

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

**COURT OF APPEAL CASE NO: CACGB-128-14**

(High Court Case no: MAHGB-000175-13)

In the matter between

**ATTORNEY GENERAL OF BOTSWANA**

**APPELLANT**

And

**THUTO RAMMOGE**

**1<sup>ST</sup> RESPONDENT**

**RONALD DADANI**

**2<sup>ND</sup> RESPONDENT**

**ATLA POELETSO SETSHEGETSO**

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

**RATANANG MOSWEU**

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

**TEBOGO MOTSHWANE**

**5<sup>TH</sup> RESPONDENT**

**ODIRILE LETSATSI**

**6<sup>TH</sup> RESPONDENT**

**KATLEGO SAINT**

**7<sup>TH</sup> RESPONDENT**

**CHRISTOPHER BAREKI**

**8<sup>TH</sup> RESPONDENT**

**AMOGELANG SEKALE**

**9<sup>TH</sup> RESPONDENT**

**THOLEGO SHABANE**

**10<sup>TH</sup> RESPONDENT**

**TEBOGO MOATSHE**

**11<sup>TH</sup> RESPONDENT**

**TINAO SETAELO**

**12<sup>TH</sup> RESPONDENT**

**TEFO RALEBALA**

**13<sup>TH</sup> RESPONDENT**

**OABONA SEPORA**

**14<sup>TH</sup> RESPONDENT**

**ANITA TAU**

**15<sup>TH</sup> RESPONDENT**

**BEVAN NONOFO ASEKENG**

**16<sup>TH</sup> RESPONDENT**

**TEFO NYEPETSI**

**17<sup>TH</sup> RESPONDENT**

**LEMMY MOKGOBYE**

**18<sup>TH</sup> RESPONDENT**

**OTENG AONE CHIMELA**

**19<sup>TH</sup> RESPONDENT**

**CAINE JASON YOUNGMAN**

**20<sup>TH</sup> RESPONDENT**

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**RESPONDENTS' HEADS OF ARGUMENT**

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## INTRODUCTION

1. At the core of this case is the question whether the decision of the Director of the Department of Civil and National Registration ("Director") and Minister of Home Affairs and Labour ("Minister") to refuse to register the organisation, Lesbians, Gays and Bisexuals of Botswana ("LEGABIBO"), was rational and reasonably justifiable in the light of their constitutional rights and in particular, their rights to equal protection of the law; freedom of association and freedom of expression.
2. At the outset, we wish to point out that this is a simple case in which the respondents merely wish to have the ability to associate themselves with a society within the parameters of the law of Botswana. They seek the registration of a society, LEGABIBO, which strives towards the protection of human rights, including the rights of lesbian, gay and bisexual individuals. They wish to associate themselves with likeminded individuals and assert their right to freedom of association, expression and assembly which are important democratic values protected by our Constitution. They do not envisage to break the law or promote any criminal activity but merely to exercise their rights to freely participate in and be part of the democratic processes of Botswana.
3. The respondents submit that the ability of citizens to associate in a manner recognised by the State and to share their opinions in a collective manner is fundamental to our democratic society.
4. The principles of pluralism and democracy denote that freedom of association and expression is beneficial because it increases respect for others' ideas, citizen participation in the democratic system and social cohesion.

5. The State has an obligation to support the exercise of these rights, especially in the case of minority groups.
6. In this regard, the African Commission on Human and Peoples' Rights in *Civil Liberties Organisation v Nigeria* held that:

*"Freedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends".<sup>1</sup>*

7. In dealing with this point the Philippines Supreme Court case of *Estrada v Escritor*<sup>2</sup> very eloquently said:

*"In a democracy, this common agreement on political and moral ideas is distilled in the public square. Where citizens are free, every opinion, every prejudice, every aspiration and every moral discernment has access to the public square where people deliberate the order of their life together... In this representative democracy, the state is prohibited from determining which convictions and moral judgments may be proposed for public deliberation... Nevertheless, in the very act of adopting and accepting a constitution and the limits it specifies – including protection of religious freedom 'not only for a minority, however small – not only for a majority, however large, but for each of us' – the majority imposes upon itself a self-denying ordinance. It promises not to do what it otherwise could do: to ride roughshod over the dissenting minorities."<sup>3</sup>*

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<sup>1</sup> *Civil Liberties Organisation v Nigeria, Communication*, No 101/93 at para 15. See also *Eric Gitari v Non-Governmental Organisations Co-Ordination Board and Others* Petition No 440 of 2013 ("Gitari") at para 82.

<sup>2</sup> 455 Phil. 411 (2003), (A.M. No. P-02-1651 August 4, 2003 & June 22, 2006).

<sup>3</sup> See note 2 page 65.

8. The Constitution of Botswana provides a sensitive and dignified framework within which the rights and interests of minority and vulnerable individuals must be protected.
9. The respondents submit that the Societies Act (CAP 18:01) (“the Societies Act”) should therefore be interpreted to give effect to this and in doing so, provide much needed protection to vulnerable individuals who merely wish to associate themselves and register an organisation in order to lawfully carry out advocacy and lobbying on human rights issues, as well as to give effect to the spirit, purport and object of the Bill of Rights.
10. In these submissions, the respondents address the following issues:
  - 10.1 The material facts and background to this appeal;
  - 10.2 The reasons provided by the appellant for the refusal to register LEGABIBO, including whether Botswana’s Constitution recognises gay, lesbian or bisexual individuals in light of the *Kanane*<sup>4</sup> judgment; and whether the registration of LEGABIBO will lead to “possible prejudice or incompatibility with peace, welfare or good order”;
  - 10.3 The refusal to register LEGABIBO violates the respondents’ right to equal protection of the law;
  - 10.4 The refusal to register LEGABIBO violates the respondents’ right to freedom of association;
  - 10.5 The refusal to register LEGABIBO violates the respondents’ right to freedom of expression;
  - 10.6 Procedural issues raised by the appellant; and
  - 10.7 Costs.

## **BACKGROUND**

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<sup>4</sup> *Kanane v. The State* 2003 (2) BLR 67 (CA)

11. This is an appeal from the decision of the High Court. That Court declared the decision by the Minister of Labour and Home Affairs which upheld the Director of the Department of Civil and National Registration's decision to reject the respondents' application to register LEGABIBO, as an unjustifiable limitation of the rights of the respondents under sections 3, 12 and 13 of the Botswana Constitution.
12. Section 7(2)(a) of the Societies Act provides that the Registrar "*shall refuse to register*" an organisation where "*it appears to him that any of the objects of the society is, or is likely to be used for any unlawful purpose prejudicial to or incompatible with peace, welfare or good order in Botswana*".
13. In all material respects, the facts giving rise to this matter are uncontested on the papers. The *locus standi* of the respondents is not an issue in this case. The respondents all have a substantial interest in the case.
  - 13.1 On 16 February 2012, the respondents and other individuals who are not a party before proceedings in the High Court filed an application for the registration of LEGABIBO in terms of the Societies Act.
  - 13.2 By letter dated 12 March 2012, the Director of the Department of Civil and National Registration rejected the application for registration on the grounds that Botswana's Constitution does not recognise homosexuals and that the application would violate section 7(2)(a) of the Societies Act.
  - 13.3 On 12 April 2012, the respondents submitted an appeal against the administrative decision of the Director.

- 13.4 On 5 October 2012, the Permanent Secretary of the Ministry of Labour and Home Affairs communicated the decision of the Minister of Labour and Home Affairs to uphold the decision of the Director rejecting the application for registration.
- 13.5 In response to the filing of further grounds of appeal by the respondents' attorneys, the Permanent Secretary, on 12 November 2012, reaffirmed the Minister's earlier decision.
- 13.6 The respondents filed an application in the High Court challenging the decision of the Director and Minister to refuse the registration of LEGABIBO.
- 13.7 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 applicants 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 this Honourable Court.
14. The appellant appeals the entire decision of the High Court, including its finding that the refusal to register LEGABIBO violates sections 3, 12 and 13 of the Constitution. The respondents submit that the High Court's findings in this respect are correct. Sections 3, 12 and 13 of the Constitution are discussed under separate headings in these submissions.
15. The appellant, in the Notice and Grounds of Appeal, argues that the reasons for the refusal to register LEGABIBO was not irrational and in violation of constitutional rights.

16. The appellant's grounds of appeal further takes issue with the High Court's findings on some procedural matters. We address these arguments under a separate heading in these submissions.
  
