IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE

MAHLB-000674-11

In the matter of:

BOTSWANA PUBLIC EMPLOYEES' UNION	**1st APPLICANT**
BOTSWANA TEACHERS' UNION	**2ND APPLICANT**
BOTSWANA SECONDARY TEACHERS' UNION	**3RD APPLICANT**
NATIONAL AMALGAMATED LOCAL & CENTRAL GOVERNMENT & PARASTATAL WORKERS' UNION	**4TH APPLICANT**

AND

THE MINISTER OF LABOUR AND HOME AFFAIRS	**1ST RESPONDENT**
ATTORNEY GENERAL (FOR AND ON BEHALF OF THE 2ND RESPONDENT)	**2ND RESPONDENT**

Advocate A.J. Freund SC (Cape Bar) with Mr. M. Chilisa for the Applicants
Mr. M. Chamme with Ms. O. Thamuka for the Respondents

J U D G M E N T

DINGAKE J:

Introduction

1. The applicants are duly registered trade unions who represent various categories of public sector employees. These applicants will henceforth be described simply as ("the Unions") or the applicants.

2. The first respondent is the Minister of Labour and Home Affairs. I shall refer to him henceforth as ("the Minister")

3. The second respondent is the Attorney General, cited in her capacity as the representative of the Minister.

4. The applicants seek orders declaring invalid Section 49 of the Trade Disputes Act (Cap 48:02) ("the TDA") and the amendment by the Minister of the schedule to the TDA which sets out the list of essential services. The amendment was effected through Statutory Instrument No. 57 of 2011 ("SI 57").

5. The applicant seeks to impugn the validity of SI 57 on a number of grounds, which I will in due course outline.

6. The case involves fundamental questions of constitutional and administrative law. It also raises issues relating to the place of international law in the municipal law of Botswana.

7. The facts that underpin this *lis* are largely common cause and may be stated briefly.

8. On or about the 18th of April, 2011, members of the applicants embarked on a nationwide industrial action. The industrial action also involved essential service workers. Also on strike were non-essential service employees such as members of the applicants whose jobs involved the rendering of veterinary, teaching, and transport services.

9. The legality of the strike by essential service workers was contested before the Industrial Court on or about the 26th April, 2011. The Industrial Court, pursuant to an application by the employer, issued an interim interdict restraining participation in the strike by those striking workers rendering essential services.

10. The interim interdict was confirmed on the 6th May, 2011, and on the 10th of May, 2011, the order of the Industrial Court was declared executable.

11. On the 16th May, 2011, the Government dismissed those employees who were said to have been providing essential services who had not returned to work.

12. On the 10th of June, 2011, the employees who remained on the strike gave notice of their decision to suspend the strike and return to work. Soon thereafter, on or about the 13th June, 2011, representatives of Botswana Federation of Trade Unions ("BFTU") received notice through e-mail, from the Assistant Labour Commissioner, on behalf of the Commissioner of Labour ("the Commissioner") of an emergency Labour Advisory Board ("LAB") meeting to be held on 16 June, 2011. The agenda for the meeting in terms of the notice, was to discuss amendment of the Schedule to the TDA through the addition of veterinary services and the teaching service to the list of essential services.

13. In her e-mail referred to above, the Commissioner referred to the definition of essential services adopted by the International Labour Organization, and echoed in Section 49 (6) of the Public Service Act No. 30 of 2008 ("PSA") namely "those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population".

14. The reasons for the amendment of the Schedule, according to the Commissioner, (on behalf of the Minister) were that, in respect of veterinary services, cattle are the backbone of the economy, thereby making it imperative to detect at the earliest opportunity disease like foot and mouth which may be detrimental to the cattle industry.

15. With respect to "teaching services", she asserted that teaching was essential to individuals in Botswana and that without it there would be no education.

16. The Commissioner also pointed out that as a result of the absence of education, students would then be subjected to poverty, and all the health hazards that flow from it.

17. On the 16th June, 2012, a meeting of LAB was convened and in addition to being requested to consider the addition of teaching and veterinary services, was also, without prior notice, requested to deliberate on the addition of "diamond sorting, cutting and selling services" to the list of essential services.

18. It is a matter of record that the LAB meeting of the 16th of June, 2011, did not proceed. It was unanimously agreed by all members of the LAB

(including those representing Government) that the meeting of June 2011 should stand adjourned until 30 June, 2011, to enable both employers and the Unions to go and seek their constituents' views on the issue.

19. The above agreement notwithstanding, on the 17 June, 2011, through Statutory Instrument No. 49 of 2011 (SI 49"), the Minister gazetted a new Schedule to the TDA.

20. The new Schedule differed from the original Schedule in material respects as follows:

    20.1 it made all transport and telecommunications services "essential services". Before the new Schedule came into being such services were only essential services if they were necessary to the operation of any of the initially listed essential services.

    20.2 The following category of services were added to the list of "essential services": Veterinary Services, Teaching Services, and Diamond Sorting, Cutting and Selling Services.

20.3 The new Schedule added the phrase "and all support services in connection therewith". The net effect of the above was a substantial amplification of the ambit of each one of the essential services, both those listed in terms of the initial schedule and those added by the new schedule.

21. It is plain that the amendments purportedly effected by the Minister substantially increased the scope of "essential services" and thereby removed rights from many employees.

22. Things took a different turn when on the 7 July, 2011, the National Assembly resolved to annul SI 49 and directed that the Minister gazette the annulment.

23. On the day after the annulment, Government expressed, through a public statement, its disappointment at the annulment of SI 49/2011 and announced that the Minister would shortly be reissuing the same statutory instrument.

24. The aforesaid statement sets out two grounds for re-issuing

the annulled statutory instrument; namely,

24.1 With regard to veterinary services, diamond cutting, sorting and selling services, the Government was concerned about the fact that they were the backbone of the economy and any prolonged industrial action would have calamitous consequences on it.

