IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-031-16
High Court Civil Case No. MAHGB-000383-15

In the matter between:

LAW SOCIETY OF BOTSWANA	**1ST APPELLANT**
OMPHEMETSE MOTUMISE	**2ND APPELLANT**

AND

THE PRESIDENT OF BOTSWANA	**1ST RESPONDENT**
THE JUDICIAL SERVICE COMMISSION	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

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

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

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JUDGMENT

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

LESETEDI J.A.

1. This matter raises two fundamental issues of constitutional importance. The first is the nature and extent of the power

conferred upon the President under section 96(2) of the Constitution in the process of the appointment of a Judge of the High Court. The second question is whether the courts have a power to prescribe to the Judicial Service Commission the manner and way in which it should carry out its constitutional mandate more particularly whether the courts can prescribe to the Judicial Service Commission that after conducting its interviews of applicants for judicial office it should make public the outcome of its deliberations on such applications.

2. The factual background leading to this dispute is common cause and it follows herein.

3. In late 2015 a vacancy became imminent in the High Court Bench due to the resignation of one of the sitting Judges.

4. To fill in the vacancy the 2nd Respondent a constitutional body provided for under Part III of Chapter Six of the Constitution, inserted an advertisement in some of the local newspapers inviting applicants for the position of a Judge of the High Court. It set out

the minimal requirements provided under section 96(3) of the Constitution.

5. A number of applicants including the 2nd Appellant applied for the position and the 2nd Appellant was selected as the successful candidate by the Judicial Service Commission and recommended to the President for appointment under section 96(2) of the Constitution. In a short letter the President through his Permanent Secretary, wrote back rejecting the recommendation. No reasons therefor were furnished.

6. Before the 2nd Respondent got to take any further step, the 2nd Appellant had come to learn about his recommendation for appointment and the President's rejection of that recommendation. He and the Law Society of Botswana which is the 1st Appellant in this matter approached the High Court challenging the President's refusal to implement or endorse the recommendation of the Judicial Service Commission. Their argument was that on a proper and plain reading of section 96(2) of the Constitution the President is bound to appoint

any person recommended to him or her by the Judicial Service Commission for appointment.

7. The Respondents' argument on the interpretation of section 96(2) of the Constitution is that the Judicial Service Commission merely advises the President and that the President is not bound by that recommendation and if he or she declines to act on the recommendation the President is not obliged to provide reasons for declining.

8. The Appellants' complaint regarding the procedure and manner in which the Judicial Service Commission hears applications for judicial appointment, together with the need to make public the outcome of its deliberations on the appointment of judges arises from the 1st Appellant's long standing discontent that the Judicial Service Commission does not carry out its mandate in the appointment of judges in a transparent manner.

9. The specific reliefs which were sought at the High Court are that:

> "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 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 appointment of judges.
>
> 1.6. The first and second respondents are ordered jointly and severally to pay the applicants' costs;
>
> 1.7. The applicants are afforded further or alternative relief."

Proceedings at the High Court

10. The dispute was fully articulated at the High Court where both sides filed detailed affidavits in support of their positions.

11. After considering those affidavits, annexures filed therewith and the weighty submissions of Counsel on both sides, in support of the contended interpretations and understandings on the points which arose, the High Court in a panel of three Judges dismissed the application with costs including costs of two counsel.

12. The High Court rejected the submission that the President's powers under section 96(2) were not subject to the powers of judicial review. It held that the President's power was subject to review on the ground of irrationality. It however found that the Appellants' case was not based on irrationality but illegality.

13. On the interpretation of Section 96(2) of the Constitution the High Court held that the advice of the Judicial Service Commission was not binding on the President and that the President was entitled to refuse to follow the lawful advice of the Judicial Service Commission on the appointment of High Court Judges. In consequence, the High Court refused to review and set aside the President's decision not to appoint the 2nd Appellant as a judge of the High Court.

14. The High Court also held that the prayer that the interviews of candidates for appointment as judges must as a rule be open to the public was vague and incapable of implementation but also that the argument on transparency was a double edged sword which did not on its own create more fairness than the current procedure of holding interviews for judicial appointments behind closed doors.

15. The same fate befell the last prayer of making public the outcome of the Judicial Service Commission's deliberations on the appointment of judges.

16. The prayer 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, was not dealt with in the judgment of the High Court and was also not pursued on appeal. The decision not to pursue it on appeal appears to have been well advised in that members of the Judicial Service Commission once appointed into the Commission and taken oath have to abide by their oath and are not

entitled in breach of their oath as members of the Judicial Service Commission to be reporting to and consulting with their principals "on all matters" as there may be matters of a confidential nature which should not be subject to public consumption. For other matters the reporting may be on broad parameters without going into the details of the matters. Any reporting or consultation and the level thereof would depend on what the Judicial Service Commission may in the circumstances of each case or as a policy authorise its members and subject to the members' oath of office. See section 103(3) to (6) of the Constitution.

