

## One for one and one for all? Human rights and transgender access to legal gender recognition in Botswana

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### *Abstract*

In 2017 a surprising development took place in an African nation with no lesbian, gay, bisexual or transgender (LGBT) rights or protections to speak of. In two separate cases, one involving a transgender man and the other a transgender woman, the Botswana High Court ruled in favour of the two litigants. The rulings allowed each to have their gender markers on their identity documents adjusted. This was a historical first on the African continent. This paper explores how this came to pass. Providing a close reading of the Botswana cases I contend that, perhaps surprisingly, the law though crucial, seems to function as simply the final decision-making tool at the judges' disposal. Drawing on interviews undertaken with both litigants and their legal teams alongside available media including op-eds' by members of the litigation team, I provide a comparative analysis of the two cases. I argue that each case followed a distinct strategy and that this may prove pertinent to future jurisprudence in the region. Beyond the much-derided framing of gender identity as a human right in Africa, in cases such as these it would seem that for transgender people, the heteronormative ways in which litigants are presented, along with their public in/visibility and perceived im/mobility can be critical to their outcomes.

### *Keywords*

LGBT Botswana; legal gender recognition; transgender Africa; trans jurisprudence; transnormativity

### *Biography*

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African continent. In 2018 they were runner up in the Africa Spectrum: Young African Scholars Award, which honours outstanding research by up-and-coming African scholars. Their first monograph *Transgender Refugees & the Imagined South Africa* (Palgrave, 2019) received honourable mention in the Ruth Benedict Prize for Queer Anthropology from the American Anthropology Association and the 2019 Sylvia Rivera Award in Transgender Studies. They are the co-convenor of the African LGBTQI+ Migration Research Network (ALMN). The network aims to advance scholarship on all facets of LGBTQI+ migration on, from and too the African continent by bringing together scholars, researchers, practitioners, activists and service providers to spark critical conversations, promote knowledge exchange, support evidence-based policy responses, and initiate effective and ethical collaborations.

**Introduction: Who Are You?**

“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 ... comfortable with” (*ND v Attorney General of Botswana and others* (2017) MAHGB-000449-15, para. 152).

Across the African continent, though the trans movement has existed since 2005 in an official capacity, it is still fair to say that the movement for transgender rights and visibility has been somewhat slow and challenging for several reasons. These include the lack of support; the nascent nature of the movement; and the fact that in many countries trans people are understood not as trans, even when they identify as such, but rather as the pinnacle of what it means to be homosexual (Camminga, 2019a). In these instances, they face severe homo/transphobia, which can make navigating court and legal systems difficult. For lesbian, gay and bisexual (LGB) people in Common Law African countries, courts have been a critical means through which to organise and mobilise. However, court action often places claimants at great risk. In states which either lack basic legal protections for LGB people or are outrightly hostile, litigation can mean increased vulnerability due to increased visibility. Given this, for the most part, the trans movement on the African continent but particularly in Southern Africa has endeavoured to work with the state rather than litigate against it (Thoreson, 2013 p. 646-665). This partnering with the state has been done most often through education and outreach in an effort to establish trans identity and therefore respond to the needs of trans people, as separate from those of LGB people.

Botswana is a relatively large landlocked country in Southern Africa. Bordering South Africa, Namibia, Zimbabwe, Angola and Zambia, the country itself, much like others in the region, has maintained, until recently,<sup>i</sup> various elements of its colonial era Penal Codes. These codes criminalise consensual same-sex sexual activity. This has had a marked impact on the lives of lesbian, gay, bisexual and transgender (LGBT) Batswana,<sup>ii</sup> in particular “violating their rights to dignity, privacy, personal liberty and freedom of expression and impact on their health rights” (Grant and Meerkotter, 2018 p. 8). The impact of this legislative environment has meant that, for the most part, LGBT Batswana have remained “invisible and undetected, for fear of further stigma, violence and arrest” (Grant and Meerkotter, 2018 p. 8).

Prior to 2017, there was no existing legal mechanism in Botswana that transgender people could draw on to adjust their sex/gender markers on official documents. As with elsewhere in the world (Currah and Mulqueen, 2011; Camminga, 2019b), carrying documents that do not accurately reflect the sex/gender of the holder can and has led to difficult and humiliating situations for trans people. In 2011, ND, a 28 year old teacher, along with Ricki Kgositau, a Motswana human rights activist living in South Africa, approached the Civil and National Registration Office in Botswana to have their gender markers legally changed on their National Identity Cards, also known as their 'Omang'. The word 'Omang' "essentially asks the question 'who are you?'" (*ND v Attorney General of Botswana and others* (2017) MAHGB-000449-15, para. 36). For both ND and Kgositau the best answer either could provide was: 'unrecognised'. Section 16 of the National Registration Act of Botswana stipulates that a new identity card should be issued "[w]here the registrar is of the opinion that any change in the particulars relating to a registered person materially affects his registration" (*National Registration Act 26 of 1986*, s. 16). Strategically bringing two individual cases in Botswana, ND and Kgositau, were eventually forced to litigate.

Between 2011 and 2017, when the cases were eventually decided, the state of Botswana steadfastly refused to change the sex/gender marker on the documents of its transgender citizens. It argued that to do so would pose a threat to national security via the National Register. Accordingly, the legal team of the state in ND's case argued that, "sex is defined at birth and cannot be changed, and it is sex (biological) that is recorded on identity documents, not gender (social/psychological). They...[the state]... said that what we want to change is a person's recorded sex, which is not a gender marker, and this cannot be done" (International Network of Civil Liberties Organizations, 2017 p. 21).