17. In summary, the respondents submit that the High Court's decision was correct and that the appellant's grounds for appeal are unfounded. The respondents submit that the decision of the Director and Minister of Labour and Home Affairs to refuse to register the LEGABIBO was irrational and an unjustifiable limitation of the respondents' constitutional rights, for at least the following reasons:
  - 17.1 In that, the Director and Minister failed to apply their mind properly to all the facts and the law and unreasonably exercised their discretion to refuse the respondents' application for registration. There is no legislation in Botswana that prohibits anyone from being lesbian, gay or bisexual nor is there any law that detracts from the fundamental rights of lesbian, gay and bisexual individuals to associate. Instead, the State has a duty to protect such individuals' right to freely associate amongst each other.
  
  - 17.2 The decision was irrational and arbitrary, in that the Director and Minister were misdirected in various respects and that they applied irrelevant considerations based on errors of law and unsubstantiated assumptions. In particular, on a rational construction of section 7(2)(a) of the Societies Act, a reasonable decision maker would not assume a possible prejudice or incompatibility with peace, welfare or good order, without appropriate evidence to support such an assumption. A reasonable decision maker would have utilised the provisions of the Societies Act to obtain additional information instead of basing their decision on mere speculation, perception and



conjecture, especially in the context where they know that a negative decision would interfere with constitutional rights.

- 17.3 The Constitution of Botswana protects the rights of “every person” within Botswana. Public officials, when applying the law must protect the rights of individuals. The assertion that “the Constitution does not recognise homosexuals” is unfortunate, incorrect, unreasonable, irrational and *ultra vires* the Constitution. It is a bare assertion without appropriate evidence. There is simply no explicit reference in the Botswana Constitution to “homosexuals” and the Constitution itself is broad in application; applying to all individuals irrespective of sexual orientation.

#### **REASONS FOR THE REFUSAL TO REGISTER LEGABIBO**

18. The appellant argues that the Director and Minister’s reasons for the refusal of registration were unassailable and that the decision taken corresponded to that taken by a reasonable decision-maker.
19. Each of the reasons raised for refusing to register LEGABIBO are dealt with separately below. The respondents submit that each of these reasons are in themselves irrational and unreasonable and would justify the High Court setting them aside through judicial review. In addition, the respondents submit that the decision-making process not only took into account irrelevant considerations without any evidential basis for doing so, but also consciously violated the respondents’ constitutional rights and was irrational in that respect as well and *ultra vires* the Constitution.

#### **“Botswana’s Constitution does not recognise homosexuals”**

20. The appellant contends that the High Court's decision was incorrect in assuming that the respondents "*exist as a class of persons*" who are entitled to protection under sections 3 to 16 of the Constitution.<sup>5</sup>
21. Sexual orientation has been defined and understood universally to refer to "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or same gender or more than one gender*".<sup>6</sup>
22. There is no law in Botswana that prohibits anyone from being lesbian, gay or bisexual in their sexual orientation nor is there any law that permits the suspension, restriction, limitation or suppression of the fundamental constitutional rights of such individuals. Botswana's criminal law in this respect extends only to certain physical practices or sexual intercourse between persons of the same sex. For the purposes of sections 3 to 16 of the Constitution, 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.
23. In fact, the inclusion of sexual orientation in national laws and policies provides an indication that the Botswana government recognises the existence of individuals of different sexual orientation within our society and that they do not seek to discriminate against these individuals purely based on their sexual orientation.

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<sup>5</sup> See Notice of Grounds of Appeal at paras 3.1, 3.7 and 3.8.

<sup>6</sup> Preamble to the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity ("Yogyakarta Principles"). The Yogyakarta Principles are a set of principles relating to sexual orientation and gender identity, and are intended to state the international human rights law standards applicable to the abuse of the human rights of LGBTI people. The Principles were developed at a meeting of the International Commission of Jurists, the International Service for Human Rights and human rights experts from around the world at Gadjah Mada University on Java from 6 to 9 November 2006. Among the 29 signatories of the principles were Mary Robinson, Manfred Nowak, Martin Scheinin, Elizabeth Evatt, Philip Alston, Edwin Cameron, Asma Jahangir, Paul Hunnt, Sanji Mmasenono Monageng, Sunil Babu Pant, Stephen Whittle and Wan Yanhai.

24. In particular, Botswana's Employment Law (Cap 47:01) specifically provides in section 23 that an employer shall not terminate a contract of employment on the ground of the employee's sexual orientation.<sup>7</sup>
25. In addition, Botswana's *National Strategic Framework for HIV & AIDS 2010-2016* provides that "the national response upholds individual and human rights by promoting the dignity, non-discrimination and welfare of all people, whether infected or affected by HIV and AIDS and ensuring equal access to health and social support services regardless of race, creed, religious or political affiliation, sexual orientation or socio-economic status."<sup>8</sup>
26. In the case of *Eric Gitari v Non-Governmental Organisations Board and Others*, the High Court of Kenya dealt with the same set of facts as those before this Court. Article 36 of the Kenya Constitution provides that "every person has the right to freedom of association". The Court opined that it was "obvious" that "an individual human being, regardless of his or her gender or sexual orientation, is a 'person' for the purposes of the Constitution".<sup>9</sup> The Court held that "there can be no argument that the term 'every person' in Article 36 properly construed does not exclude homosexual persons."<sup>10</sup> The Court reasoned as follows:

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<sup>7</sup> 23. Restriction of grounds on which employers may terminate contracts of employment  
Notwithstanding anything contained in a contract of employment, an employer shall not terminate the contract of employment on the ground of-

(a) the employee's membership of a registered trade union or participation in any activities connected with a registered trade union outside working hours or, with that consent of the employer, within working hours;

(b) the employee seeking office as or acting or having acted in the capacity of an employees' representative;

(c) the employee making, in good faith, a complaint or participating in proceedings against the employer involving the alleged violation of any law;

(d) the employee's race, tribe, place of origin, social origin, marital status, gender, *sexual orientation*, colour, creed, health status or disability; or

(e) any other reason which does not affect the employee's ability to perform that employee's duties under the contract of employment.

<sup>8</sup> *The Second Botswana National Strategic Framework for HIV & AIDS 2010-2016*, National AIDS Coordinating Agency, 2009, at 18.

<sup>9</sup> *Eric Gitari v Non-Governmental Organisations Co-Ordination Board and Others* Petition No 440 of 2013 ("Gitari") at para 73.

<sup>10</sup> *Eric Gitari v Non-Governmental Organisations Co-Ordination Board and Others* Petition No 440 of 2013 ("Gitari") at para 76.

*“The word ‘person’ is defined in the Oxford Concise English Dictionary as ‘a human being regarded as an individual.’ Black’s Law Dictionary, 9<sup>th</sup> Edition, defines the term person as ‘a human being also termed natural person.’ The Constitution thus extends the definition of ‘person’ from only the natural, biological human being to include legal persons. Neither Article 36 nor the definition of ‘person’ in Article 260 creates difference classes of persons. There is nothing that indicates that the Constitution, when referring to ‘person’, intended to create different classes of persons in terms of Article 36 based on sexual orientation.”<sup>11</sup>*

27. The Court in *Gitari* opined that *“as a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings...however reprehensible we may find their sexual orientation, we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity”*.<sup>12</sup>
28. The Interpretation Act of Botswana (CAP 01:04) stipulates that a “person” in section 49 *“includes a body corporate and an unincorporated body as well as an individual”*. It is clear from the provisions of the Interpretation Act that the word “person” is defined broadly and it cannot be argued that there is somehow an implicit exclusion of a specific group of individuals from the term.<sup>13</sup>

### *Kanane v State*

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<sup>11</sup> *Eric Gitari v Non-Governmental Organisations Co-Ordination Board and Others* Petition No 440 of 2013 (“*Gitari*”) at para 75.

<sup>12</sup> *Eric Gitari v Non-Governmental Organisations Co-ordination Board and Others* (2015) eKLR at para 104.

<sup>13</sup> The ambit of the word “person” in the Interpretation Act was also discussed in *Kamanakao and Others v Attorney General and Another* (2002) AHRLR 35 (BwHC 2001). The Court held that the word “person” is used in its widest sense and includes groups of individuals formally organised or informally organised.

