IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHGB-000383-15

In the matter between:

The Law Society of Botswana	**1st Applicant**
Omphemetse Motumise	**2nd Applicant**

and

The President of Botswana	**1st Respondent**
The Judicial Service Commission	**2nd Respondent**
The Attorney General	**3rd Respondent**

Advocate Trengove SC with Mr. Attorney Garebamono and Mr. Attorney Rantao for the Applicants

Advocate Albertus SC with Advocate Quixley and Mr. Attorney Gulubane and Ms. Attorney Sharp for the Respondents

---

JUDGMENT

CORAM: **WALIA J**
TAFA J
SOLOMON J

1. In this application launched on 25th May 2015, the applicants seek the following orders:

"1.1 The President's decision not to appoint Mr Omphemetse Motumise as a judge of the High Court is reviewed and set aside.

1.2 It is declared that the President is bound to follow and implement the lawful advice of the Judicial Service Commission on the appointment of High Court judges in terms of s 96 (2) of the Constitution.

1.3 It is declared that the representative of the Law Society of Botswana on the Judicial Service Commission is entitled to report to and consult with the Council of the Law Society on all matters relating to the appointment of judges.

1.4 It is declared that the Judicial Service Commission's interviews of candidates for appointment as judges must as a rule be open to the public.

1.5 It is declared that the Judicial Service Commission must make public the outcome of its deliberations on the appointment of judges.

1.6 The first and second respondents are ordered jointly and severally to pay the applicant's costs.

1.7 The applicants are afforded further or alternative relief."

2. The parties and their roles in the application are clearly articulated in the applicants' founding affidavit and I do not intend to burden this judgment with repetition.

3. The facts giving rise to this application are largely common cause and I will summarize them as best as I can:

- In response to invitations by the second respondent, the second applicant made application for appointment as a Judge of the High Court of Botswana.
- It is not in dispute that he was duly qualified for the office and his application was supported by certificates of academic qualifications and references by some eminent members of the legal fraternity.
- Following interviews held by the second respondent, the second applicant was deemed the most suitable candidate.
- The second respondent then recommended to the first respondent that he be appointed to the High Court Bench.
- The first respondent, however, rejected the recommendation and declined to appoint him.

4. Although the founding affidavit is silent on how or when the decision was communicated, it is common cause that on 3rd March 2015, the Acting Permanent Secretary to the President wrote the following Savingram to the Registrar and Master of the High Court:

".....2. His Excellency the President has not approved your recommendation to appoint Mr. Omphemetse Motumisi (sic) as Judge of the High Court of Botswana....."

5. Following that communication, there was extensive correspondence between the first applicant and the second respondent on the matter of the rejection of the second applicant's application and other related matters, including the appointment of an Acting Judge.

6. However, that correspondence has no bearing or impact on this application and I do not intend to deal with it in this judgment.

7. In the remainder of this judgment, for brevity, I will refer to the first applicant as "LSB," the second applicant as "Motumise," the first respondent as "the President," the second respondent as "JSC" and the third respondent as "AG."

8. The debate between the parties turns, essentially on interpretation of certain provisions of the Constitution relating to the executive powers of the President and the procedures of the JSC.

9. Aware of that, the applicants, in their Founding and Confirmatory affidavits, made averments of a factual nature only, although the annexures to the founding affidavit run into a large number of pages.

10. The basis of the application and its gist appears in paragraphs 3, 4 and 5 of the Founding Affidavit:

"3. This application concerns three legal questions:

3.1 Whether the President has a discretion to refuse candidates who were or are nominated by the Judicial Service Commission ("JSC") for appointment as judges to the High Court;

3.2 To what extent the proceedings and decisions of the JSC are confidential; and

3.3 To what extent the LSB representative on the JSC is entitled to consult with and report to the LSB Council on decisions and proceedings in the JSC."

4. The applicants submit that the JSC has the sole responsibility for deciding who should be appointed as judges of the High Court. The President does not enjoy any form of discretion to refuse or reject the advice of the JSC on which candidate should be appointed.

5. The applicants submit that the principle underlying this application is that the independence of our judiciary is foundational to our constitutional democracy and is premised on the competence, credibility, integrity and impartiality of the judiciary. The applicants submit that the JSC has been vested with a substantial public and constitutional responsibility to ensure such judicial independence, and it is incumbent on them to exercise this power in an open and transparent manner and in conformity with general principles of good governance."

11. The *locus standi* of the LSB and its right to bring this application is not in issue, acting as it does in terms of Section 59 (6) of the Legal Practitioners Act :

> "To assist the Government and the courts in all matters affecting the administration and practice of the law."

12. In interpreting Section 96 (2) of the Constitution, the applicants say that the president is bound to implement the JSC's lawful advice. He enjoys no discretion whatsoever and that the JSC enjoys the unfettered right to make appointments of Judges of the High Court.

13. The only discretion the President enjoys in his appointing powers, is in regard to the Chief Justice. The applicants' averment is based on the use of the word "shall" preceding "in accordance with the advice."