In this paper, given their significance, I provide a close reading of both the ND and Kgositau cases. Drawing on interviews undertaken with both litigants and their legal teams alongside available media including op-eds by members of the litigation team, I argue that each case followed a distinct strategy. I suggest that the first case, that of ND, was not actually about being trans. Rather it was about the way in which the life of an ordinary individual, including his traditional roles and familial duties, were being hampered by his documents. Underpinned by his acceptance of medicalised categorisation, treatment, and avoidant of any activist association, ND's case presented him, both visibly in the court and performatively in his daily life, as a

'normal man', performing normal heteronormativity. In contrast, Kgositau's case, which was far more public, attended by activists and media, was very much about her status as a trans woman and her role as a trans activist. How the cases unfolded, in relation to one another, particularly with regards to ND's case, suggests that there may be different, though not unproblematic, ways in which to litigate for transgender rights in Common Law African countries.

### *Legal situation in Botswana*

Post-independence Botswana is one of the few countries on the African continent in which a Constitution that was adopted when it attained independence in 1966 is still in force. Although there have been several amendments over time, "none have been significant enough to change the basic framework and structure set up by the original independence Constitution" (Fombad, 2013 p.3). In this way, it "still reflects the traditional British scepticism towards the entrenchment of human rights" (Fombad, 2013 p.5). Which is to say, according to Charles Fombad (2013, p.5), that the human rights, which are recognised and protected, given the time of the Constitution's creation, are rather limited. Botswana has, however, also been celebrated "for having supported one of Africa's most developed democracies" (Jjuuko, 2018 p.323-324). The courts in Botswana, according to legal scholar Adrian Jjuuko, though originally understood as illegitimate colonial institutions, have over time gained respect. This is because they have consistently maintained their independence despite attempts at interference from various arms of state including the executive. Jjuuko adds that this has seen an increased commitment to the rule of law and respect for the legal profession within the country (Jjuuko, 2018 p.332).

Unlike many other African countries, to be LGBT in Botswana is not illegal.<sup>iii</sup> However, male and female same-sex sexual activity, prior to June 2019, was criminalised. Sections 164, 165 and 167 of the Penal Code prohibited "unnatural offences", "indecent practices" and "carnal knowledge against the order of nature" (Constitution of Botswana, 1966). Transgender people also experience further discrimination in that not only are they affected by the prohibition on same-sex sexual activity,<sup>iv</sup> but have also been arrested for "public nuisance and/or offences on the basis of gender expression or otherwise non-conforming appearance" under Section 176 of the Penal Code (Aiken, 2017 p. 96).

The country's Constitution has a Bill of Rights which does guarantee fundamental rights. Critically, in common with its neighbour South Africa, 'sex' is included in the Constitution as a protected ground. Much like South Africa, it has been argued that the protection of sex provides some room to extend legal protections to LGBT people. Kitty Grant and Anneke Meerkotter (2018, p. 9) argue that the state has followed a "steady trajectory" to protect the rights of LGBT persons in the country. In 2010, the government passed the *Employment (Amendment) Act 10 of 2010* which, perhaps surprisingly, inserted sexual orientation into the Employment Act as a ground on which dismissal is prohibited. The country's Second National Strategic Framework for HIV and AIDS 2010-2017/2018 committed the country to ensuring equal access to healthcare and social support regardless; and also included sexual orientation as a ground upon which one could not be discriminated (Grant and Meerkotter 2018, p. 9). However, a focus on sexual orientation does not fully address issues that affect people on the basis of gender identity (See: Butler, 1988; Valentine, 2006)

Botswana's legal system is interesting in that while some Common Law African countries, such as South Africa, allow a person not directly affected to bring cases in the public interest, Botswana does not (Constitution of Botswana, 1966 s. 18). Zimbabwe, due to the reliance on its post-independence constitution, followed a similar approach to Botswana, its neighbour. In 2013, however, the new Zimbabwean Constitution shifted this broadening "the rules of standing in order to enhance access to the courts" (Chiduzza & Makiwane, 2016 p.2). Botswana's constitutional position has limited the possibilities of public interest litigation in that a case is only granted standing if a person is directly affected. This has, of course, hampered minority groups' access to justice. As Chiduzza and Makiwane note, "it has been observed that strict rules of standing can be a major barrier to the protection of human rights" (2016 p.4). Jjuuko argues further that given the particular legal and constitutional environment of Botswana, successful court cases affecting LGBT people have been "more on account of the activism and progressive interpretation of the judges. Indeed, the judgments could easily have gone the other way" (Jjuuko, 2018 p. 106). Where courts have ruled in favour of LGB rights, "protection has had to be implied and derived from the non-discrimination clause, rather than having the clause directly applied" (Jjuuko, 2018 p. 106).

The first case of LGBT strategic litigation in Botswana was *Kanane v The State* in 2003 (Kanane v The State 2003 (2) BLR 67). In December 1994, Utijwa Kanane and Graham Norrie were arrested and accused of having anal sex. Norrie, a foreigner, was

deported while Kanane was charged and convicted in the High Court. The Botswana Centre for Human Rights, as Kanane's legal representatives, facilitated an appeal hoping the case would challenge the country's sodomy laws. Jjuuko argues that the case failed due to timing in that "the activists simply chanced upon an on-going criminal trial to launch their decriminalisation challenge" (Jjuuko, 2018 p. 119). Sodomy was, and to some extent still is, a divisive issue in the Southern African region. According to Jjuuko, the public of Botswana had not been adequately engaged to ensure the cases' success. Indeed, this was at a time when Botswana found itself at the interstices of the striking down of the sodomy law in South Africa and the upholding of former Zimbabwean President Canaan Banana's sodomy conviction in Zimbabwe (*Banana v State*, Supreme Court of Zimbabwe 2000 (4) LRC 621). The court in Botswana held that the sections of the Penal Code criminalising same-sex practices were not unconstitutional. Critically according to the court, at the time, not only did the Constitution of Botswana not protect against discrimination on the basis of sexual orientation "no evidence was put before the court a quo nor before this court that public opinion in Botswana has so changed and developed that society in this country demands such decriminalization" (*State v Kanane* 1995 BLR 94 at para 79).

