IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-031-16
HIGH COURT CIVIL CASE NO. MAHGB-000383-15

In the matter between:

THE LAW SOCIETY OF BOTSWANA	**1ST APPELLANT**
OMPHEMETSE MOTUMISE	**2ND APPELLANT**

and

THE PRESIDENT OF BOTSWANA	**1ST RESPONDENT**
THE JUDICIAL SERVICE COMMISSION	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

Adv. A. Freund SC (with Adv. H. Rajah, Mr T. Rantao, Mr O. Garebamono and Mr T. Gaongalelwe) for the Appellants

Adv. M.A. Albertus SC (with Advocate G. Quixley and Ms Y.K. Sharp) for the Respondents

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JUDGMENT

LORD HAMILTON J.A.

1. I am in complete agreement with the disposals proposed by Lesetedi JA and with much of the reasoning which supports these disposals. However, there are some aspects of his reasoning on the interpretation of section 96(2) with which I disagree. It is, accordingly, appropriate that I express these in a separate judgment.

2. My first observation is that I agree with Lesetedi JA's general approach to the interpretation of the Constitution, namely, that it being a living and organic instrument, it should be interpreted broadly and generously and in a way which reflects the ideas, values and standards current at the time when it falls to be applied to a particular situation. I also agree that the Court should consider not only the terms of the particular provision under interpretation but also the other provisions of the Constitution which give it context. It, accordingly, follows that, in interpreting section 96(2), it is necessary to have regard not only to the words of that subsection but also to the context provided by the rest of that section, by the remaining provisions of Chapter VI (The Judicature) and by the other pertinent provisions of the Constitution. It is also necessary, for the purposes of this case, to have regard, in so far as relevant, to the ideas, values and standards of Botswana in 2017. Where I disagree with Lesetedi JA on this aspect is his discounting, as unhelpful to the task before the Court, of the events which occurred immediately prior to this Constitution

first coming into existence. For my part, these events are helpful for the purposes of interpretation not because I favour an "originalist" approach (I do not) but because these events, as I see it, carry a telling message as to why section 96(2) is in the terms it is and what that provision (although then differently numbered) was, from the outset, intended to secure with respect to the appointment of judges of the High Court (other than the Chief Justice) and what it still secures in that respect.

3. It is first necessary to say something about constitutional history. Prior to the emergence of the independent state of Botswana, the Bechuanaland Protectorate had various constitutions. The last pre-Independence constitution was that set out in the Bechuanaland Protectorate (Constitution) Order 1965, an Order in Council which came into force in March 1965. Its official citation is 1965 S.I. 134; it was later modified in some respects which are not relevant for present purposes. Under that constitution there was a Commissioner appointed

from London. The provision then made for the Judicature is to be found in section 73(1), which reads:

> "The Chief Justice and the puisne judges of the High Court shall be appointed by the Commissioner by instrument under the public seal in pursuance of instructions given to him by Her Majesty through a Secretary of State."

- that is, in effect, in the exercise of British executive power.

4. By the end of 1965 it had been determined that Independence should not be long delayed and 30 September 1966 was fixed for that purpose. The Bechuanaland Independence Conference was convened and met on various dates in February 1966 with a view to settling a constitution for Botswana. At the Conference, the existing Government of Bechuanaland (under the 1965 Constitution) was represented by (the then) Dr Seretse Khama, as Prime Minister, and (the then) Mr Q.K.J. Masire, as Deputy Prime Minister, both later in turn highly distinguished Presidents of Botswana. Among the topics for discussion was the Judicature, including the mode of appointment of the judges. It was accepted on all hands that

the Chief Justice should be appointed by the President in the exercise of his sole discretion; unfettered power in the President in that regard was, no doubt, appropriate given the importance of the office of Chief Justice and the desirability of a good working relationship between the head of the Executive and the head of the Judicature. However, the position was different in relation to the appointment of other judges, including the "puisne judges" (the name then used to describe the judges of the High Court other than the Chief Justice). The proposal from the Government of Bechuanaland was that the puisne judges should be appointed by the Judicial Service Commission, a body also to be established under the Constitution of Botswana and which was independent in its membership and operation from executive government. That draft proposal was, among others, before the Third Meeting of the Conference, held on 15 February 1966. In the minutes of that Meeting it is noted:

> "Mr de Winton [an official of the British Colonial Office] said that in the draft the Judicial Service Commission themselves appointed the puisne judges. It was usual for the President to be formally responsible.

