NCHINDO AND OTHERS v THE ATTORNEY-GENERAL AND ANOTHER 2010 (1) BLR 205 (CA)

Citation: 2010 (1) BLR 205 (CA)

Court: Court of Appeal, Lobatse

Case No: Crim App 56 of 2009

Judge: Mcnally AJP, Ramodibedi, Foxcroft, Howie and Lord Abernethy JJA

Judgement Date: January 29, 2010

Counsel: P B Hodes SC (with him B J Farlam) for the appellants. M P Phuthego (with him K Ngakaagae, T Baloi and G T Thlab

Flynote

C Constitutional law -
Legislation - Constitutionality of - Proceeds of Serious Crime Act (Cap 08:03), s 8 - Application for restraining order - Respondent not compelled to answer application in manner implicating right to fair trial and thus not inconsistent with s 10 of Constitution of Botswana - Accordingly, Proceeds of Serious Crime Act, s 8 constitutional and valid.

Practice
and procedure - Civil proceedings - Civil forfeiture - Restraining order - D Application for - Constitutionality of - On facts, court unable to determine whether respondent's right to fair trial would be infringed if respondent obliged to answer allegations contained in application - Application constitutional and valid - Constitution of Botswana, s 10.

Practice
and procedure - Civil proceedings - Civil forfeiture - Restraining order - Constitutionality of - Power conferred on Director of Public Prosecutions to bring application for restraining order, under Proceeds of Serious Crime Act E (Cap 08:03), s 8
incidental to powers given to her by Constitution of Botswana, s 51A(3) and hence not inconsistent with s 51A of Constitution - Respondent not compelled to answer application in manner implicating right to fair trial and thus not inconsistent with s 10 of Constitution - Accordingly, Proceeds of Serious Crime Act, s 8 and Director of Public Prosecutions powers under s 8 constitutional and valid.

Headnote

The appellants had been charged with a number of offences relating to the acquisition by the second and fifth appellants of two plots of land in Gaborone. The second respondent (the Director of Public Prosecutions) brought an application under s 8 of the Proceeds of Serious Crime Act (Cap 08:03) for a restraining order in respect of each of the plots of land. The appellants brought a counter-application in which they sought the G following relief: In para 1 of Part A of the notice of motion they sought an order declaring that ss 8-11 of the Proceeds of Serious Crime Act were inconsistent with the rights conferred by s 10(1), s 10(7) and/or s 10(3)(a) of the Constitution of Botswana and hence invalid. They alleged that their rights under ss 8-11 of the Proceeds of Serious Crime Act would be infringed because, in answering the application of the Director of Public Prosecutions, they would be forced to disclose information which would result in an H infringement of their rights under s 10 of the Constitution. In para 2 of Part A they sought an order declaring that the

powers conferred on the Director of Public Prosecutions to bring an application for a restraining order under s 8 of Proceeds of Serious Crime Act and a confiscation order under s 3 of the Proceeds of Serious Crime Act were inconsistent with s 51A of the Constitution of Botswana and hence invalid. In para 3 of Part A, they sought an order declaring that the application of

the Director of Public Prosecutions was in conflict with their right to A a fair trial and hence invalid. They alleged that, in light of the timing and content of the restraining order, their right to a fair trial would be infringed by the application if they had to respond to it. In Part B, in the alternative to Part A, they sought the court's permission to consult with four State witnesses in order to enable them to prepare answering affidavits in the application of the Director of Public Prosecutions. The High Court dismissed the constitutional challenges mounted in Part A; and allowed B the application for consultation with two of the four State witnesses sought in Part B. The appellants appealed against those parts of the High Court order which were adverse to them.

Held: (1) There was no risk of an unfair trial to the appellants because they were not compelled to answer the Director of Public Prosecutions application in the way in which they said they were. How they answered the Director of Public Prosecutions application was their choice. C National Director of Public Prosecutions v Brennan and Another (Case No 06/27382 WLD), unreported; National Director of Public Prosecutions v Rinquest and Others (Case No 7202 of 2003 CPD), unreported; Davis v Tip NO and Others 1996 (1) SA 1152 (W) applied.

(2) Accordingly, the appellants' challenge in Part A para 1 of the notice of motion failed. D

(3) Applying s 15(2) of the Interpretation Act (Cap 01:04) to s 51A(3) of the Constitution of Botswana, the power given by s 8(1) of the Proceeds of Serious Crime Act to the Director of Public Prosecutions to apply for a restraining order was incidental to the powers given to her by s 51A(3) and was therefore not inconsistent with the Constitution. The result was the same with regard to the powers given to the Director of Public Prosecutions to apply for a confiscation order in terms of s 3 of the Proceeds of Serious Crime Act. E

(4) Accordingly, the appellants' challenge in Part A para 2 of the notice of motion failed.

(5) It was impossible to say, at the current stage, whether the appellants' right to a fair trial would be infringed if they were obliged to answer in detail the allegations in the Director of Public Prosecutions founding papers. F

(6) Accordingly, the appellants' challenge in Part A para 3 of the notice of motion failed.

(7) The court was not persuaded that the court a quo misdirected itself in allowing access to two of the four named witnesses.

(8) Accordingly, the appeal under Part B failed.