29. The appellant specifically contends that the High Court was bound by the Court of Appeal's decision in *Kanane v State*<sup>14</sup> and was incorrect in distinguishing it from the issue before the Court in this case.
30. To the contrary, the respondents submit that the High Court was correct in distinguishing this case from *Kanane*, which dealt with a very narrow issue of the constitutionality of sections 164 and 167 of the Penal Code. Those provisions only criminalise same-sex sexual acts, and while it might create a pernicious stigmatising effect against lesbian, gay and bisexual individuals, do not criminalise their existence or limit in any way their right to associate or enter into associations of their choice. The Penal Code provisions do not deprive lesbian, gay and bisexual individuals of protection as a class of persons entitled to protection under sections 3 to 16 of the Constitution of Botswana.
31. The High Court was correct in distinguishing advocacy for legislative reforms from the ambit of *Kanane*, since advocacy is not a crime.
32. The Court of Appeal's reference in *Kanane* to a class of persons applied specifically to the question whether the Penal Code provisions were constitutional and was not a broad determination of whether persons are excluded from the protective provisions of the Constitution because of their sexual orientation. Specifically, the Court repeatedly sought to limit its statements to the context of "homosexual practices" referred to in the Penal Code.

**"Possible prejudice or incompatibility with peace, welfare or good order"**

33. Section 7(2)(a) of the Act provides that the Registrar "*shall refuse to register*" where "*it appears to him that any of the objects of the society is, or is likely to be used for any unlawful purpose prejudicial to or incompatible with peace, welfare or good order in Botswana*".

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<sup>14</sup> 2003 (2) BLR 67 (CA).

34. The High Court held, we submit correctly so, that all the objectives of LEGABIBO are harmless and in fact promote good values such as the promotion of self-reliance and education of the general public on issues of human rights.
35. The objectives of LEGABIBO are aimed at protecting the human rights of lesbian, gay and bisexual individuals in Botswana, and to provide support and advocacy in connection with, amongst other things, welfare programmes relating to such persons. The aim of LEGABIBO was never intended to further or support criminality. The appellant's contention that LEGABIBO offends the provisions of the law and is contrary to "good order" is not supported by appropriate evidence and is entirely flawed.
36. The appellant contends that the Court erred in not finding that the society would run contrary to 'good order' in terms of section 7(2)(a) of the Societies Act.<sup>15</sup> The appellant has however provided no evidence for suggesting that LEGABIBO's objectives are, or are likely to be used for any unlawful purpose prejudicial to or incompatible with peace, welfare or good order in Botswana and reliance seems to be placed, quite mistakenly, on the incorrect assertion that the "Constitution does not recognise homosexuals".
37. One of the objectives of LEGABIBO is to "advocate and lobby for equal rights". We submit that even if the subject matter is unpopular within certain sections of society, there is nothing wrong or unlawful with having rich dialogue and engagement with government and participating in the democratic processes. Our society is not stagnant and our views, values and perceptions change and develop over time. Thus in a democratic society such as ours merely lobbying for a particular law to change cannot be a crime *per se*, and, in fact, forms the basis of our democratic society.

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<sup>15</sup> Notice and Grounds of Appeal at para 3.6.

38. The Uganda Court of Appeal in *Kivumbi v Attorney-General*, in dealing with the competing claims within society and the importance of establishing associations even when their opinions are controversial held that:

*"In every society there is always tension between those who desire to be free from annoyance and disorder on one hand to those who believe to have the freedom to bring to the attention of their fellow citizens matters which they consider important...The way therefore, any legal system strikes a balance between the above mentioned competing interests is an indication of the attitude of that society towards the value it attaches to different sorts of freedom. A society especially a democratic one should be able to tolerate a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression."*<sup>16</sup>

39. The mere fact that the objectives and opinions of LEGABIBO might be unpopular and controversial is not enough to limit their right to freely associate with like-minded individuals. In this regard the Uganda Court of Appeal in *Kivumbi v Attorney General* noted that:

*"A society especially a democratic one should be able to tolerate a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression..."*<sup>17</sup>

40. The Supreme Court of Uganda in *Charles Onyango Obbo and Another v Attorney General*, held that the Constitution allows for derogation or limitation of rights in the exceptional circumstances where the enjoyment of one's right prejudices the personal rights of others or the public interest:

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<sup>16</sup> *Kivumbi v Attorney General* [2008] UGCC 4 at page 10.

<sup>17</sup> *Kivumbi v Attorney General* [2008] UGCC 4 at page 10.

*“Those are grave circumstances presenting actual mischief or danger to ‘the rights of others’ or to ‘the public interest’. In those exceptional circumstances, the Constitution allows for derogation or limitation in order to avert or remove real mischief or danger. The clause does not expressly or implicitly extend to a third scenario, where the enjoyment of one’s right is ‘likely to cause prejudice’. I do not understand the clause to permit derogation of guaranteed rights or limitation of their enjoyment, in order to avert speculative mischief or danger to public interest.”<sup>18</sup>*

### **“Popularisation of acts criminalised”**

41. The appellant argues that “a reasonable decision maker similarly positioned may conclude that the registration and consequent activities of the LEGABIBO society may lead to a popularisation of acts criminalised at section 164 and 167 of the Penal Code” and that a “reasonable decision maker may find the registration of the society to be repugnant to the provisions of these written laws”.<sup>19</sup>
42. It is trite law that decisions made by public officials should be based on evidence and not on perceptions, speculation and conjecture.<sup>20</sup> The appellant has failed to provide any reason for its assertions that the Director and Minister based their decision on evidence that the registration would lead to a popularisation of criminalised acts.
43. We submit that to limit the respondents’ right to freely associate based on mere conjecture or speculation that it will lead to “popularisation of acts criminalised” is simply not enough, is irrational and an unjustifiable infringement of their right to freedom of association. Such determinations made without any evidentiary basis have been rejected

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<sup>18</sup> *Obbo and Another v Attorney General* [2004] 1 EA 265 (SCU), page 16.

<sup>19</sup> Notice and Grounds of Appeal at para 3.5.

<sup>20</sup> *Good v Attorney General* (2) 2005 (2) BLR 337 (CA). Also see *Casswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733.



by courts as irrational and misplaced in a democratic society, which has as its founding principles notions of tolerance, diversity and pluralism.<sup>21</sup>

44. Indeed this Honourable Court in *Good v The Attorney-General* per Honourable Tebbut JP unequivocally held that:

*“It would be irresponsible in the highest degree for this court to make findings based on speculative submissions and on perceptions which may or may not be held by the public without any reliable factual material to support them”.*<sup>22</sup>

45. The Supreme Court of Appeal of South Africa in *Dabelstein and Others v Lane and Fey NNO* held that:

*“What is clear is that the “evidence” on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance”.*<sup>23</sup>

46. The Court in *Casswell v Powell Duffryn Associated Collieries* said the following:

*“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive approved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”*<sup>24</sup>

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<sup>21</sup> *United Macedonian Organisation Ilinden and others v Bulgaria (no 2)* ECHR 34960/04 (8 March 2012) at para 33(b); *Zhechev v Bulgaria* ECHR 57045/00 (21 September 2007); *Ournio Toxo and others v Greece* ECHR 74989/01 (20 October 2005) at para 36-37; *Tsonev v Bulgaria* ECHR 45963/99 (13 April 2006).

<sup>22</sup> *Good v Attorney General* (2) 2005 (2) BLR 337 (CA) at 9.

<sup>23</sup> *Dabelstein and Others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) at para 1227H.

<sup>24</sup> *Casswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733.

47. The fact that certain acts are criminalised is irrelevant to the issue of the rights of lesbian, gay and bisexual persons to associate freely with others based on their shared identities, interests, values and concerns. Freedom of association is a right guaranteed in the Constitution of Botswana irrespective of a person's sexual orientation.

48. The High Court's decision is a nuanced one, which understands the dangers in attributing criminal conduct broadly to a class of persons based on their sexual orientation – something the the appellant attempts to do.

49. A parallel may also be drawn with the situation in Uganda with regard to sexual orientation and the commission of same-sex sexual acts. In the case of *Kasha Jacqueline and Others v Rolling Stone Limited and Another* the High Court of Uganda held that:

*“Section 145 of the Penal Code Act [does not] render every person who is gay a criminal under that section of the Penal Code Act. The scope of section 145 is narrower than gayism generally. One has to commit an act prohibited under section 145 in order to be regarded as a criminal.”<sup>25</sup>*

50. Similarly, the High Court of Kenya in *Gitari*, held that:

*“The Penal Code does not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts ‘against the order of nature’. That the State does not set out to prosecute people who confess to be lesbians and homosexuals in this country is a clear manifestation that such sexual orientation is not necessarily criminalised. What is deemed to be criminal under the above provision of the Penal Code is certain sexual conduct ‘against the order of nature’...*

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<sup>25</sup> *Kasha Jacqueline and Others v Rolling Stone Limited and Another* High Court of Uganda, No 163 of 2010 at 9 (emphasis added).

