

**IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE**

**MAHGB-000449-15**

In the matter between:

**ND**

**Applicant**

and

**ATTORNEY GENERAL OF BOTSWANA**

**1<sup>st</sup> Respondent**

**REGISTRAR OF NATIONAL  
REGISTRATION**

**2<sup>nd</sup> Respondent**

Attorney Mr Rantao T. (appearing with Attorney  
Ms Nchunga L.) for the Applicant

Attorney Mr Aganga O. O. (appearing with  
Attorney Mr Kwape O.) for the Respondent

---

**J U D G M E N T**

---

**NTHOMIWA NTHOMIWA J.**

**INTRODUCTION**

1. The Applicant was born a woman and was assigned a female sex at birth but now self identifies as a man. He is a transgender man, an individual whose gender identity does not match their assigned birth gender. Because of that he states that his legal identification documents misrepresents his gender identify since they reflect the

biological sex assigned to him at birth even though he feels he is a man.

2. The Yogyakarta Principles recently quoted by the Court of Appeal in **Attorney General of Botswana v Rammoge and 19 Others, CACGB-128-14**, defines 'gender identity' "at para 56 to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms". This is different from 'sexual orientation' which "is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender". (Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity).
3. Because of that correct reflection of his gender as female (which he says is incorrect) instead of male on his identify document he has been undergoing considerable emotional distress.

4. It is therefore because of the emotional feelings that he has been going through that Applicant approached the Respondents to change the gender marker on his identify document (Omang) from female to male. The Respondent has refused to accede to that request arguing that sex assigned at birth determines the contents in one's identity documents. He therefore contends that this refusal violates his constitutional rights which the state has an obligation to protect.
5. Unhappy with Respondents refusal to change his/her gender maker he/she launched this application arguing that his constitutional rights have been breached.

**Parties**

6. The Applicant is transgender man born a woman whose identity has been concealed in view of the sensitivity of this matter. For the purposes of this application he is referred to as ND.
7. The Respondents are the Attorney General cited in terms of Section 4 of the State Proceedings (Actions by and against government of Public Officers) Act representing the 2<sup>nd</sup> Respondent, the Registrar of National Registration the officer whose decision refusing to change the gender marker of the Applicant in his identify document is challenged. The Registrar is cited in terms of Section

3(1) of the National Registration Act, Cap 01:02. The mandate of the Registrar of National Registration is to keep a National register of all citizens of Botswana of the age of 16 years or older to whom identity cards have been issued.

**The issue for determination**

8. The issues for determination are common to both parties. They are:-

1. Whether the Respondents' refusal to issue the Applicant with a New Identity document that correctly reflects his gender identity as "male" is a violation of his constitutional rights; and

2. Whether the Respondents' justification for the limitation of the Applicant's constitutional rights is reasonable and justifiable.

9. Respondents have added yet another issue which is –

Whether the argument presented by the Applicant to this Court is in fact a red herring?

10. Applicant by notice of motion filed on the 19<sup>th</sup> June 2015 approached the Court for the reasons that the denial or refusal of

the Respondent to change his gender maker was unconstitutional and that his right to equal protection of the law guaranteed by Section 3 of the Constitution; right to freedom from inhuman and degrading treatment guaranteed by Section 7 of the Constitution; right to privacy guaranteed by Section 9; right to freedom of expression guaranteed by Section 12 of the Constitution and the right to protection from discrimination guaranteed by Section 15 of the Constitution have been violated.

11. During argument it appeared to me that this matter also pivots around the interpretation of Section 16 of the National Registration Act (Cap 01:02). This view is informed by what Applicant averred in his replying affidavit at paragraphs 54 and 55 where he said:-

“I deny the contents of this paragraph to the extent that they are inconsistent with the contents elsewhere in this affidavit, the founding affidavit and any reports filed. I am advised and submit that there has been a material change in my particulars and this material change falls within the ambit of Section 16 of the National Registration Act.”

12. This case raises an issue that is not so common in this jurisdiction. It is the issue of change of gender maker of a person. It follows therefore that there would be very few local guidance or authorities in point. Assistance will therefore be sought from

international decisions so far as they are relevant to this point and can be employed to interpret local conditions. Dingake J has warned in the case of **Diau v Botswana Building Society 2003 920 BLR 409 (IC)** that:-

*"...one needs to be extremely careful with respect to the extent to which reliance could be placed on the jurisprudence from other countries, as quite often the constitutional provisions being interrogated are materially different from our own."*

13. The Court of Appeal has also provided guidelines regarding reference to foreign authorities and has discouraged courts from relying on those where there are clear local authorities in point. In this case however, there is paucity of local authorities on issues of transgender hence heavy reliance on authorities from other jurisdictions and International Conventions and treaties. The Applicant has further raised constitutional issues which in my judgment cannot be glossed over as they are also fundamental in the resolution of this matter. It is the overall effect on the Applicant of the refusal of the Registrar to change his gender maker that brings about argument on constitutional ramifications. Further International Conventions on Human Rights have been found to provide valuable guidance in understanding and resolving issues such as this one. In the case of **State v. Dow 1992 BLR 119 (B)** at

**151 F (CA)** (Per Amissah JP) the Court of Appeal said in relation to reference to International conventions and treaties:-

*“But by the law of Botswana, relevant international treaties and conventions may be referred to as an aid to interpretation.”*

At page 153 the Court went further to state:-

*“The Learned Judge a quo made reference to Botswana’s obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution.”*

He therefore concluded at page 154 D-E:-

*“I am in agreement that Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken”*

Aguda JA in a separate opinion still in the same case put it this way at page 171 B-D:-

*“If an international convention, agreement, treaty, protocol, or obligation has been incorporated into domestic law, there seems to be no problem since such*

*convention, agreement, and so on will be treated as part of the domestic law for purposes of adjudication in a domestic court. If it has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the Legislature or the Executive will not act contrary to the undertaking given on behalf of the country by the Executive in the convention, agreement, treaty, protocol or other obligation. However where the country has not in terms become party to an international convention, agreement, treaty, protocol or obligation it may also serve as an aid to the interpretation of a domestic law, or the construction of the constitution if such international convention, agreement, treaty, protocol etc. purports or by necessary implication, creates an international regime within international law recognized by the vast majority of States. One can cite some such conventions, agreement, treaty, protocol which have created regimes which no member of the community of nations can or should neglect with impunity."*

Recently the Court of Appeal again reiterated that position in the case of **Molefi Silabo Ramantele v Edith Modipane Mmusi and 3 Others CACGB 104-12** where it stated at page 43 para 69:-

*"It is well established that in interpreting the provisions of the Constitution more particularly with regard to the fundamental rights the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed."*



14. The above notwithstanding, Tebbutt JP in **Good v The Attorney General (2) 2005 (2) BLR 337 (CA)** cautioned at page 22:-

*"It must be remembered that treaties and conventions do not confer enforceable rights on persons within the state until parliament has legislated their relevant provisions into the law of the land. It has been said by this court that as a member of the community of civilized states which has undertaken to abide by certain standards of conduct and, unless it is impossible to do otherwise, it would be wrong for the courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken."*

#### **Constitutional interpretation**

15. This case also hinges on the interpretation of the constitution particularly Section 3 and 15. I have found valuable assistance in the case of **Geoffrey Khwarae v. Bontle Onalenna Keaikitse & 3 Others MAHGB-000291-14** where Dingake J laid down the following principles on constitutional interpretation at pages 26 paragraph 81-86 (unreported)

*"A constitution must be interpreted in its contemporary social context, not according to a situation that prevailed when it was adopted, otherwise, as Friedman J Observed "it will cease to take into account the growth of the society which it seeks to regulate". **Nyamakati v. President of Bophuthatswana 1962 (4) SA 540 at 567.***

*A constitution must be interpreted as a living document. On this view the Constitution is understood to grow and evolve over time as the conditions, needs, and values of our society change. On this approach, constitutional interpretation must be informed by contemporary norms and circumstances, not what the original framers had in mind.*

*It is generally agreed that to be faithful to the Constitution is to interpret its words and to apply its principles in ways that sustain their vitality over time. Fidelity to the Constitution requires judges to ask not how its general principles would have been applied when the Constitution was crafted, but rather how those principles should be applied today, in accordance with the values and dynamics that inform the contemporary era”.*

*The Courts, in interpreting a Constitution as a living document must be agents of change, and should not be stuck in the ideas and values of yesteryear – for, as it is has often been said, sometimes change is essential for fidelity, but refusing to change in the light of changed circumstances may amount to infidelity and working counter to the dictates of the Constitution.*

*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.(Underline mine)*

16. It is these principles that should guide me in considering the Constitutional issues raised in this case.

### Factual background

17. The Applicant was born, as per his/her Birth Certificate on the 19<sup>th</sup> July 1989 with female biological characteristics. From a very early age, put as about 5 years he never felt comfortable with being a girl but wished he could have been a boy. He felt as if he was a boy "trapped" within a woman's body. He grew up questioning why "he did not look like a boy". It was as if there was a disharmony between his biological sex and who he innately felt as a person.
  
18. As a consequence of the depression, the Applicant attended Lobatse Mental Hospital where in February 2007 s/he was diagnosed with Gender Identity Disorder or Gender Dysphoria; a condition which means 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.
  
19. The Applicant's dysphoria continued and in order to mitigate that gender dysphoria he was advised by physicians and doctors to undergo hormone therapy and surgery so that he could feel more comfortable within his body. The treatment was done in 2009 by Dr. Sidandi and Ms Tladi at Sbrana Psychiatric Hospital in Lobatse.