Section 96(2) of the Constitution

17. The Appellants' argument is that the President's power under section 96(2) of the Constitution is merely a formal power. They submit that the real appointment is carried out by the Judicial Service Commission and that the President is then bound to act in accordance with the recommendation or advice of that constitutional body. That interpretation, it was submitted, is consistent both with the ordinary meaning of the phrase "acting in accordance with" and

the concept of institutional independence of the judiciary whereby the judiciary is not appointed by the other arms of government but by an independent body. That interpretation, they submitted was widely accepted by many jurisdictions. The Appellants also drew the Court's attention to the "original intention of the founders of the Constitution" as reflected in one of the minutes of the committees preparing for the provisions of the founding Constitution in 1966.

18. It is unnecessary to consider each and every argument advanced by the parties save to observe that although the Respondents support the Orders of the Court below, they do not support the Court below's findings regarding the reviewability of the President's decision on irrationality but contend that such can only be reviewed on the ground of illegality.

19. The Respondents' case is that the President in exercising the powers under Section 96(2) of the Constitution is reposed with a discretion to refuse to appoint a candidate recommended by the Judicial Service Commission in that the appointment of a judge is a Presidential

prerogative power which is substantive in its nature as it involves a consideration and balance of high policy considerations for instance, factors of security and socio-political factors whilst the technical factors are the ones that stand to be considered by the Judicial Service Commission, the latter acting as a first tier in the appointment process.

20. The Respondents proceed to submit that because of its prerogative nature, the power of the President to decline or to refuse to appoint a person recommended for appointment by the Judicial Service Commission is not justiciable as it is a matter of high policy with which the court is not equipped to deal with. In that regard, so submits the Respondents, the only limit to the President's power under section 96(2) of the Constitution is that he cannot appoint a person not recommended by the Judicial Service Commission. Other than this restriction on the President's powers, he or she enjoys a margin of discretion to decline to appoint as judges persons who have been recommended by the Judicial Service Commission. He or she can, it was submitted, continue to decline appointing

recommended candidates without limit; and he or she has no obligation to give reasons therefor.

21. Counsel on both sides have submitted well researched and detailed heads of argument each drawing on authorities to support its case.

22. Having outlined what I consider to be the core arguments of the parties on this point, I now turn to the provision itself. Section 96(2) of the Constitution reads:

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

23. The preceding sub-section reads:

> "The Chief Justice shall be appointed by the President."

24. It is accepted by the parties that section 96(1) gives the President the sole and substantive power to appoint the Chief Justice. It is also accepted by the parties that the President cannot appoint other

judges except where such judges have first been recommended for appointment by the Judicial Service Commission.

25. The narrow but difficult question is whether it is peremptory under that provision for the President not to decline or to refuse to appoint a judge recommended for appointment by the Judicial Service Commission. If the answer to that question is that the President is obliged to effect the recommendation by appointing the recommended person, then that is the end of the enquiry. As in such event the Appellants' argument will have prevailed.

26. In the event the Court finds that the President's powers are prerogative powers and are not amenable to judicial review, thus not justiciable, there too flounders the Appellants' case and that will be the end of the enquiry.

27. If, however, the Court finds, as the Court below did find, that the President's powers under section 96(2) of the Constitution are subject to judicial review on questions of irrationality then that calls

for an examination of the particular facts of this case to determine whether the President, in refusing to appoint the 2nd Appellant as recommended by the Judicial Service Commission, acted irrationally. The test of irrationality in such a case will be the now well established test. See **CCSU v Minister for the Civil Service [1984] 3 All ER 935; Attorney General and Another v Kgalagadi Resources Development Company (Pty) Ltd [1995] BLR 234 (CA).**

28. Our courts have been faced with questions of the proper approach to adopt in Constitutional interpretation for several decades now. In **Petrus and Another v The State [1984] BLR 14(CA) at 34E-F**, Aguda J.A. adopted the approach expressed in the following statement of Sir Udo Udoma of the Supreme Court of Nigeria in **Rafiu Rabiu v The State (1981) 2 N.C.L.R. 293 at p.326** in reference to the written Constitution of Nigeria, that the Constitution is:

> "...the Supreme Law of the Land; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn...that the function of the Constitution is to establish a framework and principles of government, broad and

general in terms, intended to apply to the varying conditions which the development of our several communities must evolve, ours being a plural, dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution."

29. In adopting Sir Oduma's proposition, Aguda J.A. stated:

> "These principles, in my opinion provide some guide to statutory interpretation vis-à-vis the construction of Constitutional provisions."

30. Aguda J.A. immediately proceeded to articulate the caveat in the **Rafiu Rabiu** case that:

> "I do not conceive it to be the duty of this court so as to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends."

31. Similarly to the proposition in the **Rafiu Rabiu** case is the view expressed in **S v Acheson 1991 (2) SA 805 (Nm HC) at 813A-B**, that –

> "The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and

> disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

32. The views expressed above is that the constitution is not a static document but is a living and organic instrument, not a lifeless museum piece; and that it must be interpreted to reflect the mores and norms of the time was to be emphasised by the Court in **Attorney-General v Dow [1992] BLR 119 (CA)** and subsequently in **Attorney General's Reference in re The State v Marapo [2002] 2 BLR 26 (CA) at 32C-D**. That the Constitution should be understood and applied as a living document, to be interpreted to reflect the mores and norms of the time is therefore now well established.

33. In **Attorney-General v Dow [1992] BLR 119 (CA) at 131-132** Amissah P. reminded us that:

> "...the very nature of a Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution;..."

