IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHGB-000591-16

In the matter between:

LETSWELETSE MOTSHIDIEMANG **Applicant**

and

ATTORNEY GENERAL **Respondent**
LESBIANS, GAYS AND BISEXUALS OF BOTSWANA (LEGABIBO) **Amicus Curiae**

Mr. Attorney G.R. Lekgowe (with him Ms. P. Ramaja & Mr. T.K. Thankane) for the Applicant
Advocate S.T. Pilane (with him Mr. G.I. Begani) for the Respondent
Mr. Attorney T. Rantao (with him Ms. E.P. Gadise) for the Amicus Curiae

---

JUDGMENT

CORAM: TAFA J:
LEBURU J:
DUBE J:

LEBURU J:

INTRODUCTION

1. Topical and trending within this constitutional discourse is the interface between law and moral values. Law, it is trite, is a panoply and assemblage of signs, signals,prescripts and protocols that regulate human behaviour and activity. Moral values are standards of what is good, tolerable, bad or evil, which govern an individual or societal behaviour and choices, as may be influenced by different sources and perspectives, be they intrinsic or extrinsic. Juxtaposed together, law therefore ought to be a reflection of society's moral values.

2. Moral relativism informs us that what is morally good or bad to one person, within the realm of sexual orientation, choice and preference, may not necessarily

be so to another person, hence a happy and shining reflection of our plurality, diversity, inclusivity and tolerance to both majority and minority rights.

3. Sections 164 (a) and (c) and 165 of the Penal Code proscribe and criminalise sexual intercourse and/or attempt thereof between persons of the same sex and/or gender. Section 167 proscribes both public and private gross indecency. What regulatory joy and solace is derived by the law, when it proscribes and criminalises such conduct of two consenting adults, expressing and professing love to each other, within their secluded sphere, bedroom, confines and/or precinct? Is this not a question of over-regulation of human conduct and expression, which has a tendency and effect of impairing and infringing upon

constitutionally ordained, promised and entrenched fundamental human rights?

4. Our bill of rights, as entrenched and enshrined in our Supreme Law (the Constitution), is a *manifestum* of progressive, long lasting and enduring rights, which yearn for judicial recognition and protection. Any limitation, in the enjoyment of such rights, therefore, ought to be reasonably justifiable within our hallowed democratic dispensation that subscribes to the rule of law, which recognizes and protects both the majority and minority rights and interests.

5. All the foreshadowed questions shall be de-mystified as we hereunder proceed to paint and portray the answers.

RELIEF SOUGHT

6. The applicant, Letsweletse Motshidiemang, in terms of his notice of motion, is seeking the following orders against the respondent, Attorney General, namely:-

(a) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01, Laws of Botswana) are ultra vires Section 86 of the Constitution in so far as the said sections are not made for the good order and governance of the Republic of Botswana;

(b) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires the Constitution in so far as Section 164 (a) and Section 164(c) are void for vagueness;

(c) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires Sections 3 and/or 15 of the Constitution in so far as the said sections discriminate against homosexuals;

(d) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires Section 5 of the Constitution in so far as the said sections interfere with the applicant's fundamental right to liberty;

(e) declaring that Section 164(a), Section 164(c) and Section 165 of the Penal Code (Cap 08:01) are ultra vires Section 7 of the Constitution in so far as the said sections interfere with the applicant's fundamental right not to be subjected to inhuman and degrading treatment or other such treatment;

(f) any such orders, writs or direction as the Court may consider appropriate for the purpose of enforcing or securing, the enforcement of the applicant's rights;

(g) that the respondent bear the costs of this application; and

(h) further and/or alternative relief.

7. On the date of the hearing, this Court refused an application for postponement made from the bar, by Mr. Begani for the respondent. The reason advanced for the postponement was that Senior Counsel, Mr. S.T. Pilane was appearing before Garekwe J. We refused the application because the date of hearing in this matter had long been set, almost four months prior. In any event, all the parties had filed comprehensive heads of argument. It was thus in the interest of justice that the hearing of this application was proceeded with and the application for postponement was refused, having profited from the dictum of Kirby JP, in the case of **NON-BANK FINANCIAL INSTITUTIONS REGULATORY**

AUTHORITY & ANOTHER v CAPITAL MANAGEMENT BOTSWANA (PTY) LTD & OTHERS – CACGB-071-18 (CA), (unreported, judgment delivered on 27 July 2018) wherein the Court of Appeal, inter alia, dismissed an application for postponement, made on the date of hearing and from the bar.

REASONS FOR ADMISSION OF AMICUS AND AMICUS CASE

8. On the 1st November 2017, this Court granted an order admitting Lesbians, Gays and Bisexuals of Botswana, (LEGABIBO) as amicus curiae and indicated that it will give reasons for such admission in the main judgment. What follows hereunder are brief reasons for such admission.

9. In the case of **GOOD v THE ATTORNEY GENERAL**(2) [2005] 2 BLR 333 (CA), it was held that a party seeking

admission or joinder as an amicus curiae must satisfy the following:-

(a) interest in the proceedings;

(b) whether the amicus' submissions and/or averments are relevant to the proceedings; and

(c) whether such submissions raise new contentions which may be useful to the resolution of the germane issues and not just mere repetition of submissions already traversed by the substantive parties to the dispute.

10. The court, it is trite, has a discretion to admit or not admit such an interested party. Such a discretion ought to be exercised judiciously, having regard to the relevant criteria outlined above. See, **DITSHWANELO & OTHERS v THE ATTORNEY GENERAL & ANOTHER** [1999] 2 BLR 56 (HC).

11. The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. The duty of an

amicus is to provide cogent and helpful submissions that assist the court. The amicus must not repeat averments already made, but must raise new contentions. See, **MINISTER OF HEALTH & OTHERS v TREATMENT ACTION CAMPAIGN** 2002 (5) SA 713 (CC) and **KEWAGAMANG & OTHERS v ACTING OFFICER COMMANDING NO.3 DISTRICT & OTHERS** [2016] 2 BLR 82 (HC); and **FOSE v MINISTER OF SAFETY & SECURITY** 1997 (3) SA 786 (CC).

12. An applicant, to be admitted as an amicus, must demonstrate, in his or her pathway to joinder as such, not just mere interest. Brand JA, in **THE LAW SOCIETY v DINGAKE & OTHERS** – CACGB-108-16, at page 10 para 11 of cyclostyled judgment, drove the point home in the following lucid and crisp terms:-

> "If interest alone were to be found sufficient, it may well open the flood gates of allowing amici to everyone

> who may show an interest in the case, of which there may be many, with the sole purpose of burdening the court with repetitive arguments it had heard before. If a party can show direct and substantial interest in the subject matter of the litigation, it can seek to be joined as an intervening party with the concomitant risk, of course, of being held liable for costs. But, as I see it, mere interest in the case should not in itself be sufficient to allow joinder as an amicus curiae."

13. See also, **KGAFELA II v THE ATTORNEY GENERAL & OTHERS:** In re: **GABAOKELWE v THE DIRECTOR OF PUBLIC PROSECUTIONS** [2012] 1 BLR 669 (CA), wherein the same requirements relating to admission of an amicus were traversed.

14. In the present matter, LEGABIBO's averments and submissions were subjected to the above formulation. Primarily LEGABIBO submitted that its vision is to create a tolerant social environment where diversity is appreciated. In terms of its constitution, its objectives, inter alia, are to strengthen the participation of lesbian,

gay and bisexual people in the formulation of policy in Botswana, to carry out political lobbying for equal rights and decriminalisation of same sex relationships, to act on behalf of and represent lesbian, gay and bisexual people and to support public health interests by establishing an environment that enables lesbian, gay and bisexual people to protect themselves and others from violation of their basic human rights.

15. The aforestated LEGABIBO objectives were stress-tested and judicially embraced by Rannowane J (as he then was, now the Chief Justice of this Republic) in the case of **RAMMOGE & OTHERS v THE ATTORNEY GENERAL** MAHGB-000175-13 (yet unreported) where he stated, with humility and sharpness, at page 26 para 58, as follows:

> "The objects of LEGAGIBO 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."

16. With such judicial recognition and embrace, it is abundantly clear that LEGABIBO has a clear interest in the adjudication of the constitutionality of Sections 164 (a) and (c) and 165 of the Penal Code.

17. LEGABIBO, submitted that the impugned penal provisions are discriminatory in their effect; even though, ex facie, the said provisions may appear gender neutral. It was further submitted that the criminalisation of same-sex sexual conduct inhibits LGBT persons, from accessing medical treatment in the form, time and manner that is required. On that score, it was posited that such continued criminalization is in fact contrary to public interest and public health.

18. LEGABIBO further submitted that since Section 141 of the Penal Code, which defines rape, is now gender neutral and applies to penetration of any sexual organ without consent, there was no basis and rationale to maintain Sections 164 (a) and (c) of the Penal Code, as non-consensual anal penetration is covered by Section 141 thereof.

19. Having considered the above submissions, such are sufficiently relevant to the issues presented herein and have further raised new contentions not raised by the substantive applicant.

20. The above reasons therefore underscore the decision of this court to admit LEGABIBO, as an *amicus curiae*.

THE APPLICANT'S CASE

21. The applicant is a 24 year old student of the University of Botswana, reading English; African Languages and

Literature. He is a homosexual. According to him, being homosexual is not something new in his life but that it is something that he has learnt to live with whilst growing up since the age of ten.

22. Whilst growing up, he knew that he was different and such difference has long been recognized by his parents. As a little boy he did not play with or do things that little boys like, such as playing with toys and other boyish games. At the time that he started to have sexual feelings at the age of 12-13, he was not interested in girls.

23. As he grew older, the applicant thought things would change and, that he would act like boys, but that never happened, even after he had reached puberty.

24. The applicant was taunted and called degrading names because of his disposition. It was at junior school, after he had managed to summon his guts and courage that he expressed his feelings to another boy and informed him that he loved him.

25. As an adult now, it is the applicant's averment that nothing has changed, he still loves men and he is sexually attracted to men. He does not know why he likes men and does not know why he is different from other men who love women. He has accepted to live with that condition and it has become his identity. Currently, he is in a sexually intimate relationship with a man.

26. The impugned Sections 164(a),(c) and 165, according to the applicant, proscribe and prohibit him from

exercising, enjoying and engaging in sexual intercourse with a man per anum; which as a homosexual is his only mode of sexual intercourse.

27. By virtue of one or more of the impugned provisions of the Penal Code, he avers that he is prohibited from expressing the greatest emotion of love, through the act of enjoying sexual intercourse with another consenting adult male, that he is sexually attracted to and who is sexually attracted to him, as consenting adults. If he engages in such method of sexual intercourse, he will be committing a crime that attracts a sentence of imprisonment for a term not exceeding seven years. Attempting to engage in such an act is also a crime that attracts a sentence of imprisonment for a term not exceeding seven years.

