

IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHGB-000361-17

In the matter between:

NEWS COMPANY BOTSWANA (PTY) LTD APPLICANT
t/a THE GAZETTE

And

WATER UTILITIES CORPORATION 1ST RESPONDENT
GASELEMOGWE SENAI 2ND RESPONDENT

Mr. Attorney T Rantao for the Applicant

No appearance by the Respondents

JUDGMENT

MOTUMISE J

INTRODUCTION

1. This is a review application brought in terms of Order 61 as well as Order 70 of the High Court Rules in which the main question in issue is whether Water Utilities Corporation ("WUC") or "the

first respondent" is required under section 17 of the Water Utilities Act, Cap 74:02 of the Laws of Botswana ("the Act") to provide a copy of a report ("the Report") to the applicant which it had commissioned in respect of reduced water inflows into Gaborone Dam.

2. The applicant avers that the matter concerns good governance and the public duty of parastatals to be open and transparent to the public and members of the media, who aim to inform and sensitize the public. It further says that the refusal to provide the report is reviewable on grounds of illegality, unreasonableness, irrationality and alternatively, that the decision is contrary to sections 12 and 18 of the Constitution of Botswana.
3. The respondents oppose the review. They submit that the decision not to provide the report, which is the property of the first respondent is not impeachable for any reason at all because the report was not intended for public consumption.

THE PARTIES

4. The applicant is a news media company and the publisher of the Gazette Newspaper.
5. The first respondent is a parastatal wholly owned by the Government of Botswana and established under section 3(1) of the Act. The second respondent is cited herein as the Acting Chief Executive Officer of the first respondent as at 14 June 2017 and the author of the letter dated 14 June 2017 which contains the impugned decision.

THE LEGAL AND FACTUAL BACKGROUND

6. The functions of WUC are spelled out in Part V of the Act, as amended, in section 14(1) as follows;

“(a) To supply water in bulk or otherwise and in such areas as the Minister may, after consultation with the Corporation, designate by order published in the Gazette;

(b) To do all such things as may be necessary or advantageous in order to secure adequate supplies of water for the performance of its functions;

(bA) To carry out sanitation, sewer connection, sewerage, and septic tank emptying services in such areas as the Minister may, after consultation with the corporation, designate by order published in the gazette; and

(c) To apply for and obtain all such rights, licenses, permits, and other authorisations as may be required under the provisions of any written law or as may be desirable."

7. Section 17 of the Act provides in respect of research and records as follows;

"With a view to facilitating present or future research or planning, the Corporation shall keep full and accurate records of all its operations and shall have power to engage in research, and to assist others to engage in research, in respect of any matter relating to its functions, and to publish such records and the results of any such research."

8. The assets of WUC consist of among others, nine dams in the country, namely; the Gaborone, Nnywane, Bokaa, Lotsane, Letsibogo, Dikgatlhong, Thune, Ntimbale, and Shashe dams ("the nine dams").
9. Sometime in 2014 the country experienced unusually dry spells which caused a reduction in the water levels in the nine dams. The dams in the southern part of the country inclusive of the Gaborone Dam were severely affected and recorded the lowest water levels during the said period which led to water rationing to the public.

10. On or about 19 January 2014, the Sunday Standard Newspaper published an article titled "THE RICH BLOCKING WATER FLOW IN GABORONE DAM" in which it reported that the University of Botswana and WUC had commissioned a study which had allegedly revealed that there were 200 illegal dams blocking the flow of water into Gaborone Dam, resulting in reduced water levels and the rationing of water by WUC. The story alleged that the "the culprits" behind the building of the dams were individuals "connected to political interests".
11. The second respondent is quoted confirming the existence of the report and the dams in question; and saying that the report could not be shared with the public because it was not intended to be shared when it was commissioned. On the other hand, WUC denied responsibility for issuing permits to people to build dams as its only mandate was to ensure that water reached its consumers.

12. The article blamed the low water levels on the "illegal dams" whereas WUC said that it was due to the dry spells at the time. However, by 2017 the country was receiving normal rainfall; dam levels had risen and water supply was normalised.