> The Conference agreed that puisne judges should be formally appointed by the President, acting on the advice of the Judicial Service Commission."

In the Report, signed on 21 February 1966, which emerged from the Conference, it was stated under paragraph 27(1):

> "...The puisne judges ... should be appointed by the President acting on the advice of a Judicial Service Commission consisting of [The Chief Justice, The Chairman of the Public Service Commission and another member appointed by the Chief Justice and the Chairman of the Public Service Commission, acting together]."

5. The results of the Conference were made law by Order in Council, namely, The Botswana Independence Order 1966 (1966 S.I. 1171), made under powers conferred by the Foreign Jurisdiction Act 1890 and the Botswana Independence Act 1966, the Order being made on 20 September 1966 and to come into operation immediately before 30 September 1966 (the projected date of Independence). The Order set out in Schedule 2 the new Constitution for Botswana. Subsection 97(2) of that Constitution provided:

> "The puisne judges shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission."

That provision is the direct ancestor of section 96(2) of the Constitution of Botswana as it appears today.

6. It may be noted that the formulation used was not novel in relation to constitutions devised for countries, including republics with executive presidents, emerging from under British colonial or similar rule. For example, section 61(2) of the Constitution of Kenya (as amended on it becoming a republic with an executive President in 1964) is in the same terms as section 96(2).

7. In my view, it is legitimate, and helpful, in interpreting section 96(2) today to have regard to what occurred in 1966, albeit more than fifty years ago. The history, which is not in dispute and is sufficiently clear, demonstrates what the framers of the Constitution, and in particular, Dr Khama and Mr Masire, had in mind as regards the appointment of the judges of the superior courts of the state soon to acquire independence. That included moving away from executive government appointing the puisne

judges to an arrangement under which such appointments would be made exclusively by the Judicial Service Commission. There was no dissent to the substance of that proposal, the only question being how, as a matter of British practice, this should be formulated in legislation. The "old-fashioned constitutional jargon" (see paras 10 and 11 below) was used, so that section 97(2) (as then numbered) took the form that it did.

8. Caution is, of course, required when using *travaux preparatoires* as an aid to interpretation of a living instrument long after its first promulgation. But, in appropriate circumstances, such material may be a useful aid. In **S v MAKWANYANE 1995 (3) SA 391**, Chaskalson P at para [19], with reference to the South African Constitution, said that such background material "if it is clear, is not in dispute and is relevant to showing why particular provisions were or were not included in the Constitution ... can be taken into account by the court in interpreting the Constitution." A similar approach can

be found in Canada where, in relation to the interpretation of the Canadian Charter of Rights and Freedoms, the Supreme Court held that the purpose of a right or freedom under that Charter is to be sought by reference to, among other things, "the historical origins of the concepts enshrined" (**REGINA v M DRUG MART (1985) 13 C.R.R. 64**, at p. 103). Such background material is, in my view, an "accepted aid" to interpretation within the meaning of section 24(2) of (Botswana's) Interpretation Act (Cap 01:04).

9. The critical words for interpretation in section 96(2) of the present Constitution are "shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission". It is clear that the President has a role in such appointments but the question is "what role?". Is his role purely "formal" (that is, the appointment proceeds in his name as Head of State under section 30) or does he have some determinative role (and, if so, what determinative role) in such an appointment? It is accepted that the President cannot

appoint as a judge of the High Court (other than the Chief Justice) a person whose name has not been put forward for that office by the Judicial Service Commission. But, can he, consistently with the Constitution, decline, as he has done in this case, to appoint a person whose name has been put forward for that office by the Judicial Service Commission?

10. In section 96(2) the word "advice" is used. In many contexts "advice" is something which the person advised may accept or reject as he or she sees fit. But, in constitutional law, including in the appointment of judges, the expression "acting in accordance with the advice of" has, in my view, a settled meaning. It means that that the person advised **must** follow the advice given and act upon it. This is consistent with the language used; it is also consistent with accepted practice. In an article entitled "**WHO CHOOSES CONSTITUTIONAL COURT JUDGES**?" (1999 SALJ 815) Professor Christina Murray, a distinguished academic, in discussing the South African arrangements, stated:

> "...It is clear that the Judicial Service Commission (JSC) is fully responsible for the choice ... [of certain judges] ... and that the President is constitutionally bound to appoint those it selects. This is captured in the old-fashioned constitutional jargon of s 174(6) of the Constitution which requires the President to appoint all but the Constitutional Court judges 'on the advice" of the JSC. In Westminster-style systems an obligation to act on advice removes any discretion from the actor. Just as previous Constitutions instructed heads of state (or Governors-General) to carry out various acts, so s.174 casts the President in the role of 'Head of State" when appointing those judges and requires him to implement the JSC's decision."