Case Information

Cases referred to:

Attorney-General v Ahmed [2003] 1 B.L.R. 158, CA

Attorney-General v Dow [1992] B.L.R. 119, CA (Full Bench)

Davis v Tip NO and Others 1996 (1) SA 1152 (W)

Director of Public Prosecutions v Daisy Loo (Pty) Ltd and Others [2009] 1 B.L.R. 24, CA H

Good v Attorney-General (2) [2005] 2 B.L.R. 337, CA

Kobedi v The State [2002] 2 B.L.R. 502

Malebogo and Another v Attorney-General (Misca 85/08), unreported

National Director of Public Prosecutions v Brennan and Another (Case No 06/27382 WLD), unreported

A National Director of Public Prosecutions v Rinquest and Others (Case No 7202 of 2003 CPD) unreported

APPEAL against dismissal of a constitutional challenge to legislation. The facts are sufficiently stated in the judgment.

B P B Hodes SC (with him B J Farlam) for the appellants.

M P Phuthego (with him K Ngakaagae, T Baloi and G T Thlabologang) for the first respondent.

M B Marumo (with him L D Molodi and K Kebonyemodisa) for the second respondent.

Judgement

C LORD ABERNETHY JA:

The appellants in this case have been charged with a number of offences of a dishonest and fraudulent nature in relation to the acquisition by the second and fifth appellants of two plots of land in Gaborone.

The trial has not yet taken place.

On 16 October 2008 the second respondent (the DPP) filed a notice of D motion in terms of s 8 of the Proceeds of Serious Crime Act (Cap 08:03), as amended (the Act), making application for a restraining order in respect of each of the two plots of land.

In addition to a 15-page founding affidavit of the DPP the application was supported by an affidavit of a senior superintendent of the Botswana Police Service complying with the requirements of s 8(2) of the Act as to the E statements to be made and the information to

be given in the affidavit.

The affidavit, which runs to some 60 pages, states in considerable detail the basis on which the senior superintendent has a reasonable belief that the appellants committed the offences which resulted in the acquisition by the second and fifth appellants of the two plots of land.

Annexed to the affidavit are 81 documents running to some 400 pages. F There are also 27 confirmatory affidavits which, with annexures of 10 pages, run in total to some 65 pages.

On 16 February 2009 the appellants filed a notice of motion in support of their counter and interlocutory application for a number of orders, as follows:

G 'Part A

1. Declaring that sections 8 to 11 of the Proceeds of Serious Crime Act [Cap 08:03] ("the Proceeds of Serious Crime Act"), alternatively subsections 8(1), 8(2) and 8(4) of the Proceeds of Serious Crime Act, are inconsistent with the Constitution of Botswana ("the Constitution"), and more particularly the rights conferred by H subsections 10(1), 10(7) and/or 3(a) thereof, and accordingly invalid;

2. Declaring that the powers conferred on the Director of Public Prosecutions (subsequent to the commencement of Act 14 of 2005) to bring an application for a restraining order in terms of section 8 of the Proceeds of Serious Crime Act, as well as an application for a confiscation order in terms of section 3 of the Proceeds of Serious Crime Act, and also to perform all other functions in relation to such

applications as the Proceeds of Serious Crime Act (as amended) A allows, are inconsistent with the Constitution, and more particularly section 51A read with section 86 thereof, and accordingly invalid;

3. In the circumstances, declaring that the application for a restraining order which the Director of Public Prosecution ("the DPP") has brought against the Defendants under the above-mentioned Case Number infringes the Defendants' constitutional rights, is in conflict B with the Constitution and is contrary to the rule of law, and is accordingly invalid;

4. Ordering any party who opposes this portion of the application to pay the Defendants' costs in respect thereof, including the costs consequent upon the employment of attorneys and two instructed counsel; C

5. Granting the Defendants further and/or alternative relief.

Part B

In the alternative to Part A, and in the event of the relief sought therein being refused:

6. Permitting the Defendants and their legal representatives to consult with any or all of the following persons for purposes of preparing any D answering papers in response to the application for a restraining order brought by the DPP:

The Honourable Mr Justice David Newman;

Mr Nicholas Oppenheimer;

The Honourable Margaret Nasha; and

The Honourable Pelonomi Venson-Moitoi; E

7. Ordering the DPP to pay the Defendants' costs in respect of this portion of the application, including the costs consequent upon the employment of attorneys and two instructed counsel;

8. Granting the Defendants further and/or alternative relief.'

The matter came before Walia J in the High Court. On 17 September F 2009 the learned judge gave his ruling. He held that the constitutional challenge in Part A of the appellants' notice of motion failed and he dismissed it with costs, to include the costs of one senior and one junior attorney in respect of the first respondent and the costs of one senior and two junior attorneys in respect of the DPP. In respect of Part B he dismissed the application for consultation with the Hon Margaret Nasha and the G Hon Pelonomi Venson-Moitoi, but made an order, subject to certain limitations, allowing a member of the appellants' team to consult with the Hon Mr Justice Newman and Mr Nicholas Oppenheimer. He ordered that each party bear its own costs in respect of this part.

On 8 October 2009 the appellants filed a notice of appeal against the whole of the judgment and orders of Walia J save for his order to allow H consultation with the Hon Mr Justice Newman and Mr Nicholas Oppenheimer.

It is appropriate to consider the issue raised in Part A para 2 of the appellants' notice of motion first. This raises the question whether the powers conferred on the DPP to bring an application for a restraining order in terms of s 8 of the Act, as well as an application for a

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A confiscation order in terms of s 3, and also to perform all other functions in relation to such applications as the Act allows, are inconsistent with the Constitution, and particularly s 51A as read with s 86, and therefore invalid.