On the 16<sup>th</sup> of March 2016, in the case of *Attorney General v Thuto Rammoge and 19 Others*, the Botswana Court of Appeal ordered that the Registrar of Societies register the civil society grouping, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO).<sup>v</sup> Upholding the judgement made in the High Court in 2014, the Court of Appeal dismissed the State's claim that the group was encouraging the commission of criminal acts (Legabibo, 2016). The High Court instead highlighted the importance of freedom of association as a fundamental element to a growing democracy along with the right of individuals to lobby for political reform (*Attorney General v Thuto Rammoge & 19 Others* (2014) CACGB128-14 (CA) para. 58-72). Moreover, the court made it clear that the rights contained in Botswana's Constitution apply to all citizens and these are not negated by their real or perceived sexual orientation or gender identity. The court also distinguished the difference between the offence of sodomy within the law and the perception of homosexuality as a crime. It was made clear that the two are not the same and that provisions against sodomy do not extend to criminalising LGBT people themselves (para. 58-72). This created a critical space from which individuals might begin to advocate for law reform, rights and protections.

### *The Long Road*

At the time of their application to change their Omangs in 2011, both ND and Kgositau (2018) believed that once the Registrar for Civil and National Registration understood their situation, he would provide a remedy. Instead, the Registrar stated that they no longer processed applications such as theirs. Suggesting that they had perhaps done so in the past, ND (2018) was surprised. He noted that he “wasn’t sure if they were talking about past transgender issues or intersex issues” (ND, 2018). On his interpretation of the Civil and National Registration Act, the Registrar stated that ND and Kgositau would need a court order. This would allow him to make the necessary changes. To exhaust all avenues before undertaking court action, the two wrote to the office of the President. The Presidents’ office responded noting the lack of statute to govern such an undertaking. The office suggested that the two would need to find a human rights organisation in the country to, “lobby for policy and legal reform, failing which we should take the matter to the high court and seek a court order or an instruction of the court for these issues to be specifically mentioned in our legal framework in the country” (Kgositau, 2018). Before doing so, they both approached the Minister for Home Affairs who sent them on to the Director of Civil and National Registration. The Director said that she could assist and that this had, in fact, been done before, but to do so they would need first to undergo a sex verification test.

In hindsight, Kgositau (2018) believes that the Minister understood Kgositau and ND to be intersex, even though they had presented themselves as transgender and explained their cases. The process mentioned by the Director then ostensibly applied to intersex people. The tests were deeply traumatic, as Kgositau (2018) explains, “that was the most invasive and humiliating and uncomfortable and outright violent experience I’ve ever gone through as a trans person in my whole entire life... we were given these individuals that had no sensitivity to the fact that we are not just bodies, but we are individuals that have feelings”. The results indicated that neither ND nor Kgositau were intersex.<sup>vi</sup> ND’s test did, however, verify via the state gynecologist that he was indeed male. The gynecologist wrote “an extensive report stating all the medical changes that have taken place that verify that I am indeed male”, recommending a gender marker change (ND, 2018). This recommendation, according to ND, did not sit well with the Attorney General. ND was instructed to take the letter back and have the recommendation edited out.

From 2011 to 2013, Dow & Associates represented Kgositau and ND. ND had approached Unity Dow,<sup>vii</sup> one of Botswana’s most famous litigants, human rights lawyers and the firms founding partner. She, in turn, contacted the Southern African Litigation Centre (SALC) to provide legal and financial support. According to



Kgositau and ND, the state was seemingly very active in delaying the matter coming to court while their legal advisors were also cautious. The strategy at the outset was to wait for the right time to bring the cases to court. As Tshiamo Rantao, NDs eventual lawyer, explains: “this was the strategy...you want to take a case when it is ripe to court” (Rantao, 2018). Losing a case like either ND’s or Kgositau’s, especially should it reach the Court of Appeal, Botswana’s highest court, would mean a block to any further trans rights progress. This would be disastrous not only in the country, but it would have a ripple effect in the region. However, both ND and Kgositau felt that at this point, the cases stagnated.

Following the progression of the Legabibo registration in 2013, they finally filed their papers stating their intention to present in court. The Attorney General, according to both ND and Kgositau, responded that he would, “strongly oppose” their cases. For both ND and Kgositau, the use of the word “strongly” was a clear indication of prejudice on the part of the Attorney General. It was also decided at this point to split the cases to increase the possibility of a favourable outcome. According to Kgositau (2018), she was looking for a remedy that would affect trans people beyond herself and wanted the case to have publicity and media attention. She explains that ND “was very clear that for him he was not looking for any other person besides himself and that for his own personal safety. He also wanted our lawyers to have his name concealed by the court...and as such a pseudonym was then provided” (Kgositau, 2018).

In ND’s (2018) words “my life, my values and the things that I held dear... I realised that if I want a chance at, I mean right now I’m trying to fight this so that I can have what you call a ‘normal life’. The chances of me having that and being public...It would defeat it”. He explains that this was in contrast to Ricki, for whom it made more sense to be publicly visible. According to ND, for her “it’s more of her career, she can’t be anonymous and still push the same agenda...With that it was also important that the cases are looked at separately. Ricki can have a shot at her advocacy work and I could have a shot at my private life while pushing the same agenda. We wanted the same thing, but it’s *how* we wanted it” (ND, 2018). It is this *how* that I will return to later. Rantao eventually represented ND; Rantao was someone ND (2018) believed was “familiar with the culture in Botswana” (ND, 2018). Lesego Nchunga represented Kgositau; Nchunga was someone she thought understood her position having known her for years.

The Attorney General's responding affidavit suggested, according to Kgositau (2018), that both ND and Kgositau had chosen to change their sex. Furthermore, that "the sex that was assigned at birth clearly was 'okay' and 'normal' and 'fine' in so far as the National Registrar was concerned" (Kgositau, 2018). In 2015, both ND and Kgositau received their initial court dates. To further delay the cases, because of their separation, the state asked for the applicants to prove that they were not the same person. This was surprising given that they had, at the request of the state, undergone medical testing prior as two separate individuals. For Kgositau, this was a clear indication of the state's confusion and blindness. They had to submit a letter stating they were "not the same person because to them...[the state]...it was all trans, trans, trans. They were not seeing that one is trans man and one is trans woman". The state then requested the cases be consolidated. Finally, in 2016, Kgositau was given a court date for her case to be argued in the Bulawayo High Court for August 2017. ND's case was to be argued in the Lobatse High Court on March 2017.

