

FACT SHEET: ATTORNEY GENERAL OF BOTSWANA V MOTSHIDIEMANG (LEGABIBO INTERVENING AS AMICUS CURIAE)

The Court of Appeal hearing is set down for 12 October 2021 in Gaborone. The Voice Newspaper has been granted permission to livestream the hearing.

BACKGROUND

In September 2016, the applicant in the High Court (now the respondent), a man identifying as gay, challenged the constitutionality of sections 164(a) and 165 of the Botswana Penal Code, which criminalises consensual sex between same-sex partners.

On 11 June 2019, the High Court of Botswana declared that the impugned provisions violated the rights to liberty and dignity, privacy, and freedom from discrimination in Botswana's Constitution.

The High Court judgment followed other progressive developments:

- In 2017, the Botswana Court of Appeal in affirming the rights of LGBTQIA+ persons to freedom of association, noted that there is “*compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights*”.
- In 2010, Parliament amended the **Employment Act** to forbid the termination of employees' contract of employment on the grounds of sexual orientation.

DEVELOPMENTS SINCE THE 2019 HIGH COURT JUDGEMENT

An **Afrobarometer survey** conducted in July and August 2019 in Botswana recorded a 10-percentage-point gain in tolerant attitudes towards the LGBTQIA+ community after the 2019 High Court judgment.

In 2020, **Botswana's Five-Year Plan for Removing Human Rights-Related Barriers to Accessing HIV and Health Services** noted:

“Criminal laws, along with problematic socio-cultural beliefs and practices, fuel high levels of stigma, discrimination, violence and abuse against key populations. The recent overturning of laws criminalising same-sex sex removes a significant human rights barrier for gay men, men who have sex with men and other LGBTQIA+ persons; however, programmes to reduce sociocultural stigma and discrimination will still be required.”

In April 2021, the Global Fund on HIV, TB and Malaria, conducted a **Mid-Term Assessment of Botswana**, which noted:

“Already, the impact of the decision is being felt. Key informants have described more positive public discourse and media reporting of LGBTI communities and less overt stigma and discrimination against LGBTI persons, including from health care workers and law enforcement. The decision has also mitigated the risk LGBTI people feel to assert their rights. Police, traditional leaders, health care facilities and government establishments are also more willing to engage with LGBTI organizations in the country, facilitating critical sensitivity training and community dialogues with those institutions.”



THE ATTORNEY GENERAL'S POSITION

The Attorney General contends that the High Court exceeded its jurisdiction in distinguishing and overruling the 2003 Court of Appeal decision in *Kanane v The State* and in its conclusion that evidence existed indicating a change in circumstances. The Court of Appeal in *Kanane* held that the Penal Code provisions were not unconstitutional. The Attorney General appeals the High Court's findings that sections 164(a), 164(b) and 165 of the Penal Code violated the rights to equality, privacy and freedom from discrimination. The Attorney General further contends that the Court ought not to get involved in a policy matter which falls within Parliament's domain. Finally, the Attorney General relies on section 15(9) of the Constitution, a 'savings clause' which says law existing prior to the 1966 Constitution cannot be tested under the non-discrimination provision.

EVIDENCE BEFORE THE COURT

Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) was admitted as *amicus curiae*. LEGABIBO submitted uncontested evidence on the impact of the Penal Code provisions on the lives of LGBTQIA+ individuals:

1. Laws criminalising consensual same-sex sexual relationships perpetuate and increase stigma and discrimination, reinforce already existing societal prejudice and profoundly impair LGBTQIA+ persons' fundamental dignity;
2. Criminalisation of consensual same-sex sexual relationships isolate LGBTQIA+ persons from essential health services and access to care and thereby jeopardise national HIV prevention efforts and hinders public health;
3. LGBTQIA+ persons in Botswana experience higher levels of violence than the general population, with a recent study showing that 26.5% of men who have sex with men in Botswana have been blackmailed because of their sexuality, and 29% of them were afraid to

walk down the street in their communities;

4. Criminalisation contributes to high suicide rates among LGBTQIA+ persons living in Botswana; and
5. Decriminalisation of consensual same-sex sexual relationships is a crucial step to ameliorate the stigma and discrimination experienced by MSM and LGBTQIA+ individuals.

This evidence has been confirmed by the Botswana government. In its 2017 *Mapping and Size Estimation of Select Key Populations in Botswana*, the Ministry of Health and Wellness noted that:

"Same-sex relationships are illegal in Botswana, resulting in MSM hiding their sexual orientation in fear of possible sanctioning by authorities. The high level of stigma attached to having sex with other men is a critical barrier as many MSM fear ridicule and judgement from their societies; both for themselves and their families and hence remain 'in the closet'."

CONSTITUTIONAL ISSUES RAISED

The criminalisation of consensual same-sex sexual acts infringes the rights to liberty, dignity, privacy, freedom from discrimination and the right to equal protection of the law. The criminalisation of consensual sexual relationships is degrading, humiliating, and invasive and violates a person's core dignity. Criminalisation allows police officers, prosecutors and judicial officers to scrutinise and assume control of the most intimate relationships of LGBTQIA+ persons, thereby intruding into a deeply personal realm of their lives. Instead of protecting the public interest and the rights of others, criminalisation does the exact opposite, it disproportionately impacts the lives and dignity of LGBTQIA+ persons; negatively impacts public health; and disrespects and shuns the rich diversity of our Nation valued by our Constitution.