28. As a homosexual, and as long as the said provisions remain extant, he is prohibited from having anal intercourse and to that extent, he is forced to live in secrecy, under a shadow and not to openly and publicly declare his sexual affection and attraction to men or to solicit men he is interested in, for fear that the actions would be construed to be an attempt to engage in carnal knowledge against the order of nature.

29. The applicant submitted that the impugned provisions of the Penal Code are unconstitutional as they are not made for the peace, order and good government of Botswana. Furthermore, that such provisions are vague in that there is no clarity on the exact type of conduct that is criminalized.

30. He has further submitted that the said provisions violate his right and freedom to liberty, by prohibiting him from using his body as he chooses and sees fit, so long as he does not cause any disrespect and harm to the enjoyment of the freedoms by others. It is his view that such laws subject him to inhuman and degrading treatment in that they prohibit him from expressing sexual affection through the only means available to him as a homosexual. On the alleged violation of his privacy, he asserts that the impugned provisions interfere with an intimate and personal aspect of his life, that is not harmful to the public interest or public good.

31. On discrimination, it is the applicant's averment that although the law appears, at face value, non-discriminatory, its effect is discriminatory in that it perpetuates negative stigma against homosexuals.

Furthermore, he argues that in effect, the law is burdensome on him than it is on females who have other means of enjoying penetrative sexual intercourse.

32. On Botswana's readiness to embrace and tolerate homosexuality, he informed court that Batswana have, through their Members of Parliament, expressed their position that there shall be no discrimination based on sexual orientation in the Employment Act (Cap 47:01), Laws of Botswana. In terms of Botswana National Vision 2016, it was stated therein at Pillar 6 that Botswana must be a morally tolerant nation, and at Pillar 3, that Botswana shall be a compassionate, just and caring nation. In terms of the Afro-Barometer Study conducted by the University of Botswana, it is the applicant's argument that the Report posits that 43% of Batswana are not opposed to homosexuality.

33. The amicus case is as foreshadowed in the reasons for joinder, as such, save to add that the amicus, filed an expert's affidavit, in support of the application, by Alexander Muller, an Associate Professor, and a medical sociologist, at the Gender, Health and Justice Research Unit, in the division of Forensic Medicine, (Department of Pathology), in the Faculty of Health Sciences, University of Cape Town, South Africa.

34. The sum and effect of the medical sociologist's (expert) scientific criteria, is that lesbians, gays, bisexuals, transgenders and intersex people living in Botswana, experience higher levels of violence than have been reported; that such people experience sexual orientation and gender identity-related discrimination when accessing healthcare services; on account of the negative stigma attached to such persons, that Sections

164(a) and (c), 165 and 167 of the Penal Code, constitute examples of structural stigma; i.e. social stigma that is institutional or made into law.

35. According to the expert, the empirical research evidence presented, was informed by a cross-sectional quantitative study, (2016/17) conducted in Botswana, Lesotho, Kenya, Malawi, South Africa, Swaziland, Zambia and Zimbabwe. This study has been approved by the Review Board, Office of Research and Development; University of Botswana (UBR/RES/IRB/BIO/009) and the Ministry of Health and Wellness, Republic of Botswana (HPDME:13/18/1). The expert, in the study, is the International Principal Investigator.

RESPONDENT'S CASE

36. The respondent's case is amply captured in the answering affidavit of Morulaganye Chamme (May His Soul rest in eternal peace), the late former Deputy Attorney General of Botswana. The respondent has not filed any expert evidence to counter and rebut the one furnished by the amicus curiae.

37. The nub and substance of the respondent's case is that Sections 164 (a) and (c) of the Penal Code are not discriminatory as they are of equal application to all sexual preferences, and that the applicant, has other modes of sexual intercourse. Being homosexual, is not criminalized; rather it is certain sexual acts that are deemed to be against the order of nature, which are criminalized and not the sexual orientation.

38. It was argued by the respondent that Section 15 of the Constitution provides limitations on the enjoyment of fundamental rights.

39. On the vagueness argument, it is the Attorney General's submission that Sections 164(a) and (c), 165 and 167 are not ambiguous, nor do they lack clarity. Sexual intercourse against the order of nature simply meant anal penetration.

40. The respondent has further urged the court to exercise restraint and rather defer to Parliament, within the rubric of separation of powers, to make a pronouncement on the matter, and furthermore that there is a groundswell of support, amongst Batswana, against homosexuality and that Batswana are not yet ready to embrace homosexuality, as fortified by the case of **KANANE v THE STATE** [2003] (2) BLR 67 (CA).

41. The above sums up the competing submissions. In order to place such submissions into a sharper focus, it is only prudent to lay bare the classical and historical evolution of Sections 164 (a) and (c) and Section 165 of the Penal Code.

HISTORICAL EVOLUTION OF THE OFFENCE OF SODOMY (SEXUAL INTERCOURSE AGAINST THE ORDER OF NATURE)

42. The present offence of carnal knowledge against the order of nature, is traceable to the Bible; as depicted in the destruction of Sodom and Gomorrah by God; in the Book of Genesis.

43. According to Genesis 18, God and two angels visited, in the form of men, Abraham and Sarah at their tent at or near the Dead Sea. Unbeknown to Abraham and Sarah, they did not realise who they were. Subsequent thereto, Abraham and Sarah positively identified God. The

Almighty later related to Abraham the pervading grievous sin transpiring in Sodom and Gomorrah; and how He intended to proceed thereto to obtain first hand information.

44. Abraham's nephew, Lot, and Lot's family, were residents of Sodom. Abraham pleaded with God not to destroy Sodom if he found 10 righteous people there.

45. After the arrival of the said two angels in Sodom, still in the form of men, Lot invited them to spend the night in his home and gave them food. At verse 4, it is stated that "Before they had gone to bed, all the men from every part of the city of Sodom, both young and old, surrounded the house and called out to Lot. "Where are the men who came to you tonight? Bring them out to us so that we can have sex with them."

46. In response to the threatening chants, Lot emerged from the house and proceeded to the mob and told them, "No my friends, don't do this wicked thing. Look, I have two daughters who never slept with a man. Let me bring them out to you, and you can do what you like with them. But don't do anything to these men, for they have come under the protection of my roof".

47. The mob, unperturbed, kept threatening and the angels then struck them with blindness. Lot and his family then showed a clean pair of heels and fled Sodom, whereupon God destroyed Sodom and Gomorrah with fire and brimstone.

48. During the Middle Ages, it was widely accepted that the sin of Sodom which resulted in its destruction, was on account of homosexuality. It was homosexuality, on account of the mob of men who threatening to have

sexual intercourse with the angels they mistakenly believed to be men, hence the term "sodomy".

49. Again in the Old Testament, in Leviticus, Chapter 20 Verse 13, homosexuality is prohibited and labelled an abomination in the following terms:-

> "If a man---- lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you."

50. In the New Testament, in Romans Chapter 1 Verse 26-27, Paul said –

> "For this reason God gave them over to degrading passions; for their women exchanged the natural function for that which is unnatural, and in the same way also men abandoned their natural function of the woman and burned in their desire toward one another, men with men committing indecent acts and receiving in their own persons the due penalty of their error."

51. In the early ages after the creation of the United Kingdom, England incorporated into its common law an

offence of sodomy, for purposes of protecting the Christian principles upon which the Kingdom was founded. The same offence was subsequently incorporated into various criminal codes, e.g. in the Statute of 1533, the offence of sodomy was incorporated, under the description of the "detestable and abominable Vice of Buggery committed with mankind or beast." See **EDWARD COKE**, 1797, 3rd Part, Cap X of Buggery or Sodomy, p58).

52. William Blackstone, in his Commentaries on the Laws of England, also included the offence of sodomy. With the advent of colonialism, the offence of sodomy was henceforth imported into the British colonies during the 17th and 20th centuries. In this connection, two scholarly articles are instructive, namely: This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism (Human Rights Watch 2008); and Michael

Kirby, "The Sodomy Offence, England's Least Lovely Criminal Law Export. Journal of Commonwealth Criminal Law, (2011). In this latter journal, the learned author and former judge traced the origins of the offence of sodomy up to its present status and how several jurisdictions have decriminalized and/or retained same.

53. Within the British Empire, same sex activity was prohibited as it was deemed morally unacceptable to the British rulers. In the incorporation of the offence of sodomy in the colonies, such was not preceded by any consultation with the local populace.

54. According to Michael Kirby, cited above, the most copied code or template within the British Empire was the Indian Penal Code of Macaulay. In Chapter XVI, titled "Of Offences Affecting the Human Body," Section 377 provided as follows:

> "377. Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to a fine."

55. It is common cause that Section 377 of the Indian Penal Code was copied in a large number of British territories, including Botswana.

56. With the passage of time, repeal and/or amendment bells of the sodomy laws rang loud. In the United Kingdom, a Committee was formed titled "Committee on Homosexual Offences and Prostitution" in 1957 which was chaired by Sir John Wolfenden. The said Committee recommended amendments to sodomy laws, including decriminalization of consensual same-sex intercourse, where at pages 187-8, stated thus:-

> "Unless a deliberate attempt is made by society; acting through the agency of the law, to equate the sphere of crime with that of sin, there must

> remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

57. Influenced by the said Wolfenden Committee Report, the United Kingdom Parliament changed the law of England and Wales when the Sexual Offences Act of 1967 was enacted, which decriminalized same sex sexual intercourse. Several countries have since decriminalised the offence of sodomy, for instance, Angola, South Africa, Mozambique, Canada, United States of America etc.

58. The repeal of the sodomy laws was greatly influenced, in large measure, by the inherent recognition of such laws as being discriminatory, invasive of personal dignity, privacy, autonomy, liberty and lastly, the absence of compelling public interest to intrude and regulate private sexual expression and intimacy between consenting adults.

59. In 1964, the sodomy laws found its way into Bechuanaland Protectorate through the enactment of our present Penal Code, which has since undergone several amendments. In 2008, Sections 164 and 165 were amended to make them appear, ex facie, gender neutral. Despite such amendments, the applicant and the amicus curiae, are hereby and now, challenging the constitutionality of such penal provisions.

60. Having set the scene and tone of our present discourse, the point of departure is thus the issue of constitutional adjudication.

CONSTITUTIONAL ADJUDICATION

61. According to the respondent, the applicant and the *amicus curiae*, should lobby Parliament for it to amend or repeal the impugned penal provisions, rather than

approaching this Court. On that score, it was obliquely submitted by the respondent that the court should instead defer to Parliament on issues of morality; as elected representatives of the people.