### *The ND case*

ND, a transgender man, was born in 1989 and was registered as "female" in his national identity documents. From a very young age, he experienced disharmony between his body and his felt sense of self (*ND v Attorney General of Botswana and others* [2017] MAHGB-000449-15, para. 17). Eventually leading to depression, in 2007, ND was diagnosed with gender dysphoria at the Lobatse Mental Hospital (now, Sbrana Psychiatric Hospital). A condition the judgement, provided by Judge Nthomiwa, describes as meaning that the "sex assigned to him at birth, does not correspond with his felt gender or innate gender identity. Thus, instead of feeling like a woman the Applicant innately feels like a man" (para. 18). To mitigate the dysphoria, he underwent hormone therapy and surgery in 2009 as advised by his doctors. Following surgery and hormone therapy, ND's physical appearance and expression became "congruent with his felt gender identity" and allowed him to "feel more at peace" with being a man (para. 22). Though ND felt more comfortable after the surgery and therapy, he kept encountering problems, as his documents did not reflect his gender identity as expressed. The Judge noted that issues in producing a document which stated female while ND presents as a man, "obviously places the Applicant at a disadvantage and this is what he says has caused him on-going distress and discomfort" (para. 23).

Between 2011 until it finally came to court in 2017, the Registrar, as the authority that issues the National Identity Document, refused to change ND's documents to align them with his male identity. As one of the respondents to the case, the Registrar argued that the national documents reflect "sex" and not "gender". Moreover, that ND had not "demonstrated conclusively either medically or legally that there had been an actual change in the particulars of the sex" (para. 24.2). The Registrar, in his decision to refuse the change of marker in the Omang, argued that in Botswana "sex" is assigned as a "medical administrative practice". This is based on the "external appearance of the genitalia" and that once the sex is assigned it "remained so throughout the life of a person" (para. 57). The Registrar argued that there was no "gender" marker to be changed in the first place.

ND submitted that the refusal subjected him to continued harassment, abuse, discrimination and embarrassment. He argued that that this amounted to continued violation of his constitutional right including "the right to dignity, privacy, freedom of expression, equal protection of the law, freedom from discrimination and freedom from inhumane and degrading treatment" (para. 59). ND noted further that if read "generously and purposively" (para. 3), Section 16 of the National Registration Act did in fact empower the Registrar to change the particulars of a person "in circumstances where these particulars materially affect the person's registration" (para. 25).

In coming to his decision, the Judge highlighted that given the unique nature of the case, particularly as a first on the African continent, there would be very few available guidelines to assist in his judgment. To this end, it would be necessary to look to international jurisprudence and conventions on human rights as a means through which to bring life to the Constitution, bearing in mind the need to tailor these to the specificity of Botswana (para. 8; 12). Drawing from *Nyamakati v. President of Bophutatswana* 1962 (4) SA 540 at 567, he underlined the following section, "Interpreting the constitution as a living document requires that a text that falls for determination be construed to have the capacity to adapt to a changing world, otherwise, rights declared in words may be lost in reality" (para. 15). Critically, the Judge drew on key cases that had established LGB and intersex rights in specific contexts across the African continent and, where possible, cases that had dealt with trans issues specifically. Crucially he also drew on developments at the African Commission for Human and Peoples Rights (ACHPR), in particular, the passing of Resolution 275 which adopted gender identity in the list of grounds upon which discrimination is prohibited (para. 142). Drawing on the judgement in the High Court

of Kenya in *Eric Gitari v Non-Governmental organisations co-ordination board and others* (2015) KLR the Judge in *ND v Attorney General of Botswana and others* suggested,

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 persons gender/sex reflect the persons self defined gender identity (para. 80)

Judge Nthomiwa highlighted that the argument of the two parties centred on the distinction between sex and gender. Following this, he explained that the case presented two issues for determination. Firstly, whether the refusal by the Registrar to adjust ND's Omang to reflect his gender as male was a violation of his constitutional rights? Secondly, whether the reasons provided by the Registrar for the denial of change could be considered "reasonable and justifiable"? (para. 8). Finding in favour of ND, the Judge began by addressing the issue of sex and gender. While the Registrar argued the Omang could not be changed because it reflected sex and ND was expressing gender, the Judge noted that "the position poses some difficulty when one relates that distinction of the purpose of the 'Omang' and the seemingly loose use of the two words in daily parlance and practices" (para. 165). The Judge noted several instances where gender and sex remained blurred in society, including on state documents, thereby suggesting that in our "daily activities there is no formal distinction between sex and gender. And being male or female is generally attributed to having a masculine or feminine outward appearance and demeanour" (para. 175). With regards to constitutional rights, the Judge explained that in his view transgender people in Botswana are part of the diversity of that country and as such entitled to the constitutional protection of their dignity (para. 86). Furthermore, he noted that the ability to have citizenship and personal identity recognised by the State through proper documentation is at the "core of humanity and dignity" and identity documents afford such a thing (para. 83). To this end, he concluded that the Registrar had,

Failed to apply his mind and reasonably exercise his discretion in that he failed to take into account the Applicants 'psychological' male gender identity and that he completely identifies as a man. He also failed to take into account that his doctors examined his physical and psychological status ND found that he was male. In doing so, he failed to protect the inherent dignity of the Applicant as a transgender person (para. 99).

*The ordinary man*

The worldview and perception of judges are critical in hearing cases. As the person “who interprets and therefore gives meaning to the constitution, the Judge is uniquely positioned but is also influenced by factors in the courtroom (Jjuuko, 2018 p.134). Rantao and SALC executed a particular litigation strategy which arguably ensured not only ND’s win but, as both he and ND believe, Kgositau’s. In fact, for Rantao (2018), “if we didn’t have the ND precedent, Ricki would still be in court”. The lynchpin of this strategy was to show the Judge that ND was just “an ordinary private guy who has real fears...he's not an activist” (Powell, 2018). The redaction of ND’s name to protect his privacy, though necessary for ND, worked to solidify this position further. Arguably, for ND to present as an “ordinary guy” or in ND’s words “a normal man”, he could not also be an activist or at least present as such in the courtroom. Particularly since public activism is often associated with the politics of the LGB movement and media attention, running the risk of possibly muddling sexual orientation and gender identity for the court.