In answering this question it is necessary, first, to consider the nature of restraining order proceedings. The appellants contend that restraining order proceedings are civil proceedings in nature. The respondents contended B otherwise in the court a quo, but do not challenge that court's decision on the point. Relying on the judgment of Kirby J in Kobedi v The State [2002] 2 B.L.R. 502, the court a quo held that an application for a restraining order is a civil matter. In my opinion that

was a correct decision.

The appellants go on to contend, as a corollary to that decision, that the DPP is, by reason of the terms of s 51A of the Constitution, not the C competent authority to bring restraining order proceedings. Such proceedings can be brought only by the Attorney-General, the first respondent.

As the appellants state in their heads of argument (para 19), prior to the Constitution (Amendment) Act 2005 (Act 9 of 2005) and D the Constitution (Amendment) (Consequential Provisions) Act 2005 (Act 14 of 2005), neither the Constitution nor the Act (which in its original form came into force in 1990) made any mention of the Director of Public Prosecutions. Indeed, there was no such person in Botswana.

[14] The Constitution (Amendment) Act 2005 introduced a new provision, s 51A, which inter alia provides as follows:

E '51. A (1) There shall be a Director of Public Prosecutions appointed by the President whose office shall be a public office and who shall be subject to the administrative supervision of the Attorney-General.

(2) ...

(3) The Director of Public Prosecutions shall have power in any case in which he or she considers it desirable to do so -

F (a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

G (c) to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

(4)-(6) ...'

Prior to the Constitution (Amendment) Act 2005 these powers were vested in the Attorney-General in terms of s 51 of the Constitution.

H One of the statutes amended by the Constitution (Amendment) (Consequential Provisions) Act 2005 was the Act, in which the words 'Director of Public Prosecutions' were substituted for the words 'Attorney-General' wherever the latter appeared.

Thus s 8(1) of the Act, as amended, provides:

'8. (1) Where a person has been or is about to be charged with a serious

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offence,
the Director of Public Prosecutions may apply to a magistrate's A court or the High Court, ex-parte, for a restraining order.'

Section 3(1) of the Act also gives power to the DPP, where a person has been convicted of a serious offence, to apply to the court before which the conviction was obtained or to the High Court for a confiscation order in respect of that offence. B

The appellants contended that, having regard to the limited powers given to the DPP by s 51A of the Constitution, Parliament could not, without offending the Constitution, provide for the DPP to bring an application for a restraining order. In terms of the Constitution the DPP was limited to acting in criminal proceedings. But an application for a restraining order was a civil matter. In that situation the power to bring such an application C remained with the first respondent as the representative of the State in civil legal proceedings. See s 3 of the State Proceedings (Civil Actions by or against Government or Public Officers) Act (Cap 10:01).

The appellants relied on a statement by Walia J at an earlier stage in the case. He was dealing with an application for an interim interdict and he said, '[the DPP's] powers are clearly spelt out in s 51A(3) of the Constitution and D these do not extend beyond undertaking, continuing and discontinuing criminal procedures.' The appellants also contrasted the provisions of s 51A with those of the South African Constitution, in which, after making equivalent provisions to those in s 51A(3), s 182(2) provides that:

'The Public Protector has the additional powers and functions prescribed E by national legislation.'

Moreover, s 179(7) of the South African Constitution F provides that:

'All other matters concerning the prosecuting authority must be determined by national legislation.'

Section 86 of the Constitution of Botswana, on the other hand, provides that:

'86. Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana.' (my emphasis) G

Accordingly, it was contended, the Botswana Parliament can only make laws which are consistent with the Constitution.

The appellants contended that in these circumstances the powers conferred on the DPP to bring an application for a restraining order in terms of s 8 of the Act are inconsistent with the Constitution and are accordingly invalid. H

In the court a quo Walia J rejected the appellants' line of reasoning and held that the DPP was not precluded by the terms of s 51A of the Constitution from bringing an application under s 8 of the Act. He explained that what he had said about the DPP's powers at an earlier stage in the case, which might suggest that he was of a contrary view and

A on which the appellants relied, was said in a quite different context and was not applicable in the present context.

In my opinion he came to the correct conclusion essentially for the reasons that he gave. Walia J held that the provisions of s 51A fell to be interpreted in light of the provisions of s 15(2) of the Interpretation Act (Cap 01:04), which provides as follows:

B '(2) Where an enactment confers a power, or imposes a duty, to do any act or thing all such powers shall be deemed to be also given as are reasonably necessary to enable, or require, that act or thing to be done or are incidental to the doing thereof.'

C He further held that in terms of s 2(a) of the Interpretation Act all its provisions apply to the Constitution. The question therefore was whether in the context of this case a restraining order was reasonably necessary or incidental to the prosecution of the appellants.

Despite the respondents' argument to the contrary, in my opinion a restraining order is not reasonably necessary for the conduct of the D prosecution. It would be quite possible to conduct the prosecution from start to finish without the order. Moreover, in terms of s 8(1) of the Act a restraining order may be applied for before a person is charged with a serious offence. It is also to be remembered that an application for a restraining order is a civil matter and is not part of the criminal proceedings.

The purpose of a restraining order is not to serve the needs of the prosecution as such. On the contrary, its purpose is to preserve the E property in question so that in the event of a conviction it is still available so that any confiscation order that may be made in terms of s 5 of the Act may be given effect. Section 5 provides that a confiscation order will be only for a pecuniary penalty of an amount equal to the value of the proceeds of the offence, but if the proceeds are in the form of land, that land can obviously provide the means (and perhaps the only means) of paying the F pecuniary penalty. The principal purpose of the Act, it should be remembered, is, as is stated in the preamble, 'to deprive persons convicted of serious crimes of the benefits or rewards gained from such crimes'. If those benefits or rewards have been dissipated and are beyond recall by the time a confiscation order is made following upon a conviction, the purpose of the Act would be defeated.