THE IMPUGNED DECISION

13. The decision under review is contained in a letter by WUC dated 17 June 2017, written in response to a demand of a copy of the report by the applicant on 31 May 2017. It states in part;

"REQUEST FOR A REPORT ON GABORONE DAM

We refer to your letter dated 31 May 2017.
We have studied your request and wish to respond in the following manner.

The Water Utilities Corporation Act empowers the Corporation to engage in research and or publish the results thereof. The results of the research are the property of the corporation.

The corporation has not determined to release any such information or results of the search to your client or any third party."

THE APPLICANT'S CASE

14. The applicant contends that the refusal to produce the report was unreasonable because there was information of illegal activity occurring that impacted the water levels which served a large population and the nation. Thus no reasonable authority could have refused to publish the report in question. Further, WUC did not furnish any reasons for its decision.

15. It is averred that the impugned decision was irrational because there could be no rational public objective to be met by refusing to produce the report. The applicant complains that WUC conducted no enquiry beyond reading the applicant's letter, nor did it hold any meeting to consider the request to avail the report. The decision was unreasonable for the further reason that WUC ignored all the relevant factors including its public policy role.

16. The illegality is based on the alleged breach of section 17 of the Act which the applicant construes as entitling it to receive the report by virtue of the obligation by WUC to publish the report.
17. The constitutional right to receive the report is founded on section 12 of the Constitution which protects the fundamental right to freedom of expression; a right that includes the dissemination of ideas and information. In that regard, WUC, which is wholly owned by the Government of Botswana is required to ensure that there is access to information, such as the report.
18. To that extent, the applicant has assembled an impressive array of international treaties, instruments, conventions and case law on the right to information in a bid to sustain the claim that they apply in Botswana. They should be interpreted as conferring the right of freedom of information on the applicant.

THE RESPONDENTS' CASE

19. The respondents argue that the application is frivolous and vexatious and constitutes an abuse of process because it has been superseded by events and has become a futile exercise. In this respect, the application is also founded on hearsay and the unconfirmed Sunday Standard article. For that reason, the issue before the Court is abstract or mute which the Court cannot entertain. It is also submitted that the application is founded on speculation, hearsay and unconfirmed publication. In this respect the case of **Good v Attorney General [2005] 2 BLR 337, (CA)** at p349 is called in aid where the Court stated;

"It will be irresponsible in the highest degree for this Court to make findings based on speculative submissions and perceptions which may or may not be held by the public without any reliable factual material to support them."

20. The respondents contend that the Sunday Standard article is speculative and cannot form the basis of the present application because it is undisputed that the low water levels were caused by an unusually dry period at the material time experienced by the entire country which affected all the nine dams.
21. It is also submitted that the applicant has no interest in this matter except on the identity of the alleged rich persons who have allegedly blocked the flow of water into the Gaborone Dam and that the application is not one founded on the public interest but rather it is to serve the commercial and private benefit by increasing its circulation and readership. Support for this proposition is drawn from the case of **Financial Mail (Pty) Limited and Others v Sage Holdings Limited and Another 1993 (2) SA 451**.
22. The impugned decision is not reviewable at common law because it was neither irrational or unreasonable. It is additionally not reviewable on grounds of illegality because

WUC did not contravene or exceed the power which authorised the making of the decision.

23. In this particular case, if the Court found that WUC failed to exercise its powers, it could not substitute its decision by directing that the report be availed.

24. The constitutional review is premised on two grounds. First, it is argued that by virtue of the doctrine of constitutional avoidance it would be unnecessary to apply the constitution if the matter is resolved on other grounds. Secondly, freedom of expression under section 12 of the Constitution is not absolute but is subject to limitations. The section does not expressly or indirectly confer any freedom of information which the applicant can invoke in its demand for the report. By the same reasoning, the international treaties cited by the applicant on freedom of information are not binding or enforceable unless they have been introduced into our domestic law.

THE ISSUES

25. As broadly stated in the introduction, the issues that this Court is asked to determine are whether;

25.1 the application is frivolous, vexatious, moot, or is based on hearsay; and

25.2 the impugned decision is reviewable on the grounds of illegality, unreasonableness, irrationality, or constitutional grounds.

IS THE APPLICATION FRIVOLOUS, VEXATIOUS, MOOT, OR BASED ON HEARSAY?