24.2 With regards to teaching services, Government was concerned about the right of children to education.

25. On 14 July, 2011, the Minister, through Statutory Instrument No. 57 of 2011 annulled SI 49.

26. Having outlined the factual background to this matter, I turn now to the grounds upon which the applicants seek to impugn the validity of SI 57.

Grounds upon which the Validity of SI 57 is Challenged

27. The applicants raise 8 (eight) constitutional and administrative law grounds to challenge the validity of SI57. In this judgment, I discuss a majority of the grounds advanced by the applicants save for 28.6 and 28.7 outlined below.

28. Purely out of convenience, I will employ the description of the arguments adopted by the applicants in their heads as I find such description useful and appropriate. These are:

28.1 The amendment was promulgated in the exercise of powers purportedly conferred on the Minister by Section 49 of the TDA, but that provision is itself *ultra vires* Section 86 of the Constitution ("the unconstitutional delegation by Parliament of its legislative powers argument").

28.2 The amendment is *ultra vires* Section 144 of the Employment Act (Cap 47:01) because the Minister failed to consult the Labour Advisory Board, as required by that provision ("the section 144 argument");

28.3 The amendment is *ultra vires* Section 9(1) of the Statutory Instruments Act [Cap 01:04] because, properly construed, that provision does not empower the Minister to re-issue a statutory instrument which is identical to one which the National Assembly has just resolved to annul ("the Section 9(1) argument")

28.4 The amendment is *ultra vires* Section 49 of the TDA, because, on a proper interpretation, that section does not empower the Minister to publish an order – as he did – which is incompatible with Botswana's ILO obligations ("the compatibility with international law argument");

28.5 By placing a limitation on the right to strike, which is not reasonably justifiable in a democratic society, the amendment is *ultra vires* Section 13 of the Constitution ("the freedom of association argument");

28.6 The amendment is an unreasonable exercise of delegated power, that is in so far as the Minister took into account irrelevant considerations and ignored relevant ones ("the unreasonableness argument"); and/or

28.7 The amendment is *ultra vires* as an unreasonable exercise of delegated power, *inter alia*, in so far as the Minister took into account irrelevant considerations and ignored relevant ones ("the unreasonableness argument") and/or

28.8 Botswana's membership of the ILO and ratification of ILO conventions gave rise to a legitimate expectation on the part of

the applicants that the Minister would not include as "essential services" services which did not meet the ILO standards. The Minister's failure to consult them on the amendment, which was particularly directed against them, rendered the amendment susceptible to review (the "legitimate expectation argument")

29. Having set out the facts of this case and grounds upon which the applicants rely for the relief sought, I turn now to a summary of the submissions of the parties with respect to the above grounds. It would be tidy to do so under each head as outlined above.

The Unconstitutional Delegation by Parliament of its Legislative Powers

30. The crux of the applicants' complaint under this head is that Parliament acted *ultra vires* the Constitution, by providing in Section 49 that the Minister may amend the schedule which is part and parcel of the Trade Disputes Act. They argue that Parliament has no power under the Constitution to authorize a Minister to amend an Act of Parliament.

31. Advocate Freund SC, learned counsel for the applicants contends that in a system based on constitutional supremacy, it is untenable and or impermissible for Parliament to authorize a member of the Executive,

in this case a Minister, to amend an Act of Parliament, as to do so amounts, in effect, to abdication of legislative authority. They point out that the Constitution gives Parliament legislative powers and not any other authority or entity.

32. The applicants accept that the Constitution does not preclude Parliament from enacting provisions which delegate authority to make subordinate legislation within the framework of a statute under which the delegation is made; but point out quite forcefully, that Parliament has no power under the Constitution to delegate to the Executive a power to amend an Act of Parliament itself.

33. Advocate Freund SC relied heavily on the *locus classicus* decision by the South African Constitutional Court case of the **Executive Council Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) 877 (CC)** in which the court held that it was impermissible for the legislature to divest itself of the plenary legislative power vested in it by the Constitution.

34. The respondents contend that Section 49 of the TDA is not unconstitutional. According to the respondents, Sections 86 and 87 of the Constitution does not preclude Parliament from enacting

provisions which delegate its authority to make subordinate legislation.

35. Mr. Chamme, learned Counsel for the respondents, contended that the words, “Parliament shall have the power to make laws for the peace, order, and good governance of Botswana” found in Section 86 of the Constitution properly construed authorises Parliament to delegate its power.

36. The respondents contend further that in Botswana, there are two types of delegated legislation. These are: (i) the exercise of delegated authority by means of the Henry VIII clause and (ii) by means of the more common means of delegated authority’s power to make subsidiary legislation.

37. The appellation “Henry VIII Clause,” refers to clause(s) which are so wide that they permit the delegated authority to amend or repeal acts of Parliament (See **Baxter, L “Administrative Law” Juta & Co Ltd, 1984 at p 196**) According to the learned author Baxter they are so named in view of the Statute of Proclamations of 1539, by which Tudor Monarch obtained powers from Parliament to satisfy his tendencies of exercising absolute power.

38. It was contended by Mr. Chamme that over the years, Parliament has delegated its power through both means; and that the argument that Section 49 of the TDA is unconstitutional is therefore untenable and unsustainable.

39. Mr. Chamme submitted that Section 49 of the TDA cannot amount to Parliament's abdication of legislative authority because Parliament still exercises control over delegated authority, pursuant to Section 9(1) of the Statutory Instruments Act, that requires all instruments made by a subordinate law-making authority to go through Parliament. It was accordingly argued that where Parliament retains the power to supervise and render void subsidiary legislation, then its absolute or unlimited plenary authority to make law is not in any way compromised.

40. The respondent accepted that the *locus classicus* case of **Executive Council Western Cape Legislature**, cited supra, provide a good guide with respect to the approach in cases of this nature.

41. However, Mr. Chamme, learned Counsel for the respondents, was quick to distinguish the constitutional provision in the South African Constitution that clothed the South African Legislature with law making powers with the Botswana counterpart. He seemed to suggest

that the wording of Section 37 of the South African Constitution that provides for the legislative authority of Parliament cannot be equated to its Botswana counterpart being Section 86 as read with Section 87.