*More importantly, the Penal Code does not criminalise the right of association of people based on their sexual orientation, and does not contain any provision that limits the freedom of association of persons based on their sexual orientation.*<sup>26</sup>

51. In *Gay Alliance of Students v Matthews*<sup>27</sup> an appellate court in the United States considered the extent to which the Virginia Commonwealth University's denial of registration to a lesbian, gay, bisexual and transgender student group violated their right to freedom of association.
52. In that case, the court made a distinction between advocacy, which is entitled to full protection, and action, which might not be. Although same-sex sexual activity was illegal in the State at the time, the court held that the Alliance's purpose involved only advocacy, which was protected by the right to freedom of association. The court noted that "Virginia law does not make it a crime to be a homosexual".<sup>28</sup>
53. Other US courts have reached similar conclusions. For example, in *Gay Student Services v Texas A&M University*, the Fifth Circuit Court of Appeals stated:

*"As to [the University's] asserted interest in preventing expression likely to 'incite, promote, and result' in then-illegal homosexual activity, we emphasise that while Texas law may prohibit certain homosexual practices, no Texas law makes it a crime to be homosexual. Furthermore there is no evidence that any illegal activity has taken places as a result of GSS's existence in the past, nor is there any evidence that GSS is an organisation devoted to advocacy and incitement of imminent illegal, specifically proscribed homosexual activity."*<sup>29</sup>

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<sup>26</sup> *Gitari* at paras 114-115.

<sup>27</sup> 544 F.2d 162 (4th Cir. 1976).

<sup>28</sup> The Court held that "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." At 166.

<sup>29</sup> 737 F.2d 1317, 1329. See also *Gay Students Organisation v Bonner* 509 F.2d 652.

54. In the Zambian case of *People v Paul Kasonkomona*, the trial court had to consider whether the accused's discussion on television about gay rights amounted to soliciting for immoral purposes. The Trial Magistrate concluded:

*"From the evidence on the record there is no element of persistent importunation on the part of the accused. The fact accused was speaking on a topic that was repulsive to many people that in itself does not mean he was soliciting under the ambit of the Section in question. There is no evidence that the accused was enticing or persuading anyone to engage in immoral conduct."*

*"I find that indeed the topic the accused was discussing was immoral to the extent that sexual intercourse with the same sex is prohibited. I mean homosexuality is immoral in Zambia, but to discuss homosexuality is something else ... from the evidence on the record the accused was not engaging anyone to practice homosexuality. What I heard was that he was advocating for the rights of those already practicing it to be protected. ... It is through debate that people share information and ideas whether good or bad."<sup>30</sup>*

The State appealed Kasonkomona's acquittal and the Lusaka High Court affirmed the trial court's reasoning and finding.<sup>31</sup>

55. Notably, this Honourable Court, in addressing the issue of the constitutionality of same-sex sexual acts, determined that gay men and lesbians were not hindered by sections of the Penal Code that criminalised same-sex sexual conduct from associating with each other. Justice Tebbutt stated unequivocally that *"There is nothing to prevent them still associating, subject to the law."*

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<sup>30</sup> *People v Paul Kasonkomona* CR No. 9/04/13 (SubCT) "*Kasonkomona*"

<sup>31</sup> "*Kasonkomona*" at 10

## THE REFUSAL TO REGISTER LEGABIBO VIOLATES SECTION 3 OF THE CONSTITUTION

56. Section 3 of the Botswana Constitution provides that “every person” in Botswana, irrespective of race, place of origin, political opinion, colour, creed or sex, is entitled to the fundamental rights and freedoms of the individual, including liberty, protection of the law, freedom of expression and of assembly and association.<sup>32</sup>
57. The High Court has held, we submit correctly, that to hold that gay people are excluded from the enjoyment of the fundamental rights and freedoms of “every person” would amount to the cutting down on the scope of such rights by reading into section 3 implicit restrictions contrary to accepted norms of constitutional interpretation and the intention of the framers of the Constitution.<sup>33</sup>
58. The respondents submit that no person is excluded from the protective provisions of the Constitution based on their sexual orientation and that to refuse lesbians, gays and bisexuals the opportunity to form an association, while allowing other groups that right, denies them equal protection of the law. This is an affront on the Constitution of Botswana.

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<sup>32</sup> “3. Fundamental rights and freedoms of the individual

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, 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 provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

<sup>33</sup> See High Court Judgment at paragraph 32.

59. This Honourable Court in the case of *Attorney General v Dow* has held that section 3 is an autonomous section, which confers the right to equal protection of the law on the individual.<sup>34</sup>

60. In the *Dow* case, this Honourable Court found the phrase “every person” in section 3 of the Constitution to mean all people within Botswana’s jurisdiction.<sup>35</sup> To assist in answering the Court’s rhetorical question about what the phrase “every person” means, the Court posited:

*“Do they (children) have the same rights and freedoms as adults? What about aliens? Can they claim the same rights and freedoms as citizens? The answer to both questions is, while under the jurisdiction of the State of Botswana, yes ... section 3 provides, as I think, equal treatment to all save in so far as derogated from or limited by other sections.”*<sup>36</sup>

61. The appellant’s contention that the rights of individuals who are gay, lesbian or bisexual in sexual orientation are curtailed because they do not fall within the definition of “persons” within the meaning of section 3 is untenable. The appellant fails to reference any section within the Constitution that specifically addresses and limits the rights of persons based on their sexual orientation.

62. The High Court in *Kamanakao v Attorney General* has held that “protection of law” was more than protection by law enforcement but mandated that laws must treat all people equally.<sup>37</sup>

63. In particular, Botswana has always striven to protect, maintain and promote within the ethos and social environment of the country, human rights and values and the reflection of this is mirrored in section 3 of the

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<sup>34</sup> 1992 BLR at 133.

<sup>35</sup> *Attorney General v Dow* 1992 BLR 119 (CA), 133 (“Under the section, every person is entitled to the stated fundamental rights and freedoms”).

<sup>36</sup> *Attorney General v Dow* 1992 BLR 135 (CA).

<sup>37</sup> (2002) AHRLR 35 (Bw HC 2001) at para 20. See also *Attorney General v Dow* 1992 BLR at 135H.

Constitution.<sup>38</sup> Moreover, comparative jurisprudence and international law standards also suggest a persuasive approach and guidance to the question.

64. Indeed Botswana is signatory to various human rights instruments in which we undertake to apply international human rights standards in our domestic sphere. Botswana's commitment and respect for international human rights norms and standards is recognised by the country's signature to treaties and conventions such as the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR).
65. The universal importance of the right to equal protection of the law is clear from its inclusion as a substantive right in the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR).
66. Article 26 of the ICCPR provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>39</sup>

66.1 The Human Rights Committee (HRC) has held that -

*"Article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations*

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<sup>38</sup> *Good v The Attorney General* (2) 2005 (2) BLR 337.

<sup>39</sup> Article 16 of the ICCPR further provides that "everyone shall have the right to recognition everywhere as a person before the law."

*imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.*"<sup>40</sup>

66.2 In the case of *Toonen v Australia*<sup>41</sup> the HRC held that reference to 'sex' in article 26 of the ICCPR should be read to include 'sexual orientation'.<sup>42</sup>

67. Article 3 of the African Charter on Human and Peoples' Rights (ACHPR) provides that every individual shall be equal before the law and shall be entitled to equal protection of the law.

67.1 The African Commission has interpreted article 3 of the ACHPR to mean that no person or class of persons shall be denied the same protection of the laws, which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property, and in the pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under law.<sup>43</sup>

67.2 The African Commission has further held in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe*<sup>44</sup> that article 3 "guarantees fair and just treatment of individuals within the legal system of a given country." It has clarified that "the aim of [article 3] is to ensure equality of

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<sup>40</sup> General Comment 18 to the Human Rights Committee, HRI/GEN/1/Rev.9, 10 November 1989, at para 12.

<sup>41</sup> *Toonen v Australia* ICCPR Communication 488/1992, CCPR/C/50/D/488/1992 (4 April 1994).

<sup>42</sup> *Id* at para 8.7. In that case, the HRC held that the Tasmanian Criminal Codes, which criminalised consensual adult same-sex sexual conduct is discriminatory. *Id* at para 8.2.

<sup>43</sup> *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa*, Comm.294/04 (3 April 2009) at para 99 [quoting *Brown v Board of Education of Topeka* 347 US 483 (1954)].

<sup>44</sup> *Id.*



treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or *sexual orientation*"<sup>45</sup> (our emphasis).