62. It is trite that there are various ways upon which courts exercise jurisdiction over constitutional matters. A typical example may relate to judicial review of the exercise of executive powers. The courts on that score, would be called upon to determine whether the exercise of such power, is traceable to any legal prescripts or whether the impugned decision falls within the recognized grounds for review.

63. In terms of our Constitution, Section 95 grants the High Court the necessary powers as follows:-

> "95(1) There shall be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be

conferred on it by this Constitution or any other law." (my emphasis)

64. Sections 105(1) and 106 of the Constitution are equally instructive on the question of constitutional adjudication. They provide as follows:-

"105(1) Where any question as to the interpretation of this Constitution arises in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the High Court. (my emphasis)

(2) Where any question is referred to the High Court in pursuance of this section, the High Court shall give its decision upon the question and the court in which the question arose shall, subject to any appeal, dispose of the case in accordance with that decision.

106. An appeal shall lie as of right to the Court of Appeal from any decision of the High Court which involves the interpretation of this Constitution, other than a decision of the High Court under Section 69(1) of this Constitution." (my emphasis).

65. Section 127(10) of the Constitution is equally instructive on questions of constitutional adjudication. It provides as follows:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

66. Section 18 of the Constitution dissipates, completely, any lingering doubt with respect to constitutional adjudication. For completeness, it is reproduced below as follows:

> "18(1) 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 is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance to subsection (1) of this section; or

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section.

And may make any such orders, issue such writs and give such direction as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.

(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his or her opinion the raising of the question is merely frivolous or vexatious." (my emphasis).

67. In the present matter, it is common cause that the applicant's case is underpinned by Sections 3,7,9 and 15 of the Constitution and this gives imprimatur and

seal of approval to our exercise of jurisdiction in the present constitutional adjudication and discourse.

68. In the absence of any clear and specific ouster of the High Court's jurisdiction on any matter, be it constitutional or not, this court has the necessary jurisdictional potestas and authority to intervene. On the requirement for clear ouster of court's jurisdiction, see, **KGOSIKWENA v THE ATTORNEY GENERAL AND ANOTHER** [2001] 2 BLR 513 (HC); **LEIPEGO v MOAPARE AND OTHERS** [1993] BLR 229 (CA) and **MAFOKATE v MAFOKATE** [2000] 2 BLR 430 (HC).

69. I have not had sight of any clear ouster of our jurisdiction in the adjudication of the validity of Sections 164(a) and (c), and Section 165 of the Penal Code. This Court, is the ultimate interpreter and arbiter of our Constitution, hence the exercise of jurisdiction in this constitutional discourse is unimpeachable.

CONSTITUTIONAL INTERPRETATION.

70. For purposes of laying a foundation to constitutional interpretation, it is instructive and pertinent to state that a Constitution, is the supreme law of the land. According to Hans Kelsen, a jurist and legal philosopher, in his thesis of "Pure Theory Law", a constitution is the Grundnorm or the Basic Norm or rule that forms an underlying basis for a legal system. Simply put, that it is the super law upon which all other laws derive their legitimacy and validity.

71. A constitution, is an enduring supreme law that is crafted in broad, inclusive and open-ended language, and it is laden with values and beliefs associable with democracy and the rule of law. See Lourens Du Plessis: Re-Interpretation of Statutes at pages 133-138 (2002, Lexis Nexis).

72. In the case of **ATTORNEY GENERAL v DOW** [1992] BLR 119 (CA) at page 166 (A-E), Aguda J.A. assiduously stated as follows:

> "The Constitution is the Supreme Law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand the courts must continue to breathe growth and development of the State through it. In my view, the first task of a court when called upon to construe any of the provisions of the Constitution is to have a sober objective appraisal of the general canvass upon which the details of the constitutional picture are painted. It will be doing violence to the Constitution to take a particular provision and interpret it one way, which will destroy or mutilate the whole basis of the Constitution, when by a different construction the beauty, cohesion, integrity and healthy development of the State, through the Constitution, will be maintained. We must not shy away from the basic fact that whilst a particular construction of a constitutional provision may be able to meet the demands of the society of a certain age, such construction may not meet those of a later age. In my view, the overriding principle must be an adherence to the general picture presented by the Constitution, into which each individual provision must fit in order to maintain, in essential details, the picture of which the framers could have painted, had they been faced with circumstances of today. To hold otherwise would be to stultify the living Constitution in its growth. It seems to me that a stultification of the Constitution must be prevented if this is possible without doing extreme violence to the language of the

> Constitution. I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society, which is part of the wider and larger human society governed by some acceptable concepts of human dignity."

73. The Interpretation Act (Cap 01:04), Laws of Botswana is relevant in the interpretation of the Constitution, as gleaned from the Long Title of the said Act, which posits as follows:-

> "An Act to provide for the interpretation of the Constitution and other enactments."

74. When interpreting legislation or Acts of Parliament, the foundational premise is that all laws serve the public good or public interest. Jeremy Bentham, a philosopher, jurist and proponent of the utilitarian jurisprudence, also termed "Felicific Calculus" in his piece titled "An introduction to the Principles of Morals and Legislation" (1789), propounds that mankind was

governed by two sovereign motives of "pain" and "pleasure". He theorised that any object to be achieved must henceforth produce "pleasure", "good" or "happiness" and must prevent the happening of "mischief", "pain", "evil" or "unhappiness". He concluded that the object of all legislation must be the "greatest happiness of the greatest number." In this connection, Section 26 of our Interpretation Act mimics and embraces Bentham's theory in the following terms:-

> "26. Every enactment shall be deemed remedial and for the public good and shall receive fair and liberal construction as will best attain its object according to its true intent and spirit."

75. Bentham's utilitarianism is further reflected in Section 86 of the Constitution, which spells out such theory as follows:

> "86. Subject to the provisions of this Constitution, Parliament shall have power

> to make laws for the peace, order and good government of Botswana."

76. Accordingly, this Court shall interpret our Constitution as a living and dynamic charter of progressive human rights, serving the past, the here and now, as well as the unborn constitutional subjects.

77. In construing the Constitution, I will accord and give meaning and interpretation which would render it effective. The Constitution, should thus be given a generous construction, which will not unjustifiably erode civil liberties. See, **CLOVER PETRUS & ANOTHER v THE STATE** [1984] BLR 14(CA). A Constitution ought to be interpreted according to the imperatives of the prevailing socio and political context.

78. For purposes of ascertaining the true meaning of words, a court should not look at the literal meaning per se,

but should consider their setting, the context in which the words are used and the purpose for which the words are intended. Mere classical linguistic formalism, is thus discouraged. In this connection, see **TIRO v THE ATTORNEY GENERAL** (2) [2013] 3 BLR 490 (CA); **SECRETARY FOR INLAND REVENUE v BREY** 1980 (1) SA 472 (A) and Schreiner J.A's minority judgment in **JAGA v DONGES**; **BHANA v DONGES** 1950(4) SA 653 (A), which authorities advocate for a textual and contextual mode of construction. See also Section 29(1) of the Interpretation Act, which embraces an interpretation of an Act, as a harmonious whole, which thus recognizes reconciliation of seemingly conflicting and incongruous provisions, if any, in an enactment.

79. Our Courts are further enjoined to have regard to any relevant international treaty, agreement or convention, as stated in Section 24 of the Interpretation Act. It is

further useful and pertinent that domestic laws are to be interpreted in a manner that does not conflict with Botswana's international obligations. See, **DOW v ATTORNEY GENERAL** (supra).

80. Where a particular provision of an Act is challenged for invalidity or unconstitutionality, the starting premise is the presumption of validity or constitutionality, otherwise captured as omnia praesumuntur rite esse acta, which verbalizes that official acts, including enacted laws, are presumed to be valid and will where possible be interpreted to be lawful and effective, unless the contrary is shown. See, **KGAFELA II AND ANOTHER v THE ATTORNEY GENERAL & OTHERS** [2012] 1 BLR 699 (CA), at page 714 (E-G) and **RAMANTELE v MMUSI & OTHERS** CAHGB-104-12(CA).

81. He who alleges such unconstitutionality of a statutory provision bears the onus of proving same, on a balance of probabilities. Where rights and freedoms are constitutionally conferred on persons, any derogation from such rights and freedoms ought to be narrowly and strictly construed. To justify such derogation, it is incumbent upon the justifier to prove that the measures adopted satisfy a particular public imperative or objective and further that such a measure is reasonable, within our democratic dispensation. See, **R v OAKES** (1986) 1 SCR 103; **WOODS v MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS** 1995(1) SA 703, per Gubbay CJ and **ATTORNEY GENERAL AND ANOTHER v NALCPWU** [2016] 2 BLR 521 (CA).

82. I shall start with the "void for vagueness" submission.

VOID FOR VAGUENESS

83. It is the applicant's case that Sections 164(a) and (c) and 165 of the Penal Code should be struck down as unconstitutional due to the vagueness of the said sections; particularly with respect to the meaning of "carnal knowledge" "against the order of nature". In response thereto, it is the Attorney General's contention that the words used are clear and not vague and that they simply mean "anal penetration", as defined by the highest court (Court of Appeal) in the **KANANE** (supra).

84. The void for vagueness ground is a component or derivative of the principle of legality, which is multifaceted. For purposes of this judgment, we shall confine ourselves to the specific ground of void for vagueness.

85. As a starting point, the law maker, in crafting and enacting laws, must speak with irresistible clarity, lucidity and certainty. Such public policy imperative is informed by the nature of law, which is an edict for societal regulation. For a subject to dance and fashion his conduct in sync with the law's normative repertoire, then the law must be clear and certain. Without clarity, precision and consistency, the law lacks predictability. For example, how does a person conduct and arrange his/her affairs; exercise his/her rights and incur liabilities and obligations if the law is vague, I ask?

86. Lord Diplock's dictum in **BLACK-CLAWSON INTERNATIONAL LTD v PAPIERWERK WALDOF AG** [1975] 1 ALL ER 810 (HL) at p836 is relevant, as follows:

> "The acceptability of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those

consequences are regulated by a statute, the source of that knowledge is what the statute says."

87. Under the void for vagueness doctrine, a vague law is a violation of due process or the rule of law. It is on that basis that when a court is seized with an interpretation of a seemingly vague penal provision, it adopts an interpretation that favours liberty (in favoram libertas) of the individual. See, **S v VON MOLENDORFF** 1987 (1) SA 135 (T).

88. Void for vagueness may come up from different perspectives. Firstly, it may be vague if the scope and application of such law is unclear to an individual i.e. what persons are regulated by such a law. The other instance may arise with respect to what type of conduct is prohibited. It is not intended that such examples are exhaustive.

89. The principles of legality, which form part of the foundational values of our Constitution, are recognized under Section 10 of our Constitution. For the present purposes and adjudication, Section 10(8) is pertinent and for completeness, same is cited below as follows:-

> "10(8) No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law: (my emphasis)
>
> Provided that nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed."