In summary the litigation strategy for ND’s case was to show him as a normal man experiencing abnormal circumstances. The first step to doing this was, perhaps surprisingly, given that this was a court case, “not being too legalistic” (Rantao, 2018). As Rantao (2018) explains,

more often than not we have lawyers going into court, wanting to mesmerise the judge with legal jargon, with all sort of case law showing how much they have read...we will always have that but it was important to show the judge what happens on the ground. What ND goes through on a daily basis. To be honest that’s what really moved the judge. When I started I just wanted to paint this picture, show the judge what this man is going through. If the judge believes...before you go into the law, legal arguments, get the judge to wonder but why should this person go through all this?...and when you get to the law you have made it easy for the judge to see the prejudice especially on a daily basis. You know your passport, you’re being returned at the border gate when you want to attend a family funeral across the border...you go across the border,...You know you have your relatives with funerals that you have to attend. Traditional things like rituals...so you have to break it down for the judge .. Every day he [the judge] visits his relatives in Zimbabwe, in South Africa so show the judge...look at his [ND’s] identity document, he can’t cross. Before you

go into...what the law says...paint that picture....He couldn't even open a bank account.

The lack of travel to traditional family events is crucial here. Part of presenting ND as just a normal man was to underscore his inability to perform his traditional duties as a man, the same duties the judge, as a man, was seemingly able to. Using particular cultural cues, they were able to establish that ND had gained acceptance from his family and communicate this using the notion of common or shared manhood.

The second strand to this approach was to show the judge how documents related to daily inconveniences: incongruent documents frustrated ND's ability to go about daily tasks, situations that the judge might himself find quite mundane or unremarkable until disrupted. Crucially, tasks also linked to being a man, in this case, being a provider, and as such, having an accessible bank account. As Rantao explains, they were clear from the outset that the goal was not the development of jurisprudence but rather to make what they were talking about "real" for the judge.

We are not talking about legalese...of course you want to develop jurisprudence but you see we don't just want to come to court to develop jurisprudence, as your ordinary lawyer is wanting to do. What we want to achieve...is that this man is suffering and it's not just him, the judge should know that we are just talking about him but it's not just him. It's possible that there are many out there and the judge should say 'look, I have to do something about this'. That's how you deal with it because it's always just a prejudice that we have that are our own prejudices, including judges because they are also human (Rantao, 2018).

For Rantao, the law is the last thing to be presented and not the most essential element. Indeed the law simply provides a means to rectify the situation. It is but the final factor, the path to remedy, in the courtroom. For Rantao (2018), the Judge "must look for the law. When we now start bombarding him with legal arguments, he must have made up his mind...[and think]...I need law to assist me...to find remedy". Rantao's job as the lawyer is to show the judge "there's a remedy and you are the remedy". According to Rantao (2018), their judge was not progressive; he was a just a man who had come up through the legal system. He had never been a practising lawyer or activist. Due to this, they needed him to see the case as personal, regardless of the support from SALC; it was important for the judge not to think this was an assault on the system but rather the needs of one person. To this end, it was necessary to "you know let him look at one person because it's a person for starters...It's an individual having their own individual problems, personal problems" (Rantao, 2018). ND was in court with his partner every day. Rantao notes that because arguments are presented

from papers in order to ensure the Judge could put a face to a name, to humanise ND, he made sure to speak to ND in view of the Judge. The Judge never asked who ND was or who Rantao was talking to in the gallery. Yet, in doing so, the image of ND as a just a man with his girlfriend by his side, a very normal, wholesome and heteronormative image was created. As Rantao elucidates:

When I finished arguing I asked for a minute to ask my client [ND]...if I had forgotten anything. It was deliberate. I'm not sure if throughout the proceedings he [the judge] was aware. I think he was struggling because there was like four or five people in the gallery. He probably had an idea it [ND] could be him but he wasn't sure until I asked him [ND]. Then he [ND] was there with a lady and maybe the judge is thinking, "...Is that the girlfriend?" (Rantao, 2018)

We see the outcome of this normalisation strategy in the judge's eyes through his acknowledging that ND is "indeed a man" (para. 62). The Judge placed considerable weight on the fact that ND presented and fit what could be perceived as the stereotypical male appearance: "beard", "broad shoulders", "deep masculine voice" (para. 67). Highlighting a reliance on pathologisation and medicalisation, after surreptitiously having ND pointed out to him, the judge noted that these changes were "irreversible and permanent" (para. 67). A not uncommon approach, legal scholar Dean Spade explains "everywhere that trans people appear in the law, a heavy reliance on medical evidence to establish gender identity is noticeable" (Spade 2003, p.16)

ND was not just any man, but 'a normal man' in a traditional sense. A position Rantao, with his understanding of Batswana culture, was specifically contracted to present. Following from this, familial and traditional events which ND had been unable to attend were offered as examples. Events they were at pains to show that the Judge, as another man, could. It cannot be overlooked that the decision to rule in favour of ND came down to a handful of men, most of whom were cis, in a room with little external pressure on the judge – no media and no activists. In essence, what was presented to the Judge was a normal man, sitting in the gallery with his girlfriend, struggling in the world because his documents misrepresented him. The court would later acknowledge this: "the court noted with concern the on-going distress and discomfort experienced by the applicant when he is required to explain intimate details of his life to strangers whenever he seeks to access routine services" (Collison, 2018). This kind of concern, as Kgositau pointed out, was absent from her case.