14. Paragraphs 27, 28 and 30 of the LSB's founding affidavit summarize its position on the ultimate power of appointment not vesting in the President:

> "27. The JSC's power to appoint is therefore only subject to the obligation to inform the President. The process of appointment of the High Court judges is thus that the JSC initiates the selection process and chooses its preferred candidate. The preferred candidate is then recommended to the President for approval.

28. Thus the applicants submit that the Constitution requires the JSC to determine judicial appointments to ensure that the judiciary is, and is manifestly seen to be, independent of the executive.

30. In any event, the President has not given the second applicant his reason (s) for rejecting the advice of the second respondent to appoint the second applicant as judge."

15. The applicants then deal with section 103 of the Constitution, relating to the JSC, its composition, function and procedures.

16. They question the lack of transparency in the manner in which the JSC conducts its proceedings. Paragraph 39 of the Founding Affidavit summarizes the applicants' concerns:

"39. The JSC's exercise of power in this regard amounts to an exercise of public power. It therefore has to comply with the founding Constitutional principle of openness and accountability. In its exercise of the power, the JSC has to be accountable and transparent. The requirement of accountability and transparency will be satisfied through a demonstration that there is a rational basis between the powers of the JSC and the decisions it makes. Openness must exist to demonstrate that the JSC is independent."

17. Following lengthy averments on the subject, they say, in Paragraph 52 of the Founding Affidavit:

> ""The applicants submit that it is a fundamental principle that proceedings relating to the appointment of judges should be held in public, that the public should have the right of access thereto, and that this principle, save in exceptional circumstances, should ordinarily be upheld. The applicants submit that proceedings which take place behind closed doors have the potential to contribute to the erosion of public confidence in the judiciary."

18. They aver that the LSB representative on the JSC should be entitled to consult the LSB Council on all matters concerning the appointment of judges.

19. It is, in my view, safe to summarize the applicants' averments as follows:

19.1 The President is not empowered to reject the JSC's recommendation on appointment of a judge.

19.2 There should be transparency in the conduct of the JSC proceedings, suggesting that its interviews of a candidate for judgeship should be open to the public.

19.3 The LSB representative on the JSC should be at liberty to consult with the LSB Council on all matters relating to the appointment of judges.

20. The respondents have filed two answering affidavits – one by the President and the other by Michael Lebogang Motlhabi, in his capacity as Secretary to the JSC.

21. The President avers that his decision not to appoint Motumise is not reviewable. Alternatively, if the decision is found to be reviewable, it was made in the proper exercise of his discretion under Section 96 (2) of the Constitution – he had exercised his discretion duly, properly and lawfully.

22. The rationale for his not appointing Motumise appears in paragraphs 12 and 13 of his affidavit. They merit recital.

"12. I have valid reasons for not appointing the Second Applicant as a judge of the High Court of Botswana, and I have been advised and verily believe, that I am not obliged to furnish such reasons. This advice is based on the following grounds:

12.1 First, in appointing judge, I take into account a broad range of material considerations, including matters of national security, the socio-political situation in Botswana, public perceptions of the relevant candidate and the judiciary, and questions of policy. All of these involve information to which the JSC does not necessarily have access and which the JSC would, in the normal exercise of its functions, not be properly equipped or mandated to evaluate and as such, demonstrate that my power to appoint judges is not a bureaucratic administrative function, but rather an executive power

that does not fall to be reviewed by a court. This aspect will be addressed more fully in argument at the hearing of this matter.

12.2 Second, leaving aside the essential character of my decision and the accompanying legal argument in respect thereof, there may be circumstances where I will be constrained not to appoint a recommended candidate, where the reasons for doing so, will adversely reflect upon the integrity, character and reputation of the particular candidate. However, there will in the nature of things, from time to time, also be occasions where it would be inappropriate to appoint a nominee, where the reasons for doing so, will adversely reflect upon the integrity, character and reputation of the relevant nominee. It would be inappropriate for me under such circumstances to disclose the reasons for not appointing the candidate concerned, as such disclosure would be prejudicial to that person. The withholding of reasons in such circumstances will be in the interests of the candidate. In these circumstances, questions of transparency are outweighed by the protection of the privacy of individual candidates. If I am obliged as a matter of principle, to disclose the reasons for not appointing a candidate, in all circumstances, this will lead to my having to disclose reasons which, in some cases, will impair the character, integrity and reputation of certain candidates and in other cases, not; and

12.3 Third, it is in the national interest that the best candidates are encouraged to make themselves available for judicial appointment. However, suitable candidates may well be discouraged from doing so, where they fear that their character, integrity or reputation may be tarnished, should I decline to appoint them and should my decision and the reasons therefore, be made public. Were suitable candidates in any way to be deterred as a result of this fear, this will have a chilling effect on the integrity and quality of the judiciary, which at all times, should be advanced without any impediment."

23. Motlhabi, in his capacity aforesaid, avers that the President's decision is not reviewable, as a decision made in terms of Section 96 (2) of the Constitution is executive in nature. Further, that 96 (2) confers a discretion on the President.

24. On the President's discretion under Section 96 (2), he says in Paragraph 18:

"18. Whilst the JSC acknowledges that its role in the appointment of judges is pivotal, it does not accept that it has the sole responsibility for deciding who should be appointed as a judge, nor does it accept that the President has no discretion whatsoever to refuse to appoint a judge recommended for appointment by the JSC."