At para 7.17 (p. 52) of **The Appointment, Tenure and Removal of Judges under Commonwealth Principles**, published in 2015 by The British Institute of International and Comparative Law ("The Compendium"), there is an observation to the same effect. It is stated:

> "If the intention is to grant to [the relative commission] a power to make binding recommendations, then it may be best to employ a phrase such as "in accordance with", which has an unambiguous meaning which is immediately clear to both legal and lay readers".

By way of example, article 166(1) of the current Kenyan Constitution is cited, which provides that the President "shall

appoint judges in accordance with the advice of the Judicial Service Commission".

11. The deployment and effect of this "old-fashioned constitutional jargon" can be illustrated in many contexts.

12. In **MISICK AND OTHERS v THE QUEEN (2015) 1 WLR 1215 (P.C)** Lord Hughes, delivering the advice of the Judicial Committee of the Privy Council on a question arising under section 87 of the Constitution of the Turks and Caicos Islands (which provided that power to make appointments of Supreme Court judges was "vested in the Governor, acting in accordance with the advice of the Judicial Service Commission, unless the Governor is instructed by Her Majesty through a Secretary of State to do otherwise") said at para 11:

> "It follows that appointments to the Supreme Court are made in effect by the independent JSC, save in the exceptional case of instructions from London...at the level of Secretary of State."

13. In **KONG v ATTORNEY-GENERAL [2011] SGCA 9** (a decision of the Singapore Court of Appeal) a question arose under the Constitution of that jurisdiction, including the interpretation of Art 22P (1) and Art 21(1). In a joint judgment Andrew Phang Boon Leong and VK Rajah JJA stated at para 157:

> "The words "on the advice of the Cabinet" in Art 22P(1) cannot be any clearer, especially when they are read in the light of the words "act in accordance with the advice of the Cabinet" in Art 21(1). The aforesaid words in Art 22P(1) mean what they say. They do not mean what [counsel for the appellant] says they mean, i.e. that the President may act against the advice of the Cabinet".

It is clear that these judges considered that it was completely obvious that the words in question meant that the President was bound to act on the advice of the Cabinet.

14. Closer to home, in **MAKENETE v LEKHANYA and OTHERS [1990] LSHC 1**, the Chief Justice of Lesotho (Mr Justice B.P. Cullinan) had to interpret The Lesotho Order 1986 (as replaced by The Lesotho (No. 2) Order 1986), which provided that the King, in whom was vested the executive authority, "in exercise

of his functions under this Order or any other law, shall act in accordance with the advice of the Military Council". The learned Chief Justice observed at para 33 that, had it been intended to import a discretion in the King, a different phraseology, such as "acting in (after) consultation with", would no doubt have been used; the phraseology actually used ("shall act in accordance with the advice of") imported that the King was constitutionally obliged to follow the advice given.

15. More recently, the Supreme Court of India had to consider the effect of an amendment to the Indian Constitution which inserted the words that the President "shall act in accordance with the advice of" the Council of Ministers headed by the Prime Minister. It was observed (**Supreme Court Advocates-on-Record Association and Anr v Union of India** [2015] INSC 776, per Jaydish Singh Khehar, now Chief Justice of India, at para 97) that with the insertion of these words "the President came to be bound to exercise his functions in consonance with the "aid and advice" tendered to him..."

(This case should be distinguished from the earlier case of the same name reported at 1993 (4) SCC 441).

16. Advice which constitutionally has to be followed is not restricted to expressions in formal Constitutions. For example, where in such Commonwealth cases as may ultimately be appealed to the Privy Council the Judicial Committee of the Council delivers its judgment, that judgment takes the form of "advice" to the Queen. There is, however, no question of Her Majesty rejecting such advice or otherwise going her own way. It is expressed in that form essentially as a matter of constitutional politeness to the Head of State.