20. Dr. Ponatshego Gaolebale of Princess Marina Hospital, a Government Hospital supported Applicants request for gender assignment by stating that *"from a medical point of view I support his request to have his gender reassigned as male"*.
21. In 2010 the Applicant took steps to address this disorder by undergoing counseling, hormone therapy and surgical interventions. He therefore, under the advice and care of doctors and physicians, had sex reassignment treatment. As a result, his body has been altered biologically by the hormone therapy and surgery and these changes are irreversible, permanent and are now material to who he is as a person.
22. Following surgery and hormonal therapy, the Applicant's physical and outward appearance and expression are now male and as stated congruent with his felt gender identify. In fact his physical and outward appearance are said to be now in harmony with his mental and innate psychological feeling of being a man and in satisfaction he has remarked that he *"now feel more at peace"* with being a man.
23. Though the Applicant feels comfortable with his new identity there is a legal huddle. This has to do with his description in the National Identify (*Omang*) documents. In Botswana the National

Identity plays a pivotal role in every Motswana's daily life as it links him/her with any service they require from various institutions. Most activities in the Country require every Motswana to produce their Identify document ("*Omang*") for identification for purposes of receiving service e.g. in shops where one desires to pay through a credit card; in Banks for various services and in other institutions. Problems arise where there is a discrepancy between the information in the Identity document and the physical appearance of the person identified such as in the case of the Applicant. His National Identity (*omang*) reflects his gender as female while his appearance is that of a man. This obviously places the Applicant at a disadvantage and this is what he says has caused him ongoing distress and discomfort.

24. Argument of the parties centered on the distinction between "sex" and "gender" as I will show later. According to the Applicant although there is a distinction between the two terms their meanings have become blurred through usage. It is noteworthy to state that in Botswana just like in the other countries the sex of a person is determined at birth following observation.
  
25. Dr. Chris Louis De Villiers states that according to Western-based medical administrative practice a person's legal sex is usually what birth-sex is placed on the birth certificate by the birth attendant.

The sex is usually assigned according to the external appearance of the genitalia.

26. He further states that “for legal purposes a number of factors may actually determine male or female sex, including chromosomal sex, appearance of the external genitalia, internal sexual organs (gonads) hormonal level, etc. For example, in Argentina a person may now be reassigned legally solely on the basis of self-identification. More on this issue later.

**Respondents' case**

27. Respondents' case as summarized from their answering affidavit is that:-

24.1 Gender and sex are not the same thing and by definition they are distinct. The identity document issued by State reflects the particulars of sex not gender identity and that the particulars that Applicant seek to change his identity document is sex and not gender.

24.2 Applicant has not been able to demonstrate conclusively either medically or legally that there has been an actual change in the particulars of the sex.

- 24.3 The Respondent does not register and change the particulars of any individual to their desire to have their details changed either alone or coupled with an unproven medical or legal threshold as to what constitute a change in the said particulars.
- 24.4 By denying Applicant's application to change his gender marker on his identity document, they in fact uphold his right to equal protection and treatment and freedom from discrimination; and
- 24.5 Lastly Applicant should instead go for psychological treatment to obtain a remedy for his distress rather than seek to change his national identification document.
28. In addition Respondent has insisted that the decision to undergo gender reorientation was that of Applicant and not of the Respondent.

**Legal framework**

29. This application is anchored on the National Registration Act ("The Act").

30. The National Registration Act ("the Act") provides the framework in which the State can change the National Identity (*Omang*) of the Applicant to reflect his current gender status which Applicant self-identifies with.
31. The Act provides for the registration of all citizens of Botswana over the age of 16 years. In terms of Section 5 of the Act, the National Register includes details of each citizen, including their name, place of residence, sex, date of birth, marital status, date of registration and registration number.
32. The National Registration Regulations issued under Section 23 of the Act, (in regulation 3), provides that each identity card will contain the following:- particulars relating to the holder; a recent photograph; an identity card number; surname and forenames; date and place of birth; signature; the thumbprint of the holder; the nationality of the holder; the sex of the holder; the colour of the holder's eyes; the date of expiry of the identity card; the place of application for registration; and the signature of the Registrar.
33. Identification is required for most activities in the daily life of every citizen and therefore having an identify card which correctly reflects and constitutes prima facie proof of the particulars stated therein is significant for any individual. Individuals whose



physical appearance does not resemble their identity documents are likely to face some hardships and are often at risk of discrimination, stigma and harassment. They are also often subjected to interrogation at any of the institutions where they require a service.

34. Section 16 of the Act empowers the Registrar to change the particulars of a registered person in circumstances where these particulars materially affect the person's registration. Applicants have urged this court to read that provision generously and purposively in order to give effect and content to the Applicant's constitutional rights.

35. The purpose behind the National Register in Botswana is not difficult to find. It is to provide an accurate record of the person's status and the person's physical appearance is prima facie evidence or proof of the contents of the National Register and the identity document.

36. In Botswana the national identity document is titled "*Omanq*" which essentially asks the question to the holder "*who are you?*" In the Applicant's case he says the answer to this question is in reality that the "*Omanq*" he holds does not reflect his gender identity and expression and who he really is.

37. This is so notwithstanding that Section 17 of the National Registration Act allows a person to update their photograph in their identify card. The fact that one may update their photograph is to me an indication that physical appearance is prima facie evidence of what is contained in the National Identity Document (*Oman*). Section 17(1) states that: *"every registered person may, whenever he is satisfied that his personal appearance has changed so as to make it likely that his identify as certified by the identity card may be questioned, apply to the registrar of the area in which he is registered for the issue of new card with a more recent photograph"*
38. The Act does not end there. Once the Registrar has noted the changes he is under a duty to record them. In terms of the Act *"he shall cause the changes to be recorded in the relevant registers"*.
39. The above section in my view, was deliberately inserted by the Legislature to give the Registrar powers of changing the identity document or "*Oman*" of any person whose personal appearance has changed and he is satisfied that indeed it has changed. What are the envisaged changes? The Act speaks of material change. It also speaks of change in personal appearance. The Registrar would make those changes after application has been made to him by the affected person. Obviously the application will detail the personal

appearance that has changed so as to make it likely that his identity as certified by the identity card may be questioned. Do these changes relate to facial appearance only or other changes that may occur in the person's entire body? There is no doubt that those must be significant changes not only in the face but in the body of the Applicant as well. The intention of effecting those changes are captured under section 17 of the Act to prevent the likelihood of his identity 'as certified by the identity card' questioned.

40. Of further note is that, an identity card is only valid for ten years. Section 9(3) of the Act requires that when a card is renewed, it must include "an up-to-date photograph and with up-to-date particulars relating to the holder." Once the Registrar is satisfied of the changed it become imperative for him to record the changes in the Register. (See Section 17 (2). The Act does not seem to state whether such changes should be self-inflicted or involuntary. It only envisages change in personal appearance of the Applicant that meets the criteria of material change.
  
41. Perhaps a look at the objective of the National Registration Act would assist in resolving this issue. Although there is no case in point here, I have found a fitting explanation in the South Korean jurisdiction. The Court there was grappling with a situation where

there was also no provision for correction or change of gender in the Family Register Act. The Court explained the principle behind the Family Register Act as being to record the true personal status and relationship of a person. In its view it was therefore reasonable to allow a transgender person to correct their gender in the register. (See **Re Change of name and Correction of Family Register, Supreme Court of South Korea (22 June 2006.)**)

42. As stated earlier this matter also gravitates around the proper interpretation of Section 16 of the National Registration Act.

43. Section 16 of the Act provides:-

“(1) Where the Registrar is of the opinion that any change in the particulars relating to a registered person materially affects his registration, he shall record the change and notify the Registrar of National Registration of the circumstances and recommend that the person concerned should be issued with a new identity card.

(2) The Registrar of National Registration shall, if he is satisfied that the change materially affects the person’s registration, cancel the identify card issued to that person and issue a new identity card.”

44. It is evident that the Act confers wide discretionary powers upon the Registrar to determine the materiality of the change in the context of this section. An analysis of Section 16 of the Act on its

own allows for an interpretation which affords the Applicant an opportunity to change his identify to reflect his current identity or even his self-identified gender identity. The Section provides the Registrar with the authority to change the identify document of the Applicant after consideration of all relevant factors and particulars relating to the material change in terms of the section. It is in view of the requirement of that section that the Applicant would want the refusal of the Registrar to change his gender maker to be considered as an unreasonable restriction of his ability to exercise and enjoy his constitutional rights.

**Exercise of discretion**

45. It is trite law, however, that exercise of public power and discretion must be reasonable and be exercised within the ambit of fundamental rights. (See *Pharmaceutical Manufacturers of SA and Another; In re Ex parte President of RSA 2000 (2) SA 674*).
46. Though the Act is silent on the definition of "materially", Applicant contend that the Registrar and the Attorney General should have interpreted it in a manner that protects the Applicant's fundamental rights.

47. An exercise of discretion in my view, includes taking account of all the relevant circumstances and particulars of the Applicant and only after considering the relevant circumstances relating to the Applicant's application, is it open to the Registrar to make a decision that is reasonable and justifiable. Relevant circumstances in the present matter have been stated as including the medical evidence presented by the Applicant and the recommendation by his physicians, including the recommendation from the Princess Marina Hospital, that his marker should be changed to align it with his male gender identity. The Registrar, it was argued, failed to take this into account, as well as his constitutional rights.
48. Applicant further submitted that a change in gender marker from female to his psychologically self-identified male gender is material for the purpose of the National Register and his identify document.
49. Once it is established that a change is material the section is phrased as imperative and not permissive and the Registrar has an obligation to issue an individual with a new identity card.
50. In the premises, it was submitted, on a liberal construction and interpretation of Section 16 of the Act, after considering all the relevant factors relating to the Applicant, it was open to the

Registrar to interpret 'materially' to also include self-identified gender. In failing to do so it was submitted, he exercised his discretion in terms of Section 16 of the Act in a manner which unreasonably and unjustifiably limited the Applicant's constitutional right.

51. It was strongly argued that the refusal by the Registrar to issue a new identity document which reflects the Applicant's gender marker as male accordingly had the direct consequence of subjecting him to continued harassment, abuse, discrimination and embarrassment, and the continued violation of his constitutional rights.

52. I now come to deal with constitutional argument relating to the refusal by the Registrar to change the gender marker of the Applicant as canvassed by the Applicants.

**The constitutional rights of the Applicant**

53. Respondent urged the Court to adopt a wide interpretation of the Constitution when interpreting the relevant section in this case. They acknowledged that the Applicant had detailed wide ranging discretion on the Registrar but that the Registrar could not do much about Applicants condition particularly as Botswana

employed a system where sex was determined at birth. For that reason the Registrar's powers were limited in that the Registrar could not go by the feelings of a party as a means of changing his sex marker. Further, they argued, there was no conclusive medical or legal position that determined when a party's sex has changed. It is also impossible for the Registrar to use that as a yardstick as well.