42. The respondents argued that in some jurisdictions whose legal systems are based on constitutional supremacy, the use of Henry VIII clauses has been allowed by the courts. To this extent, he cited the Australian case of **Duplicators (Pty) Ltd v ACT (No.1) (1992) 177 CLR 248.**

43. Mr. Chamme argued that the above case is the authority for the preposition that it is permissible for the Legislature to delegate its law-making authority, so long as it retains the power to amend and repeal the statute that conferred the power.

44. Mr. Chamme further argued that the exercise of amending the schedule involves the issue of separation of powers, but is a matter to be done on practical consideration.

45. Having regard to the fact that both parties accept that the case of the **Executive Council of Western Cape Legislature** provides useful guideline for this court in resolving the issue of the constitutionality of

Section 49 of the TDA, it is imperative to have a closer examination of the case and the reasoning of the court. It may be worth-noting that eleven justices presided over the matter.

46. In the case of **Executive Council of the Western Cape Legislature**, cited above Chaskalson P alluded to the difficulty of Parliament attending to every detail of legislative provisions in the following terms:

> *"In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies."*

47. The above notwithstanding, Chaskalson P made it abundantly clear that where Parliament is established under a written Constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history.

48. According to Mahomed DP, a tension exists in the Constitution when it comes to the delegation of legislative authority. On the one hand, the Constitution vests the legislative power in Parliament and

therefore requires that it and it alone, shall have the power to make the laws. On the other side of the coin, it may be said that since Parliament alone is entitled to make law, there is no reason why Parliament, in principle, should not be able to delegate its lawmaking function when it considers it necessary for the proper discharge of its function.

49. It must be recalled that in the case under discussion, the issue for consideration related to the constitutionality (in terms of the interim Constitution) of Section 16A of the Local Government Transition Act 209 of 1993 (the 'LGTA'). The section authorized the President to amend the LGTA by proclamation, provided he did so with the consent of the constitutional affairs committees of the National Assembly and the Senate. Parliament was entitled, within 14 days of such a proclamation, to invalidate it by passing a resolution to that effect. The President, acting pursuant to the powers granted to him sought to amend the LGTA in order to prevent members of the provincial Executive Councils from changing the composition of provincial committees responsible for demarcating the voting districts for the local government elections.

50. All the Justices presiding were unanimous that Section 16A was unconstitutional, but proffered different reasons for their conclusion.

51. Chaskalson P held that the authority of Parliament to legislate was, in terms of Section 37 of the interim Constitution, 'subject to' the provisions of the Constitution and had to be exercised 'in accordance with' the Constitution. To delegate the power to amend or repeal Acts of Parliament to the President was inconsistent with the 'manner and form' provisions prescribing the way in which Acts of Parliament were to be passed, contained in Sections 59, 60, and 61 of the interim Constitution.

52. To the above reasoning, Chaskalson P added two further comments. First, in exceptional circumstances, such as war, states of emergency or national disaster, Parliament was, by necessary implication, authorized by the Constitution to delegate the power to the executive to make laws contrary to the manner and form prescribed by the Constitution. He reasoned that in terms of Section 4, of the interim Constitution, the executive was to depart from the manner and form requirements in such circumstances. Secondly, the outcome could be different if an Act of Parliament conferred the power to the executive to amend Acts of Parliament other than the enabling statute itself. This was so because if the executive is allowed to amend the source of its authority to make law, this would allow the executive to confer power on itself to do as it pleases. The above additional points were held not to be applicable because there was no emergency and Section 16A of

the LGTA allowed the President to amend the enabling provision in the LGTA itself.

53. Ackermann J and O'Regan J (with Kriegler J concurring on the point), appeared not persuaded by the above additional points by the President of the Court; and regrettably chose to leave the issue undecided. For these Justices, the real difference lay in the delegation of the power to make subordinate legislation and the power to delegate substantive powers to amend Acts of Parliament. Section 16A fell in the latter category. It allowed a member of the executive, in this case the President, other than the Legislature, to make law, in a manner not subject to the Constitution and not in accordance with the Constitution. The above Justices held the above to be constitutionally impermissible, having regard to Section 37 of the Constitution and the principle of the supremacy of the Constitution.

54. Langa J and Didcott J approach was slightly different. They were of the firm view that Section 16A vested the President with extensive legislative powers which enabled him to act in a manner which exceeded the competence of Parliament itself, and which sought to avoid the procedures prescribed by the Constitution in Section 61. For these Justices, Parliament cannot delegate more power than it possessed itself.

55. Madala J and Ngoepe AJ concurred with the views of Langa J and Didcott J. Mahomed DP, with Mokgoro J concurring, chose to focus on the effect of delegation on the doctrine of separation of powers. Mahomed DP was of the firm view that the competence of Parliament to delegate its lawmaking function could not be determined in the abstract but depended on a number of factors including, among others, the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegate and other similar considerations.

56. Approached in the manner suggested above, the exceptions alluded to above by the President of the Court would not be a relevant consideration.

57. Mahomed DP was also of the view that there was no need to distinguish between the delegation of the power to amend the statute under which the delegation was made and the power to amend another statute. The learned Judge reasoned that Section 16A went

too far and constituted an abdication of Parliament's legislative function.

58. Sachs J agreed with the reasoning of Mahomed DP but came up with his own factors in an attempt to determine whether or not Parliament had abdicated its powers. It is not necessary for the purposes of this judgment to summarize the views of Sachs J in any detail, suffice to say that he reached the same conclusion as the other Justices of the Court. What is clear though from his reasoning is that in a legal system based on the supremacy of the Constitution the division of powers of the three arms of the State must, as far as practically possible be obeyed, with the result that no arm should be allowed to intrude into the sphere of another in a manner not allowed by the Constitution.

59. It is clear from reading the illuminating opinions of all the Justices of the Court that the dominant, if not the decisive approach, is that the aim of the doctrine of separation of powers, in so far as delegation is concerned, is to preserve and protect the integrity of the legislative process and this must be jealously guarded by the courts. In my view, this is better illuminated by Ackermann J, O. Regan J and Kriegler J, who emphasized the difference between original and subordinate legislation.