G Walia J, however, did not base his decision on this part of the case on reasonable necessity. His decision was based on his view that the restraining order applied for was incidental to the prosecution.

He dealt with the matter quite briefly. At para 36 of his judgment he said this:

H 'In my view, the property in question is central to the criminal proceedings and an application brought for its preservation, whether by restraining order or otherwise, is most certainly incidental to the trial.'

In my opinion, having regard to the purpose of a restraining order, it is difficult to resist the conclusion he came to. The learned judge went on to find support for his conclusion in a case which he himself had decided:

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Malebogo and Another v Attorney-General (Misca 85/08),
unreported. In A that case the applicants had made an
application under s 18 of the Constitution for a permanent stay of criminal
proceedings. The application had been brought against the DPP, who argued that
by reason of the restricted powers she had under s 51A of the Constitution,
such an application should be brought against the Attorney-General. In his
judgment Walia J said that 'as the power to stop or stay any prosecution lies B with the Director of Public Prosecutions, it
accords with common sense that an application for stay of proceedings be
brought against her'. So far as he was aware - and it was not suggested
otherwise - that judgment had not been challenged.

It was not contended by counsel for the appellants at the hearing
before this court that that decision was wrong, but it was submitted that it
did not C follow, as Walia J had held, that the DPP must
be regarded as having been clothed with the necessary powers to deal with
applications for restraining orders.

Senior counsel for the appellants, however, went much further. He
submitted that Walia J had erred fundamentally in his approach to this part of
the case by relying on the provisions of the Interpretation Act in D
relation to the
Constitution. Counsel pointed to s 127(13) of the Constitution, which provides
as follows:

'(13) The
Interpretation Act, 1889 shall apply, with the necessary adaptations, for the
purpose of interpreting this Constitution and otherwise in relation thereto as
it applies for the purpose of interpreting
E and in relation to Acts of the Parliament of
the United Kingdom.'

In the original terms of the Constitution commencing on the
independence of Botswana on 30 September 1966 s 127(13) had merely provided
that:

'(13) The
Interpretation Act shall apply, with the necessary adaptations, F for the purpose of
interpreting this Constitution.'

The present Interpretation Act was enacted in 1984 and therefore
s 127(13) would have applied to it. However, s 127(13) had been altered to the
present wording of the subsection by Rectification of the Laws (No 2) Order
1993, which was made in terms of s 10 of the Revision of the Laws G Act (Cap 01:03). In that situation, it was
submitted that it had not been open to Parliament to enact, as it had purported
to do in s 2(a) of the Interpretation Act of 1984, or for Walia J to
hold, that each provision of that Act applied to the Constitution. That was
inconsistent with s 127(13) of the Constitution and therefore invalid.
Accordingly, the provisions of s 15(2) of the Interpretation Act could not
apply to the Constitution, as H
Walia J had held they did,
and the tests of reasonable necessity and incidentality provided for in that
subsection did not apply.

The submission then proceeded as follows. There was nothing in
the common law of Botswana that was relevant to cover any 'necessary
adaptations' as provided for in s 127(13). Accordingly, one had to go back to
the terms of the 1889 Act. There was nothing there to support

A the conclusion that a proper interpretation of
the powers expressly given to the DPP by s 51A(3) of the Constitution included
the power to apply for a restraining order. That conclusion could therefore
only be implied. But it was only possible to imply words into a written
instrument if they were necessary to ensure the effectiveness of the
instrument. Since it was not necessary for the effectiveness of the powers
given to the DPP by s 51A(3) B
that she also had the
power to apply for a restraining order, that power could not be implied. The
DPP therefore had no power in terms of s 127(13) of the Constitution to apply
for a restraining order.

This is an ingenious argument, but in my opinion it is unsound.
It was not foreshadowed in the appellants' heads of argument. All that was said
which might bear on this point was that 'it is far from clear, in our
submission, that C Parliament can lay down rules and principles
which apply to the interpretation of the Constitution. The Constitution is the
supreme law, and should not be read through the prism of legislation'. The
appellants then went on to submit that in any event s 15(2) of the
Interpretation Act was effectively just a restatement and embodiment of the general
interpretive rule, from pre-constitutional times, that 'powers which are D reasonably incidental to the exercise of any
given power vested in a subordinate legislature may be implied in proper
cases'. A number of South African cases are cited in support of this and then
reference is made to the Constitution of the Republic of South Africa (Act 108
of 1996), which in ss 44(3) and 104(4) provides, with regard to national
and E provincial legislatures respectively, that
legislation 'with regard to a matter that is reasonably necessary for, or
incidental to, the effective exercise of a power concerning any matter listed
in Schedule 4 [to the South African Constitution] is, for all purposes,
legislation with regard to a matter listed in Schedule 4'.

These heads of argument were filed only on 4 January 2010, the
day F before this session of the court started, so
one may perhaps be forgiven for thinking that the submission made at the
hearing was something of an afterthought in recognition of the fact that the
words 'incidental to' might present a difficulty for the appellants in this
matter, which had not been sufficiently addressed. That does not mean that the
submission presented at the hearing is not entitled to be fully considered on
its merits. Of course it is, G
but, having considered it
carefully, it is in my opinion misconceived.