54. It is well established that in interpreting the provision of the Constitution more particularly with regard to the fundamental rights the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed. See **Petrus and another v. The State 1984 BLR 14 (CA) @ 37**; Section 24 and 26 of the Interpretation Act. Section 24(1) reads:-

*"(1) For the purpose of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any textbook or other work of reference, to the report of any commission of inquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment, to any relevant international treaty, agreement or convention*



*and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates in the Assembly.*

....

*26. Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.” (underlining for emphasis)*

55. It is also well established that constitutional derogations from fundamental rights, like penal statutes are ordinarily to be given a strict and narrow rather than broad and generous construction. See **Petrus and another v. The State 1984 BLR 14 (CA) @ 34-5.**

56. At paragraph 72 the Court agreed with the Respondents that the derogation contained in Section 15(4) of the Constitution are not unchecked. “They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest”.

**The refusal to change the Applicant’s gender marker violates his constitutional rights**

57. Respondents in their answering affidavit disputed the difficulties the Appellant has been facing due to his condition, the evidence of

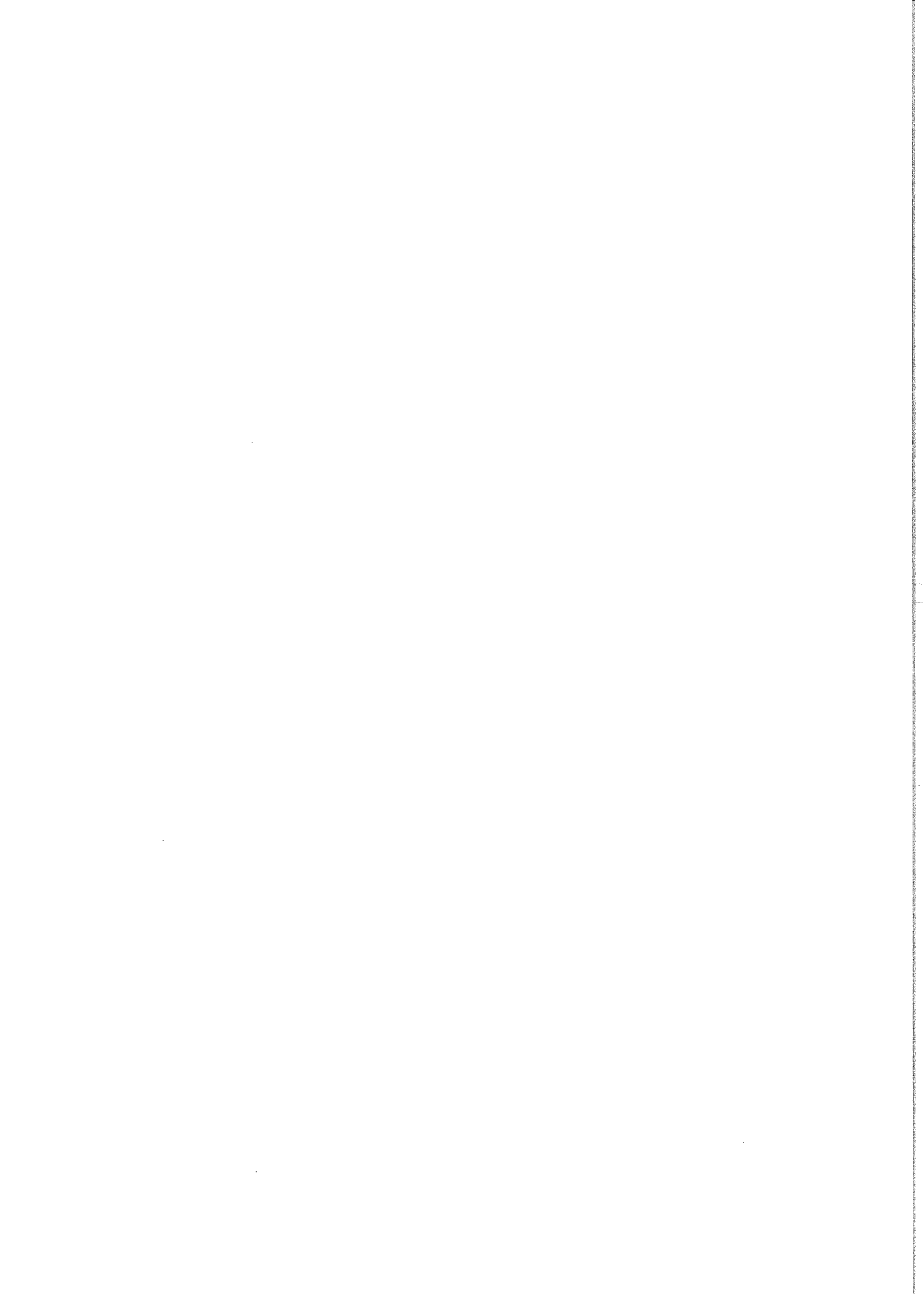
existence of unnecessary discriminatory treatment he faces due to his condition and societal perceptions. However during submission Counsel conceded that in view of his condition Applicant could have been experiencing those difficulties. That notwithstanding, they did not think that Applicant's treatment provided enough grounds to change his gender marker. They anchored their argument on the traditional practice where once sex was assigned at birth it remained so throughout the life of the person, i.e. sex assigned to the Applicant at birth becomes the determining factor. They further argued that the law did not provide for change of gender marker anywhere. Thus in the absence of any enabling statute the change could not be allowed.

58. It cannot be gainsaid that the incongruence between Applicant's gender marker and his identity document with his gender identity has and still is causing him considerable emotional distress and discomfort.
59. It is for the above reason that the Applicants contends that the refusal by the Registrar to change his gender marker on his identify document violates his constitutional rights including, right to dignity, privacy, freedom of expression, equal protection of the law, freedom from discrimination and freedom from inhumane and degrading treatment.

60. I discuss each of the above issues in the preceding paragraph below in detail.

**Uncontroverted medical evidence of the Applicant's innate gender identity**

61. Under this ground the Applicant submits that he has placed uncontroverted evidence before this court illustrating that the gender marker on his identity document is incongruent with his gender identity and that this is causing him considerable emotional distress and discomfort.
62. The Applicant has placed before this court evidence of his gender identity and how his physical appearance and gender expression reflects this gender identity. His evidence shows that he is indeed a man. Respondents have filed an affidavit by one Mr Eric Ditaui to dispute Applicants evidence. It is clear that Mr Ditaui was responding on behalf of the Respondents and in his capacity as Acting Deputy Director of Civil and National Registration in the Ministry of Labour and Home Affairs. His major handicap is that he is not an expert in this field and from his affidavit it is clear that he could not address some of the critical issues raised by the Applicant in relation to his condition. It was with the above in mind that the Applicant submitted that the affidavit of Mr Ditaui



did not raise any real or genuine dispute of fact to the evidence he put up thus rendering his evidence uncontested.

63. All that Mr Ditau could say, which Applicant, said was bare denial was “that the Applicant cannot demonstrate conclusively either legally or medically that there has been actual change in the particulars of the Applicant’s sex.” Because the Applicant cannot demonstrate a change on the particulars of sex the Respondent can therefore not be expected to alter his identity documents to reflect the said “change” on the Applicant’s identity card”.
64. The Applicant therefore submit that the Respondents’ reliance on an affidavit by Mr Eric Ditau who is neither a medical practitioner nor has any medical experience does not support their arguments as he is simply not in a position to dispute or contradict the medical evidence submitted by the Applicant.
65. The Applicant therefore urged the Court to reject Mr Eric Ditau’s affidavit because he lacked medical experience and also relied on bald assertions. His denial of the Applicant’s evidence cannot therefore suffice and does not raise a genuine dispute of fact. In this regard, the Court in *Lobatse Town Council v Herbst and Others* 2010 1 BLR 547 HC emphasised that “a Respondent is not entitled

to defeat an application merely by bare denials” or a “mere stratagem”.

66. Similarly, in dealing with the question of whether a bald denial of the Applicant's allegations is sufficient to generate a genuine or real dispute of fact, the Court in **Combination Construction (Pty) Ltd v Kweneng Land Board 2006 (2) BLR 277 (HC)** held that:

*“...in every case the court must carefully scrutinize the alleged dispute of fact and determine whether such alleged dispute of fact is genuine and or is not fictitious or simply meant to delay the Applicant to obtain appropriate relief timeously. It follows therefore that a bald denial of the Applicant's allegations in his affidavit will not in general be sufficient to generate a genuine or a real dispute of fact. Where appropriate, the court should not hesitate to decide an issue on affidavit if the dispute of fact that may be shown to exist is inconsequential or insignificant.”*

67. Thus it follows from the above therefore that a bare denial does not generate a genuine or real dispute of facts. The material uncontroverted evidence that the Applicant has tendered before Court includes that:-

- (a) His sex assigned at birth does not correspond with his innate gender identity causing him discomfort, distress and emotional trauma;
- (b) The incongruence between his gender identity and his identity documents is a contributing factor which caused him to experience gender dysphoria i.e. a condition which means that the sex assigned to him at birth, being female, does not correspond with his innate gender identity and causes him severe distress;
- (c) Allowing him to live within the gender role that is most comfortable with him, and aligning his documentation with his self-identified gender, is necessary in alleviating his gender dysphoria;
- (d) Under the care and direction of doctors and physicians, he had sex reassignment treatment, which altered his outward appearance and is irreversible and permanent. He now has a full beard on his face, and has developed broad shoulders, taut muscles and a deep masculine voice;

(e) The Applicant presents as male. His doctors have examined both his physical and psychological status and found that he was male; and

(f) The physicians recommended that his gender marker on his identity documents be amended to acknowledge his correct gender as male.

68. In view of the fact that the Respondent did not dispute this evidence the Applicant submitted that his evidence established that the sex assigned to him at birth should be amended on his identity document to align it with his gender identity.