25. In Paragraph 23, he says:

"23. The JSC accepts that the President's discretion under Section 96 (2) is fettered to the extent that he may appoint only those candidates recommended by the JSC. He may not appoint a judge who has not been recommended by the JSC. The JSC is of the view, however, upon a proper construction of the relevant provisions of the Constitution, that the President is not required to appoint every candidate recommended by the JSC. He retains a discretion to refuse to appoint the JSC's recommended candidate. This discretion is supported by the text and context of Section 96 (2)."

26. He then deals with the provisions of the Constitution whereunder the President enjoys no discretion and provisions whereunder the JSC enjoys substantive powers of appointment without reference to the President or any other body.

27. On the applicant's concerns on transparency of the procedures of the JSC, he says that the JSC has the powers to conduct interviews *in camera* in terms of Section 103 of the Constitution, it being empowered to regulate its own procedure.

28. The reasons advanced for holding interviews in private are:

- protection of the candidates' privacy;
- public scrutiny likely to dissuade candidates from seeking judicial appointment;

- transparency is not a constitutional imperative in Botswana.

29. The JSC view on transparency is captured in paragraph 64 of the affidavit:

"64. In summary, in the present case, the interests of transparency must be weighed against the privacy of individual candidates and the national interest that the best candidates for judicial appointment must be encouraged to apply free from the fear that their private or social lives will be subject to public scrutiny."

30. On the applicants' prayer for an order that the Law Society's representative on the JSC be entitled to report to and consult with the Council of the Law Society, the deponent says:

"The JSC has never prevented the Law Society's representative from consulting with the Council in respect of the appointment of judges."

31. He says, however, that the JSC's deliberations of a confidential nature may not be disclosed by the LSB representative.

32. The JSC meets the applicants' prayer for an order that it make public the outcome of its deliberations, with the following in paragraph 75 of the affidavit: "Apart from the JSC's power to regulate its own procedures, disclosure of the outcome carries the inherent risk that the President may refuse to approve a

recommendation with potential embarrassment to the relevant candidate, which is not in the interests of the candidate or the public."

33. In summary, the respondents say:

33.1 The President's executive powers are not reviewable.

33.2 If they are, then the President, in the exercise of his discretion under Section 96 (2) of the Constitution, has committed no reviewable wrong.

33.3 In holding interviews *in camera*, the JSC acts in the proper exercise of its constitutional mandate under Section 103 of the Constitution.

33.4 The LSB representative is not prevented from consulting with the LSB Council on the appointment of judges but is prevented from discussing JSC deliberations of a confidential nature.

33.5 It is not in the candidate's or public interest to make public the outcome of its deliberations.

34. The replying affidavit is a long rambling document, consisting in the main, of the denial of the averments of the deponents to the JSC's answering affidavits.

35. I find it unnecessary to deal with the affidavit in any detail, but will highlight matters not fully canvassed in the founding and answering affidavits.

36. The challenge to the President's averments on matters, *inter alia,* of national security appears in paragraphs 25 and 26 of the replying affidavit:

"25. The first respondent does not state what relevance the "socio-political situation" has to the appointment of a candidate. I submit that it could not have been the intention of the Constitution that the President can appoint a candidate on the basis of such vague and self-imposed criteria. Such a situation undermines judicial independence and suggests that only candidates who conform to the socio-political worldview of the President are eminently qualified for appointment.

26. Similarly, the criterion of "public perceptions" of a particular candidate is vague. There is currently no process that allows for the determination of public perception, especially since the process of appointment is secret and not open to public participation. If the public is unaware that a particular candidate applied, how can it be determined whether the public feels that the candidate is suitable for judicial appointment?"

37. As for the other averments, as stated above, they do little more than deny the averments in the answering affidavits.

38. There is a challenge to Motlhabi's capacity to depose to the JSC answering affidavit but I need not dwell on that as there is no application to strike the affidavit out, nor has the subject been canvassed at all in the argument before me.

39. There has also been filed, a supplementary replying affidavit, introduced without objection, the sole purpose whereof is to fill in the gaps left in "LSB 12", an annexure to the replying affidavit, being an excerpt of the Minutes of the Bechuanaland Independence Conference held in London in 1966.

40. With the full set of affidavits having been filed, the stage was set for argument. Before proceeding to deal with argument, however, I wish to deal with the efficacy of the affidavits before me.

41. Order 13 rule 3 of the rules of this Court provides:

> "(1) Every affidavit shall contain only statements of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true stating the sources and grounds thereof.
>
> (2) An affidavit shall not contain extraneous matters by way of objection, prayer, legal argument or conclusion."

42. Affidavits for both parties placed before me, contain, to a lesser or greater degree, elements proscribed by the rule aforesaid. I have, therefore, steered clear of the impermissible material without referring to it specifically.

43. Neither party has been prejudiced by the inclusion of argument in the affidavits and I am satisfied that the affidavits confirm the facts summarized in paragraph 3 above.

44. It is quite clear that the decision in this matter will turn entirely on the interpretation of certain provisions of the Constitution.