34. The same approach has been re-emphasised in subsequent cases, for instance, **Makuto v The State [2000] 2 BLR 130 (CA) at 134-5**.

35. The Appellants have in their submissions argued that the Court must in interpreting the Constitution also adopt the approach set out in **CACGB-035-16 Botswana Land Boards and Local Authorities Workers' Union and 4 Others v Botswana Public Employees Union and 4 Others (CA) (unreported)**, a case dealing with interpretation of the constitution of a bargaining council.

36. Although it has been held that words used in a statute must be given their ordinary literal meaning and that where such meaning is plain, the court must give effect thereto, that is not an approach suitable in all cases. The courts while recognising that dictionary meanings can be used as aids in interpretation have also warned against overreliance on such meanings. See, **Surmon Fishing (Pty) Ltd and Others v Compass Trawling (Pty) Ltd and Others 2009 (2) SA 196 (SCA) at page 202A-C** where the court cautioned:

> "But judicial interpretation cannot be undertaken, as Schreiner JA observed in *Jaga v Donges NO and Another, Bhana v Donges NO*

and Another 1950(4) SA 653(A) at 664H, by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears *(Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd 1984(3) SA 834 (W) at 856G ad fin*). As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispenable. Occasionally, however, it is not."

37. And as was said more than half a century ago:

> "Any... law would, of course, have to be interpreted in the light of its own language and context."

Per Schreiner J.A. in **Minister of Interior v Machadodorp Investments (Pty) Ltd and Another 1957 (2) SA 395A at 400 (AD).**

38. In my view therefore, in interpreting the Constitution, the Court should not merely be content with the literal interpretation of a particular provision or sub-provision in isolation no matter how beguilingly straight forward that interpretation may be. The court must look at other provisions of the Constitution having a bearing on the subject in issue and in the light of the whole document in the light of the prevailing values and mores of the society.

39. It was argued very strongly that in interpreting this Constitution the Court should to travel way back to one of those meetings which were held in England in preparation for the final constitutional document and peer at the statements made by some of the participants in the meetings, this without a full picture of the surrounding circumstances of those meetings and the final formulation of the Constitution. I find this not the most desirable of routes to follow for two reasons. Firstly, if a constitution is to be considered and interpreted as a living document, it will be inconsistent with that kind of approach to reflect the current mores and values of the society by travelling back in time decades and peer at the remarks made by individual members in the committee in one of the meetings when we are not given a full picture of the context and stage let alone the ranking of some of those who were involved and to look at the provisions as they themselves would have looked without they having the benefit of foresight. It is an originalist view which ignores that with the passage of times those views become more faint and irrelevant as they are stuck back in time whereas the Constitution itself is organic moving with the times. It is in my view, an approach which should

be adopted with utmost caution. What was said at the pre-constitutional conference retains its historical importance but is not pivotal as an aid in interpreting the Constitutional clause.

40. The second reason why I am not enamoured with this approach is that it seems to falter on the legalistic and textual interpretation without giving the constitution full life in its meaning to reflect the value of the times and the mischief, if any, which the provision was intended to remedy and should be considered to remedy in the times as they prevail. As we are so often reminded, "although the text is often the starting point of any constitutional construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous." Per Moseneke DCJ in the **Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd 2007(6) SA 199 CC**. See also **e.tv (Pty) Ltd and Others v Minister of Communications and Others [2016] ZASCA 85**.

41. At the end of the day the duty of the Court in trying to ascertain the meaning of a provision of the Constitution is to look at the totality of the various considerations that come into play in the interpretation; this being the wording of the provision in the context of the other provisions of the constitution having regard to the mores and values of the society as a contextual setting being mindful that a constitution is not a static document but one that lives with the times and evolves for the better good of the society within the limits of its language. Unlike an ordinary statute, it is not always helpful to travel back in time to people who were involved in its negotiation to try to find what its meaning within the current context would be. The Court must also have regard to any Constitutional developments which may have since taken place and what bearing, if any, such developments may have to the intentions of the founders of the Constitution.

42. One therefore has to look at the competing arguments and having considered some of the arguments advanced by the Appellants, I turn to those advanced by the Respondents.

43. The Respondents' argument on the prerogative power of the President is that the power to appoint a judge is one of the residual powers of the head of state traceable to the English law of the prerogative of the Head of State. They have cited among others the case of **Patson v The Attorney-General [2008] 2 BLR 66 (HC)** where Kirby J., as he then was, discussed the concept of prerogative power in detail. The question that arose in that case was one of withdrawal of the appellant's passport. The Court discussed the concept of the prerogative in detail but found that the withdrawal of the passport interfered with the appellant's constitutionally protected freedom of movement and the right to travel. It held the withdrawal reviewable and set it aside on the ground of unlawfulness. It nonetheless held, following the authority of **Good v The Attorney General (2) [2005] 2 BLR 337 (CA)** that even the exercise of prerogative power is subject to judicial review. See **President of the Republic of Botswana and Others v Bruwer and Another [1998] BLR 86 (CA).**

44. It seems to be the law however, that once a power is conferred by statute or by the constitution expressly, it ceases to be a prerogative

power. That would apply in the present case where the President's power is conferred under section 96(2) of the Constitution.