69. Courts in some parts of the world have said once medical evidence has established that the gender of the Applicant was different from the one assigned at birth the court must grant the relief. The High Court of Kuala Lumpur, Malaysia, in **JG v Pengarah Jabatan Pendaftaran Negara, JG V Pengarah Jabatan Pendaftaran Negara (25 May 2005)** has emphasized that, when medical evidence has established that the gender of the plaintiff was other than the biological sex, it was the duty of the Court to grant the relief. The Court held further that, in the absence of legislative guidance, the courts should listen to medical experts to determine gender. In that case, doctors had examined both the physical and



psychological status of the plaintiff, and found that she was female.

70. The Supreme Court of South Korea also stated that where doctors had made a comprehensive consideration of the biological, psychological, and social factors constituting gender, it was incumbent upon the Court to grant relief. (*Re Change of name and Correction of Family Register*, Supreme Court of South Korea (22 June 2006). See also International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*, pages 181-183.

71. I find this argument persuasive in the circumstances of this case.

**Emotional distress occasioned by the incongruence between the gender marker on the Applicant's identity document and his innate gender identity**

72. Applicants concern under this ground can be summarised thus:-

(a) That he experiences ongoing distress and discomfort by having an 'Omang' which is incongruent with his self-identified gender identity. This also exposes him to stigma and discrimination. Moreover, the incongruence is a factor which contributed to his experience of gender dysphoria. This is

usually caused by discomfort, distress and the psychological trauma of having a gender identity which is different from the biological sex.

(b) That on an ongoing basis, he is subjected to various forms of interrogation into his personal life and required to explain to individuals the circumstances surrounding his appearance as a man when his 'Omang' says he is a woman. This further exposes him to explain intimate details of who he is and why he came to hold a female identity document. This causes distress and is no doubt humiliating and degrading.

73. I have mentioned earlier that the distress and discomfort experienced by transgender persons, whose identity documents do not reflect their self-identified gender identity is a matter also experienced elsewhere as acknowledged by several courts and tribunals around the World. These have been extensively canvassed in other jurisdictions as I will demonstrate below.

74. The Human Rights Tribunal of Ontario in **XY v Ontario (Government and Consumer Services) 2012 HRTO 726 (CanLII)** has held that:-

*"A non-transgendered woman can confidently produce a birth certificate when she is required to do so (or when it*

would be convenient to do so) without having to contend with a sex designation that is incongruent with her lived experience. Her gender identity accords with the sex assigned at birth and is not open to question or challenge. For a transgendered woman, however, this simple act is fraught with risk. Will she be perceived differently as a result of producing a birth certificate that shows that 'officially' she is a different gender from the one that she presents? Will her gender identity be questioned or challenged by the person viewing her birth certificate? Will she even perhaps be subject to ridicule or humiliation as a result of producing a government issued document that states that she is a different gender than the one in which she presents herself?" (*XY v Ontario (Government and Consumer Services)* 2012 HRTO 726 (CanLII) at paras. 147-48.)

75. The High Court of Kenya in the case of **Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu 2014 eKLR** has also expressed its concerns regarding the discomfort experienced by transgender persons. The Court stated that:-

*"[I]n a layman's language, the Applicant is a person with the body of a man and the mind of a woman. For him, the pull of his feminine mind-set is overwhelming. It has emerged that he at one time attempted to commit suicide because of his condition."*

76. In dealing with the discrepancies between the physical appearance of a transgender man and his identity document and how this will expose him to discrimination and distress, the Brazil Tribunal of Justice in **re Gesa Case No. 0162607, Tribunal of Justice of Rio de Janeiro, Brazil** (4 August 2010) found that:-

*“Without breasts and with a beard, deep voice and other male characteristics, the Applicant’s appearance was at odds with the female name and gender recorded in his civil identification documents. Such circumstances would expose him to discrimination on a daily basis. Not granting the changes requested would violate (the right to non-discrimination) in Article 3 of the Constitution.”*

These cases confirms what Applicant has stated he is currently going through which nobody can dispute as him alone is going through that experience.

**The rights in the Constitution applies to every person**

77. Section 3 of the Constitution of Botswana protects the rights of “*every person*” and an individual human being, regardless of his or her gender identity is ‘a person’ for the purposes of the Constitution” of Botswana.

78. The universality of fundamental freedoms within the Constitution of Botswana was recently emphasised by the Court of Appeal in **Attorney General of Botswana v Rammoge and 19 Others, Civil Appeal No. CACGB-128-14 (2016)** at para 58 where Kirby JP held that:-

*“Fundamental freedoms are to be enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others.”*

79. The Court of Appeal also quoted with approval the decision of the High Court of Kenya **Eric Gitari v Non-Governmental Organisations Co-ordination Board and Others (2015) KLR** at para 104, in **Attorney General of Botswana v Rammoge and 19 Others, Civil Appeal No. CACGB-128-14 (2016)** at para 60 and stated that:-

*“as a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings... we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity”.*

80. It is for the foregoing that in my judgment 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.

81. The State can only limit fundamental rights if it is reasonable and justifiable to do so in an open democratic society based on human dignity. I will revert to this point later.

**The refusal to change the Applicant's gender marker violates his human dignity**

82. Dingake J in **Diau v Botswana Building Society 2003 (2) BLR 409 (IC)** stated the following with regard to the right to dignity:-

*"The right to dignity permeates the entire bill of rights in our constitution; it is an intrinsic part of the right to life, broadly construed, for the denial of the right to dignity would denude the right to life of its effective content and meaningfulness."*

83. Applicant's case hinges on the refusal of the Registrar to change his gender maker to reflect that he is now a man. The recognition of our citizenship and personal identity by the State which includes

the ability to have access to proper identification is at the core of our humanity and dignity. Identity documents not only enable us to have access to routine services, healthcare, social security and employment but affords us an opportunity to live in dignity.

84. The Court of Appeal in **Attorney General v Rammoge and Others** (“**Attorney General v Rammoge**”) **Court of Appeal of Botswana, Civil Appeal No. CACGB-128-14 (2016)** at para 60 has been alive to the importance of upholding individual dignity and emphasised that *“to deny any person his or her humanity is to deny such person’s human dignity and the protection and upholding of personal dignity is one of the core objectives of Chapter 3 of the Constitution.”*
85. It follows therefore from the foregoing 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 that he feels psychologically comfortable with. **National Legal Services Authority v Union of India and Others Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC)** at para 76. His right to dignity includes *“expressing oneself in diverse forms, freely*

*moving about and mixing and comingling with fellow human beings”.*

See **Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608** at paras 7 and 8.

86. It is well established that the Constitution of Botswana protects the rights of ‘*every person*’ and embraces respect and tolerance for diversity within our democratic society, regardless of whether a person is born as woman and self-identifies as a man or vice versa. In particular, the respect for diversity within our nation was highlighted by the Court of Appeal in **Attorney General v Rammoge (Court of Appeal of Botswana, Civil Appeal No. CACGB-128-14 (2016))** at para 60 where it emphasised that:-

*“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 any other progressive state, to the constitutional protection of their dignity”.* (Underline for emphasis)

87. The State has therefor a duty to fully realise the constitutional protection of the Applicant’s dignity. Having an identity document that correctly reflects his self-identified gender identity is fundamental to realising the dignity of the Applicant. See **In re Change of Name and Correction of Family Register, Supreme Court of South Korea (22 June 2006)**.



88. The nexus between human dignity and proper identification was recognised by the High Court of Kenya in **Republic v Kenya National Examination Council and Attorney General** (infra). In allowing a change to the gender marker on the Applicant's certificate of secondary education, the Court emphasised that:-

*“Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanisation. Each individual has inherent dignity, which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution.”* (**Republic v Kenya National Examination Council and Attorney General, Ex Parte AMI, JR Case No. 147 of 2013, [2014] eKLR at page 11.**)

89. Relative to the above the Court of Appeal has acknowledged that *“Botswana has since its independence striven to protect, maintain and promote within the ethos and social environment of the country, human rights and values and the reflection of this is mirrored in s 3 of the Constitution”*. (**Good v Attorney General (2) 2005 (2) BLR 337.**)

90. The National Registration Act (“the Act”) allows for the Registrar to effect changes to the *Omang* where a material change has occurred. I share Applicant's sentiments that by doing so the Registrar would be giving effect to and extending much needed

protection to vulnerable transgendered individuals and giving effect to the spirit, purport and object of the Constitution.

91. The South African Constitutional Court has also held that dignity “is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law”. **Minister of Home Affairs v Fourie and another 2006 (1) SA 524 (CC), para 78.**
92. Human dignity also has aspirational significance. “The state must not establish rigid social stratification that would consign individuals to a particular station in life, with no hope for advancement for themselves and their children.” **Erin Daly Dignity Rights: Courts, Constitutions and the Worth of the Human Person (2012) 128**
93. The right to dignity has also been recognised in regional law. Article 5 of the ACHPR provides that “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”
94. In **Purohit and Another v The Gambia, (2003) AHRLR 96 (ACHPR)**, para 57, the African Commission held that “human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may

be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right." The African Commission noted that "personal suffering and indignity can take many forms, and will depend on the particular circumstances" of each case.

95. The Supreme Court of India in **National Legal Services Authority v Union of India and Others Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC)** also observed that human dignity is not only intertwined with other rights but with the development of a nation:-

*"Thus, the emphasis is on the development of an individual in all respects. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human beings, which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspects of self-determination, dignity and*

*freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.”*

96. I agree with Counsel for the Applicant that the State (and society) has a duty to respect and uphold the individual right to human dignity despite opposing and different views it might hold with regards to the Applicant's gender identity.
97. In this regard the Supreme Court in South Korea stipulated that, transgender persons should *“be assured of worthiness and dignity as a human being, have the right to pursue and be entitled to a life worthy of human beings, [and] such rights should be protected as long as they are not against the maintenance of law and order or the public welfare”*. ***Re Change of name and Correction of Family Register, Supreme Court of South Korea (22 June 2006)***.
98. Accordingly, the Applicant argues that the Court should consider his right to be recognised as an equal human being and that he should be afforded an opportunity to express his male gender identity in a manner that he is comfortable without undue interference by the State. His right to be respected as a person with inherent dignity underlies and is the foundation of all the other rights in the Botswana Constitution.