45. The Court has had the benefit of the wisdom of eminent senior and junior counsel. Comprehensive heads of argument have been placed before us, making our task much easier.

46. Although the issues for determination fall within a narrow ambit, they are of national and public interest. It needs to be said, however, that although reference has been made to ancillary and relevant issues, the application is only about the appointment of judges and no more.

47. Thus, any action of the President or the JSC challenged or questioned in this application is of relevance only to the appointment of judges and the procedures and criteria employed in their selection.

48. As the decision will turn on interpretation of the Constitution, it is expedient to first of all, recite the relevant provisions.

49. Section 47:

"(1) The executive power of Botswana shall vest in the President and, subject to the provisions of this Constitution, shall be exercised by him or her either directly or through officers subordinate to him or her.

(2) In the exercise of any function conferred upon him or her by this Constitution or any other law the President shall, unless it is otherwise provided, act in his or her own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority.

(3) Nothing in this Section shall prevent Parliament from conferring functions on persons or authorities other than the President."

50. Section 96:

"(1) The Chief Justice shall be appointed by the President.

(2) The other judges of the High Court shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission....."

(The remaining subsections are not of relevance to this application.)

51. Section 103 (relevant portions):

"(1) There shall be a Judicial Service Commission for Botswana which shall consist of –

(a) The Chief Justice who shall be Chairman;

(b) The President of the Court of Appeal (not being the Chief Justice or other most senior Justice of the Court of Appeal);

(c) The Attorney General;

(d) The Chairman of the Public Service Commission;

(e) A member of the Law Society nominated by the Law Society; and

(f) A person of integrity and experienced not being a legal practitioner appointed by the President.

(2).....

(3).....

(4) The Judicial Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this Constitution.

(5) The Commission may regulate its own procedure and, subject to that procedure, may act notwithstanding any vacancy in its membership or the absence of any member and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings.

(6) The decisions of the Commission shall be by the vote of majority of the members present, and in the event of equality of votes, the chairman shall have a casting vote."

52. The issues for determination, although articulated differently in the parties' heads of argument, are:

"52.1 Whether or not the decision made by the President is reviewable.

52.2 If it is, whether it is unconstitutional or irrational.

52.3 Whether or not the JSC interviews of judges should be held in public.

52.4 Whether or not the LSB representative on the JSC is entitled to discuss the appointment of Judges with the LSB Council.

52.5 Whether or not the JSC ought to make public the outcome of its deliberations."

53. Of the issues aforegoing, 52.4 is easy to deal with. It is averred by the respondents that there has never been a restriction on the LSB representative discussing the appointment of judges with the LSB Council.

54. In my view, therefore, it is not necessary to make a specific order in respect of what is not really an issue.

55. However, and this is not challenged by the applicants, the confidentiality of the deliberations of the JSC may not be breached.

56. I intend to deal with each of the other issues in turn, but before doing so, must first comment on the very large number of foreign judgments and other material referred to by the parties. Although helpful they might be in their own context

and jurisdiction, the wholesale importation thereof in this matter has been of little importance or assistance. At the risk, of being criticized therefor, I am constrained to say that selection procedures, particularly, good for South Africa, are not necessarily expedient or binding in Botswana.

57. While foreign judgments have played and will no doubt continue to play a role in developing local jurisprudence, our Courts should be guided predominantly by local laws, precedents, conditions and ethos. In this regard, I can think of very few areas of human endeavor not covered by local jurisprudence.

58. I deal now with the issues:

Whether or not the President's decision is reviewable.

The bulk of the argument before the Court is devoted to this issue. The applicants say that the decision is reviewable while the respondents say that it is not.

59. It is convenient to deal with the respondents' argument first. They argue, on the basis of averments in the respondents' answering affidavit, that the President enjoys a margin of discretion, taking into account the broad range of factors specified in his answering affidavit.

60. The President derives his executive powers from Section 47 of the Constitution. Though this power is recorded in the Constitution, its character is that of the royal prerogative powers of the British Crown.

61. Basing their argument on a number of foreign cases, they say:
"If a decision affects the rights, obligations or legitimate expectations of a person or a group of persons or fundamental rights within a Bill of Rights (e.g. in Canada) this suggests that a power is justiciable; and

> "Policy-laden decisions tend not to be justiciable, but are considered to be matters for political judgment and subject only to the constraints arising within the political process (particularly responsibility to parliament.) Judicial deference is required where a decision is fact-dependant and requires the decision maker to take into account and to weigh competing considerations where views may legitimately vary as to the relevance of those considerations, and the weight to be given to them."

62. This, indeed, is the nub of the respondents' argument, supported by a large number of Commonwealth cases. Reliance is placed on the Australian case of ATTORNEY GENERAL (NSW) v. QUIN (1990) HCA 21. This case, in my view, sums up the respondents' argument on reviewability.

63. In Quin (supra) the Court had said:

"The judicial branch of Government should be extremely reluctant to intervene in the execution process of appointing judicial officers. Apart from S.12, under the Constitutional arrangements which prevail in New South Wales and the doctrine of separation of powers, to the extent to which it applies in that State, the function of making appointments to the judiciary lies within the exclusive province of the executive. According to tradition, it is not a function over which the Courts exercise supervisory control."

