



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

**MAHGB-000175-13**

**In the matter between:**

<b>Thuto Rammoge</b>	<b>1<sup>st</sup> Applicant</b>
<b>Ronald Dadani</b>	<b>2<sup>nd</sup> Applicant</b>
<b>Atla Pooletso Setshegetso</b>	<b>3<sup>rd</sup> Applicant</b>
<b>Ratanang Mosweu</b>	<b>4<sup>th</sup> Applicant</b>
<b>Tebogo Motshwane</b>	<b>5<sup>th</sup> Applicant</b>
<b>Odirile Letsatsi</b>	<b>6<sup>th</sup> Applicant</b>
<b>Katlego Saint</b>	<b>7<sup>th</sup> Applicant</b>
<b>Christopher Bareki</b>	<b>8<sup>th</sup> Applicant</b>
<b>Amogelang Sekale</b>	<b>9<sup>th</sup> Applicant</b>
<b>Tholego Shabane</b>	<b>10<sup>th</sup> Applicant</b>
<b>Tebogo Moatshe</b>	<b>11<sup>th</sup> Applicant</b>
<b>Tinag Setsaelo</b>	<b>12<sup>th</sup> Applicant</b>
<b>Tefo Ralebala</b>	<b>13<sup>th</sup> Applicant</b>
<b>Oaboda Sepora</b>	<b>14<sup>th</sup> Applicant</b>
<b>Anita Tau</b>	<b>15<sup>th</sup> Applicant</b>
<b>Bevan Nonofa Asekene</b>	<b>16<sup>th</sup> Applicant</b>
<b>Tefo Nyepetse</b>	<b>17<sup>th</sup> Applicant</b>
<b>Lemmy Mokgobye</b>	<b>18<sup>th</sup> Applicant</b>
<b>Oteng Aone Chimela</b>	<b>19<sup>th</sup> Applicant</b>
<b>Caine Jason Youngman</b>	<b>20<sup>th</sup> Applicant</b>

**and**

**The Attorney General of Botswana**

**Respondent**

**Ms. Attorney U. Dow (with her Ms. L.N. Nchunga) for the Applicants**  
**Mr. Attorney M.B. Marumo (with him Mr. Rammidi) for the Respondent**

**JUDGMENT**

**RANOWANE J:**

**INTRODUCTION**

1. The applicants have approached this court by a notice of motion seeking an order in the following terms:-

- a) Declaring the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of Section 3 of the Constitution of the Republic of Botswana in so far as the said decision denies the applicants equal protection of the law;
- b) Declaring the decision of the Minister of Labour and Home Affairs to refuse to register LEGABIBO to be in contravention of Section 12 of the Constitution of the Republic of Botswana in so far as the said decision has the effect of hindering the applicants in their enjoyment of their freedom of expression;
- c) Declaring the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of Section 10 of the Constitution of the Republic of Botswana in so far as the said decision has the effect of hindering the applicants in their freedom to assemble and associate;
- d) Declaring the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of Section 15 of the Constitution of the Republic of Botswana in so far as the said decision is discriminatory in itself and in its effect, against the applicants, based wholly or mainly on sexual orientation of the majority of the applicants;
- e) Setting aside the decision of the Minister of Home Affairs;

f) Declaring that the applicants are entitled to assemble and associate under the name and style Lesbian's Gays and Bisexuals of Botswana (LEGABIBO) registered as a society.

2. The application is supported by the founding affidavit of the 1<sup>st</sup> applicant Thuto Remmogo. The rest of the applicants totaling 19 in all, have deponed to supporting or confirmatory affidavits in support of the application.

#### **BACKGROUND**

3. This application is a sequel to the decision of the Honourable Minister of Labour and Home Affairs to uphold the decision of the Director of the Department of Civil and National Registration rejecting the applicants' application to register an organization by the name of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO).