99. In my judgment therefore the Registrar failed to apply his mind and unreasonably exercised his discretion in that he failed to take into account the Applicant's "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 and found that he was male. In doing so, he failed to protect the inherent dignity of the Applicant as a transgender person.

**The refusal to change the Applicant's gender marker violates his right to privacy**

100. It has also been argued on behalf of the Applicant that the refusal of the Registrar to change the Applicant's gender marker and issue him with a new identity document reflecting such change, violates his right to freedom from arbitrary interference with his privacy. Having a gender marker, which is different from his chosen and self-identified gender identity, it was argued, places him at risk of practical and actual detriment and vulnerability, humiliation and anxiety on a daily basis where he has to disclose the circumstances surrounding the divergence between his gender marker and appearance.

101. Section 9 of the Constitution of Botswana protects the Applicant's right to freedom from arbitrary interference with his privacy and his right to the protection of the law against such interference.

102. In the case of **Diau (Supra)** the Court stated the following in relation to the invasion of the right of privacy:-

*"An invasion of privacy may assume either the form of an unlawful intrusion of the personal privacy of another or the unlawful publication of private facts about a person. Examples of breach of the right of privacy include entering into a private residence without authority; disclosure of an individual's medical facts without authority, listening to private conversations etc. It would seem to me from reading the provision of the constitution relating to privacy, that whether or not a right to privacy has been infringed is a two stage enquiry. First, whether the conduct complained of amounts to an infringement. Secondly, if there has been an infringement, it must be determined whether the infringement is reasonably justifiable in a democratic society."*

103. The Respondent's response to that in his Answering Affidavit was generally a denial of infringement with any rights and any arbitrary interference with the Applicant's right to privacy. He averred *"further the Respondent is not infringing on the Applicant's freedom from inhuman and degrading treatment. Further the Respondent does not register and has never changed the particulars of any*

*individual according to their desire to have their details changed either alone or coupled with an unproven medical or legal threshold as to what constitutes a change in said particulars. As such the Respondent vehemently denies violating the Applicant's right to equal protection under the law. In fact my attorney's advise me that the denial of the Applicant's application in this context actually upholds the Applicant's right to equal treatment and freedom from discrimination.*

*He went further to state that "further my attorneys advise me, that there is a solution possible that avoids the constitutional claims of the Applicant. This solution is counseling and therapy for the Applicant which is available to the Applicant as opposed to the Respondent compromising the integrity of our National Identification Registers:*

104. Although Respondents denies interfering with Applicants rights they do admit that some government departments are entitled to make enquiries such as Immigration for purposes of establishing "the identity of a subject which is not in itself a violation of the Applicants right to privacy." This answer ignores that the Applicant meets different people, consults different institutions and organisations where he is required to prove his identity. This is

where his complaint lies. I do not understand Respondent to be arguing that this case falls generally in the exception contemplated under the provisions of section 9 of the Constitution. The Respondent's response sidelines the issues before this court under this ground and also ignores medical advice rendered to the Applicant prior to undergoing hormonal therapy and surgery. It is what he goes through or experiences that is of concern to him. It is the intrusion into his life that he wants protection from.

105. Article 17 of the ICCPR, which Botswana has ratified, also provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation.
106. Principle 6 of the Yogyakarta Principles recently referred to by the Court of Appeal in the case of **Attorney General of Botswana v Rammoge and 19 Others, CACGB-128-14**, at para 56 provides that:-

*“Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the*



*choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others."*

107. As mentioned above, the Applicant is often required to explain intimate details of his life and identity to strangers to access basic routine services. For example, whenever he makes a card purchase at a supermarket or restaurant he is required to explain why his physical appearance does not match his *Omang*. Although the Respondent find this a normal thing to do because the officials such as immigration officials would be entitled to seek that information to establish the identity of the subject (see para 26), I find this an invasion of his right to privately define and live his own identity without the interference of others. I say this because it happens everywhere he goes where he has to be required to present his identity document.

108. Applicant confirms this at paragraph 12 of his Replying Affidavit where he averred "*in fact, in my daily activities individuals attribute my masculine behavior to a male physiological appearance and do not appreciate the difference between sex and gender. As my identify document says I am a woman, society expects me to act in a feminine manner and express myself as a woman. For instance, when I am required to produce my Ormang at my local supermarket*

*the cashier associates my masculine gender expression as that of a man and I am addressed as "Sir" but the moment I produce my Oman and it says female, it creates alarm. By merely looking at my masculine appearance the cashier simply does not appreciate the formal distinction between sex and gender – all that she sees is a man standing before her with an identity card that does not reflect his appearance, arousing suspicion and distrust".*

109. The right to privacy and whether a person can change the gender marker on an identity document was also an issue before the Argentinian Family Tribunal in **Re KFB Sup. Cons 19/10/2001, 2 (30 April 2001) (FT)**. In that case, the Applicant filed a petition requesting that the sex and name on his birth certificate be amended to match his gender identity. In allowing the Applicant to change the gender marker on his identity document the Court held that the right to privacy includes the principle of personal autonomy and defines a person's personal identity. Individuals, including minorities, had the right to define their own identity as part of their personal freedom. In a democracy, the government did not have the power to prescribe how minorities lived their lives. Minorities had the right to define their own personal identity even when they did not conform to the majority's sense of morality. See *International Commission of Jurists: Sexual Orientation, Gender Identity and Justice: A comparative Law Casebook* pages 177-179

110. In my judgment the risk or difficulties, arbitrary interference or embarrassment and the intrusion of privacy faced by the Applicant may be avoided or minimized by the State by allowing him to change the gender marker on his identity document.

**The refusal to change the Applicant's gender marker violates his right to freedom of expression**

111. It was Applicants case that the Registrar's refusal to change the gender maker on his identity card violates his right to freedom of expression as envisaged by section 12 of the Constitution in that its effect is to deny him the freedom to express himself in the gender and manner which he feels psychologically and physically comfortable with. His gender identity is different from the sex assigned to him at birth and his psychological status is dispositive in determining his gender identity. The Applicant's doctors examined both his physical and psychological status and found that he was male. Psychologically the Applicant believes and feels that he is a man and the law should in my view provide him with the opportunity, ability and freedom to express his chosen self-identified gender identity through varied ways and by means of expression, speech, mannerism, clothing, and attitude. See **National Legal Services Authority v Union of India and Others**

**Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC) at para  
25**

112. In my judgment, and here I also agree with Applicant, a person's gender identity is one of the aspects of life that relates to a person's intrinsic sense of being male, female, or transgender, and it is integral to personality and one of the most basic aspects of self-determination and freedom. (**National Legal Services Authority v Union of India and Others**) (**Supra**). Indeed, the Applicant's right to freedom of expression and "*personal autonomy includes both the negative right of (sic) not to be subjected to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty...*" **National Legal Services Authority v Union of India and Others (supra)**.

113. The importance of the right to freedom of expression has been recognised by the drafters of the Constitution of Botswana in section 12.

114. Section 12 is phrased similarly to article 19 of the International Covenant on Civil and Political Rights, which also guarantees the right to freedom of opinion and expression.
115. The Human Rights Committee (HRC) in General Comment 34 elaborates on the content of this right. **(General Comment 34 to the Human Rights Committee, CCPR/C/GC/34, 12 September 2011)**. The HRC notes that freedom of opinion and expression are indispensable conditions for the full development of the person and are essential for any society. The right constitutes the foundation stone for every free and democratic society and is *“a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights”*. **(General Comment 34 to the Human Rights Committee, CCPR/C/GC/34, 12 September 2011)**. Freedom of expression is integral to the enjoyment of the right to freedom of association and extends to expression that may be regarded as “deeply offensive”.
116. Section 12 of the Botswana Constitution allows for limitations of the right provided such restrictions are provided for in law and are reasonably justifiable in a democratic society. Article 19 of the ICCPR allows for similar limitations of the right.

117. The HRC has interpreted the limitations in article 19 of the ICCPR to mean that restrictions of the right to freedom of expression must be for a necessary legitimate purpose; must not be overbroad; and must conform to the principle of proportionality. The requirement of proportionality includes that the restrictions must be appropriate to achieve their protective function; must be the least intrusive instrument amongst those which might achieve their protective function and must be proportionate to the interest to be protected.

118. The HRC has held in General Comment 34 that *“the principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”*. Thus, when an administrative decision restricts the right to freedom of expression, the decision-maker *“must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”*.

119. The African Commission on Human and Peoples’ Rights, in the case of **Constitutional Rights Project and Others v Nigeria** 2000 AHRLR 227 (ACHPR), held that *“freedom of expression is a basic human right, vital to an individual’s personal development and*

*political consciousness, and participation in the conduct of the public affairs of his country. Under the African Charter, this right comprises the right to receive information and express opinions”.*

120. The African Commission’s *Declaration of Principles on Freedom of Expression in Africa* (2002) emphasizes that freedom of expression is a fundamental and inalienable human right and an indispensable component of democracy:-

*“Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination. No one shall be subject to arbitrary interference with his or her freedom of expression... Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.”*  
**(African Commission “Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa,” October 2002.)**

121. Principle 19 of the Yogyakarta Principles also protects the right to freedom of expression and provides that:-

*“Everyone has the right to freedom of opinion and expression, regardless of...gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including*

*with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.”*

122. The Applicant as a transgender man has expressed his desire to be identified and live as a man, which is part of his constitutional right to define his own personal identity. ***In my opinion therefore as an expression of free choice, the decision to live his life in accordance with his gender identity must be respected.*** His male gender identity is innate from which he cannot dissociate.

