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:

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**

Advocate A. Freund SC with Advocate H Rajah; Attorneys Mr T Rantao; O Garebamono and Mr T Gaongalelwe for the Appellants

Advocate M A Albertus S.C. with Advocate G Quixley and Attorney Ms Y K Sharp for the Respondents

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JUDGMENT

CORAM: LORD ABERNETHY J.A.
LESETEDI J.A.
GAONGALELWE J.A.
LORD HAMILTON J.A.
BRAND J.A.

LORD ABERNETHY J.A.:

1. I agree with the conclusions reached by Lesetedi JA as to the disposal of each of the issues raised in this appeal. I also agree with much of the reasoning which led to those conclusions. Like Lord Hamilton JA, however, I disagree with some aspects of Lesetedi JA's reasoning on the

interpretation of section 96(2) of the Constitution. As regards these aspects I fully agree with Lord Hamilton's reasoning.

2. The task before the Court in relation to section 96(2) is one of statutory interpretation. That is a familiar task for judges. It is an important part of their function of interpreting and applying the law. It arises frequently and there are well recognised ways in which it should be approached.

3. It is trite that in the interpretation of statutes and other written documents the aim of the court is to identify the intention of the legislature in the case of a statute, of the author or authors in the case other written documents. The means by which the court will approach that exercise are also well recognised in the law of Botswana. In the recent case of **Botswana Landboards and Local Authorities Workers' Union and Others v Botswana Public Employees Union and Others, CACGB-035-16, 17 June 2016**, this Court held as follows:-

> "61. The approach to be adopted by the Courts in interpreting a document is now broadly accepted in our jurisdiction. In the interpretation exercise, the Court must first look at the language used in the document in light of the ordinary rules of grammar

and syntax and where the language is clear give effect thereto. Where the language is ambiguous or the meaning is not apparent in the language used, the Court must adopt a contextual approach. In ... **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA** ...Wallis J.A. at pages 603 to 604 observed:

> 'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is in the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' "

4. I fully recognise that in interpreting the provisions of the Constitution, perhaps most particularly the provisions in Chapter II relating to the protection of fundamental rights and freedoms of the individual, there

are certain particular considerations that the court must bear in mind, which are set out in paragraphs 28 to 33 of Lesetedi JA's Judgment.

5. It remains the duty of the court, however, to interpret the provision in question in such a way as "to effect the objective of the Constitution" (**Attorney General v Dow [1992] BLR 119 (CA), Amissah P, at pages 131 to 132**). Or, to put it another way, as Aguda JA did in **Petrus and Another [1984] BLR 14 (CA) at page 35**, it is not the duty of the court "to construe any of the provisions of the Constitution so as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends". These *dicta* reflect section 26 of the Interpretation Act (Cap. 01:04), which applies equally to the Constitution as it does to other enactments. Section 26 provides as follows:-

> "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 intent and spirit."

6. Having regard to these authorities, I now turn now to the words used in section 96(2), which are quoted by Lesetedi JA in paragraph 22 of his Judgment. This matter proceeds on the basis that the words used in the sub-section are not entirely clear and that there is some ambiguity

as to their meaning. I have some doubt as to whether that is so but I am content to proceed on that basis. So I turn to the words of the sub-section "having regard to the context provided by reading the particular provision...in the light of the document as a whole and the circumstances attendant upon its coming into existence".

7. It is convenient to consider the circumstances attendant upon the provision's coming into existence first. I agree with Lord Hamilton JA, for the reasons he gives, that the events leading to the decision to use the particular words of the provision are helpful for the purpose of interpretation of the words used in the section and also, I should add, to determine the objective in deciding to use those words.

8. These circumstances are then examined by Lord Hamilton JA and I gratefully adopt what he says. I would, however, like to add some remarks of my own. It is in my view of particular significance that the original proposal from the Government of Bechuanaland at the Bechuanaland Independence Conference was that the *puisne* judges (the judges of the High Court other than the Chief Justice) should be appointed by the Judicial Service Commission. The executive was to

have no part in these appointments. That was entirely consistent with the concept of the separation of powers, which is that the three arms of government, namely, the executive, the legislature and the judiciary are so far as reasonably practicable to be separate from one another. This concept is, and was then, widely accepted by the United Kingdom and the Commonwealth as well as by many other democratic countries governed by the rule of law. It is, and was then, considered to be of particular, indeed fundamental, importance in ensuring the independence and impartiality of the judiciary. That the judiciary should be independent and impartial in a democracy governed by the rule of law is self-evident but, in the context of the Constitution of Botswana, in terms of section 10(1), for example, it is expressly an essential requirement in the prosecution of criminal offences. Moreover, since much of the work of the courts is concerned with disputes in which the executive is involved in one capacity or another, it is obvious that the rule of law may be at risk if the executive is not separated so far as reasonably practicable from the judiciary. Equally obviously this could extend to any substantive part the executive might play in judicial appointments. As pointed out by Lord Hamilton JA, it was accepted, for the reasons he gives, that the Chief Justice should be appointed by the President, as head of the executive, but there was no expressed wish

that the President should have any substantive part to play in the appointment of the *puisne* judges. As I have said, the original wish of the Bechuanaland Government was that the President should have no part to play at all.