45. This takes the enquiry back to the starting point of looking at the wording of the questioned provision textually and contextually with regard to other provisions bearing on the subject and what in the light of the values of the Constitution and of the society can be considered to be the intention of the Constitution.

46. The Appellants in formulating their complaint have focused on the phrase "acting in accordance with" as determinative. Over and above the text of that phrase, the Appellants drew the Court's attention to the meaning ascribed to it in constitutions of a number of other countries - to expressions of the same wording or in *pari materia* to that expression. They also drew the Court's attention to page 135 of a copy of minutes of a meeting held in preparation for the final draft of the Constitution in February 1966. I have already remarked upon the reliance on the copy of those minutes.

47. A comparative analysis of the questioned phrase with those of other jurisdictions cannot be over emphasised. However, the courts must be very cautious in the wholesale acceptance of interpretations given in foreign courts on similar expressions without a full analysis of both .the law and context in those jurisdictions and those within the jurisdiction. Foreign comparative law is often more helpful in formulating the principles than in giving effect to interpretations of specific provisions without providing the context of the foreign law which is relied upon. In the present case for instance, a lot of the cases which have been referred to are cases where either the Head of State who makes the final appointment does not wield executive powers or where we were not provided with a wider context of the constitutions whose interpretations were relied upon to provide a better picture.

48. Many of the authorities relied upon were extracted from a document entitled "*The Appointment, Tenure and Removal of Judges Under Commonwealth Principles*" ("*the Compendium*") where experts were appointed to study the constitutions of the Commonwealth and make

recommendations on the best practices of judicial appointments. The Compendium itself shows that across the Commonwealth there are different constitutional settings for judicial appointment followed by the Commonwealth countries. It also showed that there are many Commonwealth countries whose constitutions are on a Westminster model with ceremonial heads of state and others with Republican types of constitutions where the Westminster model may, as in Botswana, only be reflected in the method of elections of members of parliament i.e. through first past the pole set up, but not with an executive head of state.

49. The Constitution of Kenya was also given as an example whose wording is similar to ours. This, however, has been contradicted by the Respondents who argued that the Appellants relied on the Compendium and that the Compendium had not properly reflected the provisions of the Kenyan Constitution. I have been able to obtain a copy of the Constitution of Kenya and will discuss it in due course.

50. But in the light of what I have said earlier when discussing constitutional interpretation rules, the court must not only look at that provision in isolation but must look at other provisions which have a bearing on the subject.

51. The Constitution of Botswana lays out powers and duties of both the President and the Judicial Service Commission under various provisions depending on the mandate. Where such power is fettered or unfettered it has in some provisions clearly so specified.

52. The President is the head of state and this is expressly so provided under section 30 of the Constitution. Section 47(1) vests executive power of Botswana in the President and which, "...subject to the provisions of [the] Constitution, shall be exercised by him or her either directly or through officers subordinate to him or her."

53. Section 47(2) to provides –

> "In the exercise of any function conferred upon him or her by [the] 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."

54. There are a number of instances in the Constitution where the President's powers are clearly unfettered for instance in the appointment of the Attorney-General, the Chief Justice, the President of the Court of Appeal, members of the Public Service Commission and under section 103(f) of the Constitution. That, it has been argued by the Respondents, is the default position of the powers of an executive President and where the President exercises formal powers, such being powers restricted under section 47 of the Constitution, the Constitution has plainly said so. Instances given are section 66(10) of the Constitution which relates to the removal of the Secretary to the Independent Electoral Commission from office, section 97(4) which relates to the recommendations made to the President for the removal of a judicial officer for infirmity or misbehaviour, subsection 101(4) relating to the removal of a judge of the Court of Appeal, and section 113(4) relating to the removal of a Director of Public Prosecutions from office.

55. Similarly, there are provisions in which the powers of the Judicial Service Commission are unrestricted. This is so, for instance, under section 64(2) which relates to the appointment of the Delimitation Commission and 65A (2) relating to appointment of members of the Independent Electoral Commission where the All Party Conference has failed to agree on any or all such members.

56. Section 96(2) grants restrained power, or power with a duty, to the President. One way of trying to resolve the problem of interpreting the extent of the restrained power under section 96(2) is to first consider the purpose and role of the Judicial Service Commission within the constitutional set up insofar as it relates to appointment of judicial officers in its historical and textual set up.

57. The legal instrument through which Botswana obtained its independence from the United Kingdom is the Botswana Independence Act 1966. Under that Act the Queen with the advice and consent of the United Kingdom's Lords Spiritual and Temporal, and Commons, conferred Botswana its independence on the 30th

September 1966. The 2nd Schedule to the Botswana Independence Order of 1966 was the Constitution of the newly formed republic. Insofar as it is relevant to the establishment of the Judicial Service Commission, Section 104 (now section 103(1) thereof provided:

> "(1) There shall be a Judicial Service Commission for Botswana which shall consist of –
>
> (a) the Chief Justice, who shall be the Chairman;
>
> (b) the Chairman of the Public Service Commission or such other member of that Commission as may for the time being be designated in that behalf by the Chairman of that Commission;
>
> (c) one other member who shall be appointed by the Chief Justice and the Chairman of the Public Service Commission acting together."

