

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF BOTSWANA**

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

**THE LAW SOCIETY OF BOTSWANA
OMPHEMETSE MOTUMISE**

**1ST APPELLANT
2ND APPELLANT**

and

**THE PRESIDENT OF BOTSWANA
THE JUDICIAL SERVICE COMMISSION
THE ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

**Advocate A. Freud SC with Advocate H. Rajah; Attorney Mr T.
Rantao; Attorney O Garebamono and Attorney Mr T.
Gaongalelwe for the Appellants**

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

J U D G M E N T

GAONGALELWE J.A

1. I have had the benefit of reading the judgment prepared by my brother Lesetedi J.A. I agree with his conclusions and the orders he makes in respect of dismissing some of the claims sought by appellants. On such basis I will only address the issue on which I differ.

2. The main issue in this appeal is whether in terms of section 96(2) of the Constitution judges of the High Court are practically to be appointed by the President or by the Judicial Services Commission (JSC). The contentions revolve around the proper interpretation of the phrase "...shall be appointed by the President acting in accordance with the advice of the Judicial Services Commission".

3. The phrase falls to be interpreted within the context of the whole Constitution and the nature of the regime adopted at the time of acquiring independence. The section is not the only one in the Constitution dealing with the powers of the President and those of the JSC. I will revert to this point later.

4. In arguing that for practical purposes the power to appoint judges resides in the JSC and that the President's role is merely that of rubber stamping, appellants have placed heavy reliance on a document entitled

“Compendium and Analysis of Best Practice on the Appointment Tenure and Removal of Judges under the Commonwealth Practices.”

5. Appellant’s principal argument is that the phrase “...in accordance with the advice of ...” or “in accordance with the recommendation of ...” is commonly used in the Constitutions of Commonwealth countries. I must say that much is correct. However there are two further questions which are crucial, being, how the courts have interpreted the phrase and the type of regime a particular country has.

6. Botswana is a republic and its Head of State has executive powers while in some countries referred to in the Compendium the Head of State has ceremonial powers only. In regimes falling in this latter category it must follow of necessity that the Head of State must rubber stamp the decisions of the JSC or its equivalent by whatever name it is called.

7. As regards the interpretation that has been placed on the phrase by the Courts it is noteworthy that the compendium relies on cases

decided by the courts in those countries where the Head of State has ceremonial powers only. Reliance has been placed on cases such as *MAKENETE v LEKHANYA* 1990 HSHC 1, 9. In that case the Court in Lesotho interpreted the phrase, "the King shall act in accordance with the advice of the Military Council" to mean that the Military Council had the ultimate say and that the King had no discretion in the matter. The other case cited is *KONG v ATTORNEY GENERAL* 2011 CGCA 9 which is a decision of the Court in Singapore.

8. The constitutions of both Lesotho and Singapore are based on the Westminster model with their Head of State having ceremonial powers only. In *KONG v. ATTORNEY GENERAL* 2011, SGCA 9 at para 19, it was held:

"It is trite law that the Head of State in a Constitution based on the Westminster model, such as the Singapore Constitution, is a ceremonial Head of State who (a) must act in accordance with the advice of the Cabinet in the discharge of his functions, and (b) has no discretionary power except

those expressly conferred on him by the Constitution."

9. In those Commonwealth countries where the Head of State has executive powers the above does not hold. In terms of the Ghanaian Constitution under article 144 the President appoints judges other than the Chief Justice, "on the advice of the Judicial Council." The compendium states at page 148 that:

"However, it appears that such advice is not regarded as binding."

10. Even for Malaysia where appointments are to be made by the King "acting on advice of the Prime Minister, after consulting the Conference of Rulers" the compendium states at page 163:

"The Court of Appeal has held that the King is not bound by opinions expressed by the Conference of Rulers in matters concerning judicial appointments."

The purpose of giving the example of Malaysia is principally to demonstrate the fallacy of the argument that the phrase "in accordance with" has a universally accepted meaning.

11. If the framers of our Constitution had intended to make the advice of the JSC binding on the President section 96(2) would have expressed such unequivocally. That would have been done by inserting only one short word "binding". The phrase would have read:

"In accordance with the binding advice of the Judicial Service Commission."

Inserting that one word would not have caused any prolixity at all nor cost a penny more, but would have rendered the section unambiguous and susceptible to no debate.

12. There would be nothing odd or untoward about the use of the word "binding" in a Constitution. For instance the Constitution of Kenya uses the phrase "binding recommendation" in relation to the removal of a judge from office. Section 168(7) reads:

"A tribunal appointed under clause (5) shall –

(a) ...

(b) Inquire into the matter expeditiously and report on the facts and make binding recommendations to the President."

13. The other way of looking at the matter is that if the intention had been to confer powers of appointment on the JSC the section would have provided that. Such a provision is found in some Constitutions. Section 148(b) of the Constitution of the Republic of Maldives provides as follows:

"(b) All other judges shall be appointed by the Judicial Service Commission, to be established in accordance with the provisions of this Constitution."

14. In Papua New Guinea another Commonwealth republic, by section 170(2) **"judges shall be appointed by the Judicial and Legal Services Commission."** Our Constitution would have provided likewise if that had been the intention. But it does not so provide.