64. We have not been favoured with the Constitution referred to or with the mechanisms of appointment of NSW judges. I do not believe, however, that that is necessary, having regard to what follows.

65. The importance of what the respondents say lies in their submission that at the heart of reviewability, is the doctrine of separation of powers.

66. Our attention is drawn to **MZWINILA v. THE ATTORNEY GENERAL 2003 (1) BLR 554** where it was affirmed that the Botswana Constitution is modelled on the Westminster system and is based on the doctrine of separation of powers.

67. Our attention is also drawn to **PATSON v. THE ATTORNEY GENERAL 2008 (2) BLR 66** where it was held, (according to the respondents) that prerogative powers apply to Botswana due to a non-express retention of English

Constitutional law by way of savings clause in the General Law (Cape Statutes) Revision Act (Cap 14:04.)

68. The applicants counter that the refusal by the President was irrational and therefore unlawful. The argument is summed up as follows in paragraphs 39 and 40 of their heads of argument:

"39. The JSC selected Mr. Motumise as the best qualified candidate from amongst 20 applicants. It highly recommended Mr. Motumise in its advice to the President that he be appointed. The President refused to appoint Mr. Motumise without any justification of his refusal.

40. Even in his answer to the challenge of his refusal, the President does not provide any reasons for it. He says that he has valid reasons for not appointing Mr. Motumise but does not say what they are or why he does not disclose them. He says that he is not obliged to give reasons for his refusal because he sometimes takes into account various matters which he is not at liberty to disclose. He does not say that in this case, any of those matters played any part in his decision at all."

69. The applicants then go on to deal with the issue of reviewability with reference to a number of domestic cases and conclude:

"The applicants submit that the President's refusal to appoint Mr. Motumise was unconstitutional in terms of S 96 (2) or, even if it was competent under that section, was in any event arbitrary and irrational....."

70. The applicants therefore launch a two pronged attack – the unconstitutionality of the decision under Section 96 (2) and the irrationality of the decision.

71. I will deal with the former when addressing the question of whether or not the President is empowered to reject the recommendation of the JSC.

72. The question to answer at this stage, is whether or not the President's decision is reviewable. This question can be answered quite easily with reference to three domestic landmark cases. I find it unnecessary to have regard to numerous foreign decisions referred to by the parties.

73. In **PATSON v. THE ATTORNEY GENERAL 2008 (2) BLR** this Court said, at Page 74 – H and 75 A – B:

> "The reviewability on the grounds of unlawfulness of the exercise of statutory functions even by the Head of State has long been accepted in Botswana and elsewhere even when former prerogative powers have been incorporated into legislation. See in this regard *President of the Republic of Botswana and Others v. Bruwer and Another* (1998) BLR 86, (CA) (Powers of expropriation) and *Good v. The Attorney General* (2) supra) (Powers of expulsion of non-nationals.) For many years, however, it was accepted that the exercise of non-statutory prerogative

powers, being discretionary in nature, and being protected by sovereign immunity, were not susceptible to judicial review, save, perhaps, in the case of illegality. As to the latter, it was said as long ago as 1950 by Greenberg JA in *Sacks v. Donges, NO* (supra) at P 303 that:

> ".....the question whether a purported exercise of the King's prerogative is lawful or not is always a matter for the Courts to decide."

74. Reference is made in Patson (supra) to *Good v. The Attorney General.* That case, cited as GOOD v. THE ATTORNEY GENERAL (2) 2005) BLR 337, was before the Court of Appeal in relation to the powers of the President to exclude a Non-national from Botswana.

75. On Page 347 D-F the court said:

"In *Council of Civil Service Unions and Others v. Minister for the Civil Service* (1984) 3 ALL ER 935 (HL at page 950 h) Lord Diplock said:

> 'Judicial review has I think developed to a stage today when, without reiteraiting any analysis of the steps by which the development has come about, one can conveniently classify under three heads on which administrative action is subject to control by judicial review. This first ground I would call "illegality" the second "irrationality" and the third procedural impropriety.'

Although what is being dealt with in this appeal is an executive decision rather than an administrative action or a decision on an administrative tribunal, I shall accept that those three grounds are equally applicable to what we are concerned with here.

It is the appellants' contention that the President's declaration was made unlawfully, on an irrational basis and in a procedurally improper manner.

It must be immediately stated that the appellant does not attack the declaration made by the President, what he does attack is the process by which the President came to make it."

76. The circumstances of Good (supra) and this case are strikingly similar. Here too, the decision challenged is an executive one and the attack is on the manner of making that decision.

77. **THE ATTORNEY GENERAL AND OTHERS v. DICKSON TAPELA AND OTHERS CA case no. CACGB-096-14** (unreported) is the most recent of the cases dealing with the justiciability of executive decisions. The appeal was heard by the full Bench of the Court of Appeal.