Section 127(13) of the Constitution, as rectified by the Order of
1993, must be given effect to. But it does not go very far. The Interpretation
Act 1889 is to a considerable extent concerned with the interpretation of words
and phrases which, even allowing for any
H necessary adaptations, have no relevance to
Botswana. That said, there are some provisions that, with necessary adaptation,
are relevant to Botswana. One example is s 1, where it is provided that in Acts
of the United Kingdom Parliament words importing the masculine gender shall
include females and words in the singular shall include the plural and vice
versa. Another, perhaps more pertinent for this case, is s 32, which provides
for the construction or interpretation of provisions as to the exercise of
powers and duties. It provides as follows:

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'(1) Where an Act ... confers a power or imposes a duty, then, unless the A contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where an Act ... confers a power or imposes a duty on the holder of an office, as such, then unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office. B

(3) Where an Act ... confers a power to make any rules, regulations, or by-laws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or by-laws.' C

There is nothing in any of these provisions or in any other provisions in the Interpretation Act 1889 which in my opinion, requires any implication of a kind that would be relevant to this case to make them effective. But, as I said earlier, these provisions do not go very far and in my opinion there is nothing in them, or in s 127(13) of the Constitution, which is inimical to the Parliament of Botswana making further provision for interpretation, at least D in so far as it is not inconsistent with what is said in those provisions or with s 127(13). In my opinion there is nothing inconsistent with those provisions or with that subsection in s 15(2) of the Interpretation Act. There is therefore nothing unconstitutional in the provision of s 2(a) of that Act which applies s 15(2) to the Constitution.

Furthermore, I am not aware of any decision of this or any other court in E Botswana which has cast doubt upon the validity of s 2(a) of the Interpretation Act. On the contrary, in the well-known case of Attorney-General v Dow [1992] B.L.R. 119, CA (Full Bench) Amissah P said, in relation to a submission that s 2 of the Act applied to the Constitution, at p 129:

'I agree that the provisions of the Interpretation Act apply to the F interpretation of the Constitution.'

Accordingly, had it been necessary to do so, I would have been prepared to hold that it was far too late, more than 25 years after it came into force, to declare s 2(a) of the Interpretation Act unconstitutional and therefore invalid. G

For these reasons Walia J was in my opinion correct to apply s 15(2) of the Interpretation Act to s 51A(3) of the Constitution. In my opinion he was also correct to hold that the power given by s 8(1) of the Act to the DPP to apply for a restraining order was incidental to the powers given to her by s 51A(3) and was therefore not inconsistent with the Constitution. The H result is the same with regard to the powers given to the DPP to apply for a confiscation order in terms of s 3 of the Act.

Accordingly, the appellants' challenge on this point fails.

I turn now to the issue raised in Part A para 1 of the appellants' notice of motion. This is a challenge to the validity of ss 8-11 of the Act or, alternatively, s 8(1), (2) and (4) of the Act on the ground that they are

A inconsistent with the Constitution of Botswana, and more particularly the rights conferred by s 10(1) and (7) and/or s 3(a) thereof.

If successful, the challenge would have far-reaching consequences. On the one hand, the system of restraining orders provided for in the Act would be invalidated and it is difficult to envisage any other such system which could validly take its place. As a result the effectiveness of confiscation orders B would be seriously, perhaps fatally, undermined and the purposes of the Act defeated. That would not be in the public interest. The terms of s 26 of the Interpretation Act would be overridden. That section provides that:

'26. Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its C object according to its true intent and spirit.'

On the other hand, the rights of the individual provided for by s 3 and, through s 3(a), by s 10(1) and (7) of the Constitution are basic and fundamental rights of the individual in any civilised society, to which in terms of the Constitution every person in Botswana is entitled.

D Sections 8 to 11 of the Act comprise the whole of Part III of the Act and contain all the provisions in the Act relating to restraining orders. Section 8(1), (2) and (4) are at the heart of these provisions and are in the following terms:

'8. (1) Where a person has been or is about to be charged with a serious E offence, the Director of Public Prosecutions may apply to a magistrate's court or the High Court, ex-parte, for a restraining order.

(2) An application for a restraining order may be made in respect of one, or more than one, serious offence and shall be supported by F an affidavit of a police officer of or above the rank of Inspector -

(a) stating the serious offence or offences in respect of which the application is made;

(b) stating that the officer has a reasonable belief that the defendant committed the offence, or each of the offences, G as the case may be, and that he received or derived proceeds from the said commission;

(c) identifying the property which the officer reasonably believes to represent the proceeds received or derived by the defendant from the said commission; and

(d) the basis for such beliefs.

H (3) ...

(4) Where, on an application under this section, the magistrate's court or the High Court is satisfied that there is reasonable cause to believe that the defendant has benefited from the proceeds of the serious offence or offences in respect of which the application is made, the court may, by order (herein referred to as a "restraining order"), prohibit any person from dealing in any way

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with any property to which the order applies, subject to such A conditions as may be specified in the order.'

Section 3(a) of the Constitution provides as follows:

'3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or B her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely -

(a) life, liberty, security of the person and the protection of the law;

(b) ...

(c) ...

the provisions of this Chapter shall have effect for the purpose of C affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

Section 10 is part of the Chapter referred to in s 3 and its marginal note D explains that its provisions are to secure protection of the law, which is one of the fundamental rights and freedoms in s 3(a).

Section 10(1) and (7) provide as follows:

'10. (1) If any person is charged with a criminal offence, then, unless the E charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.

...