- 67.3 Significantly, the African Commission, recognising that every individual is entitled to equal protection of the law under Article 3 of the Charter, passed a resolution addressing States' failure to respond to violence perpetrated against persons based on their actual or perceived sexual orientation or gender identity.<sup>46</sup> The resolution called on "*State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities*".
68. The refusal to register the proposed society, LEGABIBO, is a limitation of the respondents' right to freedom of association. This limitation has not been justified by the Director and the in accordance with the requirements of the Constitution.
69. In other jurisdictions, courts have held that the right to equal protection of the law would be violated where an organisation is denied registration simply because of moral disapproval.
70. The Philippines Supreme Court, for instance, has held that the refusal to register an organisation which promotes the rights of lesbian, gay and bi-sexual persons as a party for the elections, is contrary to the equal protection clause of the Philippines Constitution, noting that "*our democracy precludes using the religious or moral views of one part of the*

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<sup>45</sup> *Id.*

<sup>46</sup> Resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity, Resolution 275, 55<sup>th</sup> Ordinary Meeting of the African Commission on Human and Peoples' Rights, 28 April – 12 May 2014.

*community to exclude from consideration the values of other members of the community.*<sup>47</sup>

70.1 In that case, the court held that *“equal protection of the law”* means *“that laws of general application should apply with equal force to lesbian, gay, bisexual and transgender persons, and they deserve to participate in the party-list system on the same basis as other marginalised and under-represented sectors.”*

70.2 The court further held that *“the asserted state interest here – that is, moral disapproval of an unpopular minority – is not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause.”*

71. The right to equal protection of the law in section 3 of the Botswana Constitution may only be limited on the grounds of public interest or to protect the rights and freedoms of others.

72. The government not only bears the onus of showing why the limitation is necessary in a constitutional democracy, but is also constitutionally responsible for removing obstacles to the effective realisation of the respondents’ right to equal protection of the law.

73. We submit that the appellant has not demonstrated on what basis they were entitled to treat the respondents’ application for registration differently from that of other organisations. They have not referred to a legitimate public interest ground nor explained how the registration of the respondents’ organisation would affect the rights and freedoms of others. We accordingly submit that the Director and the Minister have not made out a case for a legitimate limitation of the right to equal protection of the law.

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<sup>47</sup> *Ang Ladlad LGBT Party v Commission on Elections*, GR No 190582, 8 April 2010

## THE REFUSAL TO REGISTER LEGABIBO VIOLATES SECTION 13 OF THE CONSTITUTION

74. Section 13 of the Botswana Constitution provides for the protection of freedom of assembly and association:

*“13(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.*”

75. The right to freedom association is also expressly recognised in regional instruments and international covenants to which Botswana is a party.

76. Article 10 of the ACHPR provides that every individual shall have the right to free association provided that he abides by the law. Article 11 of the ACHPR provides that “every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular, that enacted in the interest of national security, safety, health, ethics and rights and freedoms of others.”

77. The African Commission has recognised in its Resolution on Rights of Freedom of Association that “competent authorities should not enact provisions which would limit the exercise of this freedom” and “should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards.”<sup>48</sup>

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<sup>48</sup> *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* 2000 AHRLR 186 (ACHPR), at para 15; *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR); *Law Office of Ghazi Suleiman v Sudan (II)* 2003 AHRLR 144 (ACHPR).

78. The right to freedom of association is an essential component of our democracy, providing individuals with invaluable opportunities to, *inter alia*, express their political opinions and form social bonds with others in an association. It is the right that safeguards against banning political parties and it has also been used to fight persecution of people on the basis of political opinions and convictions.<sup>49</sup>
79. Indeed in *United Macedonian Organisation Ilinden and Others v Bulgaria*, the European Court of Human Rights held that seemingly shocking or radical political and social ideas were protected through the exercise of the right of association.<sup>50</sup>
80. Similarly, though the views and objectives of LEGABIBO might be unpopular to certain persons outside the association, this on its own is not sufficient to unjustifiably limit and interfere with their right to freely associate, lobby and advocate.
81. Notably this Honourable Court in *Kanane* suggested that the impugned provisions of the Penal Code that criminalised same-sex sexual conduct did not prevent people from associating with each other.
82. Indeed, we submit that the High Court correctly held that, because homosexuality is not a crime, denying people the right to register a society for the purposes of lawfully carrying out advocacy is a violation of their constitutional right to freedom of association, expression and assembly.
83. We further submit, as we have more fully set out above, that the Director and Minister's reliance on the provision of the Penal Code to limit the respondents' freedom of association is untenable, unreasonable and irrational. The decision was misdirected in terms of the law, was

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<sup>49</sup> See also *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) and *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR).

<sup>50</sup> ECHR 34960/04, ECHR (18 October 2011), at para 33.

unsubstantiated by appropriate evidence and based on mere speculation. In doing so, the decision unjustifiably interfered with the respondents' right to freely associate, in violation of section 13 of the Constitution of Botswana.

### **Limitation analysis**

84. The right to freedom of association is not absolute and can be limited. The Botswana Constitution allows for a limitation of the right to freedom of association on the basis of "public morality" provided that such limitation is "reasonably justifiable in a democratic society":

*"13(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-*

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;*
- (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;... and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

### **"Reasonably justifiable in a democratic society"**

85. The standard against which every limitation on the enjoyment of fundamental rights should be measured, is an objective one.<sup>51</sup>
86. The Canadian Charter of Rights for example also permits reasonable limitations of Charter rights "as can be demonstrably justified in a free and democratic society". In the case of *R v Oakes*<sup>52</sup> it was held that in order to meet this requirement a limitation of a Charter right had to be

<sup>51</sup> *Kiyumbi v Attorney General* [2008] UGCC 4 at page 9.

<sup>52</sup> *R v Oakes* [1986] 1 SCR 103.

directed to the achievement of an objective of sufficient importance to warrant the limitation of the right in question, and that there had also to be proportionality between the limitation and such objective. The Court held that “the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation”.<sup>53</sup>

87. In a frequently-cited passage from *R v Oakes*, Dickson CJC described the components of proportionality as follows:

*“There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’.”*<sup>54</sup>

### **Comparative case law**

88. The High Court of Kenya in *Eric Gitari v Non-Governmental Organisations Co-ordination Board and Others* was also called upon to consider a similar question as in the instant case: whether the decision of the Board to refuse registration of gay, bisexual, transgender, intersex and queer groups amounted to a violation of their right to freedom of association, non-discrimination and equality before the law. In answering

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<sup>53</sup> *Id* at p 105D, 136J. See also *Lyomaki and Others v Attorney General* [2005] 2 EA 127 on the principle that once a limitation of a right is demonstrated, the onus is on the party limiting such right to justify its conduct.

<sup>54</sup> *Id* at 139C-F.

the questions in the affirmative the court made the following observations:

*"In a representative democracy, and by the very act of adopting and accepting the Constitution, the State is restricted from determining which convictions and moral judgments are tolerable. The Constitution and the right to associate are not selective. The right to associate is a right that is guaranteed to, and applies, to everyone. As submitted by the petitioner, it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups. If only people with views that are popular are allowed to associate with others, then the room within which to have a rich dialogue and disagree with government and others in society would be thereby limited.*

*In addition, the Constitution and the right of freedom of association applies regardless of the popularity of the objects of the association. At the core of constitutional supremacy is that the Constitution reigns supreme, regardless of popular views.<sup>55</sup>*

89. The Argentina Supreme Court in *Asociacion Lucha por la Identidad Travesti-Transsexual v Inspeccion General de Justicia*<sup>56</sup> considered the denial of registration to an association of transgender individuals.

89.1 The Court noted that the right to freedom of association was fundamental for the protection of the right to freedom of expression and human dignity. Limitations of this right risked isolating certain social groups, especially those that had difficulties in being effectively integrated into society.

89.2 The Court held that the principles of pluralism and tolerance implied that freedom of association should always be

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<sup>55</sup> *Gitari* at paras 8, 88-89.

<sup>56</sup> 21 November 2006.

considered useful because it increased respect for others' ideas, citizens' participation in the democratic system and social cohesion. The Court held that it was wrong to understand "common good" to mean what the majority considered good and it was impossible to assert that an association that aimed to deal with prejudice was not pursuing the common good.

90. In the Philippines Supreme Court case of *Ang Ladlad LGBT Party v Commission on Elections*<sup>57</sup> the Court considered the refusal to register a lesbian, gay, bisexual and transgender organisation as a party for the elections.