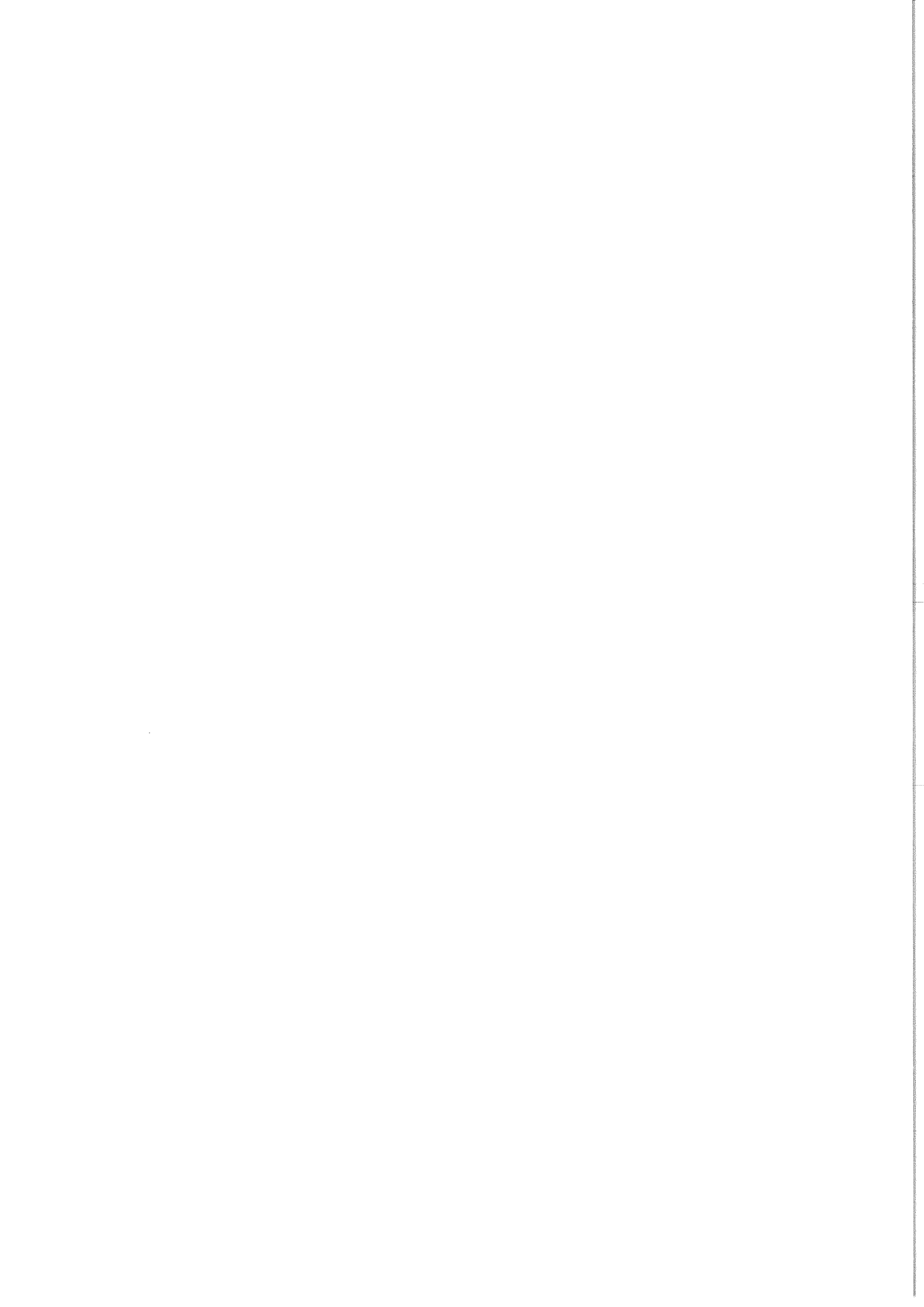
**The refusal to change the Applicant's gender marker violates his right to equal protection of the law**

123. It was further contended that by refusing to change the Applicants gender marker the Registrar violated his right to equal protection of the law. Accordingly it was submitted transgender individuals face stigma and discrimination on a daily basis and they are at risk of violence and persecution in many societies.

124. Thus the Registrars refusal to change the Applicant's gender marker it was argued, amounted to unequal treatment and had a discriminatory effect which violated section 3 of the Constitution, perpetuates these stereotypes and pushes his daily life into further uncertainty and inequality.



125. I have mentioned earlier what the objective of the gender marker in the identity document is. It is meant to assist in the proper identification of the Applicant and its purpose is not to treat people differently or unequally.
126. Section 3 of the Botswana Constitution provides that “every person” in Botswana, irrespective of race, place of origin, political opinion, colour, creed or sex, is entitled to the fundamental rights and freedoms of the individual, including liberty, protection of the law, freedom of expression and of assembly and association”.
127. This section does not seem to discriminate against transgender as it is all inclusive. It protects “every person” including transgender individuals who are also entitled to the legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of Botswana. The protection provided for in the Constitution extends to every person regardless of his or her gender identity.
128. The Court of Appeal in the case of **Attorney General v Dow 1992 BLR 119 at 133** has held that section 3 is an autonomous section, which confers the right to equal protection of the law on the individual.



129. The High Court in **Kamanakao v Attorney General (2002) AHRLR 35 (Bw HC 2001)** at para 20 has held that “protection of law” was more than protection by law enforcement but mandated that laws must treat all people equally. **See also Attorney General v Dow 1992 BLR 119 at 135H**
130. Non-recognition of the identity of the Applicant (and other transgender persons) denies him equal protection of the law, thereby leaving him extremely vulnerable to harassment, violence and sexual assault in public spaces, airports, at home and also by the police. This can also result in extreme discrimination in all spheres of society, especially in the field of employment, education, and healthcare.
131. Article 3 of the African Charter on Human and Peoples’ Rights (ACHPR) provides that every individual shall be equal before the law and shall be entitled to equal protection of the law. The African Commission on Human and Peoples’ Rights (“the African Commission”) has interpreted article 3 of the ACHPR to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property, and in the pursuit of happiness. **Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa,**

**Comm.294/04 (3 April 2009) at para 99 (quoting *Brown v Board of Education of Topeka* 347 US 483 (1954)).**

132. The government is in terms of the constitution responsible for removing obstacles to the effective realisation of the Applicant's right to equal protection of the law. This was the approach taken by an Argentinian court, which held that the refusal of the plaintiff's request to change the sex on his birth certificate and receive a new identification card violates the right to equality through legal action, but also through access to real equality of opportunity. Instead, the government was constitutionally responsible for removing obstacles to the effective realization of this equality. (***Re KFB, Family Tribunal No 1 of Quilmes, Argentina* (30 April 2001), Const 19/10/2001 (30 April 2001) (FT).**)

133. From the foregoing I conclude that the refusal to issue Applicant with a new identity document which reflects a change in his gender marker impairs his right to equality before the law and equal protection of law and violates section 3 of the Constitution of Botswana.

**The refusal to change Applicant's gender marker violates his right to freedom from discrimination**

134. Of importance in cases of this nature is the extent at which transgender rights are protected. This can only be a matter experienced by the transgender himself and the extent he feels discriminated or his rights violated. The Applicant submits that the refusal of the Registrar to allow him to change his gender marker violates section 15 of the Constitution. The effect of the refusal he says discriminates against him on the basis of his gender identity and it perpetuates the discrimination that he and other transgender individuals face on a daily basis.

135. In my view the Registrar should have interpreted the Act in a manner that is consistent with section 15 of the Constitution of Botswana, having regard to its democratic values and with aid of international instruments and conventions on human rights, which Botswana has subscribed to.

136. The Botswana Constitution provides for the right to be protected against such discrimination. Section 15(2) provides that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. Section 15(3) provides that the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political

opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

137. Dealing with this question on the list of prohibited grounds in the Constitution of Botswana, the Industrial Court in *Diau v Botswana Building Society* *Diau v Botswana Building Society*, the Botswana Industrial Court IC Case No. 50 of 2003, stated that:-

*“In my mind the grounds listed in terms of section 15(3) are not exhaustive. A closer interrogation of the said grounds show one common feature- they outlaw discrimination on grounds that are offensive to human dignity and or on grounds that are irrational. To dismiss a person because of perceived positive HIV status would offend against human dignity, in addition to being irrational”.*

138. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) also recognised several prohibited grounds in a non-exhaustive list. These include health status, age, disability, nationality, marital and family status, sexual orientation, and *gender identity*. (CESCR General Comment No.20 at paras 28-35.)

139. In fact in the United Nations Committee on Economic, Social and Cultural Rights report of 2009:-

*“Gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender.....often face serious human rights violations, such as harassment in schools or in the workplace.”*

140. Botswana has ratified the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples’ Rights. Each of these treaties have similar provisions on non-discrimination.

141. The Human Rights Committee (HRC) in its General Comment No 18 on non-discrimination, noted that:-

*“While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”*  
**General Comment 18 to the Human Rights Committee, HRI/GEN/1/Rev 9, 10 November 1989, at para 7.**

142. Importantly, the African Commission recently adopted a resolution on the protection against violence and other human rights violations; based on, amongst others, gender identity. This resolution places gender identity, *inter alia*, in the list of grounds upon which discrimination is prohibited under article 2 of the ACHPR. **(Adopted at the 55<sup>th</sup> Ordinary Session of the African Commission of Human and People's Rights in Luanda, Angola, 28 April to 12 May 2014).**

143. The Supreme Court of Appeal in **National Legal Services Authority v Union of India and Others** (*supra*), recognised the rights of transgender persons and acknowledged that their non-recognition lead to prejudice and discrimination within society and by authorities in this way:-

*“Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side-lined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mind-set which we have to change.”*



*“Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police ...Further, non-recognition of identity of Hijras/transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often.”*

144. Similarly in dealing with a question concerning gender and name change in **re Change of Name and Correction of Family Register, Re Change of Name and Correction of Family Register, Supreme Court of South Korea (22 June 2006)** the Supreme Court of South Korea held that it was likely that, where the name and gender still reflected the person’s previous sex, transgender men and women would face discrimination depriving them of their fundamental rights and resulting in a violation of constitutional protections. The Court also found that the failure to make provision in the Family Register Act for transgendered persons was not a conscious choice by the legislature but due to a failure to consider that such provisions would be needed. Finally, the Court held that the Family Register Act should adapt to changes in modern law, and under Article 120 it was reasonable to

allow a transgender person to change the Family Register to reflect his or her changed gender.