4. The chronology of events leading to this application is best captured in the founding affidavit of the 1<sup>st</sup> applicant and I can do no better than summarise it hereunder as follows:

a) On the 16<sup>th</sup> February 2012, the applicants filed an application for registration of LEGABIBO which is an acronym for Lesbians, Gays and Bisexuals of Botswana;

- b) By a letter dated 12<sup>th</sup> 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 recognize homosexuals and that the application would violate Section 7(2)(a) of the Societies Act;
- c) On the 12<sup>th</sup> April 2012, the applicants submitted an appeal against the administrative decision of the Director;
- d) On the 5<sup>th</sup> 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;
- e) In response to the filing of further grounds of appeal by the applicants' attorneys, the Permanent Secretary reaffirmed the Minister's earlier decision on the 12<sup>th</sup> November 2012;
- f) On the 14<sup>th</sup> December 2012, the applicants gave notice to the Attorney General of their intention to commence proceedings in the High Court. Consequently the application herein was accordingly filed on the 25<sup>th</sup> March 2014 seeking the orders sought in terms of the notice of motion.

5. The application is opposed and the relevant Minister, viz, the Honourable Minister of Labour and Home Affairs, Mr. Edwin Batshu has filed an answering affidavit in respect of which he opposes this application. The affidavit admits to the chronology of events leading to this application as averred to by the applicants.

6. Basically his affidavit is to the effect that although the applicants are entitled to constitutional protection under Sections 3,7,12,13 and 15 of the Constitution, limitation of these rights under 7(2)(a) of the Societies Act was justifiable in the instant case.

### THE LAW

7. The documentation relating to this application bear all the hallmarks of a review application. However, when the matter came for argument Dr. Dow for the applicants insisted that this was a Section 18 application. Out of abundance of caution, I will leave nothing to chance and ensure that the application is examined from the perspective of a review application as well as a constitutional application under Section 18. The common law remedy of Judicial Review of Administrative Decisions has long been part of the law of this country. The remedy enables the courts to control excess in the exercise of administrative powers by officials empowered to make such decisions. Thus in RAPHETHELA v ATTORNEY GENERAL [2003] 1 BLR 591 it was held *inter alia* that

"Review of Administrative or Executive action taken in pursuance of a power entrusted to an official by a statute is a most useful and quick process of control by the courts of excess in the exercise of that power. It is now recognized that the courts will review and interfere with such actions in these circumstances: First, where the decision maker acts illegally, contrary to the statute

empowering him to act; secondly, when the decision made is grossly unreasonable to the extent that a review court can only say that no person acting reasonably could ever come to that decision – in other words, when the review court comes to the conclusion that the decision maker was irrational. Thirdly, where it is shown that the decision maker acted unprocedurally and the decision making process is unfair.”

8. It is now settled that judicial review is not concerned with the decision per se, but the process through which the decision was made. The test is whether the decision made was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it. (see, **RAPHATHELA's cas supra**).
  
9. In the case of **HOME DEFENDERS SPORTING CLUB v BOTSWANA FOOTBALL ASSOCIATION** [2005] 1 BLR 400 at 403 C-E, Lesetedi J (as he then was) stated that –

“The now accepted authority of the courts power to review a decision for unreasonableness, an authority heavily relied upon by the applicant, is the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 ICB 223(CA). In that case Lord Green stated that a court may interfere with the exercise of a discretion for unreasonableness only when the authority has come to a conclusion so unreasonable that no reasonable authority could ever have come to it. The test is often referred to as the Wednesbury test. The learned authors A Bradley and K.D. Ewing in their work “Constitutional and Administrative Law” (11<sup>th</sup> ed) at p678 in discussing the

abuse of the discretionary power, are of the view that unreasonableness as a ground of review is closely related to other grounds of review such as irrelevant considerations, improper purposes and error of law."

See also AUTLWETSE v BOTSWANA DEMOCRATIC PARTY & OTHERS [2004] 1 BLR 230.

10. In determining whether the decision complained of was reviewable, it is important to first examine the law governing the registration of societies. Societies in this country are registered under the Societies Act (CAP 18:01) Laws of Botswana. Section 6(1) of the Act provides that -

"Every local society shall, in the manner prescribed and within 28 days of the formation thereof or of the adoption thereby of a constitution or of rules, regulations and byelaws, make an application to the Registrar for registration or exemption from registration under this Act. In terms of subsection 2(a) thereof, and subject to subsections 7 and 11(7) "upon application being made by a local society for registration under this Act, the Registrar shall register the Society."