78. Paragraphs 62 and 63 of that judgment are instructive:

"62. The Attorney General sought further to argue that Presidential Directives constitute an exercise of executive, or prerogative power, and are not

subject to review. That may be so in matters of high policy, such as the declaration of war, or of a state of emergency or the making of appointments to cabinet or to other high offices (see *Patson v. The Attorney General* (2008) 2 BLR 66 at 82.) But it is certainly not so here, where an administrative decision not to provide free anti-retroviral medicine to foreign prisoners was conveyed by the Permanent Secretary. Section 47 (1) of the Constitution, which confers executive power on the President, state expressly that this power is to be exercised "subject to the provisions of this Constitution." Further, it is upon Parliament, and not upon the President, that the power to make laws is conferred by Section 86 of the Constitution. So, in my judgment, executive power is, by extension, to be exercised subject to the laws made by Parliament as well.....

63. It follows that in terms of the wide powers granted to the Courts by Section 18 (2) and 95 (1) of the Constitution an executive decision conveyed through a presidential directive will be reviewable if it is shown to be *ultra vires* either a law framed by Parliament or the Constitution. We need not, however, go as far as that in the present appeals, because what has been set aside is a Government decision through a permanent secretary's savingram. I leave open the question of whether certain of the executive decisions taken under Section 47 (1) of the Constitution are reviewable also on grounds other than unlawfulness. "

(in the sense that such a decision was *ultra vires.*)

79. It will be seen from the aforegoing that there is no empirical formula for determining what executive decisions are reviewable. Each case must be decided on its own peculiar circumstances. What is clear, however, is that an executive decision tainted by illegality is reviewable.

80. It is clear also, on the unequivocal pronouncements in Good (supra) that executive decisions made irrationally are also reviewable.

81. That said, a determination must now be made as to whether the decision of the President in this case was tainted by irrationality.

82. The concept of irrationality is well known in our law. The most basic explanation is that a decision is liable to be reviewed and set aside if tainted with illegality or irrationally on the part of the decision maker.

83. Nganunu CJ, as he then was, said, in **RAPHETHELA v. THE ATTORNEY GENERAL 2003 (1) BLR 591, at Page 596 – D**:

> "It is now recognized that the courts will review and interfere with such action in three circumstances, i.e. first where the decision maker acts illegally contrary to the statute empowering him to act.....The second ground for interference by the court is where the decision made is grossly unreasonable to the extent that a

review court can only say that no person acting reasonably could ever have come to that decision. In other words, where the review court comes to the conclusion that the decision maker was irrational."

84. The irrationality complained of in this case is that the President did not give reasons for the decision he made. The question is, given the sensitivity of what he had become aware of, was he under an obligation to make that knowledge public? Public that knowledge would obviously become as soon as the documents left his office. This application itself, is evidence of the public interest generated by the President's decision.

85. It now becomes necessary to re-visit what the President says. (See paragraph 22 above.) In so far as his decision was motivated by concerns of National Security and policy, he was under no obligation whatsoever to make any disclosure. It would, indeed, have been foolhardy and irresponsible to air such matters in public.

86. In so far as the decision may have been based on adverse information in relation to the person of the applicant, it was, in my view, benevolent of the President to not make a disclosure in public, lest the applicant suffer damage to his reputation.

87. In my view, the President has committed no reviewable wrong in making the decision. The argument on irrationality is therefore without merit.

88. I now deal with the constitutionality of the decision. The applicant argues that the language of section 96 (2) is quite unambiguous. The section imposes a duty on the President to appoint judges recommended by the JSC.

89. They then borrow freely from the provisions of the South African Constitution and a compendium and analysis of best practice on the appointment, tenure and removal of judges under the Commonwealth principles.

90. With regard to the South African Constitution, wherein the language on the appointment of judges is similar to the language in our Constitution, they argue that an obligation to act on advice removes any discretion from the actor.

91. This presupposes that acting on advice creates an obligation. In the final analysis, therefore, the decision on the proper interpretation of Section 96 (2) will turn on the meaning of "acting in accordance with."

92. The compendium referred to above is of limited value as it has not found any legislative or other acceptance in Botswana. It is an idealistic document recommending best practices. There is nothing before me to show that it has been adopted or has found acceptance in any Commonwealth country.

93. The applicants have gone to great lengths in placing reliance on the compendium to argue that where the executive authority retains a discretion not to implement the advice of the JSC the executive must justify itself when it refuses to do so.

94. In support of the argument, they refer to the following excerpt from the compendium:

> "Best practice would require that the commission be empowered to present the executive with a single, binding recommendation for each vacancy. Alternatively, if the executive has a legal power to reject the Commission's recommendation, then it should be required to provide reasons for doing so."

95. This does not assist the applicants as I have found already that the President (assuming for now that he has the power to reject) was under no obligation to provide reasons for his decision. For the same reason, I do not intend to dwell on a large number of cases cited by the applicants in support of their argument that the President ought to have given reasons for his decision.

96. The applicants delve into the history of s. 96 (2) as an aide in its interpretation. The argument is captured in paragraphs 25 – 27 of their heads of argument:

"25. The history of s. 96 (2) is also admissible and important aide in its interpretation.

26. The section originated from the negotiation of the independence constitution at the Bechuanaland Independence Conference in 1965 and 1966:

26.1 The government of Bechuanaland made proposals for an independence constitution. It proposed in clause 28(1) that High Court judges "be appointed by a judicial service commission."