90.1 The Court noted that the respondent had failed to explain what societal ills are sought to be prevented or why it is of the view that admission of the organisation as a party would be so harmful as to irreparably damage the moral fabric of society – *"bare invocation of morality will not remove an issue from our scrutiny... As such, we hold that moral disapproval, without more, is not a sufficient governmental interest to justify exclusion of homosexuals from participation in the party-list system."*

91. A Turkish court in *The People v Siyah Pembe Ucgen Izmir Association ("Black Pink Triangle")*<sup>58</sup> considered the case of a lesbian, gay, bisexual and transgender organisation that had been refused registration. The Turkish Constitution provided for similar limitations to the freedom of association as those provided for in the Botswana Constitution.

91.1 In its judgment, the Court referred to the rights to freedom of association, freedom from discrimination and equality before the law concurrently. The court held that it was not possible to characterise as immoral the fact that someone had a particular

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<sup>57</sup> GR No 190582 (8 April 2010).

<sup>58</sup> Sixth Court of First Instance Izmir (30 April 2010).



“involuntary” sexual orientation, or the use of words such as lesbian, gay, bisexual or transsexual; nor was being lesbian, gay, bisexual or transsexual prohibited under national law. Therefore, the use of such terms in the organisation’s constitution could not be seen as immoral or contrary to law. The court held that lesbian, gay, bisexual and transgender individuals had the same right to associate as that enjoyed by all others in society.

*European Court of Human Rights case law*

92. Article 11 of the European Convention on Human Rights protects the right to freedom of assembly and association subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society”. Article 11 contains similar limitations to those in section 13 of the Botswana Constitution, including the protection of morals. It is accordingly useful to take note of the comparative case law emanating from the European Court of Human Rights (ECHR) on its interpretation of the right to freedom of association.

93. The case of *Baczkowski and Others v Poland*<sup>59</sup> is particularly relevant to the present matter. The case concerned Polish authorities’ refusal to allow a march relating to discrimination against minority groups including lesbian, gay and bisexual persons. The court held that this refusal amounted to a violation of article 11.

94. In *Baczkowski*, the ECHR reflected on the importance of the right to freedom of assembly and association in democracies:

94.1 *“For pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic,*

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<sup>59</sup> ECHR 1543/06 (3 May 2007).

*literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.*"<sup>60</sup>

94.2 *"Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of article 11 nor with that of the Convention in general. There may thus be positive obligations to secure effective enjoyment of these freedoms. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation."*<sup>61</sup>

95. The ECHR has repeatedly held that a refusal by the domestic authorities to grant legal entity status to an association of individuals amounts to an interference with the applicants' exercise of their right to freedom of association.<sup>62</sup>

96. The ECHR has held that *"the State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be*

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<sup>60</sup> *Id* at para 62. See also *United Macedonian Organisation Ilinden and others v Bulgaria (no 2)* ECHR 34960/04 (8 March 2012), at para 33(b); *Zhechev v Bulgaria* ECHR 57045/00 (21 September 2007).

<sup>61</sup> ECHR 1543/06 (3 May 2007), at para 64. See also *Ournio Toxo and others v Greece* ECHR 74989/01 (20 October 2005), at para 36-37; *Tsonev v Bulgaria* ECHR 45963/99 (13 April 2006).

<sup>62</sup> *Koretskyy and others v Ukraine* ECHR 40269/02 (3 April 2008), at paras 39-42. The court held that the "ability to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning". *Id* at para 38.

*construed strictly and only convincing and compelling reasons can justify restrictions on that freedom*".<sup>63</sup>

97. The test used by the ECHR to determine whether a limitation of the right to association was justified includes consideration of the following:<sup>64</sup> 1) Was the violation prescribed by law? 2) Did the violation pursue a legitimate government aim? 3) Was the violation necessary in a democratic society - i.e. was there a pressing social need for the violation and was the measure proportional?
98. The ECHR has held that the rights to freedom of expression and association are closely linked and authorities cannot refuse to register an association simply because it does not like the statements that it made or is likely to make.<sup>65</sup>
99. In *Zhechev v Bulgaria*, the ECHR held that an organisation may campaign for a change in the legal and constitutional structures of the State if the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles.<sup>66</sup> The Court in *Zhechev*, further held that the aims of the association were not a sufficient ground on which to refuse its registration – there was no indication that the association would use violence or undemocratic means to achieve its aims and in any event the organisation didn't have much public influence.<sup>67</sup>
100. The ECHR has also considered a case in which Russian authorities had banned a gay pride march. In *Alekseyev v Russia*<sup>68</sup> the ECHR noted that

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<sup>63</sup> *Koretskyy* ECHR 40269/02, at para 51; *Zhechev*, ECHR 57045/00, at para 43; *Association of Citizens Radko & Paunkovski v Former Yugoslav Republic of Macedonia*, ECHR 74651/01 (15 January 2009). See also *Tsonev v Bulgaria* ECHR 45963/99, at para 46 (holding that "exceptions to freedom of association must be narrowly interpreted. Their enumeration therefor is strictly exhaustive and their definition is necessarily restrictive").

<sup>64</sup> *Koretskyy* ECHR, at paras 39-42.

<sup>65</sup> *Zhechev* ECHR 57045/00.

<sup>66</sup> *Zhechev* ECHR 57045/00, at paras 47-48.

<sup>67</sup> *Id* at paras 49-50.

<sup>68</sup> ECHR 4916/07; 25924/08; 14599/09 (21 October 2010).

the intention of the march was to promote human rights and freedoms and to call for tolerance towards sexual minorities. There was no suggestion that participants would exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views. The Court held that:

*"There is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or 'vulnerable adults'. On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily. This was exactly the kind of debate that the applicant in the present case attempted to launch, and it could not be replaced by the officials spontaneously expressing uninformed views which they considered popular. In the circumstances of the present case the Court cannot but conclude that the authorities' decision to ban the events in question was not based on an acceptable assessment of the relevant facts."*<sup>69</sup>

101. The ECHR has interpreted the term "necessary in a democratic society" to imply the existence of a "pressing social need", which would include questioning whether there was an "imminent risk to society". When considering the meaning of "democratic society" it held:

*"Referring to the hallmarks of a 'democratic society', the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual*

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<sup>69</sup> *Id* at para 86.

*interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair treatment of minorities and avoids any abuse of a dominant position.”<sup>70</sup>*

102. We submit that the core objectives of LEGABIBO are the protection of human rights, and in particular, the human rights of persons who are gay, lesbian and bisexual. The objective is not to further criminality. There is no legislation that limits their right to freedom of association. Thus, the refusal to register LEGABIBO is not reasonably justifiable in a democratic society and a violation of their right to freedom of association.
103. We submit that LEGABIBO’s right to conduct advocacy and lobbying is also protected under the right to freedom of association and that the denial of registration is too sweeping a measure to address any concerns the State might have with the organisation. In fact, one of the ways in which to address the issues that the State might have is through fair and public debate and engagements instead of unjustifiably limiting the rights of persons to conduct and participate in such debates.
104. We point out that the State bears the onus of showing why a limitation is justifiable.<sup>71</sup> They have provided no legitimate justification for violation of the respondents’ right to freedom of association and have brought no evidence of substantial hardship to the public interest. In fact, the Constitution of Botswana reasonably obliges the State to be tolerant of vulnerable individuals.

## **THE REFUSAL TO REGISTER LEGABIBO VIOLATES SECTION 12 OF THE CONSTITUTION**

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<sup>70</sup> *Partidul Comunistilor (Nepoceristi) and Ungureanu v Romania* ECHR 46626/99 (3 February 2005); *Tsonev* ECHR 45963/99, at para 70.

<sup>71</sup> See *National Media Group Limited v Attorney General* [2007] 1 EA 261 (HCK).

105. We submit that the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO violates section 12 of the Constitution of Botswana in that its effect is to deny the respondents the freedom to express their ideas in an organised manner.

106. The right to freedom of expression is protected by section 12 of the Botswana Constitution which provides as follows:

*“12(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.”*

107. Section 12 is similar to article 19 of the International Covenant on Civil and Political Rights, which concerns the right to freedom of opinion and expression.<sup>72</sup>

108. The Human Rights Committee (HRC) in General Comment 34 elaborates on the content of this right.<sup>73</sup> The HRC notes that freedom of opinion and expression are indispensable conditions for the full development of the person and are essential for any society. The right constitutes the foundation stone for every free and democratic society and is “a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and

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<sup>72</sup> “19. (1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.”

<sup>73</sup> General Comment 34, Human Rights Committee, CCPR/C/GC/34, 12 September 2011.

protection of human rights”.<sup>74</sup> Freedom of expression is integral to the enjoyment of the right to freedom of association and extends to expression that may be regarded as “deeply offensive”.<sup>75</sup>

109. Article 9(2) of the African Charter provides that “every individual shall have the right to express and disseminate his opinions within the law”.