11. The Registrar is empowered to refuse to register a society by Section 7(2) of the Act under certain specified conditions listed under subparagraphs (a)-(h) thereof. Of particular interest to this application is 7(2)(a) which constitutes one of the two grounds forming the basis of the Registrar's refusal to register LEGABIBO. The other ground was that the Constitution of Botswana does not recognize homosexuals.

12. Section 7(2)(a) provides that -

"The Registrar shall refuse to register and shall not exempt from registration a local society where - it appears to him that any of the objects of the Society is, or is likely to be used for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare or good order in Botswana."

13. Before inquiring into the accuracy of the statement "The Constitution of Botswana does not recognize homosexual," I will proceed to examine the "objects" of the Society to ascertain if same are or can rightly be viewed as being "likely to or be used for any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Botswana."

#### **OBJECTIVES OF LEGABIBO**

14. The objectives of LEGABIBO are listed under Article 4 of its Constitution. I must perhaps point out that the said Constitution formed part of the documentation accompanying the application for registration and the Registrar can quite properly be presumed to have perused it before coming to the conclusion that the society offended against Section 7(2)(a) of the Act.

15. The said objectives are listed as follows:-



- 4.1 To integrate a legal, ethical and human rights dimension into the response to the sexual, reproductive and health rights of all people without discrimination on any basis whatsoever;
- 4.2 To strengthen the participation of Lesbian, Gay and Bisexual people in the policy fora in Botswana and at an international level;
- 4.3 To assist in promoting and encouraging networking amongst NGO's and individuals with similar goals and/or objectives so as to facilitate joint initiatives at solving problems;
- 4.4 To promote a culture of self-reliance and encourage committed participation from LEGABIBO members and the community;
- 4.5 To carry out political lobbying for equal rights and decriminalisation of same sex relationships;
- 4.6 To act on behalf of and to represent lesbian, gay and bisexual people in Botswana generally and individually;
- 4.7 To support public health interests by establishing an environment that enables lesbians, gays and bisexual people to protect themselves and others from violation of their basic human rights;
- 4.8 To advocate for the establishment of a legal framework to reach those in society that are legally and socially marginalized such as lesbians, gays and bisexuals;
- 4.10(sic) To educate the general public on issues of human rights within the context of sexuality and to facilitate the creation of stakeholder forums nationally to assist in the dissemination of information;
- 4.11 To research the human rights situation of lesbians, gays and bisexual people in Botswana and to network with stakeholders in the region in order to

establish and maintain a response to human rights and legal challenges."

16. I do not consider it necessary to reproduce the entire Constitution of LEGABIBO. It does not differ materially from Constitutions governing other societies. For example, it contains clauses dealing with membership, office bearers, meetings etc which are general or standard provisions found in the Constitution of any other society and I will proceed from the presumption that these did not inform the Minister's or the Director's decision to refuse the registration.
17. It is the objectives which distinguish one society from another and it was on the basis of the objectives that the Minister as well as the Director based their decision to refuse to accede to the application for registration of LEGABIBO.
18. I have read and re-read the above objectives with a view to finding out if any of them offends against Section 7(2)(a) of the Societies Act. In other words I have examined each objective with the primary aim of determining whether any one or all of them is or are "likely to be used for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare and good order in Botswana."
19. All of these objectives appear to me to be quite harmless and in fact promote good values such as the promotion of a culture of

self-reliance, (Article 4.4), promotion of human rights of all people without discrimination (4.1), support of public health interest of members and education of the general public on issues of human rights etc. I have taken a few of these objectives randomly to demonstrate that *ex facie*, they do not offend against Section 7(2)(a) of the Societies Act.

20. However, I have thought it worthwhile to pick out Article 4.5 for a closer examination because it is probably the one which influenced the authorities to refuse the registration of the society. The article provides as follows -

"To carry out political lobbying for equal rights and decriminalization of same sex relationships."