58. The above composition of the Judicial Service Commission shows that the Chief Justice played a predominant role in the Judicial Service Commission both as Chairman thereof and as having a say in the appointment of a third member of the Commission under that section.

59. Under Section 104(2) of the Constitution the Chief Justice and the Chairman of the Public Service Commission acting together had the

power to remove from office the member appointed under subsection 1(c) of the Constitution as it then stood.

60. I take judicial notice that Botswana was at the time a nascent state with a rudimentary set up where, as is evident, the head of the judiciary played a key, if not predominant, role in both the composition and, as is apparent from Section 104(4) and (5), its functions. There was at that time no role to play by any other stakeholders for instance, the lawyers as there may only have been a couple, if any, local practising attorneys in the country then.

61. With due passage of time as the society developed and stakeholder interest became more pronounced the necessity arose to have a national conversation on the state of the judiciary and the composition of the Judicial Service Commission. This resulted in the establishment of a Presidential Committee in 1994 which was headed by the then Justice of Appeal Akinola Aguda. Other members of the Commission were members of the legal profession and other stakeholders. One of the Commission's terms of reference was to –

"Consider the adequacy or otherwise of the Constitutional provisions relating to the Judicial Service Commission."

62. After public hearings in major centres around the country, and having received written inputs from members of the public, the Commission came up with a report which commonly came to be known as the Aguda Commission Report. One of its recommendations was that the Judicial Service Commission as it then stood was not reflective of the broader interests bearing upon the appointment of judicial officers and that it required to be widened to be more inclusive.

63. That recommendation was accepted except for a second representation of the Law Society through its Chairperson. Pursuant to that recommendation the Constitution was amended in 2002 to widen the representation of the Judicial Service Commission. Under the new Section 103 of the Constitution, the Judicial Service Commission came to be composed of:

"(a) the Chief Justice who shall be Chairman;

(b) the President of the Court of Appeal (not being the Chief Justice or the 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 experience not being a legal practitioner appointed by the President."

That Constitutional amendment required not less than two thirds majority in Parliament and a majority referendum vote to pass. See, section 89 of the Constitution.

64. Section 103(2) of the Constitution proceeds to provide that:

> "A member nominated under paragraph (e) or appointed under paragraph (f) of subsection 1 shall hold office for a period of two years, but shall be eligible for re-nomination or reappointment, as the case may be, for another term of office for two years;"

65. Significant in the amendment to the composition of the Judicial Service Commission are first, the increase of membership from three to six, second, the taking away of the power of the Chief Justice and the Public Service Commission in appointing a third member of the Judicial Service Commission together with any power of removal, and, third, the appointment of a representative of the Court of

Appeal in the Commission. Also significant is the inclusion of the representation of the Law Society as a stakeholder and of the government through the Attorney-General. The Attorney-General is, by Section 51(3) of the Constitution the principal legal adviser to the government. The President is the head of government. This inclusion gives the government of the day a representation of its views or input in the appointment of judges. The President too has the right to appoint a person of integrity and experience who is not a legal practitioner into the Commission. Such power is evidently an executive power and not a formal one.

66. From the current set up of the composition of the Judicial Service Commission several key stakeholders, to wit, the judiciary through its head and the head of its apex court, the government through its legal adviser, the law society, the public service and the interest of integrity and experience are represented.

What then is the role of the various members of the Judicial Service Commission?

67. The members of the Judicial Service Commission must bring to bear the interests and perspectives of their constituents in any evaluation of a candidate for appointment while at the same time exercising an open mind and deliberate judgment thereafter to consider all factors and reach an informed and unbiased evaluation of the suitability of a candidate. For instance, the Attorney-General will bring the view of the government on the suitability of a particular candidate having regard to the policies of government for example, issues of gender empowerment, criminal records if any or any information which the government may have which may bear on the suitability of a candidate. The President in his capacity as head of government will obviously have an input in that regard through the Attorney-General. The Chief Justice and the Judge President may in the case of a practitioner who has appeared before the courts generally also seek the opinion of some of their colleagues who may have interacted with the applicant on questions the applicant's professional ability, temperament, efficiency and such other qualities that go to create a well-balanced judge. The representative of the Law Society too, is expected to consult the Council of the Law Society on the applicants

so that its own views and input can be brought forward. For that reason, it is expected that it will be in their interests to ensure that only qualified and competent persons are appointed to the Bench. The Chairman of the Public Service Commission too plays an important role from his experience and vantage point as, notwithstanding the independence of the judiciary, members of the Bench are public officers.

68. The member of the Judicial Service Commission appointed under Section 103(1)(f) of the Constitution brings into the enquiry the perspective of the qualities of integrity which he or she is expected, in the appointment process to have an interest in and seek to observe in the applicants. He or she may pose questions that may give some insight on the candidate's qualities in that regard. The experience referred to under Section 103(1)(f) of the Constitution though undefined seems to refer to maturity and ability of discernment of character - an element which is important in ensuring that people appointed to the Bench are people with the appropriate

temperament and character necessary to build an impartial, fair minded, firm yet humble, compassionate and efficient judiciary.