145. The importance of the protection of the fundamental rights of transgender persons and the prohibition against discrimination is demonstrated by the above cases.

146. In my view the Applicant has provided medical and psychologist reports of his gender identity. His gender identity is innate to his personal identity which is only "immutable or changeable at unacceptable cost" to his psychological and emotional well-being. Having a female gender marker when the Applicant has a male identity places him at risk of discriminatory and hostile treatment.

147. In the premises therefore, the decision to reject the Applicant's application to change his gender marker amounts to discrimination. The Registrar has provided no reasonable and legitimate justification for his refusal and in my judgment this amounts to discrimination of the type that is discouraged and outlawed under sections 3 and 15 of the Constitution.

**The refusal to change the Applicant's gender marker violates his right to freedom from inhumane and degrading treatment**

148. The Applicant further argued that the refusal of the Registrar to allow him to change the gender marker on his identity document violates section 7 of the Constitution in that its effect is to treat him and other transgender persons in an inhumane and degrading manner.
149. It has been shown above that it has become widely acknowledged that transgender persons experience daily harassment by various sectors, in public places, at home, police entrapment, rape, discrimination and abuse in public places etc. **See *National Legal Services Authority v Union of India and Others Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC)***.
150. Having a physical appearance and expression different from his identity document, the Applicant says he has been subjected to treatment that is inhumane and degrading, harassment and stigma on more than one occasion and lives in constant fear that such degrading treatment will reoccur when he is asked to present his identity document.
151. These occurrences amount to unwarranted embarrassment which no individual wants to experience. Having a gender marker which is fundamentally different from the Applicant's psychological and self-identified gender forces him into recurring situations of tension

with officials and institutions when he is required to present his identity document.

152. The Botswana Constitution provides for the protection against such inhumane and degrading treatment. In particular, section 7(1) of the Botswana Constitution provides that “no person shall be subjected to torture or to inhuman or degrading punishment or other treatment”.(underline provided).

153. This protection provided to the Applicant is similar to that expressed by article 7 of the ICCPR and article 5 of the Universal Declaration of Human Rights (UDHR), which both provide that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Human Rights Committee, tasked with monitoring compliance with the ICCPR, has asserted that the purpose of the right to be free from inhuman and degrading treatment is to protect the mental and physical integrity and dignity of the individual. **See General Comment 20 to the Human Rights Committee, 1992, at para 1. See also Article 5 of the ACHPR.**

154. The African Commission emphasised in the case of *Doebbler v Sudan* that article 5 of the Charter “prohibits not only cruel but also inhuman and degrading treatment. This includes not only

actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience." (2003) AHRLR 153 (ACHPR 2003) at para 36. The Commission reiterated that this section "is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses."

155. In my opinion therefore the refusal of the Registrar in the circumstances of this case qualifies as inhuman and degrading treatment as contemplated by section 7(1) of the Constitution.

**The Respondents' refusal to change the Applicant's gender marker is not a justifiable limitation of his constitutional rights**

156. The State bears the onus of showing why a limitation is necessary in the public interest or to protect the rights and freedoms of others. See judgment of the **Kenya High Court in National Media Group Limited v Attorney General [2007] 1 EA 261 (HCK)**.

157. The State can only validly limit the fundamental rights of persons, if it is reasonably justifiable and proportionate to do so within the circumstances.

158. Moreover, the State must provide evidence to justify the limitation of the right of any person and that there is no alternative or lesser means than the limitation of the right. The Respondents' reliance on bald assertions to limit fundamental rights cannot in my judgment suffice.

159. The Court of Appeal in **Attorney General v Rammoge and Others**, (supra) held that:-

*"The test of what is reasonably justifiable in a democratic society is an objective one ... and, as I have said, where the Minister seeks to rely on one of the limitations to the fundamental rights provisions of the Constitution, the onus is upon him to prove that it squarely applies to the law or action taken under that law which is in question. That is not an onus which is easily discharged, because clauses which derogate from constitutional rights are to be narrowly construed, while clauses conferring such rights receive generous construction..."*

*To discharge that onus, the Minister must first identify the social ill which he regards as being of sufficient importance to justify the derogation, or against the dangers of which he considers that it is sufficiently important to safeguard the rights and freedoms of others. Having identified that social ill, the action he takes to counter that social ill must be subjected to what has become known as the proportionality test, to ensure that it passes constitutional muster."*

160. The Court of Appeal in **Attorney General v Tapela and Others**, **Court of Appeal Civil Case No. CACGB-096-14**, at para 74 rejected the notion that the government can make bald assertions, unsubstantiated by evidence. The Court noted that:-

*“Finally, on the issue of affordability, no evidence whatever has been placed before the Court of any of the material facts upon which it would be necessary to base a finding that the provision of HAART to non-citizen prisoners would be unaffordable.... All we have before us is a bald statement that the provision of HAART to non-citizens is unaffordable. That cannot suffice”.*

161. Similarly, the South African Supreme Court of Appeal has also confirmed:-

*“A bare or unsubstantiated denial will only pass muster where there is no other option available to a Respondent due to, for example, a lack of knowledge, and nothing more can be expected of the Respondent. A bare denial, in circumstances where a disputing party must necessarily be conversant with the facts averred and is in a position to furnish an answer (or countervailing evidence) as to its truth or correctness, does not create a real and genuine dispute of fact. A proper answer to material averments under reply requires, at the minimum, a separate and unequivocal traversal of each and every such allegation which the party seeks to contest.”*  
**Municipality of Mossel Bay v the Evangelical Lutheran Church [2013] ZASCA 64 at para 6, citing Wightman t/a J W Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at**

para 13 and *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at para 17.

162. In my judgment and agreeing with the Applicant's it is particularly important in constitutional litigation that the State satisfy a court that there is a legitimate government purpose that justified the limitation of constitutional rights. I could not find any evidence in justification of the limitation of the Applicant's constitutional rights. All that the Respondent could say was that there was no law authorising change of gender maker and that the Applicant was not able to demonstrate conclusively either medically or legally that there had been actual change in the particulars of the Applicants sex. This argument is advanced in the light of medical evidence that confirmed that the Applicant went through hormone therapy and surgical treatment which are irreversible and was now a man and the consequent physical appearance.

**The Respondents' restrictive interpretation of the Act and evidence unreasonably limits the Applicant's rights**

163. Dingake J. in the case of **Geofrey Khwarae (supra)** gave a distinction between "sex" and "gender". He stated this at page 76 paragraph 89 (cyclostyled judgment:-



*“Sex is a biological term. It refers to biological and physical differences between men and women. (See: Iain Currie and Johan de Waal, **The Bill of Rights Handbook, (2005) Juta, p.250**). Gender is a social term. It refers to ascribed social and cultural male and female roles. Although closely linked, the two terms do not mean the same thing”.*

164. The Respondents suggest that “sex” and “gender” are by definition distinct. And that since they are distinct, the particulars of “sex” envisioned in the ‘*Omang*’ only refers to sex at birth and not gender and therefore they cannot change the marker on the *Omang*. Based on the latter interpretation of sex they further suggest that the Applicant has not established legal or conclusive medical basis to claim that the Applicant’s gender reorientation has actually changed the Applicant’s sex.
165. This position poses some difficulty when one relates that distinction to the purpose of the “*Omang*” and the seemingly loose use of the two words in daily parlance and practices.
166. A broad survey of other jurisdictions might assist here. Courts across the world have affirmed that sex is determined by a combination of biological, psychological and social factors which include a person’s innate feeling of what it is to be a man or woman. That “*the mind as well as the body determines the sex of*

an individual". *Michael v. Registrar-General of Births, Family Court of Auckland, New Zealand* (9 June 2008). For example, the South Korean Supreme Court, held that:-

*"[T]he determination of sex shall be made after a comprehensive consideration of the biological factors and the emotional and social factors. (In re Change of Name and Correction of Family Register 2004 Seu 42 available at [http://library.scourt.go.kr/jsp/html/decision/2\\_67.2004seu42.htm](http://library.scourt.go.kr/jsp/html/decision/2_67.2004seu42.htm).)*

167. Indeed, medical knowledge has progressed to the point where scientists have underscored the inadequacy of determining gender based on chromosomes, genitals, and gonads. ***Re Kevin* 2001 Fam CA 1074 available at <http://www.austlii.edu.au/cgi->**
168. It was contended on behalf of the Applicant that, the notion of chromosomes, or "genome mapping", as the sole indicator of "sex" has been rejected by several international tribunals. Courts around the world have recognised that "sex" cannot always be accurately identified at birth, and therefore "sex" must include psychological factors such as gender identity - one's innate feeling of being male or female.

169. The Human Rights Tribunal of Ontario in **Hogan v Ontario 2006**

**HRTO 32** found that:-

*“sex’ is not a mono-faceted term about the pair of sex chromosomes. It includes sexual identity, which is, in part, a psychological matter of self-perception, and in part a social matter that is of societal preconception of the role of the female or male.”*

170. Similarly, the European Court of Human Rights in **Goodwin v**

**United Kingdom**, has explained that:-

*“It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.” **Goodwin v United Kingdom, ECHR 28975/95 (2002), para. 82. (Emphasis added).***

171. Moreover, several courts have posited that gender identity is the most important factor when determining one’s “sex”. In ordering the Malaysian Government to recognise the plaintiff as a woman and change her marker on her identity document, the Court in **Pengarah Jabatan Negara JG v Pengarah Jabatan Pendaftaran Negara [2005] HCKL** noted that defining sex purely in regards to chromosomal or biological factors would be too restrictive and determined that though the “*psychological factor[s]* cannot be considered at birth because they do not yet manifest, they may

*become an overriding consideration subsequently as the individual develop[s].”*

172. Consequently, after examining the medical evidence placed in front of it by the plaintiff, the Court held:-

*“They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.”*

173. Notwithstanding, that genes are not a stand-alone factor for determining sex and that various factors, including a person’s internal feelings, psychology and prenatal hormonal influences also play a part, Applicant submitted that the distinction between sex and gender is often blurred within our society and within our daily social interactions. Here, the term “sex” as used in the National Registration Act includes the societal preconception of what it means to be a man or woman, and therefore refers to the cardholder’s “gender”.

