

Government Appeals the Decision of the Gaborone High Court to Allow Registration of LEGABIBO

FACTSHEET ON THE CASE

Background to the Case

On 16 February 2012, the Respondents applied for the registration of LEGABIBO in terms of the Societies Act. On 12 March 2012, the Director of the Department of Civil and National Registration rejected their application for registration on the basis that the Botswana Constitution does not recognise homosexuals and that the objectives of the organisation are contrary to section 7(2) of the Societies Act. The Respondents appealed against this decision to the Minister of Labour and Home Affairs. The appeal was rejected on 12 November 2012. On 12 March 2013, the Respondents filed a case before the High Court of Botswana, asking the court to review the decision to refuse to register LEGABIBO.

On 14 November 2014, the High Court, per Rannowane J, declared that the decision of the Minister to refuse registration of LEGABIBO contravened sections 3, 12 and 13 of the Botswana Constitution and declared further that the Respondents were entitled to have the group Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) registered as a society. The Attorney General appealed this decision, which now forms the subject of the appeal before the Court of Appeal.

The Respondents are represented by Mr Dick Bayford of *Bayford and Associates* and Ms Lesego Nchunga of *Dow and Associates*. The case is supported by the Southern Africa Litigation Centre and the Botswana Network of Ethics, Law and HIV/AIDS.

Once registered, LEGABIBO aims to provide an opportunity for lesbians, gays and bisexuals to form part of an association which will provide them with information on human rights and advocate for their rights, particularly the right to access to health services.

Parties to the Case

The Appellant is the Attorney General, who acts on behalf of the State. The Respondents are individuals who support the objectives of LEGABIBO and assert that the refusal to register LEGABIBO violates their right to form and join an association.

Reasons for Refusal of Registration of LEGABIBO and Argument on Appeal

The Attorney General argues that they should not have to register LEGABIBO because Botswana's Constitution does not recognise homosexuals. The Attorney General claims that the group could be used for an "unlawful purpose" that is "prejudicial to or incompatible with peace, welfare or good order in Botswana" and that registering a lesbian, gay and bisexual organization would popularize acts criminalized in terms of the Penal Code.

The Importance of the Case

Freedom of association, assembly and expression are paramount values in a democratic society. These rights are protected in the Botswana Constitution as well as regional and international human rights instruments. The refusal to grant legal status to an organisation amounts to an interference with these rights.

The Respondents seek to emphasise the importance of these rights in a constitutional democracy. A dismissal of the State's appeal against the High Court decision, will benefit not only the Respondents, but any minority group which seeks to uphold its right to freedom of association and expression in Botswana.

Arguments in the Case

The Respondents argue that the High Court decision, which ordered the State to register LEGABIBO, was correct and should be upheld by the Court of Appeal.

The decision to refuse registration of LEGABIBO was unreasonable and irrational because the Director and Minister failed to apply their minds to the question whether to register LEGABIBO, and instead misconceived the provisions of the Constitution, and applied irrelevant considerations based on errors of law and unsubstantiated assumptions. The decision was further irrational and unlawful because it violated the Respondents' constitutional rights.

There is no evidence that LEGABIBO's objectives are likely to be used for any unlawful purpose prejudicial to or incompatible with peace, welfare or good order in Botswana. The denial of registration does not serve any substantial government interest. The State has provided no legitimate justification for violating the respondents' rights.

Rights violated by the refusal to register LEGABIBO

Section 3 of the Botswana Constitution provides that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual" including the right to equal protection of the law, the right to freedom of assembly and association, and the right to freedom of expression.

The right to equal protection of the law means that administrative decisions should not be exercised in a manner which is unfair and discriminates arbitrarily between different classes or groups of people.

LEGABIBO argues that the High Court correctly held that, a person's sexual orientation does not make a person a criminal. Denying people the right to register a society for the purposes of lawfully carrying out law reform advocacy is a violation of their constitutional rights to freedom of association and assembly and freedom of expression.

Constitutional rights are universal in application and can only be restricted if this is reasonably required in the interests of defence, public safety, public order, public morality or public health. Any limitation of the rights in the Constitution must be proved to be reasonably justifiable in a democratic society. The Respondents contend that the Director and the Minister have failed to demonstrate a clear, tangible and significant threat, which would result from their registration, which would justify a limitation of their rights.

There is no law in Botswana that prohibits anyone from being a lesbian, gay or bisexual person, nor is there any law which detracts from their fundamental rights. Botswana's criminal law in this respect extends only to certain sexual conduct between persons of the same sex. The fact that certain acts are criminalised is irrelevant to the issue of the rights of persons, irrespective of their sexual orientation, to associate freely with others based on their shared identities, interests, values and concerns.

Court of Appeal Hearing

The Court of Appeal hearing is set down for 15 January 2016. The Attorney General has however made an application to postpone the matter to later in the same court session. The Court of Appeal will only make a decision on whether the postponement will be granted, on 15 January 2015.