26. These questions can be summarily dealt with. At the centre of the application is a demand for the report whose existence is not an issue. The subject of the report is the inflow of water into Gaborone Dam which had allegedly been impacted by two hundred "illegal" dams erected within the catchment area of Gaborone Dam. Of course, the illegality of the dams is only an allegation by a newspaper which is yet to be established should

that be necessary. However, Water Utilities is the sole water authority in Botswana. It is therefore not idle for members of the public to be interested in any matter that may impact its mandate and capacity to provide the public with adequate and uninterrupted water supply.

27. Such concern is neither frivolous, vexatious, or in this case moot because the impact of the alleged dams on the flow of water into Gaborone Dam cannot be ignored or dismissed unless the true extent thereof is known. The matter is also not based on hearsay because the existence of the dams in question is not denied.
28. On that basis, I do not believe that the application ought to be dismissed on those grounds.
29. The only question that arises is whether the applicant's interest is sufficient or equates to a legal right that can sustain the present application. That question is dealt with below.

REVIEW OF THE IMPUGNED DECISION

30. The principles on which an administration decision may be reviewed have been articulated in a long chain of cases in Botswana which are too numerous to recite here. In **Attorney-General v Tapela [2018] 2 BLR 118** at p130E-G. Kirby JP (as he then was) stated;

“The headline grounds upon which administrative and quasi-judicial decisions may be reviewed and set aside in Botswana are illegality, irrationality, and procedural impropriety. See *Attorney-General and Another v Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234, (CA) in which *Council of Civil Services Unions and Others v Minister for the Civil Service* (1984) 3 All ER 935 (HL), and *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) were applied.”

31. The Court continued to state that;

"The word 'irrationality' is used in the sense of 'Wednesbury unreasonableness' as characterized by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; [1948] 1 KB 223 (CA) at p 683 as 'a decision on a competent matter . . . so unreasonable that no reasonable authority could ever have come to it', and by Corbett JA in the *Witwatersrand Nigel* case at p 152 as '(a decision) so grossly unreasonable as to warrant the inference that he (the decision-maker) had failed to apply his mind to the matter . . .'. The ground of illegality, or unlawfulness, also embraces the doctrine of ultra vires, and in this case the complainant is that the directive conveyed by the savingram, is ultra vires the Prisons Act, and is also irrational."

32. In considering illegality, it is imperative to have regard to the case of **Landmark Projects (Proprietary) Limited & 5 Others v Cul De Sac (Proprietary) Limited CACGB – 029 - -21** (unreported) where the Court of Appeal held that;

"A decision is illegal if it:

- a) contravenes or exceeds the terms of power which authorises the making of the decision;
- b) pursues an objective other than that for which the power to make a decision was conferred;
- c) is not authorised by any power;
- d) it contravenes and fails to implement a public duty."

33. It is common cause that WUC is a creature of statute and is bound to exercise its powers and perform its functions within the four corners of the enabling legislation; in this instance section 17 of the Act.

34. It is acknowledged that Interpretation is the process of attributing meaning to words used be it in a document, legislation or some other statutory instrument. See, **Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) (SA) 593 (SCA)** at para 18. The Court will in that enterprise not only consider the words used and their grammatical meanings but also to the provision in question in its context and purpose.
35. The Endumeni Municipality case has been given seal of approval by the Court of Appeal in several cases. See, **Seleka v Bibian Ventures (Pty) Ltd [2015] BLR 412** at p415H – 416A–F; **Botswana Land Board Authorities Workers' Union and Others v Botswana Public Employees Union and Others [2016] 1 BLR 434 (CA)** at p448. See also **Phakalane Estates (Pty) Ltd v Mpaesele [2013] 3 BLR 410, (CA); Mhale v Boko and Others [2014] 2 BLR 134 (CA).**

36. It is important to also bear in mind that "interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise.'" See; **Bothma - Batho Transport (Edms) BPK v Bothma & Seun Transport (Edms) BPK 2014 (2) SA 494 (SCA) at para 12.**

37. In addition, the Interpretation Act Cap 01:04, provides essential directions on how statutes must be interpreted. Section 26 thereof provides;

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

38. In section 49 power is defined as including; privilege, authority or discretion.

39. In attributing meaning to section 17, one observes that the section confers power on WUC for the purposes of facilitating

present or future research or planning in the execution of its mandate. To achieve that objective, WUC shall keep full and accurate records of its operations. And shall have the power to engage in research and to publish the results thereof.