21. There is inherently nothing sinister or unlawful about the process of lobbying or advocacy. It is in fact common in many democratic countries that lobby groups for various courses operate freely and lawfully for courses, such as; discrimination of abortion in certain circumstances, decriminalisation of consumption of drugs (such as Marijuana) decriminalisation of prostitution. Such lobby groups' basic aim is to campaign or persuade the powers that be to embark on legislative reforms that would make it possible for a particular conduct to be lawful.

22. Advocacy for legislative reforms need not only be about decriminalization, it may also be about for example, putting in place laws to protect the environment, minority languages and culture, marginalized groups, endangered species etc. Registering a society for the purposes of lobbying for legislative reforms to make same sex sexual relationships legal is therefore not a crime, neither does it give any appearance of being "likely to be used for any unlawful purpose, nor prejudicial to, or incompatible with peace, welfare and good order in Botswana."
23. What would clearly offend against the said section, is to engage in same sex relationship. But it is important not to read into the objectives some meanings that are not justified by the words used in these objectives. The applications by LEGABIBO is not for the registration of their society for the purposes of having same sex relationships but rather for agitating for legislative reforms so that same sex relationships would be decriminalized. In a democratic society asking for a particular law to be changed is not a crime, neither is it incompatible with peace welfare and good order.
24. The other ground for refusing the registration was that the Constitution does not recognize homosexuals. This assertion unfortunately is not correct. There is no provision of Botswana Constitution that expressly states that it does not recognize homosexuals. Likewise, there is no provision in the same

constitution that says that it recognizes heterosexuals. It is not clear what the Director intended to communicate by this claim. A homosexual according to Shorter Oxford Dictionary, is person who is sexually attracted to people of his or her own sex. It is not a crime for one to be attracted to people of one's own sex and this has nothing to do with the Constitution.

25. It may be that engaging in homosexual activity is outlawed. But if I were to use an example of one born left handed, if it was a crime to write with a left hand, such a person would not be punished for being left handed but for writing with a left hand just as a gay person would not be punished for being gay but rather for engaging in same sex relationship.
26. The decision to refuse to register the society was therefore clearly wrong because it was based on the presumption that its objectives were to engage in homosexual relationships when as a matter of fact, the objectives were *inter alia*, to lobby for legislative reforms to make it lawful to so engage. In my opinion there is a world of difference between engaging in a prohibited conduct and lobbying for that conduct to be decriminalized. The first one is unlawful whilst the latter is not. This then means that the Director refused to register a society whose objective was to engage in a lawful exercise of amongst others lobbying for legislative reforms and dissemination of information on matters such as health issues to its members.

The decision to reject the application for registration was in the light of the above grossly unreasonable and at common law stood to be reviewed and set aside.

27. I will however proceed to deal with this case purely as Section 18 application. I will not recite the said section now but will do so later in my judgment when I deal with the respondent's case. The first constitutional violation that the rejection of the application to register the society is alleged to have occasioned is in respect of Section 3 of the Constitution.

28. The said section provides as follows:-

"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 freedom 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 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 provision of this Chapter shall have effect for the purpose 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."

29. The constitution is the supreme law of the land and any administrative Acts that contravene any of its provisions are legally invalid. It is now an accepted norm that constitutional provisions that protect rights of individuals should be given a broad and generous interpretation whilst those limiting fundamental rights should be given a narrow and restrictive reading. Hence in ATTORNEY GENERAL v MOAGI 1982(2) 124 at 184 Kentridge JA stated:-

"A constitution such as the Constitution of Botswana, embodying fundamental rights, should as far as language permit be given a broad construction. Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them ----."

30. The words of Amisshah JP (as he then was) in the famous case of ATTORNEY GENERAL v DOW [1997] BLR 119 at 131 come to mind where after reviewing authorities from various jurisdictions stated –

"In my view these statements of learned Judges who have had occasion to grapple with the problem of constitutional interpretation capture the spirit of the document they had to interpret, and I find them apposite in considering the provisions of the Botswana Constitution which we are now asked to construe. The lessons they teach us are that the very nature of the constitution requires that a broad and generous approach be adopted in the interpretation of its provisions, that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution; and that where rights and freedoms are conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed."