109.1. The African Commission on Human and Peoples’ Rights, in the case of *Constitutional Rights Project and Others v Nigeria*<sup>76</sup>, held that “freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and participation in the conduct of the public affairs of his country. Under the African Charter, this right comprises the right to receive information and express opinions”.<sup>77</sup>

109.2 In the case of *Law Office of Ghazi Suleiman v Sudan (II)*<sup>78</sup> the African Commission emphasised the right to freedom of expression as a cornerstone of democracy. Citing the Inter-American Court of Human Rights, the African Commission noted that “when an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to ‘receive’ information and ideas”.<sup>79</sup>

109.3 The African Commission’s *Declaration of Principles on Freedom of Expression in Africa* (2002) emphasises that freedom of expression is a fundamental and inalienable human right and an indispensable component of democracy:

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<sup>74</sup> *Id* at para 3.

<sup>75</sup> *Id* at para 11.

<sup>76</sup> 2000 AHRLR 227 (ACHPR).

<sup>77</sup> *Id* at para 26.

<sup>78</sup> 2003 AHRLR 144 (ACHPR).

<sup>79</sup> *Id* at para 50.

*“Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination. No one shall be subject to arbitrary interference with his or her freedom of expression... Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.”*<sup>80</sup>

110. The importance of this right and its interconnection with other rights was very neatly summarized by the Uganda Court of Appeal in *Kivumbi v Attorney General* where the Court held that:

*“The fundamental right of freedom of expression is closely related to freedom of religion, belief and opinion, the right to dignity, the right to freedom of association and the right to peaceful assembly etc. These rights are inherent and not granted by the State and it is the duty of all Government agencies who include the police to respect, promote and uphold these rights”.*<sup>81</sup>

111. In the Canadian Supreme Court case of *R v Zundel* stated:

*“The guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority’s perception of ‘truth’ or ‘public interest’ from smothering the minority’s perception. The view of the majority has no need for constitutional protection; it is tolerated in any event. ... Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection.”*<sup>82</sup>

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<sup>80</sup> African Commission “Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa,” October 2002.

<sup>81</sup> [2008] UGCC 4, at page 10. See also *Gitari* at para 84.

<sup>82</sup> (1992) 10 (CRR) (2d) 193 (Can SC) per McLachlin CJ.



## Limitation analysis

112. Section 12 of the Botswana Constitution allows for limitations of the right provided such restrictions are provided for in law and are reasonably justifiable in a democratic society.<sup>83</sup> Article 19 of the ICCPR allows for similar limitations of the right.
113. In its deliberations on justifiable limitations to the right to freedom of expression, the HRC has held that any restrictions on the exercise of freedom of expression “may not put in jeopardy the right itself”<sup>84</sup>; “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly” and “may not confer unfettered discretion for the restrictions of freedom of expression on those charged with its execution”.<sup>85</sup>
114. Regarding any limitation of the right to freedom of expression on the ground of public health or morals, the HRC has emphasised caution: “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition” and “any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination”.<sup>86</sup>
115. The HRC has interpreted the limitations in article 19 of the ICCPR to mean that restrictions of the right to freedom of expression must be for a necessary legitimate purpose;<sup>87</sup> must not be overbroad;<sup>88</sup> and must conform to the principle of proportionality. The requirement of

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<sup>83</sup> “12. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-  
(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; ...  
and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

<sup>84</sup> General Comment 34, Human Rights Committee, CCPR/C/GC/34, 12 September 2011, at para 12.

<sup>85</sup> *Id* at para 25.

<sup>86</sup> *Id* at para 32.

<sup>87</sup> *Id* at para 33.

<sup>88</sup> *Id* at para 34.

proportionality includes that the restrictions must be appropriate to achieve their protective function; must be the least intrusive instrument amongst those which might achieve their protective function and must be proportionate to the interest to be protected.<sup>89</sup>

116. The HRC has held in General Comment 34 that “the principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”.<sup>90</sup> Thus, when an administrative decision restricts the right to freedom of expression, the decision-maker “must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”.<sup>91</sup>

117. These principles were confirmed in the case of *Fedotova v the Russian Federation*.<sup>92</sup> In that case, a lesbian activist was fined under an administrative law which specifically prohibits “public actions aimed at propaganda of homosexuality”. Fedotova displayed posters that declared “homosexuality is normal” and “I am proud of my homosexuality” near a secondary school building. She stated that her aim was to promote tolerance towards persons whose sexual orientation is gay, lesbian or bisexual. Both parties admitted that the conviction had amounted to a restriction of Fedotova’s right to freedom of expression. The HRC held that the State failed to demonstrate why it was necessary for one of the legitimate purposes of article 19(3) to restrict Fedotova’s right to freedom of expression.

118. Part of the proportionality assessment is determining whether the harm suffered as a result of the exercise of freedom of expression is sufficiently serious to limit the important right of freedom of expression. In

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<sup>89</sup> *Id* at para 34.

<sup>90</sup> *Id* at para 34.

<sup>91</sup> *Id* at para 35.

<sup>92</sup> UN Human Rights Committee, Communication No. 1932/2010 (31 October 2012).

*Chimakure v Attorney General of Zimbabwe*, the Zimbabwe Constitutional Court held that only serious harm can lead to a limitation of the right: “*The exercise of the right to freedom of expression is not protected because it is harmless. It is protected despite the harm it may cause.*”<sup>93</sup>

118.1 Malaba DCJ went on to say that the limitation “*must be a response to the effects of direct and proximate harm or likelihood of harm to the public interest.*”<sup>94</sup>

119. The Ugandan Supreme Court also emphasised that only real damage or harm can justify a limitation:

“*The Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in section 20(2)(a) of the Constitution.*”<sup>95</sup>

120. The question of whether there is a rational and proportional connection between the purpose of the limitation and the limitation itself is closely linked to the last question, namely whether the limitation is “reasonably justifiable.”

121. The requirement that the law limiting the right must nevertheless be “reasonably justifiable in a democratic society” in effect limits any of the allowable limitations of rights. This characteristic was identified by Mulenga JSC in the Ugandan Supreme Court in *Obbo v Attorney General*:<sup>96</sup>

“*In addition, they provided in that clause a yardstick, by which to gauge any limitation on the rights in defence of public interest. That yardstick is*

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<sup>93</sup> *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 57.

<sup>94</sup> *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 57, 54.

<sup>95</sup> *Obbo and another v Attorney General* [2004] 1 EA 265 (SCU), 295.

<sup>96</sup> *Obbo and another v Attorney General* [2004] 1 EA 265 (SCU).

*that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as 'a limitation upon the limitation'. The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society."*<sup>97</sup>

122. In Uganda, Mulenga JSC explained that the reason why the right must be interpreted broadly is because the protection of rights is the primary purpose of the constitution:

*"Protection of the guaranteed rights is the primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance, is permissible."*<sup>98</sup>

123. The Uganda Supreme Court continued:

*"The provision in clause 2(c) clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those principles and values, and therefore, to that standard. While there may be variations in applications, the democratic values remain the same...[D]emocratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the*

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<sup>97</sup> *Obbo and another v Attorney General* [2004] 1 EA 265 (SCU), 295.

<sup>98</sup> *Obbo and another v Attorney General* [2004] 1 EA 265 (SCU), 296.

*Constitution has to be justified. In determining the validity of the limitation imposed by section 50 on freedom of expression, the Court must be guided by the values and principles essential to a free and democratic society.*<sup>99</sup>

124. We submit that the refusal to register LEGABIBO constitutes a violation of the right to freedom of expression in a context where the authorities should be protecting the respondents' right to form an association, in order to be able to express their views collectively on matters of importance to them.

125. We further submit that reference to section 7(2)(a) of the Societies Act in order to limit their right to freedom of expression is not 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 right to freedom of expression.

#### **PROCEDURAL ISSUES RAISED IN THE GROUNDS OF APPEAL**

126. The appellant raises a number of procedural issues in its grounds of appeal, each of which are dealt with below:

126.1 The appellant contends that the High Court erred in dealing with the case as both a review application and a section 18 application, and that this conflated procedure prejudiced the appellant.<sup>100</sup>

126.2 The appellant further contends that no grounds for a review application were made out in the founding affidavit.<sup>101</sup>

126.3 Finally, the appellant contends that in its review, the Court exceeded its powers by considering the

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<sup>99</sup> *Obbo and another v Attorney General* [2004] 1 EA 265 (SCU), page 19-20

<sup>100</sup> Notice and Grounds of Appeal at para 3.2.