40. In *casu*, the proper interpretation of the section is that it confers a privilege, authority, or discretion on WUC to publish the results of any research or records as it may determine. The section is therefore permissive and not directive, meaning that the decision whether or not to publish is discretionary.
41. That being the case, the applicant is wrong in contending that it is entitled to the report because section 17 mandates it.
42. Water Utilities commissioned the study and the resulting report was intended for its benefit and to aid in its operations, hence the decision was taken not to publish the report. The question is whether in making that decision, WUC contravened or

exceeded the terms of the power conferred on it by section 17 or whether it pursued an objective not authorised by the Act.

43. The power conferred by section 17 included the power to conduct research and to publish the results. WUC exercised that power by commissioning the study but chose not to publish the report for the reason that the report was for its internal use. The applicant has not shown in what manner that decision contravened or exceeded the bounds of section 17 or was not authorised by the Act.

44. The applicant has strenuously argued that it was unreasonable and contrary to the dictates of section 17 for WUC not to publish the report because no authority or public authority in the position of WUC would have reached the decision that WUC arrived at. Here we must recall, at the risk of repetition, that the research was undertaken for the purpose of enabling WUC to plan for its activities in the discharge of its functions. The applicant has not shown any unreasonableness in the manner

in which WUC exercised its discretion not to publish the report, or how that discretion was abused by WUC.

45. The applicant complains of the irrationality of WUC's decision. The burden lay on the applicant to show how the decision not to publish was irrational. This is because if the decision is to be irrational, it should be one which the water authority could never have arrived at because it was so farfetched that it could not have been a proper decision to arrive at. The impugned decision was taken in the exercise of a discretion as opposed to a directive to publish. The decision was in the circumstances sanctioned by the Act.
46. For those reasons the applicant's case must fail because no illegality, irrationality or procedural impropriety has been shown.
47. The question now remains whether the impugned decision is reviewable under the constitution for breach of the applicant's

perceived freedom of information. Several international instruments and case law on freedom of information were cited to buttress the applicant's case. It should be noted that Botswana does not have a freedom of information Act. Parliament is yet to enact such a law. This is why the applicant has travelled far and wide to quote international instruments. It is trite that, unless such instruments are domesticated in our legislation, they are of no legal force.

48. The other aspect of the question is whether the right to the report can be justified under the constitution. In view of the decisive conclusion already arrived at above, it is unnecessary to delve into that enquiry on the basis of the doctrine of constitutional avoidance, concerning which the case of *Tapela*, *supra*, at p127G-H states;

"Constitutional cases are of great moment. They are thus brought only in exceptional cases since most disputes can be resolved by reference to the common law and to the statutes enacted by Parliament, and by review

proceedings. It is for this reason that it has been consistently held, as Mr Marcus pointed out, that where a case can be determined without resorting to the Constitution, that is the route which should be followed. In **Ramantele v Mmusi and Others [2013] 2 BLR 658**. (CA) a full bench of this court held per Lesetedi JA at p 670 that:

'It is a well-recognized general rule of decision-making that where it is possible to decide a case before the court without having to decide a constitutional question, the court must follow that approach.'

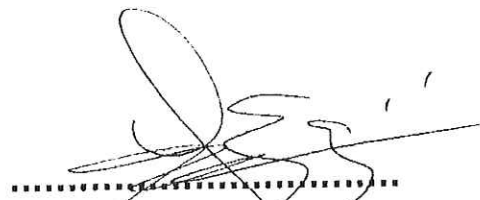
See, **S v Mhlungu and Others 1995 (3) SA 867 (CC); 1995 (2) SACR 277; 1995 (7) BCLR 793; [1995] ZACC 4** at p 895E."

THE ORDER

49. It is ordered as follows;

The application is dismissed with costs.

**DELIVERED IN OPEN COURT ON THIS 26TH DAY OF
SEPTEMBER 2023**



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O M MOTUMISE
JUDGE