60. Equally impressive is the approach of Mahomed DP, Sachs J and Mokgoro J, who indicated that the purpose of the doctrine of separation of powers is to promote and protect a division of powers to limit the power of government officials such as the President and to ensure a system of controls over the exercise of power.

61. I am happy to take the queue from the **Executive Council** case.

62. In order to resolve the question whether Section 49 is unconstitutional or not, we need to revert to the basics on separation of powers as propounded by John Locke and subsequently by the renowned French philosopher Montesquieu.

63. Much of the modern thinking on separation of powers stems from Montesquieu celebrated publication: *L'Esprit des Lois,* which I have read again recently with much delight, criticism and profit. It was Montesquieu who wrote that separation of powers amongst the three arms of the state was the condition precedent for liberty, for without it tyranny will reign supreme.

64. Although there is no provision in the Constitution that provides for separation of powers in express terms, it is generally accepted that the State in Botswana is made up of three arms – often incorrectly referred as three branches of Government, namely the Legislature, Executive and the Judiciary, each with its own distinct mandate.

65. Elementary principles of constitutional law require that we should recall that the primary mandate of the Legislature is to pass laws; the executive to implement the laws passed by the Legislature and in the event of a dispute the judiciary is the arm to adjudicate over the dispute that has arisen.

66. The Court of Appeal has characterized separation of powers in Botswana as loose. Their Lordships stated that: *"None of the various arms of government: the Executive, the Legislature and the Judiciary comes to life or lives in a hermetically sealed enclave"* (**See Botswana Railways' Organization v Setsogo and Others 1996 BLR, P 804, Per Amissah JP**) Essentially, all that the Court of Appeal intended to communicate by the above poetic statement was that separation of powers in Botswana is loose as members of the executive are also members of the legislature.

67. Taking the queue from the case of **Botswana Railways' Organisation,** referred to above, it is clear to me that in applying the principle of separation of powers in our jurisprudence we must also recognise that the Constitution enjoins upon the three branches of the State separateness, autonomy, reciprocity and interdependence.

68. In recognizing the looseness of separation of powers, we are not in any way authorizing that each branch may encroach into the core mandate of the other. All that we (the courts) are doing is simply to recognise that the greatest security against tyranny – the accumulation of excessive authority in a single organ – lies not in a hermetic division amongst the organs, but in a carefully designed system of balanced power. It was Madison who taught that the greatest security against the concentration of power in one authority, consists in giving to those who administer each department, the necessary constitutional means to resist encroachments of the others.

69. Having regard to the above, the answer to the question regarding the constitutional validity of Section 49, depends to a large extent, upon whether our constitutional scheme permits Parliament to delegate its law-making powers without falling foul of the doctrine of separation of powers, more particularly Sections 86 and 87 of the Constitution.

70. As Mr. Chamme correctly pointed out, there is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. Over the years, Parliament has done so and this was generally accepted as legitimate. Put differently, it is common and acceptable for Parliament to delegate to the Executive authority to make subordinate legislation within the framework of the statute under which the delegation is made.

71. In an ideal democratic state that respects the doctrine of separation of powers, the function of passing and repealing laws should be restricted exclusively to the legislature. Prima facie delegated legislation is a serious compromise on the doctrine of separation of powers. At worst, delegated legislation, ex-facie, amounts to surrender of legislative powers by the Legislature.

72. Increasingly, however, all modern states, including those that subscribe to the doctrine of constitutional supremacy have come to accept that it is necessary to temper idealism with pragmatism or practical considerations. Consequently, authority to make subordinate legislation by the executive is fairly common even in legal systems that subscribe to the system of constitutional supremacy. It is therefore important to approach the issue of separation of powers from the point of view that government is not a set of robots, but a living organism.

73. A careful reading of the literature on delegated legislation suggests that the following are the reasons often cited to justify delegated legislation:

1. In view of the bulk of legislative work, parliaments, have no time and personnel to attend to matters of detail.

2. Parliaments must concern themselves with general policy of legislation (appropriate Minister or administrative authority must give flesh and blood to the skeleton made by parliament).

3. Sometimes the subject-matter on which legislation in required is too technical and may not be fully appreciated by members of parliament.

74. The following reasons are often cited against delegated legislation.

a) It is incompatible with the doctrine of separation of powers,

b) Subordinate legislation, may turn out to be the most important and may actually go against the general policy set by parliament. Because such rules have not been subject to fuller debate and public scrutiny – they may suffer from legitimacy crisis.

c) Parliament lacks time and resources to keep a full watch over what it delegates.(See **Gellhorn and Byse's Administrative Law: Cases and Materials – Ninth Edition, Peter L Strauss, et al)**

75. A consideration of all the above reasons necessitate that a balance must be struck somewhere, conscious of the obvious fact that in the

administration of a modern state, the functions of Parliament are so multifarious and the work they do is so involving that no Parliament can be expected to attend to matters of detail and should be allowed, in appropriate cases, to authorize other bodies to give flesh and blood to the skeleton made by Parliament.

76. In order to illuminate our discourse, it is imperative to engage in a somewhat limited survey of the law as it has developed in other countries where the Constitution is the mother of all laws. I intend to focus more on the jurisprudence of the United States of America, Australia and South Africa.

United States of America

77. The United States Constitution although somewhat different in wording and historical evolution, is not necessarily irrelevant at a broader level when one interrogates the policy objectives of the doctrine of separation of powers, which is more rigid compared to the one that obtains in Botswana.