69. Each of the members of the Judicial Service Commission appreciating the onerous task of appointing of judicial officers will of course be alive that the process of appointing of a judge is an involved one and requires much more than the satisfaction by a candidate of the requirements set under Section 96(3) of the Constitution some of which, for instance, parts of 96(3)(b) and (c) do not require anything other than mere qualification to practice as an advocate or an attorney for a specified period.

70. Appointment to the High Court requires not only the technical qualifications but also a substantial legal experience. A judge presiding over cases has to have the experience, understanding, and ability to guide and oversee the proper conduct of litigation before him or her.

71. To be able to perform its duties the JSC through its members will of necessity have to carry out background checks and may in fairness to applicants have to place before the applicants certain probing questions based thereon some of which may be uncomfortable. On the other hand too, the applicants for this position must understand the public importance of the office they seek to hold and of the onerous responsibility resting on the Judicial Service Commission. A sensitivity in this regard may require that the applicants not only answer certain questionnaires in response to the advertisements but also sign authorisation and consent forms for purposes of facilitating background checks. The authorisation and consent forms would make it possible if not easier for the Judicial Service Commission to carry out its background checks and at the oral hearings of the applications to give the affected applicants the opportunity to comment on any findings that may adversely affect the applicant's suitability for appointment.

72. Of course, it may be important as has been realised in many jurisdictions that the Judicial Service Commission to effectively carry

out its mandate needs to be resourced to carry out these investigations. In England and Wales this has been provided for under the Judicial Appointments Commission.

73. The movement in making the Judicial Service Commission more representative and giving the government a say in the appointment of judges is not unique and some jurisdictions for instance, Canada have also moved in the same direction for judicial appointments to the Supreme Court.

How does this analysis have a bearing on the interpretation of Section 96(2) of the Constitution?

74. In the first place the above constitutional development of the composition of the Judicial Service Commission partially affects the originalist argument of relying on the minutes of a meeting held to discuss the drafting of the Constitution in February 1966 to show that the Constitution as it stands provides for a role by the executive head of state through the direct appointment of one of the committee members who is not there by virtue of an earlier appointment in a different substantive office for instance the Chief Justice and the

President of the Court of Appeal. It also shows that the government of the day has a way through its legal adviser the Attorney-General in the appointment of judges of the High Court all of which were not the case in the original Constitution.

75. What still remains is whether once the Judicial Service Commission has recommended a name for appointment as a judge under Section 96(2), the President is completely without discretion to decline to appoint the recommended name. In other words, is this appointment of the recommended name a mere formality? It is here that I turn, for comparative analysis, to the Kenyan Constitution of 2010. Article 166(1) of the Constitution of Kenya as revised in 2010 reads:

> "1. The President shall appoint –
>
> (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
>
> (b) all other judges, in accordance with the recommendation of the Judicial Service Commission".

76. The language of that Article is very clear and direct. It obligates the President to follow a certain procedure in appointing the Chief Justice, the Deputy Chief Justice and all other judges. Similar direct language is used in the Constitution in relation to the duties of the President, acting in accordance with the recommendation of the Judicial Service Commission. A distinguishable provision is Article 168(7)(b) which refers to a report by a tribunal appointed to investigate whether or not a judge ought to be removed from office. The provision reads:

> "(7) a tribunal appointed under clause (5) shall –
>
> (a) ...
>
> (b) inquire into the matter expeditiously and report on the facts and make binding recommendations to the President".

77. I do not for a moment intend to interprete the Constitution of Kenya. That is for the Kenyan courts if and when the moment arrives. It is however, significant to note that the language used in section 96(1) and (2) of the Constitution of Botswana puts emphasis on the appointed and not the President. It will be recalled that it reads:

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

(2) The other judges of the High Court shall be appointed by the President..."

78. The emphasis in that provision of our Constitution is on how a judge is appointed and in 96(2) the mandatory "shall" is on the judge of the High Court being appointed by the President. Thereafter there is a comma followed by the phrase 'acting in accordance with the advice of the Judicial Service Commission'. It is therefore clear only to the extent that a judge shall be appointed by the President if the President has been advised by the Judicial Service Commission to so appoint him. The language used in the preceding section 166 of the Kenyan Constitution is a direct one whereas in section 96(1) and (2) of our Constitution the emphasis is not on the appointing authority but on the appointed. In other words, a judge shall only be appointed by a President after having been recommended to the President by the Judicial Service Commission. That still raises the question does the President have an unfettered, if any, power to decline to appoint a name recommended for appointment by the Judicial Service Commission?

79. As stated above, when discussing the composition of the Judicial Service Commission, the President would, at the time of receiving the recommendation, have had an indirect input through the Attorney-General if he has any reason to believe that a particular candidate may not be suitable for appointment as a judge of the High Court. His or hers is however not the sole voice to be considered by the Judicial Service Commission. Importantly fairness would ordinarily require that some of the misgivings or issues which the government (the President being its head) may have against the candidature of an applicant, may also have been put to the candidate during the interview for him or her to comment, so by the time a recommendation is made to the President his views on the candidate would have been well considered by the Judicial Service Commission.