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.' F

The appellants contend that their rights under the above provisions will be infringed because in answering the affidavits in support of the DPP's application for a restraining order they 'will be forced to disclose, among other things, their intended strategy and approach; the reasons why they contend that the evidence of the DPP's witnesses is wrong or unreliable or G should be disbelieved; the evidence which they intend to lead; the names of witnesses they propose to call; and the gist of what any rebutting evidence will be' (my emphasis).

That quotation is taken from the appellants' heads of argument and it is central to their argument that they are forced or compelled to answer the DPP's case in such a way as to disclose information that would result in an H infringement of their rights under s 10. The

authorities they rely on likewise proceed on the basis that an accused has no obligation to assist the prosecution and cannot be put in a position where he or she is compelled to do so.

In my opinion, however, agreeing with Walia J in the court a quo, the critical question is whether the appellants are forced or compelled to answer

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A the DPP's case in the way that they say they are. It is only if they are forced to answer in that way that the authorities cited are in point.

Before going any further, however, it is necessary to say something about the nature and effect of the constitutional rights which the appellants rely on. Section 3 of the Constitution was authoritatively interpreted by this court in Attorney-General v Ahmed [2003] 1 B.L.R. 158, CA. In that case B counsel for the Attorney-General submitted that since every succeeding section in Chapter II of the Constitution had to be read along with s 3, it followed that each of those sections must have the implied limitation that the enjoyment of those rights and freedoms shall not prejudice the rights and freedoms of others or the public interest. As Lord Sutherland, giving the unanimous judgment of the court, explained at p 161D:

C '... [T]his argument proceeds on a misreading of s 3. The first word in the section is "whereas". If ever a word is redolent of a preamble, this is it. The section from the beginning down to the end of (c) appears to be declaratory of all the fundamental rights to which a citizen of Botswana is entitled. After this preamble there follows the substantive part of the D section which gives effect to the declaration and aspirations contained in the preamble. It also deals with the permissible limitations on such rights and freedoms, but it does so in a specific way. It provides that the provisions of chap 2 have effect for the purpose of affording protection to the rights and freedoms specified in the preamble "subject to such limitations of that protection as are contained in those provisions." It E follows therefore that one must look at each individual provision to see if it contains any limitation.'

In Ahmed the court was dealing with s 10(2). No relevant limitations are contained in that subsection and therefore no implied restriction should be read into it. Similarly, in my opinion, no relevant restrictions are contained F in either of subsecs (1) or (7) of s 10 and so no implied restriction should be read into either of them. Despite what was said in Ahmed, counsel for the first respondent made the same submission to this court (a submission which was adopted by counsel for the DPP) as had been made, and rejected, on behalf of the Attorney-General in Ahmed. In doing so counsel relied for support on what had been said by Amissah P in this court in Attorney- G General v Dow (supra) and by Tebbutt JP in Attorney-General v Otlhomile [2004] 1 B.L.R. 21, CA.

The particular passage referred to in Amissah P's judgment in Attorney-General v Dow (supra) is as follows (at p 133E):

'From the wording of section 3 [of the Constitution], it seems to me that the H section is not only

a substantive provision, but that it is the key or umbrella provision in Chapter II under which all rights and freedoms protected under that Chapter must be subsumed. Under the section, every person is entitled to the stated fundamental rights and freedoms. Those rights and freedoms are subject to limitations only on two grounds, that is to say, in the first place, "limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not

prejudice
the rights and freedoms of others", and secondly on the ground A of "public interest". Those limitations are provided in the provisions of Chapter II itself, which is constituted by sections 3 (but effectively, section 4) to 19, of the Constitution.'

In my opinion, when the whole of that passage is properly understood, so far from it being contrary to what was said by Lord Sutherland in Ahmed, it B is totally consistent with it. The key in my opinion is in the last sentence of the passage.

What the learned judge is saying is that it is necessary to look at each of ss 4 to 19 to discover whether the rights and freedoms provided in those sections are subject to one or other or both of the limitations mentioned in s 3. The passage from Amissah P's judgment in Dow quoted above was C before the court in Ahmed. Indeed, it was quoted by Lord Sutherland and, as I have said, counsel for the Attorney-General in that case sought to take from it precisely what counsel for the Attorney-General, the first respondent, sought to take from it in this case. That is then expressly rejected by Lord Sutherland in the passage from his judgment in Ahmed quoted above. There is not a hint in that passage that the court in Ahmed D thought that it was saying anything inconsistent with what Amissah P had said in Dow.

Attorney-General v Otlhomile (supra) was a criminal case which came before a full bench of this court. The issue there was whether what has been called a 'reverse onus' in a statute was inconsistent with the presumption of innocence provided by the Constitution. More E particularly, it was whether the provision in s 4(a) of the Stock Theft Act (Cap 09:01), which, read short, provided for a presumption that a person found in possession of stock suspected of being stolen was guilty of an offence under s 3 (theft of or receiving stolen stock 'unless the contrary is proved'), was inconsistent with s 10(2)(a) of the Constitution, which provides that every person who is charged with a criminal offence shall be F presumed to be innocent until he or she is proved or has pleaded guilty.

The case was decided almost exactly a year after Ahmed and four of the five judges in Ahmed were also in Otlhomile. Ahmed does not appear to have been referred to in Otlhomile, but it is almost inconceivable that the judges would have forgotten about Ahmed, particularly as the two cases were each concerned with s 10(2) (although different parts of that subsection) of the Constitution. G

Interestingly, counsel for the first respondent was then a member of the High Court judiciary and was the judge a quo in Otlhomile.