### *The activist*

In stark contrast to the ND case, on the occasion of Kgositau's arrival at court, having flown in from South Africa, the courtroom was packed with supporters and community members, many wearing protest slogans on their shirts or carrying placards. They were a visible example of LGBT representation in Botswana taking up space both in and outside of the courtroom. Kgositau suggests that her judge seemed more fearful of issuing a judgement, given that fact that she, the judge, was a woman and the public nature of the case. More especially because the case was seeking policy reform and not just individual remedy. For Kgositau (2018)

It became very clear that my judge was afraid of having to set this kind of precedent...she was making all these kinds of delay tactics from her end to assign us a date to see when ND's case would be argued such that it gets to be argued before mine...Because she's a woman she...in 2016 and 2017 we did not even have a woman Justice sitting on the bench of the High Court of Appeals, it was all male oriented...She was afraid of making that determination and needed somebody else to do it before her ...The system in itself for me was already as it was crippling for women to be able to set such precedents at a constitutional level. She was afraid of making that determination and needed somebody else to do it before her, particularly who was sitting on the other case. ND was a man, so his case got argued and ours was to be heard on the 4th of August. We were to be arguing on the 4th of August so come the 4th of August the judge goes MIA on the day that we are in court. Only on the day that we are in court do we get told, "no your judge is not present, she has gone on a leave of absence."

Kgositau (2018) believes that the judge postponed because the full result of the ND case "had not been written and had not been served publicly. So, she could not even refer to it" The matter was postponed to the 12th of December. Kgositau's council, Nchunga, asked the presiding judge why it was being pushed so far back? The judge overseeing the postponement became hostile and accused Nchunga, according to Kgositau (2018), of "dictat[ing] to him how he should run his court". For Kgositau, the response from the audience in a packed courtroom was palpable.

Everybody who was in the room, civil society present as well as all of community both LGBTI and trans that was very present in the room. You could hear the kind of gasp of air that everybody had been through because it was a fully packed court. Everyone had prepared that we were arguing because the ND case unfortunately was heard behind closed doors. This was the case that everybody was aware of because we couldn't publicise anything to do with ND's case. The whole entire of our community was present, wearing t-shirts and placards really in solidarity. As this was said, everyone just gasped for air when the judge



became very hostile...Lesego was trying to explain to him that, “my lord, Ricki Kgositau lives outside of the country, for her to come for any hearing, one it’s a time constraint and two, financially it’s exorbitant for her to be able to get this kind of time and thirdly, to get away from work. Could the matter not be set for an earlier time than the 12th of December?”

Highlighting the apparent differences in how the cases were heard and their meaning and impact, Kgositau (2018) notes that she felt as if though judge was desperate to be rid of her. He made it clear that,

he didn’t like the kind of frenzy that we had created around this case because it was making it seem as if the State was torturing me or something ...It was sitting ill on the reputation of the court and that of government. We got to understand that that’s what they were intimidated by the kind of presence, both of media and of the community that was there on that day that they felt as if they were being ambushed (Kgositau, 2018).

For Kgositau (2018), ND’s judge had been far more “understanding and more sensitive to the plight of anybody who has to go through such a rigorous scrutiny of their personhood in order to affirm themselves”. To this end, although they believed their media engagement had been positive, they also acknowledged it could have had a negative impact. As she explains, “one of the things we realised was that that media frenzy could have gone either way, it could have gone positively for the case that was already heard for ND or it could have made things worse” (Kgositau, 2018). In light of this, they chose to shift their strategy, “play it lowkey. People were still aware of the fact that the case was to be heard on the 12<sup>th</sup>, but we did not go all out like we did in August where we sent out a media advisory ahead of us being in court” (Kgositau, 2018).

On the 29th of September, the ND judgement came out. Once this had happened, there was no longer any need to argue or delay Kgositau’s case. The court ordered all of Kgositau’s documents be amended to reflect her sex as female. As she had expected, supporting her suspicions about her judge, Kgositau’s case was decided in her favour based on the ND case. To be able to get married in Cape Town, a week later, Kgositau accepted the order of the court. This was not the legislative change she had hoped for but an individual remedy. There was an option to argue the case further, but this would have affected her ability to marry, as she would have to keep her current incorrect Omang. Her lawyer advised her to take “the low hanging fruit”, and that they could use the two cases “as the launching pad for pushing for legal and policy reform” at a later stage. For Kgositau (2018), this was disappointing in that “I

had been the person pushing at the forefront of everything to ensure that there was a face to the case, there was sensitivity built up in society as we kept on moving up closer to arguing the matter that now it was just treated as I don't know, a clerical process of just we sign, we sign, go". Kgositau (2018) believes her case gave ND's case the possibility of being decided as it was, in that hers was the case that engaged with broader society and did, "not treat the case as something to be hidden away from the eye of society and media".

### *Aftermath*

Advocate Rantao noted in media interviews after the ruling that not only was the ND judgement a significant victory for his client but also for the transgender community. He also suggested that the judge, presiding in Kgositau's case (as she eventually did), would "surely...have to refer to this judgement" (Thomas Reuters Foundation, 2017). From the outset, the cases took a significantly different strategic approach. While ND took an individualistic approach seeking personal remedy with the understanding that it could set precedent, Kgositau was clear that her investment was in public litigation. For her, there would be no point in a judgement that gave her an individual remedy. She wanted "policy reform or an explicit policy mention of trans persons" (Kgositau, 2018).

This kind of activist approach to the courts mimics much of the early 90s sexual orientation litigation that started from South Africa and moved outwards as a possible model for gaining rights for LGB people across Southern Africa. Outside of South Africa, however, this has failed significantly (Currier, 2012; Stychin 1996; Camminga 2019 p. 93-94). ND's approach, in this sense, was radically different. Jjuuko makes clear that the worldview and perception of judges are critical in hearing cases. As the person "who interprets and therefore gives meaning to the constitution, the Judge is uniquely positioned but is also influenced by factors in the courtroom (Jjuuko, 2018 p. 134). ND wanted the judge to see him as an everyday person, a normal man, someone trying to move on with his life, an individual, attending family funerals, performing traditional roles, ostensibly wanting to get married and so forth. In doing so, arguably, ND went some way to provide clarity in the difference between sexual orientation and gender identity. In that, he was able to humanise himself as a man, undeniably, to the judge in his case. ND (2018) believes that if he had "put himself out there", in the way Kgositau had done, it might have been read as "provoking society".