90. In order to avoid the tentacles of the void for vagueness doctrine, what is required in the law, is certainty (ius certum principle) and not perfect lucidity. In other words, the doctrine of vagueness does not require absolute certainty of the laws. See, **AFFORDABLE**

MEDICINES TRUST AND OTHERS v MINISTER OF HEALTH AND ANOTHER 2006(3) SA 247(CC), where Ngcobo J said:-

> "The doctrine of vagueness is founded on the rule of law, which ..... is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."

91. Under this void for vagueness doctrine, I can do no better than cite the seminal pronouncements of Thurgood Marshall J, in **GRAYNED v CITY OF ROCKFORD**, 408 US 104 (1972) where he stated, with remarkable lucidity and gusto as follows:-

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to

> know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply to them. A vague law impermissibly delegates basic policy matters to policemen, judges, juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application."

92. Section 164(a) creates an offence of having carnal knowledge of any person against the order of nature whereas Section 164(c) is directed towards those who permit another person to have carnal knowledge of him or her against the order of nature.

93. The Penal Code does not define what is "carnal knowledge" and "the order of nature".

94. As a matter of general proposition, it is prudent and logical that words used in an enactment, should be defined in the same piece of legislation. Where there are no definitions, the court as final arbiter, may provide a definition.

95. The importance of a court-given definition cannot be ignored because courts are sources of law. The courts, as functionaries within our open justice system, that subscribe to, amongst others, openness and transparency of judicial processes, and/or the publishing of court decisions or law reports, are sources of law. Examples (non-exhaustive) of where courts make law are thus: where the applicable statute has not rendered a definition to some conduct or transaction; secondly where there is a lacuna or casus omissi in the Act and thirdly in the development of common law. According to Lord Denning, in the "Reform of Equity", Law Reform and Law-Making (1953), "the judges do every day make law, though it is almost a heresy to say so."

96. In the case of **GAOLETE v STATE** [1991] BLR 325 (HC), "carnal knowledge" was defined by the court as "sexual

intercourse", and "the order of nature" was defined as "anal sexual penetration." The same definitions were embraced by the highest court of the land in **KANANE v THE STATE** cited supra per Tebbutt JP and this court is thus bound by such definition.

97. On that basis, the provisions of Section 164 (a) and (c) are not vague, having regard to the definition accorded thereto.

THE KANANE DECISION

98. The **KANANE** (supra) decision is the respondent's buoy and trumpcard. Hence a studious interrogation of the case is inevitable. The brief facts were as follows:

99. The appellant, an adult male, was in March 1995 charged with committing an "unnatural offence" with another adult male person, contrary to Section 164(c) of

the Penal Code (Cap 08:01). Alternative to this count, he was charged with committing an indecent practice, contrary to Section 167 of the Penal Code. The appellant pleaded not guilty to the charges. The particulars of the offence (first count) alleged that on 26th December 1994, at Maun, the appellant permitted one adult male to have carnal knowledge of him against the order of nature. The particulars of the alternative count alleged that the appellant, committed an "act of gross indecency with a named male person".

100. The appellant submitted that the said sections discriminated against male persons on the ground of gender and offended against their rights of freedom of conscience, expression, privacy, assembly and association, as entrenched in Section 3, 13 and 15 of the Constitution.

101. Section 164(c) and 167 under which the appellant was charged, read as follows:

> "164. Any person who –
>
> (a) has carnal knowledge of any person against the order of nature;
> (b) ..... (not relevant);
> (c) permits a male person to have carnal knowledge of him or her against the order of nature;
>
> is guilty of an offence and is liable to imprisonment for a term not exceeding seven years."
>
> 167. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with himself or with another male person, whether in public or private, is guilty of an offence."

102. The Court of Appeal, per Tebbutt J.P. held as follows:-

> "(a) the courts ought to be alive to the fact that constitutional rights, ought to be evaluated and interpreted in accordance with kindred and similarly circumstanced democracies;
>
> (b) all constitutional rights are subject to limitations contained in Section 3 of the Constitution, particularly the public interest in instances where the applicable legislation is of public concern;

(c) Section 164(c) of the Penal Code was intra vires the Constitution;

(d) Section 167 of the Penal Code (before it was amended in 1998) was discriminatory and therefore ultra vires Sections 3 and 15(1) of the Constitution."

103. According to Tebbutt JP, at page 71, "carnal knowledge against the order of nature" meant sexual intercourse per anus. He further continued and determined that oral sexual stimulation of either a male or a female by either another male or female amounts to gross indecency, as envisaged by Section 167 of the Penal Code.

104. The court further stated that Section 164 (after its amendment) was gender neutral and therefore it was not discriminatory. In conclusion, the following words, at page 80 of the court are pertinent and I reproduce them:-

> "It is not necessary for this court to express any opinion as to whether the social norms and values of the people of Botswana as to the question of homosexuality are conservative or liberal. The Court has no evidence of either. It, however, does have indications before it that the time has not yet arrived to decriminalise homosexual practices even between consenting adults males in private. Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution." (my underlining for emphasis purpose).

105. An interrogation of the aforestated dictum, plainly reveals that as at the time of rendering the **Kanane** decision in 2003, the Court of Appeal was of the view that the time for decriminalising homosexual practices between two or more consenting adults, in private, was not ripe. Obviously, the highest court left out a window of opportunity, whenever the imperatives of events and circumstances were apposite and conducive, to decriminalise same. It is the applicant's and amicus' case that there has been a material change of circumstances since the **Kanane** decision was

rendered, and therefore sex between males and males should be decriminalised.

106. The impugned provisions are under attack on the grounds that they violate the right to privacy, liberty, dignity, that they are discriminatory in effect and as an alternative to the discriminatory argument, that they amount to inhuman and degrading treatment.

THE RIGHT TO PRIVACY

107. Privacy is as old as mankind. What is considered to be private and thus legally protected differs; according to era, the society and the individual. Privacy is therefore context based.

108. On a brief historical context, the following is worth mentioning, with respect to privacy. The King of Hammurabi, of ancient Babylon, introduced his "Code

of Hammurabi" of 282 laws in 1754 BC, which contained a paragraph against the intrusion into someone's home. In the same vein and breath, Mark Tullius Cicero, a Roman stateman, orator, lawyer and philosopher, stated:

> "What more sacred, what more strongly guarded by every holy feeling, than a man's home".

109. William Blackstone's Commentaries on the Laws of England, Book 4, Chapter 16, proclaimed that a man's home is his castle and fortress as follows:

> "And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with immunity."

110. Biblically, privacy is explained after Adam and Eve had eaten the fruit of the tree of knowledge as follows, "the eyes of both were opened, and they knew that they were naked; and they sewed fig tree together and made

themselves aprons." See Genesis 3:7 (Revised Standard Version).

111. Jurists Warren S.D. and Brandeis L.D. in their path breaking article, aptly titled The Right to Privacy (published in the Harvard Law Review, 1890), submitted that as political, social and economic changes occur in the society, the law has to evolve and create new rights in order to meet the demand of the society and ensure full protection of the person and the property. They poignantly contended that the right to privacy can be defined as "the right to be let alone" (Vol 4 No 5 at pages 193-196).

112. According to Black's Law Dictionary 1196 (6th ed 1990), privacy has been defined as the right to live a life of seclusion, the right to be free from unwanted publicity, and the right to live without unwarranted interference by the public in matters with which the public is not

necessarily concerned. Such crucial decisions may concern religious faith, political affiliation, intimacy, secrecy, control of personal information etc. As highlighted above, privacy's concrete form differs according to the prevailing societal characteristics, the economic and cultural environment. It means therefore that privacy must be interpreted in the light of the current era and context. Like all fundamental rights; privacy is a qualified human right. See, Posner R.A.: The Right to Privacy. Georgia Law Review. Vol 12 No.3 (1978) p.409.

113. Privacy is essential to who we are as human beings. It gives a person space to be himself/herself without judgment. It allows persons to think freely without hindrance and is an important element of giving people personal autonomy and control over themselves and those who know what about them. See, Solove D.J.

Nothing to Hide: The False Tradeoff Between Privacy and Security (Yale University Press, 2011).

114. As a matter of general proposition, privacy, private life, honour and image of people are inviolable. The right to privacy is multifaceted and multi-pronged, hence it is an arduous task to define privacy. However, such facets of privacy can only be unearthed and determined on a case by case basis. Privacy may relate to one's physical body, (physical privacy). It may also relate to his/her personal information, otherwise termed informational privacy and lastly the privacy of choice. A few typical examples will amplify but simplify privacy: for example, a person's right not to be arbitrarily searched by law enforcement agencies; a voter's political privacy relating to his/her secret vote and/or a person's right to choose an intimate or life partner. The list thereof is non-exhaustive.

115. The right to privacy is entrenched in Section 3(c) and Section 9 of our Constitution. Section 3(c) and 9(1) provide as follows:

> "3. 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 freedoms of others and for the public interest to each and all of the following, namely –
>
> (a) ----------
> (b) ----------
> (c) Protection for the privacy of his or her home and other property and from deprivation of property without compensation.
>
> 9(1) Except with his or her own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises."

116. At face value, one may be tempted to postulate that the right to privacy underscored by Section 9 above only relates to protection against the search of his or her person, property, or entry by others on his/her

premises. Such a linear and face value interpretation runs foul to our cherished generous, purposive and context orientated mode of constitutional interpretation. Furthermore, such a narrower construction will thus whittle down fundamental rights.

117. The right to privacy, under Sections 3(c) and 9(1) thereof is thus multifaceted and multipronged. I am fortified thereof by the case of **KETLHAOTSWE AND OTHERS v DEBSWANA DIAMOND COMPANY (PTY) LTD**, CVHGB-001160-07 per Lesetedi J (as he then was) (unreported, delivered on 27 September 2012). See also a scholarly article by two professors Balule T.B. and Otlhogile B: Balancing the Right to Privacy and the Public Interest: Surveillance by the State of Private Communications for Law Enforcement in Botswana. Statute Law Review (Oxford University Press, 2015).

118. The right to privacy, it is common cause, is not absolute. Through reverse syllogism, any entitlement to privacy is what remains after the law has siphoned out from the wholesome basket of privacy, through acceptable limitations. Section 3 and 9(2) is what the law arrogates to itself in the following terms:

> "3. ----------
> the provisions of this Chapter shall have effect for the purpose of 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.
>
> 9(2) 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 –
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, for the purpose of any census or in order to secure the

development or utilisation of any property for a purpose beneficial to the community;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other person;

(c) that authorizes an officer or agent of the Government of Botswana, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or duty or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or

(d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or duty upon any premises by such order; and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not be reasonably justifiable in a democratic society."