9. The minutes of the Independence Conference, however, reveal that an official of the British Colonial Office had said that "it was usual for the President to be formally responsible". The minute then continues: "The Conference agreed that *puisne* judges should be formally appointed by the President, acting on the advice of the Judicial Service Commission". That the President should be formally responsible is entirely understandable given the place *puisne* judges occupy in the constitution and the fact that in the United Kingdom and other Commonwealth countries they were then, and are, usually appointed by the Head of State. But in this the Head of State is acting purely formally in the appointment process. In these circumstances it was agreed by the Government of Bechuanaland that its original proposal should be changed accordingly. But in my view that change does not in itself depart in any way from the original objective of the Government of Bechuanaland to exclude the President from the substantive power to appoint *puisne* judges. Nor is there before this Court any indication

from any other source to suggest that the Government of Bechuanaland wished to depart, or had departed, from that original objective.

10. And so a form of words was chosen to reflect the objective of the Government of Bechuanaland and also to observe the recognised formalities. The words chosen were those in section 96(2). As Lord Hamilton JA says, the critical words for interpretation in that section are "shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission". There are other sections in the Constitution in which a different form of words is used in different contexts to exclude any executive power that the President might otherwise have had. They are referred to by Lesetedi JA in paragraph 54 of his Judgment. The words chosen in those sections, in which the President, although an executive Head of State, is acting formally, were no doubt chosen to reflect the particular requirements of those sections. The question remains, though: what is the proper interpretation of the words used in section 96(2)?

11. For my part, I am clearly of the opinion that those who drafted the Constitution of Botswana which in terms of the Botswana Independence Order 1966 (1966 S.I. 1171) came into operation immediately before

30th September 1966, the date of independence, were in no doubt what they meant by the words they chose for what is now section 96(2) and I am clearly of the opinion that they were in no doubt as to the objective which informed that choice of words. In my opinion they were clearly of the view that the substantive power in the appointment of *puisne* judges should lie with the Judicial Service Commission with the President having merely the formal power of appointment, a point of view that was entirely consistent with the further, underlying objective of providing for an independent and impartial judiciary as separate and independent of the executive as was reasonably practicable. The choice of words used was in my opinion entirely consistent with those objectives.

12. All that was more than fifty years ago. Of course many changes in human affairs have taken place since then. Ideals and values have in some respects changed radically. Nothing, however, was put before this Court which in my opinion would entitle the Court to conclude that the words used in section 96(2) should be interpreted differently. The words used are as consistent with the objectives stated in the previous paragraph now as they were in 1966. Indeed, as Lord Hamilton JA cogently explains, they now have a settled meaning in constitutional

law, which again is entirely consistent with the meaning which in my opinion they had in 1966. The competing interpretation advanced by the respondents, on the other hand, is not consistent with those objectives. Indeed, it is, in my view, entirely contrary to them.

13. If the words themselves have not changed in meaning since the Constitution was enacted, have there been any changes in other respects, in the ideals and values of the nation or, as Lesetedi JA puts it in paragraph 38 of his Judgment, the prevailing values and *mores* of society? None was suggested by either side in the appeal that would bear upon the objectives underlying section 96(2) and might lead to a different interpretation of the section from that intended when the Constitution was enacted. It appears also that there was nothing of this kind which appealed to the 1997 Aguda Commission referred to by Lesetedi and Lord Hamilton JJA. Indeed, if I am correct in my identification of the objectives which led to the choice of words in section 96(2) in 1966, it might be thought surprising if there were any suggestion that those objectives were any less desirable in to-day's world than they were then.

14. I have previously mentioned the other sections in the Constitution in which a different form of words was used to provide that the President, although an executive Head of State, was acting formally. In my opinion there is nothing in them or in any other part of the Constitution which, when weighed against what I have said above, would lead to the conclusion that on a proper interpretation of section 96(2) the power of appointment of judges of the High Court other than the Chief Justice was an executive power or part of the President's prerogative, as the respondents contended.

15. In my opinion, on a proper interpretation of section 96(2) the President's power to appoint these judges is no more than a formal power and the substantive power lies with the Judicial Service Commission. The President accordingly acted unconstitutionally in my opinion in declining to appoint the second appellant to the office of a judge of the High Court.

16. For these reasons the appeal on this part of the case in my opinion must succeed. As I indicated earlier, 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.