

LM v ATTORNEY GENERAL OF BOTSWANA: Challenging Criminalisation of Same-sex Sexual Relationships

Fact Sheet

Background to the Case

In September 2016, a gay man (“the Applicant”), filed an application challenging the constitutionality of sections 164(a), 164(c) and 165 of the Botswana Penal Code. These provisions criminalise same-sex sexual acts between consenting persons. The Applicant seeks an order that the continued criminalisation of consensual same-sex sexual relationships violates his constitutional rights, including, the right to equal protection of the law and freedom from discrimination, the right to liberty and the right not to be subjected to inhuman or degrading treatment.

Subsequently, the human rights advocacy group, Lesbians, Gays, and Bisexuals of Botswana (“LEGABIBO”), in August 2017, approached the High Court of Botswana to be admitted as *amicus curiae* or “a friend of the court” on the basis that they have an interest in the case and that LEGABIBO would present factual and legal evidence that will assist the Court in making its determination. This evidence seeks to demonstrate that continued criminalisation of consensual same-sex sexual conduct perpetuates stigma, intolerance, homophobia and violence against members of the LGBT community.

In November 2017, the High Court of Botswana admitted LEGABIBO as “a friend of the court”.

The Importance of the Constitutional Issues Raised in the Case

Previously, the Court of Appeal in *Attorney General v Rammoge* (the so-called “LEGABIBO registration case”) has emphasised that the Constitution of Botswana protects the rights of “every person” including members of the LGBT community, and that it embraces values such as respect for individual human dignity and tolerance for diversity within our democratic society, regardless of an individual’s sexual orientation.

In its present submissions, LEGABIBO argues that continued criminalisation of same-sex sexual relationships—especially in light of the evidence demonstrating its considerable negative impact—is an affront to the constitutional values Botswana holds dear as a nation. The State has a duty to uphold the values and fundamental human rights of every person.

LEGABIBO seeks to emphasise that decriminalising consensual same-sex sexual acts is an important step toward achieving Botswana’s values of inclusion, tolerance, celebration of diversity, respect for individual dignity and care for the most vulnerable and marginalised in society of Botswana. The State has a duty to take active measures to ensure that these constitutional values are protected and respected.

Reasons by the State for Refusing to Decriminalise Consensual Same-sex Sexual Relationships

The State raises two key arguments against the decriminalisation of same-sex sexual relationships in Botswana -

- First, that the language of sections 164 and 165 of the Penal Code of Botswana target a specific sexual act (anal penetration) regardless of a persons’ sexual orientation

being heterosexual or homosexual. Therefore, the impugned provisions are non-discriminatory; and

- Second, if the Applicant or any other person wishes to change the law, they should lobby Parliament instead of approaching the Court.

Evidence Submitted by LEGABIBO and its Key Arguments in the Case

LEGABIBO submitted evidence that seeks to demonstrate continued violations of the constitutional rights of LGBT persons, including the rights to dignity, privacy, not to be treated in an inhumane and degrading manner, equality before the law and non-discrimination.

In particular, the evidence will seek to demonstrate that the mere existence of the criminal provisions seriously exacerbates harm towards LGBT persons, negatively impacts public health and runs counter to the values enshrined of the Constitution of Botswana. In fact, the Botswana government itself has acknowledged that the criminalisation of consensual same-sex sexual acts fuels negative public attitudes, stigma and discrimination against LGBT persons in documents such as *Behavioural and Biological Surveillance (BBSS) of HIV/ STI Among Select High-Risk Sub-Populations in Botswana* and the *National Commitments and Policies Instrument (NCPI)*.

LEGABIBO submits that -

- Sections 164 (a) and (c), 165 and 167 of the Penal Code of Botswana contribute to disparities in mental health status, to high levels of violence and stigma and to the barriers to access to health care experienced by lesbian, gay and bisexual people living in Botswana; and
- The mere existence of the criminal offence exacerbates harm and risk to LGBT persons by preventing them from seeking health care services and accessing important information about their own sexual health.

LEGABIBO will argue that decriminalisation of consensual same-sex sexual relationships is a crucial step to ameliorate the stigma and discrimination experienced on an ongoing basis by men who have sex with men (MSM) and LGBT persons more broadly. Moreover, decriminalisation would not only greatly enhance public health—by assisting with treatment, care and education in the fight against HIV in particular—but it will also affirm basic human rights and the diversity of the Botswana nation.

LEGABIBO will argue that there is a clear violation of several constitutional rights and that under the law, the State that must prove that any limitation of a person's constitutional rights is reasonable, justifiable and in the public interest and in light of the evidence submitted before the Court. LEGABIBO will argue that the State has failed to prove that there is a justifiable limitation of fundamental constitutional rights.

High Court Hearing

The High Court hearing is set down for 31 May 2018 in Gaborone.