119. Any interference with the right to privacy must therefore be done under the aegis of some law; that it must be for

purposes of protecting the rights listed in Section 9(2)(a) and (b) and lastly that such a limitation must be reasonably justifiable in a democratic society. Any limitation not covered by this triad of limitations will not pass constitutional muster.

120. At an international plane and sphere, the limited right to privacy is a cherished fundamental human right. The United Nations Declaration of Human Rights (1948), at Article 12, posits that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Similarly, the International Covenant on Civil and Political Rights (1966) at Article 17 states that "No one shall be subjected to arbitrary or unlawful interference with his

privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

121. The right to privacy is also included in:

(a) Article 14 of the United Nations Convention on Migrant Workers.

(b) Article 16 of the United Nations Convention on the Rights of the Child.

(c) Article 10 of the African Charter on the Rights and Welfare of the Child.

(d) Article 4 of the African Union Principles on Freedom of Expression (the right to access information).

(e) Article 11 of the American Convention on Human Rights.

(f) Article 5 of the American Declaration of the Rights and Duties of Man.

(g) Articles 16 and 21 of the Arab Charter on Human Rights.

(h) Article 21 of the ASEAN Human Rights Declaration; and

(i) Article 8 of the European Convention on Human Rights.

122. The constitutional right to privacy protects the liberty of people to make certain crucial decisions regarding their well-being, without coercion, intimidation or

interference, from any direction, be it governmental or otherwise. In the Indian case of **NAVTEY SINGH JOHAR AND OTHERS v UNION OF INDIA, MINISTRY OF LAW AND JUSTICE** (Writ Petition No. 76 of 2016, (Supreme Court), the case in which Section 377 of the Indian Penal Code, dealing with sodomy laws, was struck down as unconstitutional, Malhotra J, at page 33 para 16.2 dealt with the right to privacy as follows:

> "The right to privacy has now been recognised to be an intrinsic part of the right to life and personal liberty under Article 21.
>
> Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its core protection lies at the core of Fundamental Rights guaranteed by Articles 14,15 and 21. The right to privacy is broad-based and pervasive under our constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and preserves the sanctity of the private sphere of an individual. The right to privacy is not simply the "right to be let alone" and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference."

123. Justice Chandrachud, still in the same case of **Navtey Singh Johar** cited supra, profoundly remarked, with refreshing clarity and erudition, that in matters of personal intimacy and sexual orientation; the State has no role to play. He posited that -

> "The choice of a partner, the desire for personal intimacy, and the yearning to find love and fulfilment in human relationships have universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the State has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation."

124. The Constitutional Court of South Africa, in **NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY & ANOTHER v MINISTER OF JUSTICE AND OTHERS** 1999(1) SA 6 (CC), addressed the issue of privacy in the following terms:-

> "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human

> relationships without interference from outside the community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."

125. Arbitrary intrusion upon another's solitude or private affairs is highly offensive and thus an invasion of privacy. In the case of **GRISWOLD v CONNECTICUT**, 381 US.479, 85S (1965); the US Supreme Court struck down a statute forbidding married adults from using birth control and the ratio of the case being that the said statute violated the sanctity and privacy of the marital bedroom. In **LAWRENCE v TEXAS**, 539 US.558, the US Supreme Court struck down the criminal prohibition of homosexual sodomy as it violated the right to privacy.

126. It is the applicant's case that Sections 164(a),(c) and Section 165 of the Penal Code impair and infringe upon his privacy in that they criminalise consensual sexual activity with his preferred partner, who is an adult. He asserts that it is not the business or mandate of the law to regulate consensual sexual activity between two consenting adults, expressing and nurturing their love to each other, within the secluded confines of their bedroom.

127. In my view, the attacked provisions, impair the applicants right to express his sexuality in private, with his preferred adult partner. The applicant has a right to a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that it is consensual. There is no complainant/victim in that regard.

128. I will now address the right to liberty, dignity and equality.

LIBERTY, EQUALITY AND DIGNITY

129. A man/woman is known by the company he/she keeps. Liberty, equality and dignity are associable friends who hobnob in close proximity, and are thus intricately and harmoniously related. The said triumvirate is what forms the core values of our fundamental rights, as tabulated and entrenched in Section 3 of the Constitution. Professor Susanne Baer, refers to the said triad as "fundamental rights triangle of constitutionalism." See, Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism University of Toronto Law Journal, Vol 59, Issue 4 pages 417-468 (2009).

130. Section 3 of the Constitution is the overarching section that encompasses all fundamental human rights.

131. According to the applicant, the impugned provisions of the Penal Code infringe upon his liberty, dignity and equality; and same are ultra vires the Constitution.

132. On liberty, it has been averred by the applicant that his right to choose his preferred intimate sexual partner is infringed by the criminalisation of sexual intercourse per anum; which is his only mode of sexual intimacy. Such criminalisation, according to him, undermines his individual autonomy.

133. He further submitted that the said sections impair his right to dignity, which is key and essential for a meaningful existence and which is also an integral part of his personality. He argued that it is not for the State to choose or arrange the choice of a partner, but for the

partners to choose themselves, and that there is no reasonable justification to have such penal provisions.

134. It is the amicus's case that the impugned sections are also discriminatory, in effect, (indirect discrimination). In amplification, learned counsel Mr. Rantao has submitted that sexual intercourse per anum, is the applicant's only mode of sexual expression and thus denying him his only mode of sexual expression, is discriminatory in that the heterosexuals are permitted the right to sexual expression in a way that is preferred by them, and such equates to a indirect discrimination, founded on sexual orientation.

135. According to the amicus curiae, the criminalisation, as aforestated, perpetuates stigma and hostile discrimination against the entire LGBT persons; since any kind of sexual intercourse in the case of such persons would be considered a crime. The said

criminalisation also has negative health effects on LGBT community in that the impugned provisions, which perpetuate stigma and opprobrium, dissuade the LGBT from accessing health facilities, and that even when they attend and visit health facilities, they are shunned and/or attended to with contempt and disdain; and thus making it hard for them to access vital messages about safe sexual conduct, essential in the age of HIV/AIDS.

RESPONDENT'S CASE

136. In answer thereto, the Attorney General has submitted that the applicant is a "cry baby" and that he is free to engage in sexual activity as long as it is not sexual intercourse per anus.

137. It is the respondent's position that Sections 164 (a) and (c) are not discriminatory as they are of equal application to all sexual preferences, and that Section 15 of the Constitution provides limitations on the enjoyment of fundamental rights. Curiously, the respondent has not pigeon-holed the applicable limitation to the applicant's asserted rights.

LIBERTY

138. The right to liberty, as guaranteed under Section 3 of the Constitution is multi-faceted. Specifically, the right asserted herein is the right to choose a sexual or intimate partner, otherwise referenced sexual autonomy.

139. In the case of **PLANNED PARENTHOOD OF SOUTH EASTERN PA v CASEY**, 505 US 833 (1992), the US

Supreme Court, per Kennedy J, held that matters of personal intimacy and choice are central and key to personal liberty and autonomy and that it is not the business of the law to choose for a person his/her intimate partner.

140. In **NAVTEJ SINGH JOHAR & OTHERS** (supra) Misra CJ, poignantly asserts, at page 142, as follows:

> "The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegragable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perceptions that the majority population is peeved when such an individual exercises his/her liberty, despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly the fundamental right of liberty of such an individual is abridged."

141. As a nation, there is an ardent need to respect our diversity and plurality by being tolerant to minority views and opinions. We need not be too prescriptive

and try to cajole people into becoming who and what they are not. Personal autonomy on matters of sexual preference and choice must therefore be respected. Any criminalisation of love or finding fulfilment in love dilutes compassion and tolerance. In this connection, the powerful words of wisdom from Jimmy Creech, a United Methodist Pastor, found at (www.hrc.org) are pertinent, as follows:-

> "Sexuality is a wonderful gift from God. It is more than genital behavior. Its the way we embody and express ourselves in the world. But we cannot love another person intimately without embodying that love; without using our bodies to love. And that does involve genital behavior. Sexual love is for the purpose of giving and receiving pleasure with our most intimate partner. It is a means of deepening and strengthening the intimate union that exists. This can only be healthy and good if our behavior is consistent with who we are and with whom we love, and when we are true to our own sexuality and orientation."

142. Sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important

attribute of one's personality and identity; hence all and sundry are entitled to complete autonomy over the most intimate decisions relating to personal life, including choice of a partner. The right to liberty therefore encompasses the right to sexual autonomy. See E Cameron "**SEXUAL ORIENTATION AND THE CONSTITUTION: A TEST CASE FOR HUMAN RIGHTS** (1993) 110, SALJ 450.

143. The right to liberty goes beyond mere freedom from physical restraint or detention. It includes and protects inherently private choices, free from undue influence, irrational and unjustified interference by others. See, **NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY AND ANOTHER v MINISTER OF JUSTICE AND OTHERS** (supra) and **LAWRENCE v TEXAS** (supra), wherein the US Supreme Court held that same

sex sexual conduct between consenting adults was part of liberty protected by substantive due process.

144. Anal sexual penetration and any attempt thereof are prohibited and criminalised by Sections 164(a), (c) and 165 of the Penal Code. Effectively, the applicant's right to choose a sexual intimate partner is abridged. His only mode of sexual expression is anal penetration; but the impugned provisions force him to engage in private sexual expression not according to his orientation; but according to statutory dictates. Without any equivocation, his liberty has been emasculated and abridged.

DIGNITY

145. Dignity, derived from *dignitas*, means "worthy of honour and respect." It is one of the core values of our

fundamental rights. It envisages the state or quality of being worthy of honour, respect and regality. According to Immanuel Kant, in his piece titled Groundwork of the Metaphysics of Morals 4: pages 434-435, dignity "relates to human value and the requirement to respect others".

146. According to one of the greatest legal and moral philosophers, Ronald Dworkin, in his piece titled "Justice For Hedgehogs" the title of which is influenced by Greek poetry about a Fox and a Hedgehog, he posits that we all deserve to live well and/or have a good life. He articulates his overarching value or thesis in terms of human dignity. He argues that we must respect fully the responsibility and right of each individual (including ourselves) to decide for himself/herself how to make something valuable of his life; and thus referring to

personal choice and autonomy. (Dworkin R: Justice For Hedgehogs: Harvard University Press. 2011)

147. In **NAVTEJ SINGH JOHAR & OTHERS** (cited above), Misra CJ, on dignity, at page 84, tells us:

> "..... that life without dignity is like a sound that is not heard. Dignity speaks, it has its sounds, it is natural and human. It is a combination of thought and feeling.....
>
> It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning."