There are passages in Tebbutt JP's judgment in Otlhomile (with which all the other judges agreed) which, if taken out of context, might

be interpreted as saying something different about s 3 of the Constitution from what was H said in Ahmed (and, by extension, from what was said in Dow). As I have previously indicated, the context in Otlhomile was the position of the reverse onus in s 4(a) of the Stock Theft Act in relation to the presumption of innocence in s 10(2)(a) of the Constitution. As is clear from Tebbutt JP's judgment, reverse onus is a concept that is to be found in statutory provisions in many jurisdictions. It is recognised that one of its

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A consequences is a limitation on or exception to the presumption of innocence. Whether it is a permissible limitation will turn on considerations of whether it is reasonably necessary to protect the rights and freedoms of others and the public interest, and that in turn involves considering proportionality.

To this extent the reverse onus may in appropriate circumstances (such as B were held to be the case in Otlhomile) be said to be a qualification of what was said by Lord Sutherland in Ahmed, but it is a qualification only in the context of reverse onus. There is nothing in Otlhomile to suggest that this court was in general departing from what it had said in Ahmed and I do not think that it was. Accordingly, Otlhomile provides no support for the general prevalence of public interest over individual rights contended for C by the first respondent.

Reference was also made to the case of Good v Attorney-General (2) [2005] 2 B.L.R. 337, CA. The facts of that case are far removed from the present case. It was concerned with the constitutional validity of certain sections of the Immigration Act (Cap 25:02). However, at p 344C-E Tebbutt JP said this:

D '... [I]t is important to note that the exercise of the rights contained in those provisions of the Constitution contained in Chapter II is subject to the respect for the rights and freedoms of others and to the public interest and the limitations to the protection of those rights, as expressed in the provisions of the Constitution defining such rights, are designed to ensure E that their enjoyment does not prejudice the rights and freedoms of others or the public interest.' (my emphasis)

What Tebbutt JP said there was in my opinion totally consistent with what Lord Sutherland had said in Ahmed. In my opinion, therefore, the proper interpretation of s 3 of the Constitution is the one which the full F bench of this court unanimously decided in Ahmed and is subject to qualification only in special circumstances such as were found to exist in Otlhomile but do not exist here.

The words of the subsections must, however, still be construed according to the well-known rules of construction. The primary rule, of course, is to ascertain the intention of the legislature and, if possible, that is achieved by G giving the words used in the subsection their ordinary meaning. I do not think that there is any difficulty in doing that in relation to these two subsections.

Taking s 10(7) first, the right conferred is quite clear. It is a specific right that no person who is tried for a criminal offence shall be compelled to give evidence at the trial. Just as no implied restriction is to be read into the H subsection, so no gloss can be implied which would alter the plain meaning of those words. Restraining order proceedings are

not part of the trial. Accordingly, in my opinion s 10(7) does not apply to the circumstances of this case.

Section 10(1), in short, guarantees the right of all accused persons to a fair trial. If, therefore, the appellants were compelled to respond to the DPP's case for a restraining order in the way they say they are, then I accept that

that could result in unfairness. Whether it would necessarily do so is another A matter. Walia J thought that it was too early to say; it was a matter that could only be decided at the trial. I can understand that approach and there is good authority in support of it, because not every piece of unfairness necessarily results in an unfair trial and it is usually difficult, if not impossible, to decide the matter in advance. I am prepared to accept, however, that there may be circumstances in which it could be said in B advance of the trial that if certain matters unfolded in a particular way, it would inevitably lead to an unfair trial. However, I am satisfied that that is not the situation in the circumstances of this case. That is because I am satisfied that the appellants are not compelled to answer the DPP's application in the way that they say they are. On the contrary, whether and, if so, to what extent, the appellants respond to the application is in C my opinion a matter of choice for them. A number of cases in the High Court of South Africa in support of that proposition were relied on by the DPP: National Director of Public Prosecutions v Brennan and Another (Case No 06/27382 LD) unreported; National Director of Public Prosecutions v Rinquest and Others (Case No 7202 of 2003 CPD) unreported; and Davis v Tip NO and Others 1996 (1) SA 1152 (W). D

Senior counsel for the appellants submitted that these cases were wrongly decided, but he did not say why and I am unable to see anything wrong with what was said with regard to the point I am dealing with. All three of these cases are in point and the first two were concerned with an application for forfeiture. It is sufficient to quote the passage from Khampepe J's judgment in Brennan, which Walia J quoted: E

'Indeed the respondent has an election whether to file an affidavit rebutting incriminating evidence or run the risk of a finding that there is evidence on a balance of probabilities that the property in question is the proceeds of unlawful activities. To my mind the exercise of such an election does not amount to compelling him to speak in the criminal F proceedings. As pointed out in Davis v Tip what distinguishes compulsion from choice is whether "the alternative which presents itself constituted a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so". In my view, in electing to adduce evidence to rebut incriminating evidence that the property in question is the proceeds of unlawful activities does not - by any stretch of the G imagination - amount to compelling him to speak in the criminal proceedings. It merely requires the respondent to make a choice, "hard as that choice might be" and nothing more. In the event that he elects not to file rebutting evidence he would have legitimately exercised his choice....'

The test which the DPP has to pass in order to obtain a restraining order H in terms of s 8(2) of the Act is a low one. In Director of Public Prosecutions v Daisy Loo (Pty) Ltd and Others [2009]

1 B.L.R. 24, CA Tebbutt JP said this at p 32F-H).

'In considering objectively whether it is satisfied that there is a reasonable cause to believe that the defendant has benefitted from the proceeds of a

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A serious crime for which he has been or may be charged, the test to be applied by the court is not whether the applicant has satisfied it beyond reasonable doubt nor on the balance of probabilities. The standard of proof is a low one requiring only that the court must be satisfied on reasonable grounds that there might be a conviction and a consequent confiscation order.'