31. I will now apply the above principles to the question before court which is whether refusal to register LEGABIBO violates the applicants' right in terms of Section 3 of the Constitution.
32. Section 3 of the Constitution reproduced above refers to all "persons in Botswana" and since members of LEGABIBO are also "persons" albeit with different sexual orientation, it is difficult to imagine that they are not included in the phrase "all persons" as contained in the above provision. If the framers of the constitution intended that they should be excluded from the enjoyment of those fundamental rights and freedoms I am certain that they would have done so in clear terms. Consequently, to hold that gay people are excluded from the enjoyment of the fundamental rights and freedoms conferred on "all persons" would amount to cutting down on the scope of such rights by reading into the above provision implicit restrictions contrary to accepted cannons of constitutional interpretation.
33. It must be understood as I have postulated earlier, that being homosexual is not a crime in Botswana neither is being bisexual. As I said there is a distinction between lobbying for legal reforms or legislative changes to decriminalize an act and actually engaging in such an act. Conducting a lobby, (sometimes called advocacy) for legislative reforms to decriminalize homosexuality is lawful unless



perhaps carried out by violent or unlawful means whereas engaging in the prohibited act is unlawful.

34. Advocacy or lobbying is protected by the right to freedom of expression as well as freedom of association. It goes without saying that denying people whose sexual orientation is not a crime in Botswana the right to register a society for the purposes of lawfully carrying out advocacy for inter alia, decriminalization of homosexuality is a clear violation of their constitutional right to freedom of expression, assembly and association contrary to Section 3 of the Constitution.

35. Sections 12 and 13 of the Constitution are intercontextual with, and seem to amplify the fundamental rights protected by Section 3 of the same constitution. It is therefore not surprising that the rights protected by these provisions seems to be interrelated such that violation of rights protected by any of them will *ipsa facto* impinge on the rights protected by Section 3.

36. For example, Section 12(1) provides that:-

"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 opinion without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether communication to be the public generally or to any person or class of persons) and freedom from interference with his or her own correspondence."

37. There are of course limitations placed on these rights in particular subsection 2(a) of the same section which provides as follows:-

"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 - that is reasonably required in the interest of defence, public safety, public morality or public health."

38. It is noteworthy that the Director's letter dated 18<sup>th</sup> January 2012 refusing to register the organization suggested two reasons for his refusal. The first was that "the constitution does not recognize homosexuals" and the second one was based on Section 7(2)(a) of the Societies Act, which allows him to do so where any of "the objects of the Societies is (sic) or likely to be for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare and good order in Botswana."
39. I have already reproduced the objectives of the organization. None of these was cited as being unlawful or incompatible with peace, welfare or good order in Botswana. I have already discussed the main objectives of the organization which is *inter alia* to advocate and lobby for legal reforms to decriminalize same sex relationship.
40. There is nothing in my opinion to suggest that it is immoral or unlawful to persuade those in power to change certain laws as long as that is done lawfully and peacefully. If the change advocated for is in the views of the lawmakers, likely to lead to or promote

unlawfulness or any other undesirable situation or consequences, they are perfectly entitled to refuse to accede to such suggested changes. To refuse the applicants the opportunity to come together and register an organization to carry out peaceful and lawful advocacy for legal reforms in my view clearly violates their rights under the above provision.

41. Section 13 provides for protection of freedom of assembly and association. I have earlier pointed out that the said section as well as Section 12 were intercontextual with, and appear to be an amplification of the rights protected by Section 3 of the same Constitution. This section likewise permits limitations on the freedom of assembly and association under subsection 2(a) which is framed on the same terms as those in Section 12(2) as discussed above. It goes without saying that for the same reasons as those discussed earlier refusal to register the organization constituted a violation of the applicant's freedom of assembly and association.