80. There may however be those rare instances where that is not so. One instance is where between the date the recommendation for appointment is made by the Judicial Service Commission and the President's acting on the recommendation, new developments come to light which impact on the suitability of the proposed appointee for

judicial appointment. In such a situation the President should, through the Attorney-General or directly, bring to the Commission's attention such development so as to give the Judicial Service Commission an opportunity to reconsider its recommendation in the light of the developments. In some rare instances the Judicial Service Commission may, where relevant information which may affect a candidate's suitability come to light after a recommendation has been made but before appointing, recall the recommendation for reconsideration in the light of the new developments. It is doubtful whether the Judicial Service Commission can at that stage be considered to be *functus officio* as the appointment process comes to conclusion when the appointment concluded through the act of appointment of a candidate. See, **Retail Motor Organisation and Another v Minister of Water and Environmental Affairs and Another 2014 (3) SA 251 SCA at 258.** It is also doubtful whether by merely drawing the Judicial Service Commission's attention to a factor which may be relevant for consideration in the appointment of an individual without directing the Judicial Service Commission to act

one way or the other such conduct can be considered a violation of section 103(4) of the Constitution which provides that:

> "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."

81. In exceptional circumstances where issues of national security arise, the government may either through the Attorney-General or through such committee as may have been appointed by the Judicial Service Commission under section 12 of the Judicial Services Act, bring that fact to the Judicial Service Commission in utmost confidence. Even in such a case, it is upon the Judicial Service Commission to consider the President's concerns and to call for such other information as may be necessary either from him or from any other source so as to reach a decision not only in the interests of the judiciary but the nation on whether or not to nonetheless recommend the candidate for appointment. Here the President may, ultimately and for stated reasons within the permissible limits decline to act on the recommendation where he considers that the recommendation

ignores an overriding concern of public security. Such scenarios may be rare indeed but are conceivable.

82. It is, as may be apparent from this judgment, sound that in considering whether a candidate is suitable for appointment, the Judicial Service Commission is entitled to make such enquiry as it considers relevant into the candidate's background, character assessment and other relevant considerations, in its evaluation of an application. There will obviously be cases where none of the candidates may meet the criteria set out for qualification in which event a re-advertisement may be called for.

83. In this legal set up therefore the President has some, though limited discretion, to refuse to appoint a candidate recommended to him by the Judicial Service Commission for appointment. His role in appointment of a judge under section 96(2) however, is not a formal one as he is in exceptional cases entitled, through the input of the Attorney-General to bring to the attention of the Judicial Service Commission factors which he considers relevant to the suitability of a

candidate for appointment. But this input does not become the sole determinant factor. It is weighed by the Judicial Service Commission together with other various inputs or factors brought to its attention through its other stakeholder members and in an evaluation process such input may or may not be the determining factor depending on the ultimate decision of the Judicial Service Commission. Therefore when all factors which reasonably ought to have been brought before the Judicial Service Commission at the time it carried out its evaluation of the candidates, then the President has little if any discretion to reject the decision of the Judicial Service Commission outright. Where he or she so acts, then his decision is subject to judicial review on the ground of illegality, so too when he or she keeps moving the goal posts resulting in delay or frustration of the appointment process.

84. Having considered the legal position, I turn to the particular facts of this case. The 2nd Appellant's application for appointment as a judge of the High Court was considered by the Judicial Service Commission and he was found to be the most suitable candidate. There is

nothing in the documents before this Court showing that at any stage during the deliberations of the Judicial Service Commission there was any input from the Attorney-General which may have reflected on the government's reservations on the 2nd Appellant's suitability to be appointed to the office of a Judge of the High Court.

85. The letter from the President refusing to act on the recommendation of the Judicial Service Commission did not provide any reason for such refusal. In his answering affidavit to the review application, the President, over and above relying on the legal advice upon which he acted in not providing any reason for refusing to act on the advice of the Judicial Service Commission, pointed out that he had sound reasons for not acting on the advice of the Judicial Service Commission but that on legal advice those reasons could not be disclosed. It is apparent that both the Judicial Service Commission and the President were not properly advised on the remit and powers of the Judicial Service Commission and those of the President in the implementation of section 96(2) of the Constitution.

86. In the circumstances, the President was not entitled to turn down the recommendation of the Judicial Service Commission as his role other than as set out above was to act in accordance with the Judicial Service Commission. It is the Judicial Service Commission which determines when to fill a vacancy. It initiates that process of filling up a vacancy by issuing out advertisements for the position and setting out the minimal qualifications stipulated in the Constitution for appointment to that office. It is to the Judicial Service Commission that the applications are submitted and it is that Commission as a collective body which considers the applications, evaluates the individual applicants and where necessary appoint subcommittees and/or where necessary, engage independent professional bodies to assist it in the evaluation of candidates. It is at that stage of the evaluation that the government as any other stakeholder including the judiciary and the Law Society brings its own input. And the Judicial Service Commission is entitled to seek even more views than those from the stakeholders so as to identify suitable candidates who meet the kind of independent minded, hardworking, upright and fair minded individuals to resource the judiciary. For it is only with those

kinds of individual judicial characteristics that a judiciary which is independent minded, which is efficient, accountable, and has sound knowledge of the law can be built. Sound institutions are not only built on sound legal infrastructure but also by people of sound qualities. This is where the role of the Judicial Service Commission comes into play.