148. Kirby JP, in **ATTORNEY GENERAL v RAMMOGE & OTHERS** (unreported, delivered on 16 March 2016) at page 51, with remarkable sapience, informs us as follows:

> "To deny any person his or her humanity is to deny such person human dignity and the protection and upholding of personal dignity is one of the core objectives of Chapter 3 of the Constitution ....
>
> Members of the gay, lesbian and transgender community although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are

fully entitled in Botswana, as in other progressive States, to the constitutional protection of their dignity.

149. On the right to dignity, see also **LAW v CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)** 1999 (1) SCR 497, at para 53 where it was stated as follows:

> "Human Dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to the individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, devalued, and is enhanced when laws recognize the full place of all individuals and groups....."

150. It is trite that sexual intercourse is not just for purposes of procreation. It constitutes an expression of love and intimacy.

151. The impugned sections, in my view deny the applicant the right to sexual expression in the only way available to him. Such a denial and criminalization, goes to the core of his worth as a human being. Put differently, it violates his inherent dignity and self-worth. All human beings are born free and equal in dignity. See, Articles 1, 2 and 3 of the United Nations Universal Declaration of Human Rights. Dignity acts as a core of a diverse but interrelated body of inalienable rights. Human dignity refers to the minimum dignity and belongs to every human being qua human. It does not admit of any degrees. It is equal for all humans. See, **ND v ATTORNEY GENERAL OF BOTSWANA & ANOTHER** MAHGB-000449-15 (unreported, delivered on 29 September 2017) per Nthomiwa J, a case involving a transgender, in which the State was ordered to change

the gender marker on an identity document. It was stated therein as follows:

> ".... the State has a duty to uphold the fundamental human rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy. This includes taking all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State – issued identity documents which indicate a person's gender/sex reflect the person's self-defined gender identity."

152. Nthomiwa J continued and held that:

> ".... the recognition of the Applicant's gender identity lies at the heart of his fundamental right to dignity. Gender identity constitutes the core of one's sense of being and is an integral part of a person's identity. Legal recognition of the Applicant's gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with."

153. By parity of reasoning and logic, the applicant's sexual orientation, lies at the heart of his fundamental right to dignity. It is his way of expressing his sexual feelings,

by the only mode available to him. His dignity ought to be respected, unless lawfully restricted.

DISCRIMINATION

154. It is the applicant's case that the challenged penal provisions are discriminatory in effect, contrary to Section 15(1) of the Constitution of Botswana. The respondent on the other hand submits that the said penal provisions are gender neutral and are not discriminatory.

155. I have already reproduced the impugned penal provisions above. The issue that yearns for interrogation is whether such provisions are discriminatory, in effect.

156. Ex facie, the aforestated provisions are gender neutral and apply to all and sundry, whether male or female.

However, the nub and substance of the amicus case is that the provisions are discriminatory in effect, by denying him sexual expression and gratification, in the only way available to him, even if that way is denied to all. He submitted that heterosexuals are permitted the right to sexual expression in a way that is natural to them; hence the provisions are discriminatory, on the basis of sexual orientation. It was further submitted that the word "sex" in Section 3 of the Constitution should be generously and purposively interpreted to include 'sexual orientation'.

157. On the basis of the formulated rules of constitutional construction or interpretation, I have no qualms whatsoever in determining that the word 'sex' in Section 3 thereof is generously wide enough to include and capture "sexual orientation", as I hereby determine.

158. The Court of Appeal in the **DOW** (supra) case has stated that the enumerated grounds of discrimination in Section 3 of the Constitution were not hermetically sealed, nor cast in stone. Amissah P, at page 146(H) neatly buttressed the point as follows:

> "I do not think that the framers of the Constitution intended to declare in 1966, that all potentially vulnerable groups and classes, who would be affected for all time by discriminatory treatment, have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as farsighted people trying to look into the future, they would have contemplated that, with the passage of time, not only groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination."

159. It is henceforth determined that 'sex', as used in Section 3 of the Constitution includes "sexual orientation". See

also Canadian case of **VRIEND v ALBERTA** [1998] 1 S.C.R 493, which also expanded "sex" to include 'sexual orientation'. To buttress and fortify this amplification and expansion of the word "sex", our Parliament has, in its graceful and usual wisdom, recognized that there may be discrimination, at the workplace, on account of sexual orientation, as shown by the Employment (Amendment) Act No. 10 of 2010, which amendment made it unlawful to terminate employment on the grounds of, inter alia, sexual orientation and gender, per Section 23(d).

160. It is trite that all laws made are traceable to the Constitution, specifically Section 86 of the Constitution, which provides as follows:

> "86. Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana."

161. How do we therefore trace such amendment of the Employment Act to the Constitutional discrimination based on sex? The Constitution outlaws discrimination, based on sex. The Employment (Amendment) Act eschews discrimination, based on sexual orientation. In my view, the discrimination outlawed under Employment (Amendment) Act, neatly dovetails with the outlawed discrimination, based on sex, in the Constitution. The two forms of discrimination; namely sex and sexual orientation, are associable signifiers of a similar scope and content. The constitutional discrimination, based on sex, is of wider scope and application, whereas discrimination based on sexual orientation, in the Employment (Amendment) Act, is of a narrower campus. "Sexual orientation" is thus subset or component of "sex". In **TOONEN v AUSTRALIA, COMMUNICATION** NO. 488/1992, the United Nations

Human Rights Committee ruled that various forms of sexual conduct, including consensual sexual acts between men in private under Tasmanian law, were incompatible with the International Covenant on Civil and Political Rights (ICPPA) and further held that the word "sex" in Articles 2 and 26 were to be interpreted as including "sexual orientation". Botswana has ratified the ICCPR in 2000.

162. Having so determined, through jurimetrics, that sexual orientation forms part of wider definition of sex in Section 3, are the two provisions, namely 164 and 165 of the Penal Code discriminatory in effect?

163. Discrimination, based on sexual orientation, as hitherto determined, is governed by Sections 3 and 15(1) of the Constitution. I have already reproduced Section 3 of the Constitution above, hence I will only limit myself to Section 15(1) of the Constitution.

15(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect." (my underlining)

164. Anal sexual intercourse is, generally, associated with gay men. According to the applicant, as a homosexual man, anal sexual intercourse is his only mode of sexual gratification and expression. Heterosexuals, according to him, are spoilt for choice. Effectively, he submitted that Sections 164 and 165 completely closes the door in final fashion on his face, and places unconstitutional burdens on him, hence the provisions are discriminatory in effect.

165. In the case of **MOATSWI & ANOTHER v FENCING CENTRE LTD** [2002] (1) BLR 262 (IC), Ebrahim Carstens J, on indirect discrimination, at page 266 F-G, stated as follows:-

> "Indirect discrimination is harder to identify. It occurs where an employer applies a rule which ostensibly applies neutrally to all employees; but the application of the rule has a disproportionate negative effect on one group."

166. In the case of **CITY COUNCIL OF PRETORIA v WALKER** 1998 (2) SA 363, it was held that indirect discrimination occurs when conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination. **LEUNG v SECRETARY FOR JUSTICE** [2006] 4 HKLRD 211 (CA), is a leading Hong Kong authority on the issue of equal protection relating to sexual orientation under instances where the impugned law, at face value, applied equally to all.

167. The brief facts in the **LEUNG** case (supra) were that, prior to the case, the age of consent for homosexual men was 21 and for heterosexual and lesbian couples was 16, in terms of the Crimes Ordinance. The applicant, a 20 year old gay man challenged the constitutionality

of the age of consent and argued that the Crimes Ordinance discriminated against him, based on his sexual orientation.

168. The court determined that the word sex, included sexual orientation. It further held that although the said penal provisions appeared gender neutral, they were discriminatory in effect, because of the negative effect they had on gay men; particularly the continued stigma attached to homosexuals. See also, **SUTHERLAND v UNITED KINGDOM** – NO. 25186/94; European Court of Human Rights, 2001 and the 2006 Yogyakarta Principles (as updated), dealing with human rights in the areas of sexual orientation and gender identity.

169. An interrogation of the impugned provisions, in my view, reveals that the said provisions, have a substantially greater impact on the applicant as a

homosexual, who engages only in anal sexual penetration; than it does on heterosexual men and women. The fact that anal intercourse is the only means available to the applicant, is dispositive. Denying the applicant the right to sexual expression, in the only way natural and available to him, even if that way is denied to all, remains discriminatory in effect, when heterosexuals are permitted the right to sexual expression, in a way that is natural to them. Simply put, it is indirect discrimination founded upon sexual orientation. The impugned provisions render the applicant a criminal, or an "unapprehended felon", always on tenterhooks, waiting to be arrested.

170. Sections 164 and 165 are discriminatory in effect. The **Kanane** (supra) decision is distinguishable from the present case.

171. In the **Kanane** case, the Court of Appeal stated that as at that time (2003), the impugned provisions were not discriminatory to gay men, on account of the factual and legal matrix presented in the case. What is presented before this court is fundamentally different from the **Kanane** case. Before this court, expert evidence has been adduced to prove the case, whereas there was no such evidence in the **Kanane** case. The Court of Appeal, furthermore, did not deal with the present issues of privacy and dignity. It also did not consider if the impugned provisions were discriminatory, in effect.

172. In my respectful view, the **Kanane** case is thus distinguishable to the present one.

173. The notion of universality of human rights is fundamental. Any discrimination against a member of the society is discrimination against all. Any

discrimination against a minority or class of people is discrimination against the majority. Plurality, diversity, inclusivity and tolerance are quadrants of a mature and an enlightened democratic society. I am fortified, in this position, by the South African Constitutional Court, in **MINISTER OF HOME AFFAIRS & ANOTHER v FOURIE & ANOTHER** [2005] ZACC 19 at page 60, where it was articulated as follows:

> "A democratic, universality, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalize people for being who and what they are not is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a level or homogenization of behavior or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization and stigma. At best, it celebrates the vitality that it brings to any society ..... The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting."

174. In my respectful view, Sections 164(a),(c) and 165 of the Penal Code, impair the applicant's right to dignity, privacy, liberty (autonomy) and lastly that the said provisions are discriminatory in effect.

175. Whenever the State seeks to rely on one of the constitutional limitations to the fundamental rights, the State is then saddled with the onus to prove that such limitation, squarely satisfies the constitutional limitation, under the circumstances.

176. The onus to justify a limitation to a fundamental right is not an easy one to discharge, considering that clauses which derogate from constitutional rights are to be narrowly construed, whereas clauses conferring and giving such rights receive a generous construction. Amissah P, in the locus classicus of **Dow**, (supra) at page 31 said the following:-

> "…. the very nature of a Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions, that all 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."

177. In order to discharge such onus, the respondent is enjoined to identify the mischief or measures that are of sufficient importance to justify the derogation therefrom, or factors of sufficient importance that safeguard the rights and freedoms of others; as encapsulated in the maxim sic utere tuo ut alienum non laedas; (use or enjoy your rights so as not to injure others' rights).

