

Challenging the refusal to register LEGABIBO in the High Court

Fact sheet on the case

Background to the case

On 16 February 2012, the Applicants applied for the registration of LEGABIBO in terms of the Societies Act. On 12 March 2012, the Director of the Department of Civil and National Registration rejected the Applicants' application for registration on the basis that the Botswana Constitution does not recognise homosexuals and that the objectives of the organisation are contrary to section 7(2) of the Societies Act. The Applicants' appealed against this decision to the Minister of Labour and Home Affairs. The appeal was rejected on 12 November 2012.

On 12 March 2013, the Applicants filed a case before the High Court of Botswana, asking the court to review the decision to refuse to register LEGABIBO. The Applicants are represented by Unity Dow, a well-known human rights advocate in Botswana and internationally. The case is supported by the Southern Africa Litigation Centre. The case is due to heard on 18 March 2014.

Once registered, LEGABIBO aims to provide an opportunity for lesbians, gays and bisexuals to form part of an association which will provide them with information on human rights and advocate for their rights, particularly the right to access to health services.

Parties to the case

The Applicants are individuals and organisations who support the objectives of LEGABIBO and assert that the refusal to register LEGABIBO violates their right to form and join an association. The Respondent is the Attorney General, who acts on behalf of the State.

The importance of the case

Freedom of association, assembly and expression are paramount values in a democratic society. These rights are protected in the Botswana Constitution as well as regional and international human rights instruments. The refusal to grant legal status to an organisation amounts to an interference of these rights.

Where a 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. The State has an obligation to support the exercise of these rights, especially in the case of minority groups. In this respect, it does not matter if the views of such associations are unacceptable or unpopular. The principles of pluralism and democracy imply that freedom of association and expression is always useful, because it increases respect for other people's ideas, citizen participation in the democratic system and social cohesion. In this context, it cannot be said that an organisation which promotes the universality of human rights and aims to deal with prejudice is not for the common good.

Freedom of association and expression imposes an obligation on authorities to take positive measures to promote diversity. Linked to this is the recognition of the inherent dignity of each person, and the liberty of every person to make a choice to form and belong to an association which promotes their interests.

By taking this case to court, the Applicants seek to emphasise the importance of these rights in a democracy. Succeeding in this case will benefit not only the Applicants, but any minority group which seeks to uphold its right to freedom of association and expression in Botswana.

Arguments in the case

Application for judicial review

The Applicants seek judicial review of the decision to refuse to register LEGABIBO, on the basis that such refusal was irrational and illegal - The decision was illegal in so far as it transgressed the rights provisions in the Botswana Constitution. The decision was irrational because the Director and Minister failed to apply their minds to the question whether to register LEGABIBO, and instead misconceived the provisions of the Constitution, and failed to consider the provisions of the Societies Act.

The Director and Minister did not substantiate the refusal to register LEGABIBO. There is no evidence or suggestion that LEGABIBO's objectives are likely to be used for any unlawful purpose prejudicial to or incompatible with peace, welfare or good order in Botswana. The denial of registration does not serve any substantial government interest. The refusal to register LEGABIBO without any reason for such decision, suggests that the decision is based on moral disapproval of the objectives of LEGABIBO. Such reasoning has been rejected by courts as irrational and misplaced in a democratic society which has as its founding principles the notion of tolerance, diversity and pluralism. When issues are discussed in public, general consensus is rare and the norm is a diversity of views. It is therefore unreasonable in the extreme that one should be denied the right to hold or impact on opinions just because he holds an opinion different from that of others.

Rights violated by the refusal to register LEGABIBO

Section 3 of the Botswana Constitution provides that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual" including the right to equal protection of the law, the right to freedom of assembly and association, the right to freedom of expression, the right to protection from discrimination and inhumane treatment and the rights to respect for one's liberty and dignity.

The right to equal protection of the law means that administrative decisions should not be exercised in a manner which is unfair and discriminates arbitrarily between different classes or groups of people. The African Commission has held 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". This includes equal treatment of persons irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.

None of the rights in the Botswana Constitution is limited based on sexual orientation. The rights are universal in application and can only be restricted if this is reasonably required in the interests of defence, public safety, public order, public morality or public health. Any limitation of the rights in the Constitution must be reasonably justifiable in a democratic society.

There is further no law in Botswana that prohibits anyone from being a lesbian, gay or bisexual person, nor is there any law which detracts from their fundamental rights. The inclusion of protection from discrimination based on sexual orientation in Botswana's national laws and policies shows that the Botswana government does not seek to discriminate against people based on their sexual orientation. There is accordingly no basis on which to argue that a lesbian, gay or bisexual person may not form or join an association which seeks to promote his or her specific interests.

The Applicants argue that the refusal to register LEGABIBO violates various rights entrenched in the Botswana Constitution:

- Section 13 which provides for the protection of freedom of assembly and association;
- Section 12 which provides for the protection of freedom of expression;
- Section 15 which provides for protection from discrimination;
- Section 5 which provides for the right to personal liberty;
- Section 7 which provides for the protection from inhuman treatment.

At the heart of liberty is the right to define one's own concept of existence, to define the issues which are important to a person and to form associations to pursue common goals. The refusal to register an organisation denies a person's right to self-determination and freedom of choice. The denial of registration on purely discriminatory grounds amounts to degrading treatment which violates the right to inherent dignity of every person.

Due to the sensitive nature of this case, we request that you respect the right of the Applicants to decide on the advocacy surrounding the case, and that any statements made in regard to the case be cleared with LEGABIBO.