17. This excursion into examples may be concluded by a reference to paragraph 9.3.2 of the 1997 Report of the Presidential Commission on the Judiciary (the "Aguda Commission Report" referred to by Lesetedi JA). There the Commission, incidentally to its consideration of possible reforms to the Judicial Service

Commission, mentioned that the then Chief Justice had raised the issue of whether or not the President had the constitutional right either to refuse to take the advice of the Commission or to amend recommendations made to him regarding the appointment of Judges of the High Court or Justices of the Court of Appeal. The authors of the Report, who included Aguda JA, as Chairman, and Trengvove J, as one of its members, stated:

> "We have been told that there is some doubt about the interpretation of [sections 96(2) and 100(2) of the Constitution], and we have been called upon to recommend a solution to this. However, we have considered these provisions and found them to be clear, unambiguous and adequate, and we recommend that they be retained."

While the authors do not spell out the interpretation which they find so obvious, I, for my part, have no doubt that, in these matters, it was to the effect that the President was constitutionally bound to follow the advice given to him by the Judicial Service Commission.

18. As the Compendium makes plain, there is, of course, a wide variety of mechanisms across the Commonwealth for the appointment of senior members of the judiciary; and these have, in some cases, changed over time. In Botswana a change in this field has been an alteration, following the Aguda Commission Report, to the composition of the Judicial Service Commission. Under section 103(1) the Commission now consists of:

> "(a) the Chief Justice who shall be Chairman;
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> (b) the President of the Court of Appeal (not being the Chief Justice or the most Senior Justice of the Court of appeal);
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> (c) the Attorney-General;
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> (d) the Chairman of the Public Service Commission;
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> (e) a member of the Law Society nominated by the Law Society; and
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> (f) a person of integrity and experience not being a legal practitioner appointed by the President."

That alteration reflects changes over time, including, no doubt, the increase in business of the Court of Appeal and the advances in the number and organisation of the legal

profession; the Attorney-General was, after discussion of arguments for and against doing so, included in the membership of the Commission for the reasons given at para 9.4.4 of the Aguda Commission Report. The membership of the Commission is, accordingly, more broadly based than previously, with a wider range of perspectives. I should observe, however, that, in my view, none of its members should be regarded as a "representative" of any external person or body nor should any such person or body be regarded as a "constituent" or "principal" of any member. The members of the Commission, whether such by reason of the holding of other offices or by nomination or appointment otherwise, are bound, when discharging the very important functions conferred on them as members, to act on their own personal judgment, and not on behalf of or in the interests of any other person or body.

19. The alteration to the composition of the Commission, while an important development, does not, in my view, affect the

interpretation of section 96(2). Although its composition has changed and different perspectives may now come to bear on the decisions made by the Commission, the President is still bound, in the matter of choice of an individual for appointment as a judge of the High Court, to act in accordance with the advice given to him by that body as a whole. The objective sought by Dr Khama and Mr Masire in 1966 (to ensure that appointments made of judges of the High Court, other than the Chief Justice, were in substance made by the Judicial Service Commission) is as valid today as it was then. The President's role was, and remains, in that respect purely formal. While the President may, no doubt, provide information and express concerns to the Commission, either through the Attorney-General or, possibly, otherwise, the decision on appointment is, in the end, for the Commission and for the Commission alone. This is an instance in which the wide executive powers conferred on the President by section 47(2) of the Constitution are qualified by the phrase "unless it is otherwise provided".

20. So far as drawn to the attention of this court, there are no other prevailing ideas, values or standards in Botswana which would warrant a different interpretation being given today to section 96(2).

21. I should add that there may well be situations in which the President, as the person in whom the executive power of Botswana is vested by section 47(1) of the Constitution, has a role to play in whether or not an appointment is made-for example, as regards the number of judges to serve at any particular time (See High Court Act (Cap:04:02), section 3(2)). The amount of judicial business, current and prospective, may affect whether, regard being had to the financial cost to the public purse, a vacancy which has occurred should or should not be filled or an additional appointment should or should not be made. But, no such situation arises in this case.

22. For these reasons, I am of the view that the President acted unconstitutionally in declining to appoint the second appellant

to the office of a judge of the High Court and that, in that respect, the appeal must succeed. As earlier indicated, I agree with Lesetedi JA that, for the reasons he gives, the appeal in all other respects should be dismissed.

DELIVERED IN OPEN COURT AT GABORONE THIS 19th DAY OF APRIL 2017.

LORD HAMILTON
JUSTICE OF APPEAL