B The DPP has gone to very great lengths in her application for a restraining order. So great indeed that the appellants complained that it went well beyond what was contemplated by s 8 of the Act. Be that as it may, the first choice to be made by the appellants is whether to answer the application at all, never mind in the detail that they say they would have to C answer it. Bearing in mind the low standard of proof required, the appellants will have to judge whether there is any real prospect of success in their opposing the application. On the other hand, if they consider that despite the length of the supporting documentation the application has no prospect of satisfying the low standard of proof, they can decide to rely on the court coming to the same conclusion and dismissing the application. As D Walia J pointed out, it is not a foregone conclusion that the court will grant the restraining order; the court has to be satisfied that the statutory test has been passed.

Judgments and decisions of this kind have to be made day in day out by legal practitioners acting on behalf of clients. There is nothing unusual about them. They may of course involve hard choices, but they are E nevertheless choices. The fact that the appellants are required to make these choices does not in any way mean, in my opinion, that they are forced into a position where their rights to silence and to a fair trial are infringed.

For these reasons the appellants' challenge in Part A para 1 of their notice of motion also fails.

F I turn now to consider the order which the appellants seek in Part A para 3 of their notice of motion. This is aimed not at the constitutional validity of any of the provisions of the Act but at the DPP's application for a restraining order itself. The appellants contend that in the light of the timing and content of the restraining order their constitutional rights would be infringed by the application if they had to respond.

G Counsel for the first respondent submitted that this point could not stand alone; it was premised on paras 1 and 2 of Part A. That was clear from the opening words 'In the circumstances'. Counsel admitted that he had not taken the point in the court a quo. In my opinion the point is unsound. In my opinion it is perfectly possible to read para 3 as a stand-alone point and I am prepared to deal with it on that basis.

H I have already referred to the very great length of the documentation filed in support of the application. On the face of it, it might seem to be excessive, having regard to the low standard of proof required in such matters, but I am in no position to judge that. It would certainly be undesirable for the DPP to go to inordinate lengths in seeking a

restraining order, but it is impossible to say at this stage what would be inordinate lengths in the circumstances of this case, still less to say, as the appellants invited the

court to do, whether the appellants' rights to a fair trial would be infringed A were they to be obliged to answer in detail the allegations in the DPP's founding papers.

In the court a quo Walia J referred, rightly in my view, to 'the trite principle that courts do not engage in providing opinions or making declarations where no consequential relief is in issue', but nevertheless went on to venture an opinion. That opinion was criticised by the B appellants. I do not propose to go into this point in any detail. In the first place, the appellants' position is predicated on their having to respond to the DPP's application. For the reasons I have given earlier in this judgment I am of the opinion that they do not have to respond; it is a matter of choice whether they do or not and, if they do, to what extent. Secondly, the appellants are in effect asking the court to give an opinion on C a matter which is to a large extent academic and hypothetical and without reference to legal principle. That is not something the court should indulge in in my opinion.

For all these reasons the appellants' case for the orders sought in Part A of their notice of motion in my opinion fails and is hereby dismissed.

In the court a quo Walia J dismissed the appellants' case under Part A D with costs. It is a recognised practice, however, in a case involving an unsuccessful challenge to constitutional rights by a citizen which is not frivolous or vexatious, that there should be no order for costs. The appellants' case under Part A was certainly not frivolous or vexatious. On the contrary, the points they raised under paras 1 and 2 were points of general importance. In my opinion there should be no order for costs E both in this court and in the court a quo.

I turn now to consider Part B of the appellants' notice of motion. I can deal with this point briefly.

First, though, counsel for the DPP submitted that the appellants were not entitled to any relief under Part B because notice in respect of that part had not been served on the second respondent in terms of s 4 of the State F Proceedings (Civil Actions by or against Government or Public Officers) Act. This submission, it seems to me, has an air of unreality about it. The Attorney-General is the first respondent in this case and therefore already has notice of the appellants' notice of motion. So the purpose of s 4, which is to ensure that such actions are not proceeded with without the Attorney-General's knowledge, has been served. It would be patently absurd to insist G on notice and so delay matters unnecessarily in that situation. Not surprisingly, counsel for the first respondent did not make a similar submission. In my opinion it is of no merit whatsoever.

In Part B the appellants seek access to four named witnesses, the Honourable Mr Justice David Newman, Mr Nicholas Oppenheimer, the Honourable Margaret Nasha, and the Honourable Pelonomi Venson- H Moitoi. Walia J granted access to the first two but not the last two. The appellants now appeal against the decision in respect of the last two. The second respondent appeals against the decision in respect of the first two.

In my opinion the matter was very much one for the court a quo. I am not persuaded that Walia J misdirected himself on it and I would not interfere with his decision save on the minor point that it be ordered, as I hereby

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A order, that two designated members of the appellants' defence team may consult with Mr Justice Newman and Mr Oppenheimer rather than just one. This was requested by senior counsel for the appellants and was not opposed by counsel for the DPP, assuming his appeal in respect of these witnesses failed. In my opinion it was a reasonable request.

Subject to that, the appellants' appeal under Part B fails and is dismissed. B As in the court a quo each party should bear its own costs.

McNally AJP, Ramodibedi, Foxcroft and Howie JJA concurred.

Appeal dismissed.