26.2 The Conference considered the government's proposals at its meeting on 15 February 1966. One of the UK representatives, Mr D Winton, noted that the government's proposal provided for the JSC to appoint High Court judges but that it was "usual for the President to be formally responsible." The Conference consequently agreed that High Court judges "should be formally appointed by the President, acting on the advice of the Judicial Service Commission."

26.3 The final report of the Conference accordingly provided in clause 27(1) that High Court judges be appointed "by the President acting on the advice of the Judicial Service Commission." This is the provision that ultimately found its way into s 96(2) of the Constitution.

27. It is clear from this history that, as with all the other similarly worded Commonwealth constitutions, s 96(2) was intended from the outset to vest the effective power of appointment of High Court judges in the JSC. The

President's role is a mere formality. As the Conference agreed, judges should be formally appointed by the President, acting on the advice of the Judicial Service Commission."

97. The applicant's argument in sum, therefore is that on a proper interpretation of Section 96 (2) the President's role is purely ceremonial and he is under an obligation to appoint the candidate recommended by the JSC.

98. The respondents counter that the President is not a mere rubber stamp, he has the discretion to reject a candidate recommended by the JSC. Their argument is summarized as follows:

> "42. Section 96(2) has been deliberately and carefully formulated. The emphasis is placed on the repository of the power and, to this extent, the section provides that it is the President who shall appoint judges, they shall be appointed by him and by none other and where he chooses to do so, he is obliged to do so in accordance with the advice of the JSC."

99. As for the applicants' reference to the Bechuanaland independence conference, they say "that was then, this is now." In other words, the Constitution must be interpreted in its existing form and not with reference to preceding discussions.

100. The respondents argue that the constitution, where powers are intended to be unfettered or restricted, makes specific provision on the extent or limits. They say, in Paragraph 70 of their heads of argument:

> "It is accordingly submitted, for the reasons set out above, that the Constitution expressly set out circumstances in which the President and the JSC have exclusive powers of appointment and where the President's power is exercised in conjuction with, and balanced against, the powers of other bodies, such as the JSC. The Constitution carefully balances the respective powers and functions of the JSC and the President."

101. Dealing first with the applicants' argument on the independence Constitution conference, it is to be noted that the initial proposal was for the High Court Judges to be appointed by the Judicial Service Commission. This proposal came from the Government of Bechuanaland.

102. However, following discussions, it was recommended that High Court Judges "should be appointed by the President, acting on the advice of the Judicial Service Commission."

103. The applicants say that Section 96(2) was intended from the outset to vest the effective power of appointment of High Court Judges in the JSC. The President's role is a mere formality.

104. There is a flaw in this argument. If the JSC was always intended to be the sole appointing authority, why bring in the President at all? This question is not answered by the applicants.

105. Numerous provisions of the Constitution make specific provision where the powers of the JSC are untrammelled:

- The power to appoint the delimitation commission under Section 64 of the Constitution and the independent electoral commission under Section 65 vests entirely in the JSC.

106. No such absolute vesting exists, in respect of Section 96(2). If the Constitution had intended the power to appoint High Court Judges to vest absolutely in the JSC it would have said so, as it does in respect of sections 64 and 65.

107. The president too enjoys some absolute and some tempered powers. He has the exclusive power to make the following appointments:

- Ministers and Assistant Ministers
- Attorney General
- DPP
- Chief Justice
- President of the Court of Appeal
- Lay Members of the JSC

- Members of the Public Service Commission

108. Some presidential powers are tempered and balanced against the powers of other organs. Examples of this are the appointment of the vice president, which is subject to endorsement by the elected parliamentarians and the removal of a High Court Judge in terms of Section 97 of the Constitution. In the latter case, the President is bound by the decision of the tribunal appointed by him.

109. There is yet another reason why Section 96(2) may not be construed as vesting the ultimate power of appointment in the JSC.

110. Section 18 (1) of the Interpretation Act (Cap 01:04) provides:

"(1) Where an enactment confers a power to appoint a person to an office, whether for a specific period or not, the power includes power, exercisable in the manner and subject to the limitations and conditions applicable to the power to appoint –

(a) to remove or suspend him;

(b) to exercise disciplinary control over him;

(c) to reappoint or reinstate him....."

111. None of the powers referred to in (a), (b) and (c) above vest in the JSC. The powers vest exclusively in the president, subject, of course, to the strictures of Section 97 aforesaid. The JSC does not even play an advisory role. Having

made a recommendation, it falls out of the picture altogether. How then, can it ever be regarded as the appointing authority?

112. Having regard to the aforegoing, the only conclusion I can reach is that in terms of Section 96(2) the President is the appointing authority and a proper interpretation of that section is that provided by the applicants in their heads of argument. (Paragraph 98 above.)

113. Put differently, the power to appoint a Judge vests in the President. He shall be the appointing authority but in the exercise of his powers as such, he may not appoint a person not recommended by the JSC.

114. Turning now to the argument on transparency of the JSC's proceedings, I must say at once, that the applicants have not approached the matter with the degree of enthusiasm they have displayed in respect of the other issues.

115. They argue that Section 103 of the Constitution must be read with S. 127(10) which provides:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or

authority has performed those functions in accordance with this Constitution or any other law."