Though the strategy was quite clearly to humanise and normalise ND to another man, a singular judge, this question regarding what cases such as these do beyond the courtroom remains open. The strategy was also clearly intended not to provoke. For ND, the lack of media and activist presence was critical. As Rantao (2018) notes, “there was no pressure on the part of the judge, and when we were arguing this matter, there was not many people in the courtroom”. The anonymity of ND, by extension, also provided the judge with some form of cover. Alternatively, Kgositau’s judge in the far more publicly visible case, seemingly relied on delaying her judgement as her form of protection. Jjuuko notes that delays have been a crucial tactic used in several courts across the African continent when receiving LGB cases, especially as a means through which to avoid the ire of the state. As Jjuuko explains, courts though they may not want to, are bound to receive LGBT cases. They may delay the case as long as possible, “but ultimately it has to be decided” (Juuko, 2018 p. 67). ND (2018) believes that because the “Attorney General didn’t fight [the ruling] she [Kgositau’s judge] also had the liberty of just passing it down because there is no opposition, it’s not her opinion it’s all parties agree”. ND continues to wonder if she, Kgositau’s judge, wasn’t “also relieved that she didn’t have to make that decision?” Whether, given her previous avoidance tactics, she was suddenly “so forthcoming and relaxed about the issue because the judgement had already been made and handed out?” (ND, 2018).

Though ND is adamant that he is not an activist, he also insists that not all activism needs to take place, “up there, in the front. Some can just be in the background, I suppose” (Collison, 2018). To this end, the judge in the ND case did explicitly note that non-recognition not only infringed on ND’s rights but “other transgender persons” as well. Following this, the judge made clear that “the protection provided for in the Constitution extends to every person regardless of his or her gender identity” (para. 127). Lastly, he also stressed that Botswana has a duty to ensure procedures exist “whereby all State-issued identity documents which indicate a person’s gender/sex reflect the person’s self-defined gender identity” (para. 127). All of these statements are not just confined to ND but rather aimed at broader community impact; acknowledgement; and outcomes which suggest a type of activist intervention. As Jjuuko notes “the courts have both special effects, which apply to the individual concerned, and general effects, which affect the population at large, and the application of all these forces may radiate into social change” (Jjuuko, 2018 p. 56).

It is worth asking whether this strategy would have been possible if Kgositau's case had gone first. Would the same normalisation and perceived lack of provocation have been possible for a trans woman? Kgositau certainly seems to think not. For her, part of the reason ND could have his case in anonymity, behind closed doors, with very little media attention and by extension the judgment he did is because she made herself visible in the media. It was not only her visibility that assisted him, but if she had gone first given the "patriarchal system", she doubts she would've found the same reception. For her, ND's case

was won on my sweat and blood because I had been the visible person throughout even before these cases got argued, I was the person who visibilised myself in media...this is what access to justice for women looks like. We are here to be put on the backburner and it doesn't matter how it affects us, but at least let a man be the one to take that first step through the door.... it's my perception, interpretation and analysis based on the kind of engagement I've had with the court system and just with that with our patriarchal system that dictated how we treat women and how we treat men (Kgositau, 2018)

As Paisley Currah and Tara Mulqueen argue, the "legal definitions of gender and the various criteria states use to classify individuals as male or female are certainly fraught, but they do matter because gender is a mechanism for the unequal distribution of rights and resources" (2011 p. 557-582). In this case, relying on particular notions of familial acceptance and traditionalism, using Batswana cultural codes to signify a specific kind of acceptable maleness perhaps came at the price of Kgositau's femaleness and activist visibility. The role of gender in the unequal distribution of rights may also be readable in how each judge responded not only to the cases but also the applicants: in essence in privileging ND's masculinity and his right to particular forms of recognition as a man. McAllister suggests, "the struggle for sexual minority rights in Africa has urgent social and political implications...but confronts an enormous obstacle in the reactionary, traditionalist argument that homosexuality is an alien assault on 'African culture'" (McAllister, 2013 p. 89). One of the ways in which this narrative of 'unAfrican' might be undermined is to present the legitimacy of claims through particular forms of acceptance - in this case, familial, traditional and heterosexual acceptance while at the same time separating what it means to be transgender from homosexuality. The ways in which this was done was not only through showing the judge what ND looked like, his visual presentation as a man, but to also reference his medical transition.

The judge then reiterated this medicalised understanding by referencing judgements in both Korea and Malaysia. In the absence of legal guidelines on gender transition, these judgements suggest that it is necessary to rely on medical evidence and refer to physicians' expertise to determine a person's gender (para. 68-71). Although the impact of this cannot be understated, it also has the inverse result of reinscribing the pathologisation of trans identity and shoring up binary notions of gender. As Spade warns, this strategy can have adverse effects when medical care, but especially affirming healthcare, remains inaccessible (or undesirable)<sup>viii</sup> to most "gender transgressive people, where medical care associated with sex reassignment is still doled out through gender-regulating processes that reinforce oppressive and sexist gender binaries, and where, because of these circumstances and others, many gender transgressive people will choose not to or be unable to access medical care associated with their gender identity" (2003, p.18). At the same time, the judgement, in its wording, does refer to the need to legally recognise an applicant's gender identity. This may, in some very distant future, provide some room to begin to talk about acknowledging gender identities that fall outside of the binary.