78. Compared to a number of Commonwealth countries, law-making in the United States of America complies more strictly with the doctrine of separation of powers. The laws are passed by both houses of

Parliament and then presented to the President for consideration and possible veto. Delegation of powers within limits is generally permissible. Generally, the delegation of legislative power which involves a discretion as to what that law shall be is impermissible; but conferring an authority or discretion as to how to execute a law is permissible. (**See Panama Refining Company v Ryan 293 US 388 (1935); Hampton and Co v United States 276 US 394(1928)**

79. In another case of **American Power and Light Co v. SEC, 329 U.S, at p106**, the court stated that:

> *"I believe the legislation at issue here fails on all three counts. The decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy. For Congress to pass that decision on to the Secretary in the manner it did violates, in my mind, John Locke's caveat … that legislatures are to make laws, not legislators. Nor … do the provisions at issue or their legislative history provide the Secretary with any guidance that might lead him to his somewhat tentative conclusion that he must eliminate exposure to benzene as far as technologically and economically possible. Finally, I would suggest that the standard of "feasibility" renders meaningful judicial review impossible. … It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge."*

Australia

80. The Australian courts have often pointed out that the loose separation of powers that obtains in many Commonwealth countries as

illustrated by the close relationship between the legislature and the executive, pursuant to the influence of English law, makes the US approach to delegated legislation inappropriate ostensibly because unlike the Commonwealth frame of government, in the US, the Executive is not responsible to Parliament. It would seem from a quick survey of the Australian case law on the propriety of delegation of legislative power that in Australia it is generally permissible.

South Africa

81. In South Africa, the Constitutional Court in the case of **Executive Council, of the Western Cape Legislature**, cited supra, has held that whilst the history of South Africa, like that of Australia, India, Canada, and other Commonwealth countries was one of parliamentary supremacy, a critical feature of the British system, the South African Constitution of 1993, showed a clear intention to break away from that history. Consequently, the court held that Section 37 of the South African Constitution re-affirmed the supremacy of the Constitution in two respects: First, the legislative power is declared to be “subject to the Constitution, and secondly, laws have to be made, “in accordance with this Constitution”.

82. In the final analysis, the court held that it was constitutionally impermissible to delegate legislative power to the President. This was so notwithstanding that Parliament retained control in the sense that the legislative powers to be exercised under Section 16A had to be approved of by the appropriate committees of both the National Assembly and the Senate, and that Parliament as a whole retained the power by simple resolution to nullify them.

83. The above aerial overview of the case law demonstrates quite clearly and forcefully that where the legal system is one of constitutional supremacy, the courts would not lightly permit encroachment by one arm of the state into the sphere of another. The courts are likely to insist that each sphere remain in the constitutional lane allocated to it by the Constitution, because anything inconsistent with the Constitution is invalid to the extent of such inconsistency.

84. It has been said that the rule against delegation might be better termed a rule against sub delegation. This is so because the power to make laws is delegated to the legislature by the people and the legislature cannot in turn delegate it to other bodies. An analogy with private law may be in order. What the rule against sub delegation asserts is that, an agent, in the private law setting, who has agreed to undertake a discretionary task, involving judgment, is not free to delegate that task to another person.

85. In public law terms, **Peter L. Strauss cited supra, quoting John Locke, Second Treatise of Civil Government Section 141 (1690)** states at page 68 that:

> "*Fourthly, the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be. And when the people have said, we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.*"

86. Having read some of the leading authorities in the United States of America and South Africa on delegated legislation, it seems clear that the rule against delegation of legislative power serves three important functions. Firstly, it ensures that important choices of social policy are made by the legislature, the branch of the State that represents the will of the people. Secondly, the rule ensures that where the legislature considers it necessary to delegate authority, it provides the recipient of that authority with clear guidelines to guide the exercise of the delegated power. Thirdly, where those guidelines are in place, it is

easier for the courts to test the exercise of delegated power against ascertainable standards.

87. Ultimately, whether or not delegated legislative authority is constitutionally permissible is a function of a number of factors, such as the language of the Constitution construed in the light of the country's own history and existing jurisprudence.

88. Now, when Botswana adopted a written Constitution in 1966, it no doubt retained some features of the English system whilst at the same time carving for itself its own constitutional niche, in terms of which it opted for a written Constitution that assumed the status of the mother of laws and that all entities created by it, the legislature included, shall carry out their respective assignments or mandates in accordance with its terms and spirit.

89. This constitutional niche is that Botswana, unlike the United Kingdom, does not subscribe to the notion of parliamentary supremacy but constitutional supremacy.

90. It follows, therefore, that the heart of Botswana's democracy is not a supreme parliament but a supreme law in the form of a Constitution.

Whilst within the British system separation of powers has been reported to be approached with casualness, the same cannot be said to be true in Botswana.

91. Writing about the British Constitution, Professor Robert Stevens quotes the Lord Chancellor's office as having noted that: "*Nothing underlines…the nature of the British Constitution more than the casualness with which it approaches the separation of powers.*" (**See Robert Stevens (1993) The Independence of the Judiciary: The View from the Lord Chancellor's Office**)

92. In the case of **Petrus and Another v The State 1984 BLR 31**, the Court of Appeal, per Aguda JA in interrogating the nature and character of the Botswana Constitution stated as follows at page 33:

> "*Under a written Constitution such as we have in the Republic of Botswana, the National Assembly is supreme only in the exercise of legislative powers. It is not supreme in the sense that it can pass any legislation even if it is ultra vires any provision of the constitution. I believe it is clear, and this point must be strongly made, that every piece of legislation is subject to the scrutiny of the courts at the instance of any citizen, or indeed in an appropriate case at the instance of a non-citizen living in the country, who has the necessary locus to challenge the constitutionality of the legislation. This is more compelling in cases where there is a challenge to a piece of legislation on the grounds of its repugnancy to any of the provisions of Chapter 2 of the Constitution … The sole duty of the Courts in this regard is to decide disputes between citizens and the State…*

93. In the case of **Attorney General v Dow 1992 BLR 119 (CA)** at page166 the court stated that:

> *"The Constitution is the Supreme Law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece …"*

94. The doctrine of separation of powers obliges the other arm of the State, namely the Judiciary, to also respect the separation of powers. In ensuring that it does not trespass on the mandates of other arms of the State, the Judiciary should not lose sight of the fact that its constitutional mandate is to place legal checks on the exercise of power by other arms of the State.