178. Once the mischief has been identified, then the action taken by the respondent, in order to justify the derogation, will then be subjected to the proportionality

test, as described by Dickson CJ, in the Canadian case of **R v OAKES** (1986) 1 SCR 103, at page 139 C-F as follows:-

> "There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as being of sufficient importance."

179. From the respondent's affidavit, there is no scintilla or iota of justification, advanced for the derogation in question. The only answer placed at the fore is that the impugned sections are not discriminatory, but, a

contrario, this court has found otherwise. A litigant stands or falls by his founding papers.

180. The respondent's semblance of justification, can best be described as bare assertions and or speculations that sexual anal penetration is contrary to public morality or public interest. It is exactly the respondent's speculative assertions that the Court of Appeal had in mind, when the Honourable Tebbutt J.P. unequivocally held in **GOOD v THE ATTORNEY GENERAL** (2) [2005] 2 BLR 337 that:

> "It would be irresponsible in the highest degree for this court to make findings based on speculative submissions and on perceptions which may or may not be held by the public without any reliable factual material to support them."

181. Moreover, in addition to providing evidence to justify the limitation taken, the State must provide evidence to prove that there is no alternative or lesser means than

the limitation chosen. No such evidence has also been presented, but just bald assertions to limit fundamental rights. In the cases of **TEDDY BEAR CLINIC FOR ABUSED CHILDREN v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** 2014 (1) SACR 327 (CC) at para 96 and **ATTORNEY GENERAL AND OTHERS v TAPELA AND OTHERS** CACGB-096-14, it was emphasized that concrete evidence is particularly important in litigation where a law affects constitutional rights. The *amicus* in casu was a friend in need and indeed. It produced scientific evidence on how the said penal provisions impact negatively on the LGBT community. Such evidence was never controverted. Even if such evidence has not been controverted, the court is still enjoined to critically assess the merits/ demerits of such evidence.

182. It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court is then duty bound to satisfy itself as to the correctness of the expert's reasoning and scientific criteria. Absent any reasoning, such an opinion is inadmissible. See, **MASSTORES (PTY) LTD v PICK n PAY RETAILERS (PTY) LTD** 2016 (2) SA 586 (SCA) and **ROAD ACCIDENT APPEAL TRIBUNAL & OTHERS v GOUWS & ANOTHER** [2018] (1) ALL SA 701(SCA). This court after extensively considering the expert's report, filed by the amicus, finds the said report credible, having regard to the factual matrix, the study methodology and the research employed.

183. Out of abundance of caution, and considering that issues raised herein are weighty and pithy, I find it

necessary to consider the public interest/morality argument, even though it was not buttressed by any factual, scientific and cogent evidence.

184. Whether something is within the public interest, ultimately depends upon a host of several considerations, including, but not limited to the peace, security, stability and well-being of the people. See, **GOOD v THE ATTORNEY GENERAL** (2) supra.

185. To what extent then does public opinion or public mood, with respect to morality, as highlighted in the respondent's legal bastion of **Kanane**, play a role in the public interest enquiry. Public opinion is relevant in matters of constitutional adjudication, but it is not dispositive. Such public opinion is rendered lilliputian by the towering and colossal human rights "triangle of constitutionalism", namely; liberty, equality and dignity. Kirby JP's rendition, in **Ramantele** case

(supra) on this point is apropos and he states as follows:-

> "Prevailing public opinion, as reflected in legislation, international treaties, is a relevant factor in determining the constitutionality of a law or practice, but it is not decisive."

186. In the case of **S v MAKWANYANE** 1995 (3) SA 391 (CC) paras 77-88, the court remarked neatly, on a question of public opinion, as follows:-

> "Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignity, and a retreat from a new legal order established by the 1993 Constitution."

187. Lord Bingham of Cornhill, in **PATRICK REYES v THE QUEEN – PC** APPEAL NO. 34 OF 2001 [2002] UKPC II,

at paragraph 26, relative to the role of public opinion in constitutional adjudication, said:

> "The Court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right, in the light of evolving standards of decency, that mark the progress of a maturing society ..... In carrying out its task of constitutional interpretation, the court is not concerned to evaluate and give effect to public opinion."

188. See learned articles by M Du Plessis: "Between Apology and Utopia: The Constitutional Court and Public Opinion (2002) Vol 1, South African Journal on Human Rights 12 and the article by Dr O. Jonas: Gender Equality in Botswana: The Case of Mmusi & Another v Ramantele & Others. African Human Rights Law Journal (2013) page 11.

189. In my view, criminalising consensual same sex in private, between adults is not in the public interest.

Such criminalisation, it has been shown by evidence availed by the amicus, disproportionally impacts on the lives and dignity of LGBT persons. It perpetuates stigma and shame against homosexuals and renders them recluse and outcasts. There is no victim within consensual same sex intercourse inter se adults. What compelling State interest is there, necessitating such laws? Should private places and bedrooms be manned by sheriffs to police what is happening therein? In my view, such penal provisions exceed the proper ambit and function of criminal law in that they penalise consensual same sex, between adults, in private, where there is no conceivable victim and complainant. Any notion of public morality justification, (which is a question of prejudice), fails to satisfy the proportionality test, enunciated in the Oakes case above.

190. The impugned penal provisions oppress a minority and then target and mark them for an innate attribute that they have no control over and which they are singularly unable to change. Consensual sex conduct, per anus, in my view, is merely a variety of human sexuality.

191. Even if the respondent's public interest or morality justification was to be subjected to the criterion of "reasonable and justifiable in an open democratic society", such justification does not pass constitutional muster. The test of what is reasonably justifiable in a democratic society, is an objective one. There is nothing reasonable and justifiable by discriminating against fellow members of our diversified society.

192. The State has failed to single out the objective that is intended to be satisfied by the impugned provisions.

193. The Court of Appeal, in **Rammoge** case,cited above, noted as follows:-

> "--- there is compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights."

194. In his speech, on the occasion of the National Launch of the 2018 Commemoration of 16 days of Activism Against Violence in Women and Children (25th November 2018), His Excellency the President of the Republic of Botswana, Dr. Mokgweetsi Eric Keabetswe Masisi, at paragraph 6, graciously articulated the universality of inalienable human rights as follows:

> "There are also many people of same sex relationships in this country, who have been violated and have also suffered in silence for fear of being discriminated. Just like other citizens, they deserve to have their rights protected."

195. Parliament, passed the Employment (Amendment) Act, as outlined above to forbid the termination of an employees' contract of employment on grounds of sexual orientation, gender etc (Section 23(d)). Legislative bodies are representative bodies that express the will of the people. Through passage of legislation, the people's will is transferred into the will of the State. Inevitably, the source of the State's authority, is the people. In casu, the people of Botswana have spoken, through such amendment of the Employment Act.

196. The embodiment of the three arms of government have loudly spoken on the need to protect the rights of the gays, transgenders, lesbians etc.

197. The nation has not been left behind. The nation's enduring chorus, and crescendo on the same point, is loud and clear. It can be heard from afar and it is not far from being heard. In terms of Botswana National

Vision 2016, following nationwide consultation, we as a Nation, adopted several pillars that anchor our Vision. We accepted, amongst others, to be "A Compassionate, Just and Caring Nation." We further aspired to be "An Open, Democratic and Accountable Nation" and lastly "A Moral and Tolerant Nation."

198. To discriminate against another segment of our society pollutes compassion. A democratic nation is one that embraces plurality, diversity, tolerance and open-mindedness. Democracy itself functions, so long as the differences between groups do not impair a broad substrate of shared values. Our shared values are as contained in our National Vision. Furthermore, the task of laws is to bring about the maximum happiness of each individual, for the happiness of each will translate into happiness for all.

199. In terms of our new National Vision 2036, under Pillar 2: Human and Social Development (at Social Inclusion and Equality), it is stated as follows:-

> "Social inclusion is central to ending poverty and fostering shared prosperity as well as empowering the poor, the marginalized people, to take advantage of bourgeoning opportunities. People should be capacitated to have a voice in decisions that affect their lives. (my emphasis).

200. On Gender Equality, it is our Vision that equal rights and opportunities for women and men, in all areas of society, will enable full participation for them in national development. On Constitution and Human Rights, our Vision states as follows:-

> "The Constitution and human rights framework in Botswana will ensure human equality, uphold the rule of law, guarantee the inalienable birthright of citizenship, while offering individual liberties in which all residents are allowed and encouraged to contribute positively to society.
>
> Batswana will live in full enjoyment of their constitutionally guaranteed rights. Botswana

> will be among the top countries in the protection of human rights."

201. Our National aspirations and Vision therefore speak for themselves and require no further interrogation.

202. In the **Kanane** case, the Court of Appeal, in 2003, said "time has not yet arrived to decriminalise homosexuals practices". With the greatest of respect and deference, I say, dies venit, or simply put, time has come that private same sexual intimacy between adults must be decriminalised, as it is hereby proclaimed.

203. This Court is judicially attracted to the dissenting opinion of Gubbay CJ, in the case of **BANANA v THE STATE** 1998(1) ZLR 309(S). The facts of the case were as follows: Canaan Banana, was convicted by the High Court on two counts of sodomy, seven counts of indecent assault, one count of assault and one count of committing an unnatural offence.

204. Consequent upon his conviction, he appealed to the Supreme Court. One of the issues that arose was whether the crime of sodomy was constitutional i.e. whether it violated Section 23 of the Constitution of Zimbabwe, which guaranteed protection against gender discrimination.

205. By a split decision of 3 to 2, the Supreme Court (majority decision) rejected the Section 23 Constitutional argument on discrimination based on gender. Gubbay CJ, in his attractive dissent, stated as follows:-

> "In my view, the criminalisation of anal sexual intercourse between consenting adults in private, if indeed it has any discernible objective, other than enforcement of private moral opinions of a section of the community (which I do not regard as valid), is far outweighed by the harmful and prejudicial impact it has on gay men. Moreover, depriving such persons of the right to choose for themselves how to conduct their intimate relationship poses a greater threat to the fabric of society as a whole than tolerance and

understanding of non-conformity could ever do."

206. The retention of the sodomy provisions in our Penal Code, imposes unconstitutional burden on the applicant's fundamental rights of privacy, dignity, liberty and equal protection of the law; taking into account that the applicant's only available sexual avenue, is per anum. See **NORRIS v IRELAND** (1989) 13 ECHR 186 and **MODINOS v CYPRUS** (1993) 16 ECHR 485, which upheld the unconstitutionality of sodomy laws in Ireland and Cyprus, respectively. See also, **OROZCO v ATTORNEY GENERAL OF BELIZE** AD 2016, Claim No. 668/2010, wherein the Supreme Court of Belize held that provisions in the Belize Criminal Code, which criminalized private consensual sexual conduct between adults of the same sex, violated the

applicant's rights of privacy, liberty and dignity. The said provisions were consequently struck down.