15. Our Constitution has provisions which confer absolute powers upon the JSC in the same way as does that of the Republic of

Maldives. The examples are the appointment of the Delimitation Commission in terms of section 64 and the appointment of members of the Independent Electoral Commission in terms of section 65 A. The wording of those sections makes it clear that where the framers of the Constitution intended to confer absolute power on the JSC they did so expressly and clearly. Section 64 provides:

“The Judicial Service Commission shall...appoint a Delimitation Commission...”

Section 65A similarly states in categorical terms that the Chairman of the Independent Electoral Commission and the other members shall be appointed by the Judicial Service Commission. Section 96(2) is not worded the same way.

16. It is a trite presumption of statutory interpretation that a deliberate change of expression imports a change of intention – HAHLO and KHAN on;

“The South African Legal System and its Background”

at 203. It is also an established rule of drafting of statutes that a good draftsman does not indulge in variations for the purpose of elegance only.

17. I have also looked at the Judicial Services Act CAP 04:03 in order to ascertain the true powers and functions of the JSC. Section 11 of the Act lists its functions. It reads:

"Subject to sections 103 and 104 of the Constitution, the functions of the Judicial Service Commission shall be to –

(a) Make recommendations to the President

regarding –

(i) The conditions of service of the judges of the High Court, the President of the Court of Appeal, Justices of Appeal, Registrars, the Master and Magistrates, and

(b) Consider and deal with any complaints regarding a judge of the High Court, the President of the Court of Appeal, a Justice of Appeal, Registrars, the Master or a Magistrate."

18. Section 103 of the Constitution deals with the establishment of the JSC, its composition, tenure of office of its members and its procedure. Section 104 reads as follows:

“(1) 104(1) Power to appoint persons to hold or to act in offices to which this section applies, to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the President acting in accordance with the advice of the Judicial Service Commission.

(2) The offices to which this section applies are –

(a) The office of Registrar of the Court of Appeal and High Court;

(b) All offices of magistrate;

(c) Such other offices of President or member of any court or connected with any court as may be prescribed by or under an Act of Parliament.

(3) In this section references to a court do not include references to a court martial”.

19. Nowhere does section 11 nor any other provision in the Act make reference to the appointment of Judges. The section does not even refer to section 96(2) of the Constitution. Such a big task of practically appointing judges is one of paramount importance which

would be in the forefront of the functions of the JSC at least by reference if at all the idea had been to confer such a mandate upon it.

20. There were arguments made on either side concerning the composition of the JSC and its capabilities. Appellants' contention is that since the body now includes responsible officers who hold high positions it is therefore suited and capable of making final determinations in regard to the appointment of judges.

21. But it is noteworthy that unlike in South Africa for instance all the six members of our JSC are not men and women who are elected by the people to their positions of responsibility. The JSC of South Africa has six members of Parliament a member of cabinet and some members of the National Council of Provinces. The fact of there being ex officio members who are included in the JSC by virtue of having been elected to their positions of responsibility is viewed as conferring some legitimacy upon the appointment of judges as being done partly at least by the representatives of the people in a democratic society.

22. The point is succinctly made by Sir Antony Mason the former Chief Justice of Australia in his work **"The Appointment and Removal of Judges."** He is quoted as having expressed the view that there is a powerful democratic argument against the transferring of the power of appointment of judges to a judicial commission consisting of unelected persons.

23. Regarding the minutes of the pre-independence conference held in London in 1966 my view is that generally such material would be relevant and admissible for the purpose of ascertaining how certain provisions were included in the Constitution. My difficulty with the minutes in this case is whether they meet the test expressed by the Constitutional Court in South Africa per CHASKALSON P. in S v. MAKWANYANE 1995 (3) SA 391 CC. At page 407 the Court stated:

"Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution.... It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken

into account by a Court in interpreting the
Constitution.”

24. While it does appear that some delegates alluded to the idea of the Head of State making appointments by simply rubber stamping it is not clear whether ultimately the actual framers of the Constitution acceded to the idea. I refer here to what I stated earlier herein concerning refraining from using the word “abiding” or “formal”. Contrary to what was stated in the above quoted passage the minutes in this case are not clear but are rather controversial when viewed against section 96(2) of the Constitution.

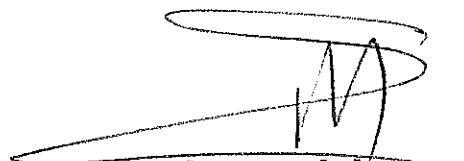
25. It is a trite principle of statutory drafting that draftsmen use words for a purpose. Conversely where they deliberately refrain from including a word such as “binding” or words to that effect such must be treated as equally purposeful.

CONCLUSION

26. My view is that there is no universally accepted meaning attributed to the Phrase "acting in accordance with the advice." It all depends on the regime of a particular country and the context in light of other provisions in the Constitution. I am in agreement with the conclusion of the court a quo that in this matter the phrase simply means the President is not to appoint a person who has not been recommended by the JSC.

26. The appeal on this claim must accordingly be dismissed as well.

DELIVERED IN OPEN COURT THIS 19TH OF APRIL 2017


M.S. Gaongalelwe
JUSTICE OF APPEAL