<sup>101</sup> Notice and Grounds of Appeal at para 3.3.

reasonableness/correctness of the decision, which “constitutes an undue interference of the Minister’s discretion to make the decision in question”.<sup>102</sup>

127. The applicants clearly stated in their founding affidavit their contention that the refusal to register LEGABIBO violated their constitutional rights. The appellant accordingly has no basis on which it can argue that it was prejudiced in its arguments.
128. In its Notice of Motion, the applicants asked the Court to declare that their rights were violated. The applicants did not mention specifically under which rule of the Court Rules it brought its application. In substance, the application took the form of both a judicial review and an application in terms of section 18 of the Constitution.
129. The Court of Appeal has confirmed that the “grounds upon which administrative and quasi-judicial decisions may be reviewed and set aside are illegality, irrationality and procedural impropriety”.<sup>103</sup>
130. It is important to recognise that there are instances in which the facts of the case make an application under either Order 61 or 70 possible.
131. The respondents submit that an unreasonableness/irrationality argument under judicial review in this case overlapped with a constitutional argument in terms of section 18 of the Constitution. In fact, it is not unusual for such a scenario to occur, see for example the Court of Appeal’s decision in *Good v Attorney General*.<sup>104</sup>

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<sup>102</sup> Notice and Grounds of Appeal at para 3.4.

<sup>103</sup> *Attorney General and Others v Tapela and Others*, CACGB-096-14, at para 49.

<sup>104</sup> *Good v Attorney General (2)* 2005 (2) BLR 337 (CA).

132. Collins J in *Autlwtse v Botswana Democratic Party and Others*<sup>105</sup> quotes the following passage from Wade and Forsyth on Administrative Law (7<sup>th</sup> ed) at p400-401:

*“Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as ‘irrelevant consideration’, and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question.”*

133. Irrationality was considered in *Masitara Investments Pty Ltd v Botswana Unified Revenue Services* where it was held that the irrationality ground is the same as the unreasonableness ground referred to *Wednesbury*.<sup>106</sup>

134. The Constitutional Court of South Africa, in *Pharmaceutical Manufacturers Association of SA and Another; In re Ex Parte President of RSA* discussed irrationality and concluded that the Constitution “places further significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law.”<sup>107</sup>

135. The respondents submit that any decision which takes into consideration irrelevant issues and ignores legal provisions in the Constitution is both irrational and *ultra vires* the Constitution, allowing for a determination under either judicial review requirements or the provisions of the Constitution.

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<sup>105</sup> 2004 (1) BLR 230 (HC) The case was cited with approval by the Botswana Court of Appeal in *Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234 (CA).

<sup>106</sup> 2009 1 BLR 321 HC per Kirby J

<sup>107</sup> *Pharmaceutical Manufacturers Association of SA and Another; In re Ex Parte President of RSA* 2000 (2) SA 674 (CC) at para 83.

136. If the Court is inclined to find that the respondents did not comply with the Rules of Court, we humbly submit that the High Court was correct in the discretion it exercised in terms of Order 5 in favour of substantive justice instead of the unfairness that strict compliance with technical procedures would have produced. The respondents submit that the High Court was correct in proceeding with the application.

137. Order 5 Rule 2(1) of the Rules of the Court provides that:

*"No proceedings shall be void or be rendered void or wholly set aside under rule 1, or otherwise by reason only of the fact that the proceedings were begun by means other than those required in the case of the proceedings in question by any provisions of these rules".*

138. The High Court held that, where a group of citizens allege that their constitutional rights are being violated, that alone should trigger alarms bells in the mind of the Court and motivate it to ensure that the truthfulness or otherwise of the serious allegations be investigated.

139. Other jurisdictions have also found that substantive justice should trump procedural technicalities, to avoid hindering unfairness and the cause of justice.

140. In particular, the High Court of Kenya in *National Media Group v Attorney General* held that a Court:

*"...should be liberal in the manner it goes around dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice".<sup>108</sup>*

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<sup>108</sup> Kenya in *National Media Group v Attorney General* ("National Media Group") 2007 eKLR. Page 11



140.1 Notably in that case the respondent also challenged the jurisdiction under which the applicant filed their application. The applicant invoked constitutional jurisdiction rather than judicial review jurisdiction, and the respondent argued that this was incorrect. However, the Court specified that “invoking constitutional jurisdiction in the place of judicial review jurisdiction where there is a constitutional issue for determination does not itself amount to invoking the wrong procedure”.<sup>109</sup>

## COSTS

141. The High Court did not address the question of costs.
142. The respondents submit that, as the successful party in the High Court, they should have been awarded costs by the High Court. The Court of Appeal, in *State v Marapo*, held that it could “see no reason why therefore the individual respondent, as the successful party in his application, should be deprived of his costs”.<sup>110</sup>
143. In the event that the Court does not decide in the respondents’ favour, we urge the Court to apply the principles set out in *Attorney General v Oatile*<sup>111</sup> that unsuccessful private parties litigating constitutional rights against the State should not be ordered to pay the costs of the State.
144. The Court of Appeal in *Nchindo and Others v Attorney General and Another*, held that it is recognised “in a case involving an unsuccessful challenge to constitutional rights by a citizen, which is not frivolous or vexatious, that there should be no order for costs”.<sup>112</sup>

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<sup>109</sup> *National Media Group* page 16.

<sup>110</sup> (2002) AHRLR 58 (BwCA 2002) at para 26.

<sup>111</sup> 2011 (2) BLR 209 (CA) at p 242. See also *Nchindo & Others v Attorney General of Botswana and Another* CACLB-056-09 [2010] BWCA 49 at para 71 and *State v Marapo* (2002) AHRLR 58 (BwCA 2002) at para 26.

<sup>112</sup> [2010] BWCA 49 at para 71.

## **CONCLUSION**

145. For all of these reasons, the respondents submit that the decision of the Director and the Minister refusing to register LEGABIBO was irrational and an unjustifiable violation of the respondents' rights and falls to be set aside.
146. We respectfully submit that the appeal should be dismissed and this Honourable Court should confirm the High Court's order.

**DATED AT GABORONE THIS 11<sup>TH</sup> DAY OF JANUARY 2016.**

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**BAYFORD & ASSOCIATES  
(RESPONDENTS' ATTORNEYS)  
PLOT 7104, TSHETLHA CRESCENT  
BROADHURST,  
GABORONE.**

**TO: THE REGISTRAR  
COURT OF APPEAL  
GABORONE**

**AND TO: THE ATTORNEY GENERAL  
(APPELLANT)  
GOVERNMENT ENCLAVE  
GABORONE**

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

**COURT OF APPEAL CASE NO: CACGB-128-14**

(High Court Case no: MAHGB-000175-13)

In the matter between

**ATTORNEY GENERAL OF BOTSWANA**

**APPELLANT**

And

**THUTO RAMMOGE**

**1<sup>ST</sup> RESPONDENT**

**RONALD DADANI**

**2<sup>ND</sup> RESPONDENT**

**ATLA POELETSO SETSHEGETSO**

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

**RATANANG MOSWEU**

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

**TEBOGO MOTSHWANE**

**5<sup>TH</sup> RESPONDENT**

**ODIRILE LETSATSI**

**6<sup>TH</sup> RESPONDENT**

**KATLEGO SAINT**

**7<sup>TH</sup> RESPONDENT**

**CHRISTOPHER BAREKI**

**8<sup>TH</sup> RESPONDENT**

**AMOGELANG SEKALE**

**9<sup>TH</sup> RESPONDENT**

**THOLEGO SHABANE**

**10<sup>TH</sup> RESPONDENT**

**TEBOGO MOATSHE**

**11<sup>TH</sup> RESPONDENT**

**TINAO SETAELO**

**12<sup>TH</sup> RESPONDENT**

**TEFO RALEBALA**

**13<sup>TH</sup> RESPONDENT**

**OABONA SEPORA**

**14<sup>TH</sup> RESPONDENT**

**ANITA TAU**

**15<sup>TH</sup> RESPONDENT**

**BEVAN NONOFO ASEKENG**

**16<sup>TH</sup> RESPONDENT**

**TEFO NYEPETSI**

**17<sup>TH</sup> RESPONDENT**

**LEMMY MOKGOBYE**

**18<sup>TH</sup> RESPONDENT**

**OTENG AONE CHIMELA**

**19<sup>TH</sup> RESPONDENT**

**CAINE JASON YOUNGMAN**

**20<sup>TH</sup> RESPONDENT**

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**DATED AT GABORONE THIS 11<sup>TH</sup> DAY OF JANUARY 2016.**

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**AND TO: THE ATTORNEY GENERAL  
(APPELLANT)  
GOVERNMENT ENCLAVE  
GABORONE**