207. In my view, the questioned penal provisions do not serve any useful public purpose. In other words, the means used to impair the right or freedoms articulated above are more than is necessary to accomplish the enforcement of public morality or objective. Cory J, in **VRIEND v ALBERTA** (1998) 4 BHRC 140 at 168 neatly articulated the negative effects of sodomy laws as follows:

> "(102) Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy, of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian

> individuals constitutes a particularly cruel form of discrimination."

208. The sodomy provisions, as foreshadowed above, are a relic of Victorian era and were influenced by Judeo-Christian teachings. Such teachings recognized, initially, that sexual intercourse was only for procreation. It is common cause that such a premise is no longer valid and sustainable.

209. People enter into intimate sexual relationships not only for purposes of procreation, but for a host of several factors. Such procreation-induced rationale is thus no longer tenable. If the reason or rational for the law ceases, the law must also cease, aptly framed as cessante ratione legis, cessat ipsa lex. See, **MILIANGOS v GEORGE FRANK (TEXTILES) LTD** [1997] AC 443 at 476. Sodomy laws therefore deserve archival

mummification, or better still, a museum peg, shelf or cabinet for archival display.

210. Our constitutional ethos of liberty, equality and dignity are paramount. Our Constitution is a dynamic, enduring and a living charter of progressive rights; which reflect the values of pluralism, tolerance and inclusivity. Minorities, who are perceived by the majority as deviants or outcasts are not to be excluded and ostracized. Discrimination has no place in this world. All human beings are born equal. According to Nelson Mandela, a paragon and epitome of humility, dignity, sagacity and tolerance, in response to some divergent views that homosexuality was "un-African" he stated that homosexuality was "just another form of sexuality that has been suppressed for years..... It is something we are living with". (N Mandela in Gift Siso Sipho and B Atieno (2009). United Against

Homosexuality. New African (quoted in Human Rights Watch 2008, p10.)

211. The former Secretary General of the United Nations, Mr. Ban Ki-Moon, on the 25 January 2011, at the Human Rights Council in Geneva said the following:

> "Two years ago, I came here and issued a challenge. I called on this Council to promote human rights without favour, without selectivity, without any undue influence ..... We must reject persecution of people because of their sexual orientation or gender identity ..... who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender. They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights.
>
> I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights ..... When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my consistent position. Human rights are human rights everywhere, for everyone."

212. It is incumbent upon the final arbiter the, courts, that exercise posterior control, to be cognizant of ever evolving needs and aspirations of our people, in the form of human rights. The scope, content and horizons of human rights are forever expanding and the concomitant caveat is that courts should not, in that progressive poise and posture, drop the ball and diminish the morality of the Constitution, by whittling down people's rights.

213. As long as the applicant display affection, in private and consensually with another man, such conduct is not, injurious to public decency and morality. There are adequate statutory measures or regulatory provisions that cater for immoral acts of indecency done in public. See, Section 167 dealing with indecent practices in public. There are further adequate measures to deal with non-consensual sexual encounters, as referenced

under Sections 141 (rape), 146 (indecent assault), 147 (defilement) etc, which provide adequate air cover and protection, in the event the rights of any person are under ground-attack.

214. Consensual adult sexual intercourse, between homosexuals, lesbians, transgenders, etc, do not trigger any erosion of public morality – for such acts are done in private. The Wolfenden Report demystifies any lingering question by postulating that there must remain a realm of private morality and immorality which is not the laws' business. No solace and joy is thus derived from retaining such impugned penal provisions.

215. The impugned provisions, even viewed from a regulatory and enforcement prism, do not serve any useful purpose. Legislative effectiveness posits that laws should not only communicate its purpose and the

means by which it achieves that purpose, but that such laws should be capable of implementation and enforcement. See, Prof Xanthaki H. Drafting Legislation: Art and Technology of Rules For Regulation. (Oxford: Hart Publishing, 2014). How does the State regulate consensual private intimacy and/or enforce the impugned provisions? Certainly the State cannot place a sheriff or policeman/woman in those secluded places, let alone subject suspects to intrusive, inhuman and degrading medical examination, in order to enforce such laws.

SEVERABILITY OF "PRIVATE" FROM SECTION 167

216. Section 167 of the Penal Code, has also been attacked on the ground that it seeks to regulate conduct deemed grossly indecent, done in private. According to the

applicant, such prescription of private conduct, is a violation of one's privacy or liberty. The section provides as follows:-

> "167.Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence."

217. The tenor and general theme of our decision, as foreshadowed above, is that the question of private morality and decency, between consenting adults, should not be the concern of the law. Stemming therefrom, is the court justified in severing and excising from the said provision, the word "private", in order to remedy the unconstitutionality of private indecency.

218. The doctrine of severability, its purpose is to sever or to separate that portion of a statutory legislation or contract deemed void, from the portion considered to be

valid and of legal force and effect. The word, "sever" is derived from the Latin word "salvatorius," which means to "estrange", "separate", "isolate", or "segregate".

219. Severability is thus the invalidation of some sections or clauses in a document that will not affect the validity of the remaining provisions or clauses. The test for severability was considered by our Court of Appeal in the case of **PRESIDENT OF THE REPUBLIC OF BOTSWANA & OTHERS v BRUWER AND ANOTHER** [1998] BLR 86 (CA), wherein the court adopted and embraced the dictum of Lord Bridge of Harwick, in the case of **DPP v HUTCHINSON** [1990] 2 ALL ER 836, at 839F-840 wherein he stated as follows:

> "The application of these principles leads naturally and logically to what has traditionally been regarded as the test of severability. It is often referred to inelegantly as the "blue pencil" test. Taking the simplest case of a single legislative instrument containing a number of separate clauses of which one exceeds the lawmaker's powers, if the remaining clauses enact free-standing provisions which were

intended to operate and are capable of operating independently of the offending clause, there is no reason why those clauses should not be upheld and enforced. The lawmaker has validly exercised his power by making the valid clauses. The invalid clause may be disregarded as unrelated to, and having no effect on, the operation of the valid clauses, which accordingly may be allowed to take effect without the necessity of any modification or adaptation by the court. What is involved is in truth a double test. I shall refer to the two aspects of the test as textual severability and substantial severability. A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the lawmaker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect."

220. On severability, see also **COETZEE v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**; **MATISO & OTHERS v COMMANDING OFFICER, PORT ELIZABETH PRISON AND OTHERS** 1995 (4) SA 631 (CC); **EVANS JOHN ORANJA v CARTER MORUPISI & ANOTHER** [2011] 1 BLR 24(HC) and **PRINT MEDIA**

SOUTH AFRICA & ANOTHER v MINISTER OF HOME AFFAIRS & ANOTHER [2012] ZACC 22 (CC).

221. The severability of the valid and invalid provision of a statute or contract does not depend on whether such provisions are enacted in the same section or different section. It is not the form, but the substance of the matter that is fundamental and that has to be ascertained, on an examination of the Act or document as a harmonious whole, having regard to the setting, the context and scope of the relevant provision in question. Likewise, when the valid and the invalid parts of a statute are independent and do not form part of a scheme and after severance, what is left is so thin and truncated, as to be in substance different from what it was when it emerged out of legislature, then the remainder should also be jettisoned in its entirety. See, **R.M.D.C v UNION OF INDIA AIR**, 1957 S.C. 628

(Supreme Court), and **JOHANNESBURG CITY COUNCIL v CHESTERFIELD HOUSE** 1952 (3) SA 809 (A) at p822.

222. It must always be borne in mind that under the doctrine of severability, the role of the court is to review and interpret the provisions in order to determine their validity, rather than drafting of new legislation by the court, which will thus be a usurpation of legislative function. Caution therefore ought to be exercised against judicial arrogation of Parliament's essential legislative function. See, **SCHACTER v CANADA** (1992) 10 CRR (2d) 1.

223. In casu, we have determined that it is not the business of the law to regulate private consensual sexual encounters between adults. The same applies to issues of private decency and/or indecency between consenting adults. Any regulation of conduct deemed

indecent, done in private between consenting adults, is a violation of the constitutional right to privacy and liberty, as outlined above. By invoking textual surgery, any reference to "private" indecency ought to be severed and excised from Section 167, so that its umbrage and coverage is only public indecency. Even after such severance, Section 167 thereof remains intelligible, coherent and valid.

224. There must remain, as we have already determined, a realm of private morality and immorality, which should not be the province of the law, particularly where there is no victim or complainant and when such conduct is consensual. In the event that there may be indecency with a minor and/or an adult, without the consent of the said adult, but done in private, there are adequate penal provisions do deal with such infraction. See, Section 146 of the Penal Code dealing with indecent

assault on any person. No justification has been given by the respondent as to why a person's right to privacy and autonomy, ought to be curtailed, relating to consensual acts done in private. In any event, such curtailment of fundamental rights cannot be justified within our democratic dispensation, nor do such abridgment satisfy the proportionality test.

225. It is accordingly ordered that the word "private" be and is hereby severed and excised from Section 167 of the Penal Code.

226. On the basis of the aforegoing, it is the decision of this Court that Sections 164(a); 164(c) and 165 of the Penal Code are declared ultra vires the Constitution, in that they violate Section 3 (liberty, privacy and dignity); Section 9 (privacy) and Section 15 (discrimination). Under Section 167 of the Penal Code, the word "private", is to be severed and excised therefrom, so as to remove

its unconstitutionality from the remaining valid provision.

227. Before I conclude, I am greatly indebted to the attorneys and advocate who appeared before us, and their erudite submissions and heads of argument, that assisted the Court in this weighty matter. The amicus was not only a friend in need, but a friend indeed. It is however, not the usual practice of the courts to award costs or condemn the amicus with an order for costs; hence no order shall ensue in that regard. See, **HOFFMAN v SOUTH AFRICAN AIRWAYS** 2001 91) SA 1 (CC).

CONCLUSION

228. The orders of this Court are the following:

(a) Sections 164(a), 164(c) and 165 of the Penal Code (Cap 08:01), Laws of Botswana be and are hereby declared ultra

vires Sections 3,9 and 15 of the Constitution and are accordingly struck down;

(b) The word "private" in Section 167 of the Penal Code is severed and excised therefrom and the section to be accordingly amended;

(c) The respondent be and is hereby ordered to pay applicant's costs of this application, and

(d) There is no order as to costs in relation to the amicus curiae – LEGAGIBO.

DELIVERED IN OPEN COURT AT GABORONE THIS 11TH DAY OF JUNE 2019.

.....

M. LEBURU

(JUDGE)

I agree: .....

A.B. TAFA

(JUDGE)

I agree: .....

J. DUBE

(JUDGE)