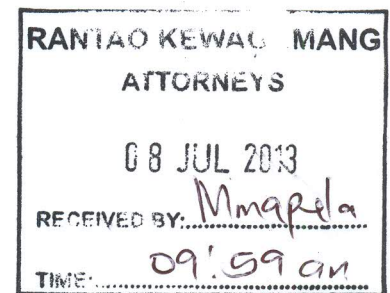
**DATED AT GABORONE THIS 5<sup>TH</sup> DAY OF JULY 2013.**

*OF*  
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**4<sup>TH</sup> RESPONDENT**

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**THE ATTORNEY GENERAL'S HEADS OF ARGUMENTS**

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**BE PLEASED TO TAKE NOTICE THAT** The Attorney General having been directed to appear amicus curiae, hereby submit the following heads of argument upon which reliance will be placed at the hearing of this matter.

**INTRODUCTION**

1. On or about the 15<sup>th</sup> May 2007, the lower Customary Court, heard and determined in favour of the 1<sup>st</sup> Respondent a dispute concerning the inheritance of the estate of the parents of the 1<sup>st</sup> Appellant and the Respondents.
2. The 1<sup>st</sup> Respondent was ordered to vacate the home in issue within 30 days of the Order. She appealed to Kgosi Lotlaamoreng's court which on

the November 2008, he ordered that the elders convene a meeting with all concerned parties and identify the one child who will take care of the home.

3. The judgement of Kgosi Kgolo Lotlaamoreng was overturned by the Customary Court of Appeal on the basis that, in sengwaketse culture and traditions, if the inheritance is distributed the family home is given to the last born child.

#### **SUMMARY OF ISSUES FOR DETERMINATION**

4. The Attorney General addresses the following issue;

- 4.1 That the court a quo erred by failing to take into consideration the argument that the Constitution of Botswana contains a provision on non discrimination which has limitations. Under Section 15 (4) (c), the prohibition on non discrimination does not apply to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law and that the Ngwaketse customary law that is sought to be impugned being part of personal law, enjoys the protection captured under section 15 (4) (c) of the Constitution.

- 4.2 That the court a quo erred by giving too much weight to international legal Instruments, declarations and reports without considering that the documents are binding only upon domestication.

- 4.3 That the court a quo erred by giving too much weight to foreign decision whose constitutional provisions are not necessarily similar to Botswana Constitution.

**Section 3 and section 15 of the Constitution.**

5. Section 3 of the Constitution of Botswana provides that -

*Whereas every person in Botswana is entitled to the fundamental rights and freedom of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely -*

*(a) Life, liberty, security of the person and the protection of the law;*

*(b) Freedom of conscience, of expression and of assembly and association; and*

*(c) Protection for the privacy of his or her home and other property and from deprivation of property without compensation.*

The Attorney General submits that section 3 of the Constitution provides the general principle in so far as the protection of rights is concerned and Section 15 of the Constitution provides the more specific principle which deals with the issue of non discrimination.

6. The Attorney General content that the above view is supported by section 3 itself where it states that -

***“Provision of this chapter (being sections 3 -19) shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitation of that protection as are contained in those provisions, being limitation designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedom of others or public interest.”***



The Attorney General contend that the above caption from section 3 of the Constitution recognize that the other provisions in Chapter II afford the protection of rights and freedom subject to the limitations in those provisions.

7. The Attorney General submits that section 3 of the Constitution cannot be interpreted in isolation from section 15 of the Constitution. This approach has been approved by the High Court in the case of **Kamanakao I v The Attorney General 2001 (2) Botswana Law Reports 662** where the court stated that –

*“We endorse the position that the right to the protection of the law contained in section 3 of the Constitution leads to the principle that all laws must treat people equally save as may legitimately be excepted by the Constitution.”*

The Kamanakao case further pointed out that the interpretation of provisions of the Constitution should not be repugnant to each other. Where two provisions of the Constitution are repugnant to each other it is Parliament duty to resolve the conflict. The Attorney General contend that the learned judge failed to fully consider the relationship between section 3 and 15 of the Constitution.

See also **Holomisa v Ungers Newspapers LTD 1996 (2) SA 588(w) 607 D – 608 A**

**Minister of Education v systrets trust LTD 2006 (4) SA 205**

8. In the earlier case of **Unity Dow v Attorney General 1992 Botswana Law Reports (119)** the court of appeal had stated that section 3 (a) conferred the right to equal protection of the law on individual. The case



was decided in 1992 and the then section 15 (3) of the Constitution which defined the word “discrimination” did not include “sex”. Section 15 (3) amended through Act no. 9 of 2005 now include the word sex. Thus discrimination on the basis of sex is still permissible in accordance with the limitations provided under section 15 (4) of the Constitution.

9. It has to be noted that in recognition of the limitation provided by section 15 (4) of the Constitution, Parliament when promulgating the Abolition of Marital Power Act, limited the rights conferred by the Act to civil marriages and did not confer the same rights to women in customary and religious marriages. (**See Section 3 of the Abolition of the Marital Power Act**). We therefore submit that the Ngwaketse Customary Rule of inheritance is not ultra vires the Constitution of Botswana.

#### **International legal instruments and reports**

10. The Attorney General submits that the court a quo erred by giving too much weight to international legal instruments and reports, without considering that the convention are binding only upon domestication.
11. In the case of **Good v The Attorney General 2003 (2) Botswana Law Report 67** the court considered and determined that international treaties to which Botswana is a signatory do not have force of law until incorporated into domestic law.
12. The Attorney General contend that a quo erred by giving too much weight to foreign decision whose constitutional provisions are not necessarily similar to Botswana constitution.

WHEREFORE The Attorney General prays that the court uphold the appeal and setting aside the judgement of the court a quo and its orders.

**DATED AT GABORONE THIS 5th DAY OF JULY 2013**

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**For Attorney General  
Attorney General's Chambers  
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