174. Thus, it was submitted, the Respondents disregard the practical purpose and functions of the *Omang* which is required in most activities within our daily lives, including verification of identity

such as opening a bank account. Within these daily activities individuals attribute the Applicant's masculine behavior to a male physiological appearance and do not appreciate the difference between sex and gender.

175. Examples of this blurring of sex and gender within our society are abound. For instance the documentary evidence provided by the Applicant of a loan application form from the Botswana Savings Bank and the Limkokwing University of Creative Technology, Botswana. In both of these applications reference is made to gender and not sex. In fact even a document of the Water Utilities Corporation ("WUC"), a parastatal wholly owned by the government of Botswana, refers to gender and not sex. These are just a few of several other examples which indicates the blurring of the terms 'sex' and 'gender' within our society. It is quite evident that in our daily activities there is no formal distinction between sex and gender. And being male and female is generally attributed to having a masculine or feminine outward appearance and demeanour.

176. In **Schroer v Billington**, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) the court acknowledged that sex includes social expectations of how a man and woman should behave:-

*“It is well-established that, as a legal concept, “sex” as used in Title VII refers to much more than which chromosomes a person has. As the Sixth Circuit has explained, “[b]y holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”*

177. The notion that sex includes societal preconception of the role of the female or male or how a man or woman should behave is particularly highlighted by the remarks of the Applicant when he said in his Replying Affidavit at para 12/p91 that:-

*“As my identity document says I am a woman, society expects me to act in a feminine manner and express myself as a woman. For instance, when “I am required to produce my Omang at my local supermarket the cashier associates my masculine gender expression as that of a man and I am addressed as “Sir” but the moment I produce my Omang and it says female, it creates alarm”.*

178. The conflation or blurring between sex and gender within a societal context has been recognised by courts throughout the world.

179. In ***Hogan v Ontario* 2006 HRTO 32 at para 125** the Human Rights Tribunal of Ontario observed this conflation between “sex”

and "gender" in their own statutes by finding that discrimination on the basis of one's perceived gender constitutes "sex" discrimination. The tribunal observed that:-

*"The common usage of the words "sex" and "gender" are synonymous enough in ordinary usage to be used interchangeably for the ground "sex" in the [human rights code]" and that "the absence of a specific sex falls within the rubric of the term sex, just as atheism can fall within the ground of creed or religion. Gender ambiguity as in transsexualism or intersexed is a form of sex."*

180. Similarly in ***Sheridan v Sanctuary Investments Ltd*** [1999]

**BCHRTD No. 43 (QL)** the Tribunal held:-

*"that discrimination against a transsexual constitutes discrimination on the basis of sex. Whether the discrimination is regarded as differential treatment because the transsexual falls outside the traditional man/woman dichotomy or because male-to-female transsexuals are regarded as a sub-group of females (and vice versa), the result is the same: transsexuals experience discrimination because of the lack of congruence between the criteria which determine sex..."*

181. The United States Supreme Court in ***Price Waterhouse v Hopkins*** **490 U.S. 228 (1989)** also held that failure to conform to gender stereotypes amounts to a form of sex discrimination. The Court found that a woman who alleged that she was refused partnership status because she presented stereotypically "male" traits could sue for sex discrimination under Title VII of the Civil Rights Act,

which forbids discrimination on the basis of “sex.” The Court noted that the plaintiff may have been “*unlawfully discriminated on the basis of sex*” because an employer “*who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.*”

182. Likewise, the 9<sup>th</sup> Circuit in the United States in **Schwenk v Hartford 204 F.3d 1187 (9th Cir. 2000)** has suggested that for the purposes of “sex” discrimination, “*the terms “sex” and “gender” have become interchangeable.*” The Court affirmed that “sex” discrimination is the failure to “*conform to socially-constructed gender expectations*”, and therefore discrimination on the basis of sex “*encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.*”

183. In dealing with the question whether discrimination of sex includes discrimination on the basis of a person’s gender identity, the Ontario Human Rights Tribunal in **Hogan v Ontario Human Rights Commission 2006 HRTO 32 at para 127** held that:

*“the construction of the terms sex and gender are flexible enough to enable it to conclude that transsexuals and the intersexed fall within the ground of sex to recognize the*



*Code's special nature and purpose of the enactment, and to give it an interpretation that advances its broad purposes to protect every person from unlawful discrimination on the ground of sex."*

184. From the foregoing it does appear to me that the two terms have reached a point where the distinction between them has been blurred by usage. Sex seems to determine the gender of someone.

**The Respondents provide no evidence in support of their allegation that the change of gender marker will compromise the national identification register and national security**

185. The Respondents seem to suggest that changing the Applicant's marker would compromise the integrity of the entire national identification register as this would create inaccuracy within the register. The Respondents have provided no evidence in support of this assertion.

186. It is trite law that decisions made by public officials should be based on evidence and not on perceptions, speculation and conjecture. ***Good v Attorney General* (2) 2005 (2) BLR 337 (CA)**. Also see ***Casswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733**. The Respondents have failed to provide any reason for the assertions that the Registrar based his

decision on evidence that changing the marker would compromise the national identification system or affect national security.

187. I agree with Applicant's submissions that to limit the Applicant's constitutional rights on mere conjecture or speculation is simply not enough. Such determinations made without any evidentiary basis have been rejected by courts as irrational and misplaced in a democratic society, which has as its founding principles notions of tolerance, diversity and pluralism. **United Macedonian Organisation Ilinden and Others v Bulgaria (no 2)** ECHR 34960/04 (8 March 2012) at para 33(b).

188. It is these type of speculations that the Court of Appeal had in mind in *Good v Attorney General* (supra) when Tebbut JP unequivocally held 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."*

189. The Supreme Court of Appeal of South Africa in **Dabelstein and Others v Lane and Fey NNO 2001 (1) SA 1222 (SCA)** at para 1227H held that:-

*"What is clear is that the 'evidence' on which an Applicant relies, save in exceptional cases, must consist of allegations*

*of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance.”*

190. The Court in **Casswell v Powell Duffryn Associated Collieries Ltd 1939 (3) All ER 722 at 733** put it thus:-

*“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive approved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”*

191. Notwithstanding the speculative nature of the State’s argument, Applicant submitted that there was a duty upon the State to take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity. The State should therefore develop mechanisms and “less restrictive” means upon which the State’s objectives is achieved while at the same time upholding the Applicant’s constitutional rights and fundamental human dignity.

192. As mentioned by the Supreme Court of South Korea in *re Change of Name and Correction of Family Register*, (supra) the Family

Register Act should adapt to changes in modern law, as under their Constitution it was reasonable to allow a transgender person to change the information in the Family Register to reflect his or her changed gender. This change will in my view enable us in the words of Dingake J in **Geoffrey Khwarae (supra)** “to adapt to a changing world.”

193. The Applicant further submitted that the Respondents have not established the nexus between the gender marker on the *Oman* and national security.

194. Even the United States, which has particularly heightened concerns about terrorism, allows individuals to update gender markers on passports and the Department of Homeland Security permits states to make their own determinations about gender markers on state identity documents. This strongly indicates that the United States government does not believe that gender classification is important for the prevention of terrorism or that it poses a national security risk. Several other countries like Argentina, Canada, Colombia, Denmark, and Ireland, allow persons to revise official documents to match their gender identity and national security is not a consideration.

195. Courts have held that there is no nexus between national security and gender marker and that, in fact, when a person's physical appearance fails to match the gender marker on an identity document, this can lead to confusion, mistrust and sow doubt in the legitimacy of that document.

196. In *Anonymous v Weiner* 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966). **(Emphasis added.)** the Court noted that:-

*"A male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact. This individual dresses, acts, and comports himself as a member of the opposite sex. The Applicant appeared before this court and, were it not for the fact that petitioner's background was known to the court, the court would have found it impossible to distinguish this person from any other female. It would seem to this court that the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotations of any type, to classify this individual as a 'male' when, in fact, as aforesaid, the individual comports himself as a 'female.'"*

197. Similarly, a mismatch between appearance and gender marker can actually subvert effective law enforcement. For instance, in *Love v Johnson*, the Court outright rejected the State's argument that their policy of not allowing gender marker changes on state driver's licenses served to promote effective law enforcement, the Court noted that:-

- (a) The policy bore “*little, if any, connection to the [State’s] purported purpose*” of promoting “*effective law enforcement.*” ***Anonymous v Weiner, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966).***
- (b) The policy would actually *undermine* this rationale, “[*b]ecause... the sex listed on [their] licenses fails to match their appearance and the sex associated with their names.... ‘when such individuals furnish their license to third-persons for the purposes of identification, the third-person is likely to conclude that the furnisher is not the person described on the license.’” K.L. v State, Dep’t of Admin., Div. of Motor Vehicles, No. 3AN-11-05431 CI, 2012 WL 2685183, \*7 (Alaska Super.Ct. Mar. 12, 2012).*
- (c) The policy was not a legitimate limitation of fundamental rights because it neither furthered a “*compelling state interest*” nor was “*narrowly drawn*” to further that interest.


#### **CONCLUSION**

198. For the foregoing reasons, I conclude that:-

- (a) The decision of the Registrar and the Attorney General refusing to change the gender marker in terms of section 16 of the Act is unreasonable and unjustifiable. The refusal violates the Applicant's constitutional rights to dignity, equal protection of the law, non-discrimination, privacy, freedom of expression, and freedom from inhuman and degrading treatment.
  
- (b) Non-recognition of the Applicant's gender identity denies him equal protection of law and exposes him to wide-spread discrimination, stigma and harassment.
  
- (c) The decision of the Registrar of the National Registration is set aside and the Registrar is directed to issue the Applicant with a new identity document that reflects his male gender identity.

199. Finally I am indebted to Counsel from both sides for their comprehensive research on this case and the valuable authorities from various jurisdictions across the world which they unearthed which no doubt assisted the Court in resolving this difficult matter.

**DELIVERED IN OPEN COURT THIS 29<sup>th</sup> DAY OF SEPTEMBER 2017.**

  
.....  
**NTHOMIWA NTHOMIWA**  
**[JUDGE]**