116. The nub of the applicants' argument is that the JSC must exercise its functions in the public interest. They then place reliance once again on the Commonwealth compendium.

117. They also argue that the JSC's interviews of candidates should be held in public. This argument too, is based on the principle of public interest.

118. The next argument on the need for publication of the JSC deliberations is also raised on the basis of public interest. The common thread that runs through each argument is public interest, the applicants saying that it is in the public interest, that the JSC interviews be held in public and that the deliberations be made public.

119. The respondents counter, first of all, in their heads of argument:

"……the respondents submit that an order sought by the applicant is impossibly vague and cannot sensibly be given effect to. This Court cannot order that a particular practice be adopted as *a rule.* The applicants do not explain when the general rule is to be applied and when it may be deviated from……"

120. They argue also that an order that JSC's interviews be held in public would amount to an unjustified interference with the JSC's constitutional authority to regulate its own procedure.

121. They say that:

- protection of candidates' privacy requires that interviews be held in camera.
- public scrutiny may dissuade otherwise suitable candidates from seeking judicial appointment.
- transparency is not a constitutional imperative in Botswana, as it is, for example, in South Africa.

122. In my view, the proper interpretation to be placed on Section 127 of the Constitution is not what the applicants contend. The language of that section is clear and unambiguous. It directs those enjoying, inter alia, the freedom of regulating their own procedures, to exercise that right lawfully and constitutionally.

123. For their argument to succeed, the applicants must show that in any given case, the JSC has not acted in violation of its Constitutional prerogative. The applicants are, in my view, wrong in contending that that section permits a blanket direction by the court to the JSC to conduct its business in a particular fashion, either in relation to interviews or otherwise.

124. Once again, the applicants base their argument on transparency on what happens in South Africa and what the Commonwealth compendium says. They have placed before us, an impressive array of cases.

125. The applicants, however, lose sight of two important factors. One, that the holding of interviews for judicial appointment in South Africa is mandated by statute and internal procedures of the Judicial Service Commission.

126. They disregard the fact also that case law in South Africa directs the deliberations of the Judicial Service Commission may not be made public. See **Helen Suzman Foundation v. Judicial Service Commission and Others 2015 (2) SA 498**. The court in that case concluded:

> "Confidentiality breeds candor, that it is vital for effective judicial selection, that too much transparency discourages applicants and will have an effect on the dignity and privacy of the applicants....."

127. Paragraph 107 of the respondents' heads of argument, summarizing the respondents' contentions, resonates with my own views:

> "The applicants state that it is not their intention to prescribe any particular procedure for the JSC and that they simply contend that the current practice does not accord with the principles of

transparency and openness that is required and that can be justified in a democratic society. The applicants plainly ask this court to prescribe a procedure to be adopted by the JSC. It is submitted that the applicants' statement that they do not intend to prescribe any procedure stems from their awareness that the JSC is constitutionally entitled to prescribe its own procedure. Moreover, contrary to the applicants' contentions, it is clear from the examples set out above, that a confidential interview process is not consistent with democratic values.

128. In my judgment, the applicants have failed to show that the procedure adopted by the JSC is contrary or inimical to public policy. No reason exists for this Court to invoke Section 127 (10) of the Constitution, or to order that the JSC procedures be disturbed in any way.

129. In summary:

129.1 The application for an order that the President's decision not to appoint Mr. Omphemetse Motumise as a Judge of the High Court be reviewed and set aside, is refused;

129.2 The application for an order declaring that the President is bound to follow and implement the lawful advice of the JSC on the appointment of High Court Judges, is refused;

129.3 The application for an order declaring that the JSC's interviews of candidates for appointment as judges must as a rule be open to the public is refused;

129.4 The application for an order declaring that the JSC must make public the outcome of its deliberations on the appointment of judges, is refused.

130. In the final result, the application is hereby dismissed.

131. In its notice of motion, the applicants ask for costs. However, in his replying affidavit, the deponent says:

"132. In the event that the applicants are unsuccessful it is submitted that this case was brought in the public interest and in accordance with the jurisprudence of this Court, the applicants should not be burdened with an adverse costs order. Further legal arguments will be made during the hearing in this regard."

132. There are two reasons why this prayer is not properly before the Court. Firstly, it has been introduced for the first time in the replying affidavit, giving the respondents no opportunity to deal with it. Secondly, it is in breach of order 13 rule 3 (2). In so far as it comprises a prayer.

133. Furthermore, despite an averment that argument would be advanced at the hearing, no argument was advanced on costs, although it would have been permissible to do so.

134. I do not agree that the application was brought in the public interest. The tenor of the application suggests clearly that it was brought to challenge the non-appointment of Mr. Motumise.

135. I can see no reason for departing from the general rule and order, accordingly, that the costs of the application, which shall include costs of two counsel, shall be paid by the applicants, jointly and severally, one paying, the other to be absolved.

DELIVERED IN OPEN COURT AT GABORONE ON THIS.....5th.....DAY OF FEBRUARY, 2016.

.....
L.S. WALIA
JUDGE

I agree. .....
A.B. TAFA
JUDGE

I agree. .....
P.G. SOLOMON
JUDGE