42. I do not consider it necessary in the light of these conclusions to consider whether the refusal to register violated Section 7 and 15 of the Botswana Constitution but would rather straight away address my mind to the respondent's case.

#### **THE RESPONDENT'S POSITION**

43. The respondent's opposition to this application is two pronged. Firstly it was submitted that this application is not a review

application and even if it can be held to be or a review application it fundamentally falls short of the requirements of Order 61 of the Rules of this court and it is liable to be struck out or dismissed for such an irregularity. Secondly, in the event that the court finds that it is not a misconceived review application but a substantive application for constitutional redress under Section 18(1) of the Constitution, such an application too must fail.

44. The reason for that was that in rejecting the application for registration, the Director relied on and was guided by Section 7(2)(a) of the Societies Act. In dismissing the appeal the Minister was likewise guided by the above provisions. Looking at the aims of LEGABIBO, the refusal was justified on the basis that the applicants were all, except for applicants 1 and 15, persons of homosexual orientation. They were therefore persons inclined towards the commission of the offences listed under Section 164 and 167 of the Penal Code.
45. The applicants on the other hand, submitted that their application was brought in terms of Section 18(1) of the Constitution which provides that -

“Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of Section 3 to 16(inclusive) of this Constitution has been, is being, or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which his lawfully available, that person may apply to the High Court for redress.”

46. Learned Counsel Mr. Marumo (may his soul rest in peace) for the respondent extensively reviewed the law governing applications for review and came to the conclusion that this was not a review application and if it was found that it was, then it was fundamentally flawed and was liable to be dismissed or struck out.
47. The gist of the argument for the respondent as I understand it was that the decision complained of was that of the Minister of Labour and Home Affairs, who was not joined as a party, had not been served with the application as he was not a party to the proceedings and had not been called upon in terms of the Rules of this court, to dispatch the record of the proceedings or give reasons for his decision.
48. Review applications are governed by Order 61 of the Rules of this court which provides as follows:-
- “Except where otherwise any law provides, all proceedings to bring under review the decision or proceedings of any magistrates court and of any tribunal, board or office performing judicial, quasi judicial, or administrative functions, shall be by way of notice of motion directed and delivered by the parties seeking to review such decisions or proceedings to the judicial officer, or chairman of the court, tribunal or board, or to the officer as the case may be and to all other parties affected -
- a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and,
  - b) calling upon the judicial officer, chairman or officer, as the case may be, to dispatch within 14 court days of the receipt of the notice of motion to the Registrar, either -

- (i) the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or he desires to give or make; or
- (ii) where no record of the proceedings was kept available, a written explanation for the lack of the record together with such reasons as he is by law required or he desires to give or make; and to notify the applicant that he had done so."

49. The provisions of this Order are quite clear on the procedure the applicant in a review proceedings ought to follow. It was not followed in the instant case. The argument by learned counsel is therefore correct. Applicants' counsel as I pointed out earlier conceded this point and submitted that the application was brought in terms of Section 18 of the Constitution and not Order 61 of the Rules.

50. The problem with this application is that it failed to state the Rule under which the application is brought contrary to Order 12 of the Rules of this court. The said Order is peremptory in respect of this requirement and it is imperative that lawyers practising in this jurisdiction should strictly comply or risk having their applications dismissed.

51. But where, as in the instant case, a group of citizens allege that their constitutional rights are being violated, that alone should trigger alarm bells in the mind of the court and motivate it to move

mountains to ensure that the truthfulness or otherwise of this serious allegation is investigated. It is in this context that notwithstanding this procedural shortcoming, I will rather err in favour of substantive justice rather than technical correctness and hold that this is an application properly brought under Section 18 of the Constitution of this country. In case I am wrong, I take refuge under Order 5 Rule 2(1) of the Rules of this Court which provides that -

"2. (1) 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 provision of these Rules."

That being the case, this court is entitled to consider the application on its merits and determine whether there is any substance to it.