95. The Constitution empowers the courts to declare invalid any exercise of power by any of the arms of the State that may be inconsistent with the Constitution. The Judiciary is required to carry out its task without fear or favor. It would be a travesty of the Constitution if in carrying out its functions it becomes paralyzed by fear or favoritism. A manifestly independent and impartial court lies at the heart of the system of checks and balances built into the Constitution.

96. In my mind, it would be tiresome and perhaps unnecessary to elaborate the antiquity and universality of the principle of the

independence of the judiciary. It is axiomatic. It goes with the very title a judge carries: justice. The concept of the independence of the judiciary appears in the oldest books of the Bible: See e.g. Exodus 18:13-26. It is also discussed by Plato in his Apology. It is discussed by Aristotle in The Rhetoric, Book 1, Chapter 1. It is interrogated by Thomas Aquinas in Part 2 of the Second Part of Summa Theological.

97. Having dealt with that part of our history that is relevant to understanding the Constitution and the doctrine of separation of powers upon which this enquiry draws inspiration, we seem to have reached the appropriate stage where we can consider the language of the Constitution.

98. Sections 86 and 87 of the Constitution provide as follows:

> 86. "*Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good governance of Botswana. (emphasis mine)*
>
> *87. (1) Subject to the provisions of section 89(4) of this Constitution the power of Parliament to make laws shall be exercised by Bills passed by the National Assembly, after reference in the cases specified in section 88(2) of this Constitution to the Ntlo ya Dikgosi, and assented to by the President.*
>
> *(2) When a Bill is presented to the President for assent he or she shall either assent or withhold his or her assent.*

> (3) *Where the President withholds his or her assent to a Bill the Bill shall be returned to the National Assembly.*
>
> (4) *If where the President withholds his or her assent to a Bill the Assembly resolves within six months of the Bill being returned to it that the Bill should again be presented for assent, the President shall assent to the Bill within 21 days of its being again presented to him or her, unless he or she sooner dissolved Parliament.*
>
> (5) *When a Bill that has been duly passed and presented for assent is assented to in accordance with the provisions of this Constitution it shall become law and the President shall thereupon cause it to be published in the Gazette as a law.*
>
> (6) *No law made by Parliament shall come into operation until it has been published in the Gazette, but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.*
>
> (7) *All laws made by Parliament shall be styled "Acts" and the words of enactment shall be "enacted by the Parliament of Botswana"."*

99. Before engaging in an in depth analysis of the above sections, more particularly Section 86, it is prudent to have regard to the guiding principles with respect to constitutional interpretation endorsed by our courts over the years.

The interpretation of the Constitution and the role of the courts

100. In interpreting Sections 86 and 87 of the Constitution, we must first heed the wise and time tested words found in the case of **Minister of**

Home Affairs (Bermuda) v Fisher (1980) AC 319 (PC) (1979) 3 ALLER 21) to the effect that the plain language of the lawgiver must be adhered to.

101. The Constitution is not an inert and stagnant document; it has its own inner dynamism that the Judges must connect to without fail. We must therefore heed Warren CJ's reminder that: *"The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice."* (**See Trop v Dulles 356 US 86 (1958)**)

102. Whilst I accept the obvious truth that no Justice ascends to the bench as an ideological virgin, (a contrary view to those postulated by legal positivists) I believe that interpretation must be influenced by many factors, such as the language of the provision, the history of the country, and the broader essence and philosophy underpinning the constitutional scheme of the republic.

103. In his now famous eulogy on Justice Brandeis, Chief Justice Harlan F Stone said that for Brandeis the Constitution was: *"primarily a charter*

of government… Hence its provisions were to be read not with narrow literalism of a municipal code or a penal statute, but so its high purposes should illumine every sentence and phrase of the document and be given effect as a part of a harmonious framework of government". (**Quoted in Baloro and Others v University of Bophuthatswana and Others 1995 (4) SA 197, page 245 B-C)**

104. It is also well established that in interpreting a Constitution, the courts would prefer and adopt an interpretation that gives effect to the values of the Constitution than to an interpretation that does not. This principle was stated quite admirably by Ngcobo J in the case of **Matatiele Municipality and Others v President of South Africa and Others 2007 (6) SA 477 (CC)** as follows at page 488:

> *"The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution."*

105. Having highlighted what principles of constitutional interpretation would be brought to bear on Sections 86 and 87. I turn now to the interpretation of Sections 86 and 87.

106. From the outset, it should be plain from the language used by Section 86 that it is Parliament that shall have the power to make laws for the peace, order, and good governance of Botswana. To my mind, Section 86 needs no interpretation as the words speak for themselves. It is an elementary rule of interpretation that words in a Constitution and or statute must be given their ordinary meaning unless an absurdity would result therefrom. In this connection, I derive joy and strength from the case of **Investors Choice (Pty) Ltd v Ratshosa Frankel Letamo and Others CVHLB-000102-**10 wherein Leburu J neatly echoed the canons of statutory interpretation.

107. The classical exposition of the above rule was stated by Lord Wensleydale in the old case of **Grey and Others v Pearson and Others (1843 -60) ALL ER Rep 21 (HL)** at 36 as follows:

> *"The grammatical and ordinary sense of words is to be adhered to, unless that would lead to an absurdity. Or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid inconsistency, but no further."***(See also Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995 (3) SA 289 (CC)**

108. There is an endless line of authorities in this jurisdiction that assert that the word "shall" its ordinarily peremptory.

109. Section 87 sets out the procedure of making laws. It says that the power of Parliament to make laws shall be exercised by Bills passed by the National Assembly. It follows therefore that any procedure of passing laws that by-passes the process of Bills as contemplated by Section 87 would be unconstitutional. In this case the process of the amendment of the TDA by the Minister was not exercised by way of Bills. Section 87 (1) employs the word shall which is mandatory.

110. I must also say that I have anxiously compared the provisions of Section 37 of the then interim South African Constitution and Section 86 of the Botswana Constitution and whilst the language used differs, the provisions are substantially similar. I will go further and say the Botswana counterpart is more emphatic than the South African provision as it says, "Parliament shall", which ordinarily understood makes it obligatory or compulsory that only Parliament shall have power to make laws.