Other government policy considerations for instance, gender parity, may entitle the President to bring these to the Judicial Service Commission's attention to ascertain if such considerations have been taken into account in the recommendation process and if those considerations have not, to call upon the Judicial Service Commission do so without compromising on other qualities which are important in judicial appointment.

87. In the absence of an explanation by the President therefore, his decision stands to be reviewed and set aside.

88. For that reason therefore this ground of appeal is upheld and the President's refusal to act on the recommendation of the Judicial Service Commission for the appointment of the 2nd Appellant as a judge of the High Court is set aside.

89. The now remaining issues for determination are in relation to the functioning of the Judicial Service Commission in relation to the value of transparency. This encapsulates the two reliefs, to wit, that it be declared that the Judicial Service Commission's interviews of candidates must as a general rule be open to the public, and, that it be declared that the Judicial Service Commission must make public the outcome of its deliberations on the appointment of judges. The need for deliberations themselves to be held behind closed doors is appreciated and accepted by the Appellants.

90. The Appellants predicate the two reliefs not on the ground that the contrary manner the Judicial Service Commission currently operates violates any written law, let alone the provisions of the Constitution

itself, but on what was submitted to be the principle of public interest and transparency.

91. Section 103(5) of the Constitution provides:

> "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". (*emphasis added)*

92. The Judicial Service Commission does not seem to have any documented procedure which it can be said to have breached. It has, so far as this Court is aware, been conducting its business behind closed doors as procedure which it has by conduct regulated for itself.

93. As the High Court held, the principle of transparency is neither set out as a requirement as to the manner in which the Judicial Service Commission may conduct its business nor is there any other provision in the Constitution or in the Judicial Services Act making that a

requirement. This can be contrasted with the position in South Africa where the Constitution expressly provides for openness as one of the guiding values (*vide* – Section 1(d) of the Constitution of South Africa).

94. Whether or not the Judicial Service Commission conducts its business of interview of candidates in the open or making public the outcome of its deliberations on the appointment of judges, is a decision to be made by the Judicial Service Commission and the Court has no right in the absence of any law empowering it to do so, to intervene and regulate the Commission's procedure. If the Court were to do so, it would itself be in breach of the very same Constitution by which it is bound and whose letter and spirit it is to articulate in its decisions.

95. The question of whether or not conducting interviews for judicial appointment should be carried out in the open is one of public debate. In South Africa there have been efforts to push the boundaries of the value of openness and transparency to disclosure of Judicial Service Commission's deliberations. But even there the

question of legal enforceability was not easy to surmount. See, **Helen Suzman Foundation v Judicial Service Commission and Others 2015 ZASCA 161**, where the Supreme Court of Appeal in South Africa recently held that the value of openness did not constitute a discrete and enforceable right.

96. There is a debate as to whether interviews conducted in public bear more fruits in the selection process than where interviews are conducted behind closed doors. Taking into account the need for a deliberative and rigorous selection process for the appointment of judges and the desirability of placing in front of candidates any pertinent facts of their character or antecedents for comment, sensitive, private and difficult questions may often have to be fielded by candidates during interviews. Public interest may then weigh in heavily on the side of protecting the privacy and dignity of the candidates. Practitioners who are doing well in their careers are likely to be inhibited by a process that exposes their private lives to unnecessary public scrutiny at an interview stage resulting in the recruitment process attracting those whose opportunities of success

elsewhere are more limited. These are some value consideration factors. No evidence was placed before the Court to empirically demonstrate the utility of public hearings over private ones in ensuring the recruitment of more qualified and competent judges.

97. The need for public hearings may even be reduced by publication of clear documented qualification criteria beyond the constitutional minimum standard so that successful candidates recommended for appointment can be judged, against that criteria, by the public.

98. It is unclear too, how, beyond the public getting to know those candidates whose applications have been unsuccessful, the public interest of knowing the failed candidates and with it the collateral possible embarrassment to the failed candidates, the public's perceived benefit crystalises to any enforceable right.

99. These are matters which the Judicial Service Commission itself has to consider, if it has not yet done so, as it is solely within its

Constitutional remit. But no matter how important values advocated for by the Appellants are, they do not constitute enforceable rights.

100. In the absence of any legal wrong, which the Appellants can point out as having been committed by the Judicial Service Commission and upon which a remedy lies, the reliefs sought in paragraphs 1.4 and 1.5 of the Appellants' notice of motion must, as held by the High Court, fail.

101. It is observed in passing that the High Court was also correct in pointing out that in any event the relief sought in paragraph 1.4 *i.e.* that the interviews of candidates must as a rule be open to the public is vague and lacks the necessary precision for judicial adjudication as it does not precisely state the circumstances under which the Judicial Service Commission may interview candidates behind closed doors.

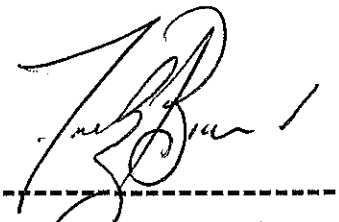
Costs

102. The Appellants having succeeded partially in the reliefs they sought, each party must bear its own costs of this appeal.

DELIVERED IN OPEN COURT AT GABORONE THIS 19th DAY OF April 2017.

I.B.K. LESETEDI
[JUSTICE OF APPEAL]

I AGREE



F.D.J. BRAND
[JUSTICE OF APPEAL]