52. I will now deal with the argument that the refusal to register LEGAGIBO was based on the understanding that the applicants were persons entitled to commit offences under Section 164 and 167 of the Penal Code. These offences are unnatural offences and indecent practices between persons respectively. This argument is not sustainable because it presupposes that people should be punished for what they are capable of doing and not for what they have actually done. Experience shows that people are capable of committing murder, stealing, robbery etc but it would be

inconceivable to give such people advance punishment for what they are capable of doing.

53. In any case the presumption that because they are homosexuals, the applicants are person inclined to commit offences against a well-known constitutional dispensation in any democratic country that people are presumed innocent until proven guilty.

54. It was further argued that –

“the lawfulness or otherwise of homosexual, gay, lesbian or bisexual practices has been the subject of full and extensive examination by the Court of Appeal in the case of **KANANE v THE STATE** [2003] 2 BLR 67.”

The Court of Appeal in that case was called upon to declare provisions of the Penal Code criminalizing homosexual practices to be in violation of Section 3 and other sections of the Constitution of Botswana. The Court rejected this proposition. This case was used as an authority to support the refusal to register the LEGABIBO and that because of the doctrine of stare decisis, this court should follow the above decision .

55. The doctrine of stare decisis is fully binding on this court and I would never dare show any tendency to disrespect or undermine it. However there is a world of difference as far as the issues before this court are and the issues in **KANANE's** case (supra) were. The



Court of Appeal in that case had to determine whether the law criminalizing homosexual practices was unconstitutional. In the instant case, the issue is whether it was unconstitutional to refuse to register a society of people of homosexual orientation etc to inter alia advocate for decriminalization of homosexual practices. It is clearly not a crime to be a homosexual and neither is it a crime to advocate for legislative reforms. Advocacy for legislation reforms is not per se a crime in this country. That case is therefore not applicable and can be distinguished from the present case.

56. From the respondent's argument it is clear that the Director misconceived the aims or objectives of the LEGAGIBO. He was operating from the mistaken belief that the applicants intended to register LEGABIBO for the purposes of engaging in homosexual practice which is a crime. Unfortunately that was not the case. The objectives of LEGABIBO was to do various things including advocacy for legislative reforms to decriminalize homosexual practices and same sex relationships.

### **CONCLUSION**

57. In a democratic society such as ours freedom of association, assembly and expression are important values duly protected by our Constitution. The enjoyment of such rights can only be limited where such limitation is reasonably justifiable in a democracy.

58. The objects of LEGABIBO as reflected in the societies' constitution are all *ex facie* lawful. They include carrying out political lobbying for equal rights and decriminalization of same sex relationships. Lobbying for legislative reforms is not per se a crime. It is also not a crime to be a homosexual.
59. Refusal to register LEGABIBO was not reasonably justifiable under the Constitution of Botswana nor under Section 7(2)(a) of the Societies Act (CAP 18:01). It violated the applicants' rights to freedom of expression, freedom of association and freedom of assembly, as enshrined under Sections 3, 12 and 13 of the Constitution of Botswana.
60. : The application is therefore granted in terms of paragraph a, b,c,e,f and g of the notice of motion.
61. Consequently, I order as follows:-

**ORDER**

- a) The decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO is hereby declared to be in contravention of Sections 3 of the Constitution of the Republic of Botswana in so far as the said decision denies the applicants' equal protection of the law;
- b) The decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO is hereby declared to be in contravention of Section 12 of the Constitution of the

Republic of Botswana in so far as the said decision has the effect of hindering the applicants in their enjoyment of their freedom of expression;

- c) ~~The decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO is hereby declared to be in contravention of Section 13 of the Constitution of the Republic of Botswana in so far as the said decision has the effect of hindering the applicants in their enjoyment of their freedom to assemble and associate;~~
- d) The decision of the Minister of Labour and Home Affairs is hereby set aside;
- e) It is hereby declared that the applicants are entitled to assemble and associate under the name and style of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO);
- f) It is hereby declared that the applicants are entitled to have the group Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) registered as a society.

**DELIVERED IN OPEN COURT AT GABORONE THIS 14<sup>TH</sup> DAY OF NOVEMBER 2014.**



**T.T. RANNOWANE**

**(JUDGE)**