111. There is a long line of authorities by our Court Appeal, compelling in logic, which is the hallmark of our jurisprudence on constitutionalism and the rule of law that establishes that substantive legislative provisions and/or law-making should be a product of transparent legislative process. (**See Botswana Motor Vehicle Insurance Fund v Marobela 1991(1) BLR 21 (CA))** This accords with the essence of separation of powers because if the legislature was to be permitted to

abdicate its authority to pass substantive legislative provisions then the whole system of division of labour amongst the three arms of the state would be fundamentally undermined and the Constitution literally turned on its head. Fortunately, positivist jurisprudence founded on the sovereignty of Parliament as contrasted with jurisprudence based on the supremacy of the Constitution has never been entertained in this Republic.

112. In the case of **Motor Vehicle Insurance Fund** cited supra, the court observed, obiter, at p21 that:

> "*Botswana is a democratic State, proud of its tradition of being governed in terms of the rule of law and by the provisions of its enlightened Constitution. A hallmark of its democracy is that substantive legislative provisions that impact on the rights of its citizens should be a product of a transparent legislative process and not be imposed by executive of other administrative fiat…*
>
> *The trenchant criticisms of Honey in his work cited above are in my opinion fully justified. Should the solvency of the Fund, the prevalence of bogus claims and any other legitimate considerations require a re-definition of the limits of its liability, this can in my view only be done via an open democratic process. Parliament, and Parliament only can legislate to abrogate or diminish the rights conferred by the law on its citizens." (emphasis mine)*

113. Further, that legislative power is subject to the Constitution – in particular that Parliament is not at liberty to act contrary to the Constitution, is now trite law. (**See the cases of Petrus and Dow, cited supra)** This contrasts sharply with the United Kingdom where,

as it is often said, Parliament may declare a man a woman and vice-versa and so it shall be.

114. Mr. Chamme has raised the interesting point that to the extent that Parliament still retains control on the delegated legislative power, the court should save Section 49 from being declared unconstitutional. My simple comment is that on plain reading of Section 86, Parliament cannot delegate its legislative power and if it does so it is acting *ultra-vires* the Constitution.

115. In my mind, there is a huge difference between delegated authority to make subordinate legislation within the framework of an Act of Parliament, and assigning legislative power to another body, in this case the Minster, as Section 49, purports to do.

116. The Constitutional Court in South Africa in the case of **Executive Council, Western Cape Legislature**, cited supra, rejected similar arguments in the following terms:

> *"Mr. Gauntlett, on behalf of the respondents, placed considerable reliance on the fact-which has also been mentioned in some of the Commonwealth judgments-that Parliament retains control over the functionary to whom plenary legislative power is delegated and can withdraw it if the power is not exercised in accordance with its wishes. In the present case that element of control clearly exists, for the President can only legislate with the consent of the appropriate committees of both the Senate and the*

Assembly, on which there is multi-party representation, and Parliament can by resolution disapprove of the legislation made by the President, in which event it will cease to have validity. There is also the fact that the statute in issue in the present case is essentially a transitional provision, designed to manage the difficult and complicated transition to democratic local government for a limited period of time. The power vested in the President is a power to amend the Transition Act, which because of its far-reaching implications would, even if s 16A were valid, have to be narrowly construed, R v Secretary of State for Social Security, Ex Parte Britnell [1991] 1 WLR 198 (HL) ([1991]2 ALL ER 726) and would not necessarily include the power to make fundamental changes to the Act (S v Mngadi and Others 1986 (1) SA 526 (N), but compare the judgment in the case on appeal sub nom Attorney-General, Natal v Mngadi and Others 1989 (2) SA 13 (A) at 21C-F read with 21H). These are all factors which could be relied upon to explain and justify the delegation of law-making power to the President in terms of s 16A. But, if Parliament does not have the constitutional authority to delegate this power to the Executive or to any other body, the reasonableness of the delegation or the absence of objection is irrelevant. The only way in which Parliament can confer power on itself to act contrary to the Constitution is to amend the Constitution. And this was not done in the present case."

117. I find the above logic compelling and agree with it.

118. In the *locus classicus* case of **Attorney General v Dow**, cited supra, the Court of Appeal stressed that the legislative powers of Parliament in Botswana are limited by the Constitution. The court stated as follows at page 137:

"Scrutton LJ's statement is correct because Britain does not live under a written Constitution; no piece of legislation by Parliament has primacy over others and Parliament cannot legislate to bind future Parliaments. We, therefore, speak of the supremacy of Parliament in Britain. What the British Parliament has done or is capable of doing is no sure guide to us trying to understand a written Constitution. The American revolution which started off

the era of written Constitutions changed all that. <u>With a written Constitution, under which the existence and powers of the legislature are made dependent on the Constitution, the power to legislate is circumscribed by the Constitution. As section 86 of the Botswana Constitution put it, the power of Parliament 'to make laws for the peace, order and good government of Botswana', is 'Subject to the provisions of the Constitution'.</u> Parliament cannot, therefore, legislate to take away or restrict the fundamental rights and freedoms of the individual, unless it is on a subject on which the Constitution has made an exception by giving Parliament power to do so, or the Constitution itself is properly amended. Instead of the supremacy of Parliament, we have, if anything, the supremacy of the Constitution.

As the legislative powers of Parliament in Botswana are limited by the provisions of the Constitution, where the Constitution lays down matters on which Parliament cannot legislate in ordinary form, as it does in Chapter 2, for example, or guarantees to the people certain rights and freedoms, Parliament has no power to legislate by its normal procedures in contravention or derogation of these prescriptions. This view of a constitution is, of course, contrary to the law and practice of the British Constitution under which the normal canons of construction of Acts of Parliament are formulated." (emphasis added)

119. I agree entirely with the above sentiments. In a nutshell, the above quote makes it clear that the Constitution is supreme in two respects. Firstly, that legislative power is subject to the Constitution and laws have to be made in accordance with the Constitution – exactly the same conclusion reached by the court in the **Executive Council** case.