### *Conclusion: Precedence*

The decision in the ND case and the subsequent ruling in the Kgositau case did not emerge out of the ether. Instead they are part of a longer trajectory of work done by LGBTI individuals to not only gain specific rights but to bring the language of sexual orientation and gender identity into the courtroom. However, there has been a tendency in global media to depict Sub Saharan African countries as particularly hostile to LGBTI people and LGBTI rights. This does a disservice to how grassroots work has been done and the "considerable diversity and dynamism of domestic, regional, and international LGBTI advocacy in sub-Saharan Africa, which has made powerful gains in recent years" (Thoreson, 2018 p. 7). Indeed, the focus on criminalisation has often obscured the many gains and inroads made, especially those not carried out in the conventional model of mass activist supported litigation. Thoreson challenges us to think through "power within movements, the efficacy of human rights advocacy relative to other forms of activism, and the utility of NGOs as vehicles for social change". The ND case is a challenge to future thinking around advocacy and litigation, especially for trans people in Sub-Saharan Africa, if not Africa more broadly. Separating trans issues out from issues regarding sexual orientation may be necessary, but what is the cost of carrying the burden of humanisation for trans people? Grappling with the regions "geopolitical dynamics remain urgent and important endeavours" (Thoreson, 2018 p. 7). As Tashwill Esterhuizen from SALC,

and a member of both litigation teams notes, the importance of a case such as ND's is that "the principle is accepted that human rights apply to all human beings and can only be limited if it passes the requirements of reasonableness and proportionality, then it becomes much easier for vulnerable groups, such as the transgender community to assert their own basic rights and freedoms" (International Network of Civil Liberties Organizations, 2017 p. 25-26). The drawback may be that cases argued in this manner rely on specific cultural factors, in particular, moments that may not be reproducible elsewhere, although this remains to be seen.

What this case suggests is that in countries where there is on-going hostility to LGBT rights, humanising LGBT people in the courtroom might be a critical first step before turning to the law. Of course, this places a particular burden of humanisation on those who are more often than not abjectly dehumanised - trans people. The strategy used in this case also suggests that it may be prudent in some instances to make legal gains out of the public eye, especially in situations where judges feel constrained by prevailing public opinion or are confused about the difference between sexual orientation and gender identity. In this way, precedent might be set with the "low hanging fruit" as the first step towards discourse and social change. Rulings such as these can assist in creating a more nuanced dialogue and work against anti-trans rhetoric incrementally rather than "out front".

I still say that the case was provocative, but in a strategic way in the sense that it didn't feel like I was directly trying to get a reaction from the courts...I was trying to get the Attorney General to do what I want, but I wasn't saying, look courts we want to blow your BS out of the water. We're saying, I'm a citizen and I want to get on with my life. This is what I'm presenting to you and this is the issue that I presenting to you and I'm not posing as a threat...Still I knew the impact that it would have, so it's kind of like having your cake and eating it too... It's there; it's in the archives. It will always be there in the law reports; some one can always use that as precedence. That was the part that I wanted to play (ND, 2018)

Cases such as NDs can set a precedent beyond the borders of Botswana, especially in countries with "similar values to Botswana — such as Namibia, Zambia and Malawi" (Collison, 2018). At the same time, they can also assist in opening spaces for more significant policy discussion with the State. Dialogue and policy reform might now be an option in the country, although it may not be very easy to carry through without faces willing to undertake it.

The cases may have set precedent but there remains a difficulty where this type of individualist strategy is undertaken. ND has gone on with his life, and Kgositau lives and works in South Africa. Although, as ND points out, this in itself may have been a blessing in that had Kgositau been living in the country and had he revealed his name “and had the same thing happen with the judgement coming out while [she was] living here it would have probably sparked more controversy and news around it ... It’s a small country, how many are we?...it would have been more publicity and the whole issue around trans rights and trans life itself would have been shoved into the light” (ND, 2018). Perhaps ND does have a point? Cases such as these in terms of LGB people have in the past courted backlash from the public (Jjuuko, 2018 p. 73). Though incidences of violence against LGB people in Botswana are rare, trans people still experience threat.

It is difficult to assess the impact of cases such as this in Botswana. As with many other countries on the African continent (and beyond), the day-to-day lives of trans people, especially trans women, remain difficult. At the end of 2018, just over a year after the court decisions, several Southern African news outlets reported that a trans woman in Botswana had been “publicly beaten while onlookers laughed and made derogatory comments” (RightsAdmin, 2018). The video of the attack was subsequently posted on social media, ostensibly to humiliate the victim further. In a press statement, Legabibo called on the police to act swiftly but also reminded readers that, given the recent court rulings, “the Constitution of Botswana has declared that EVERYONE deserves the right to be protected against inhumane treatment and that includes transgender persons” (Igual, 2018). But if the normalising *EVERYONE* is yoked to performing or presenting heteronormativity, as with the court rulings, then for those who may not be desirous or able to access affirming healthcare in the same way as the litigants, deserving seemingly remains open to interpretation.

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## Notes

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<sup>i</sup> On the 11th of June 2019 Botswana's High Court determined that the law that criminalised "carnal knowledge of any person against the order of nature" was discriminatory and therefore unconstitutional (Epprecht, 2019).

<sup>ii</sup> The demonym for all people of Botswana.

<sup>iii</sup> This was clarified in the Legabibo registration case when and LGBT organisation was denied legal registration by the state for representing LGBT people. The court made it clear that though same-sex sexual activity was criminalised in Botswana identifying as gay or lesbian was not.

<sup>iv</sup> As I have noted elsewhere "In societies where the notion of transgender or a language for gender transgression or non-conformity does not exist within the wider public realm, those that present in

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ways read as outside heteronormatively aligned sex roles are immediately considered be homosexual” (Camminga, 2019a p. 138-139).

<sup>v</sup> Civil society organisations are required to be registered in Botswana in order to become legal entities and operate within the country.

<sup>vi</sup> There was a third applicant who had been sent to the hospital along with them. This person’s results came back indicating that he was intersex. Unlike ND and Kgositau, the gender marker on his documents was changed.

<sup>vii</sup> See: *Attorney General v. Unity Dow* (1992) 103 ILR 128.

<sup>viii</sup> The desirability of affirming healthcare and the meaning of transgender identity must be geopolitically situated. As several authors have noted the term ‘transgender’ and indeed, trans identity, can mean different things beyond the Global North (see: Camminga 2017; Vartabedian, 2018).