



LESBIANS, GAYS AND BISEXUALS OF BOTSWANA

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MEDIA RELEASE: LEGABIBO IS DISAPPOINTED BY THE ATTORNEY GENERAL'S DECISION TO APPEAL THE UNANIMOUS DECISION OF HIGH COURT JUDGEMENT TO DECRIMINALISATION OF CONSENSUAL ADULT SAME-SEX SEXUAL ACTS IN PRIVATE

Date: 24th Sep 2019

In a unanimous decision, on 11 June 2019, Justices A.B Tafa, M Leburu and J. Dube decriminalised same-sex sexual acts/conduct among consenting adults in private. Sections 164, 165 and 167 of Botswana's Penal Code outlawed 'carnal knowledge of any person against the order of nature,' attempts to commit carnal knowledge and acts of 'gross indecency' respectively. These provisions have been interpreted to outlaw or criminalise sexual intercourse and/or attempts at such intercourse between persons of the same sex. They carried with them the threat of up to seven years' imprisonment for those found to have contravened them.

In finding that the provisions contravene several constitutional rights, the High Court noted that "no solace and joy" is derived from retaining laws that negatively, unjustly and unfairly impact on a segment of our society. Nor "do not serve any useful public purpose" in a country such as Botswana that aspires to embrace diversity. The Court further noted that the Botswana Constitution is a dynamic, enduring and living character of progressive rights; which reflect the values of pluralism, tolerance and inclusivity and that removing these laws would enhance our Constitutional values, National Vision and aspirations as a nation.

We note that subsequently, on the 22 July 2019, the Attorney General of Botswana lodge an appeal against the unanimous judgment of the High Court. In terms of the notice of appeal, the Attorney General seems to appeal the decision on several grounds, including that the High Court overstepped their boundaries by overruling the previous decision of the Court of Appeal in *Kanane v State* in 2003. In *Kanane*, the Court of Appeal said that, in 2003, the circumstances and the time for decriminalisation of same-sex sexual acts or homosexual practices had not yet arrived. By 2019, however, the High Court, deemed that the time had indeed arrived to remove the provisions from the Penal Code. The Court noted that the facts and circumstances of this case was fundamentally different from when *Kanane* was decided by the Court of Appeal, 16 years ago. The High Court noted that these circumstances include the uncontroverted evidence that were placed before the Court that demonstrate that continued criminalisation of consensual adult same-sex sexual acts had a range of harmful effects on the daily lives of LGBT persons in Botswana, including causing them to experience high levels of violence and inhibiting their access to healthcare and other services.

While LEGABIBO respects and acknowledge the State's right to appeal any judgment of the High Court with which it is unhappy, we have our time to study the grounds of appeal, on behalf of the Botswana LGBTI Community, LEGABIBO wishes to express our deep disappointment that the State continues to invest time and resources on appealing the High Court's decision. Instead of appealing the well-reasoned decision by three (3) judges of our High Court, the State should have taken active steps and measures to ensure equal rights and opportunities and that all Botswana are free from all forms of structural stigma and discrimination in all areas of society and our lives. This would have been in line with our National Vision 2036, which encourages social inclusion and that "people should be capacitated to have a voice in decisions that affect

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their lives". Our National Vision further emphasize that "Batswana will live in full enjoyment of their constitutional guaranteed rights". Abiding by the High Court's decision to decriminalise consensual same-sex sexual acts between adults would therefore have sent a positive message and would have been an important step to demonstrate the government's commitment towards fulfilling and upholding our shared National Vision, aspirations and the broader human rights framework in our Constitution.

LEGABIBO would like to highlight that though the State has taken steps to appeal the High Court's decision, sections 164, 165 and 167, remain struck down, unconstitutional and as it stands are not part of Botswana's Penal Code. This simply means, that consensual same-sex sexual acts between adult persons in private remain decriminalised and continue to be legal in our country. This will continue to be the position unless the Court of Appeal should determine otherwise. We therefore urge members of the LGBTI community to speak out against any threat or discrimination that they might experience as a result of perceived criminalisation of these acts.

LEGABIBO would like to encourage Batswana to read and engage with the contents of the High Court's decision. The decision is simply more than the decriminalisation of consensual same-sex sexual acts between adult persons. It was about our shared humanity, values and aspirations of being a fairer, more just and compassionate society. This ultimately benefits our society as a whole. Importantly, the case highlights that any discrimination against one Motswana is a discrimination against all Batswana.

LEGABIBO and the LGBTI community continue to put our trust and faith in the judiciary of Botswana, who is the guardian of the values and rights enshrined in the Constitution, and we are confident that fairness, compassion, and justice will prevail.

LEGABIBO would like to thank the countless Batswana from all walks of our society, who have continued to provide us support and well wishes throughout this journey for freedom.

LEGABIBO is represented by Tshiamo Rantao and supported by the Southern Africa Litigation Centre (SALC).

ISSUED BY LEGABIBO

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