120. The separation of powers required by the Constitution, amongst the three arms of the State, must be jealously guarded otherwise the great instrument upon which this republic is predicated, would be

undermined and rendered a mere paper tiger, or a piece of paper upon which Parliament can transgress with little consequence.

121. An essential part of this separation is that substantive law-making, not providing details, must remain the function of the Legislature. Any other interpretation will imperil the future of this republic. That the Legislature must pass laws, the executive implement same is foundational and indispensable to a properly functioning constitutional democracy based on the rule of law.

122. The above is consistent with international law. Section 24 of the Interpretation Act requires our courts to be inspired or guided by International Law in an appropriate case. The principles of separation of powers and the rule of law, underscored by international law, are indispensable cornerstones upon which the Constitution is based.

123. I am more than persuaded that having regard to the language employed by Section 86 as read with Section 87, only Parliament is vested with the power to pass laws and in the absence of express or implied power in the Constitution to delegate to another authority, Parliament may not do so.

124. The interpretation alluded to above is both textual and contextual and promotes the values of the Constitution. It preserves rather than destroy the essence of separation of powers and the rule of law.

125. In my view, to interpret Section 86 and 87 in the manner contended for by the respondents is pregnant with danger. In the absence of clear and comprehensive guidance, it may in the course of time lead to the gradual transfer of legislative powers to the executive through a similar approach as captured by Section 49 of the TDA. This would be absurd in the extreme in that Parliament would then cause to be the only authority to pass substantive law following debates and transparent process.

126. There are indeed a number of textual and contextual indicators that Section 86 in particular does not empower Parliament to delegate legislative powers. This is clear from the mandatory language used that pins legislative power to Parliament. Failure by the legislature to prescribe specific guidelines to guide the Minister in the exercise of his delegated authority, as required by authorities, strengthens the view that the delegation offended against the Constitution. In this case, if I may borrow the words of justice Cardozo, "the delegated power is not canalized within banks that keep it from overflowing".

127. As I have said earlier, the Minister's purported legislative powers offends against the normal process of law-making, where a piece of legislation starts life as a Bill and goes through various stages before it is assented to and signed by the President.

128. I have considered the principles and jurisprudence that have a bearing on this head of argument at some length because of the constitutional importance of the argument.

129. It is a serious matter for the courts to be asked to declare a statutory provision to be *ultra-vires* the Constitution. So serious is the matter that the Justices of this court invariably think hard and long before doing it. They will not hesitate to strike down any piece of legislation that offends the Constitution and in doing so they may not be consumed by fear. All that such a task requires is sensitivity and balance.

130. This court stands, as ever, between the executive and the subject, as Lord Atkin said in his famous passage – "alert to see that any coercive action is justified in law" (See **Liversidge v Anderson (1942) AC 206, 244)**. This must be so because the Justices of this court are no

respecters of institutions or persons, no matter how mighty and powerful. Their oath of office compels them to obey the Constitution above all else.

131. In my view, the great purpose of separation of powers would stand subverted if judgments, emanating from this court encourage, disobedience of the Constitution. To do so would be inimical to the rule of law; it would invite contempt for the law and encourage the citizenry to become a law unto themselves.

132. No jurist of credible pedigree can contest the assertion that a Constitution that promotes concentration of power in the hands of one arm of the state offends the principle of constitutionalism – a concept that extols the virtues of limited government.

133. The idea of constitutionalism is probably best encapsulated in the famous words of one of the founding fathers of the United States Constitution, James Madison, who wrote in the Federalist NO 51 that:

> *"In framing government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government but experience has taught mankind the necessity of auxiliary precautions."*

134. The beauty of constitutionalism therefore lies not merely in reducing the power of the State but in ensuring that all the branches of the State respect rules that limit their powers. The rules that limit the powers of the arms of the State such as Section 86 of the Constitution seeks to prevent the concentration of power in one arm of the State – the very antithesis of constitutionalism.

135. At the heart of our system of government – based on constitutional supremacy – is what Etienne Mureinik famously referred to as the "culture of justification" (See **Etiene Mureinik**, "A **Bridge to where?", Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31 at 32**)

136. It is clear from the facts of this case that the justification proffered by the respondent for delegating substantive legislative power to the Minister is weak and does not meet the requirements of the Constitution and constitutionalism. As it is now well known, it is all too easy to have a Constitution, that does not conform to the principle of constitutionalism – a concept that emphasizes the value of limited government.

137. In my mind, the right to strike is a fundamental constitutional right that is entrenched by Section 13 of the Constitution. It is

inconceivable that a court can hold that such a right may be taken away or compromised by the Minister, by way of a statutory instrument without due process of law, acting in terms of S49 of the TDA.

138. In the absence of a clear mandate in S49, it is unreasonable to assume that Parliament intended to give the Minister unprecedented power to adversely alter existing rights of the workers.

139. I am therefore satisfied, having regard to the Botswana’s system of constitutional supremacy and the fact that the Constitution assigns the power to make laws to Parliament in the most emphatic terms, that Section 49 of the TDA constitutes an impermissible abdication of Parliament’s power to pass laws – and consequently the said section being ultra-vires the Constitution, is declared unconstitutional and is set aside.

140. I wish to conclude this part of the judgment by paraphrasing Andrew Hamilton, one of the distinguished American lawyers, who once observed that power must be kept within its limits, because once kept within its limits, it is beautiful and useful, but when it overflows its banks, it is then impetuous to be stemmed; it bears down all before it,

and brings destruction and desolation wherever it comes. He observed that if this be the nature of power, then it behooves all people of good will, who value freedom, to use their intellect to support liberty, the only bulwark against lawless power.

141. In summation, I have come to the conclusion that S49 is liable to be set aside as unconstitutional for one or all of the following grounds:

i) that S49 violated the express provisions of Section 86 of the Constitution.

ii) that Section 49 violated the manner and form prescribed in section 87 of the Constitution.

iii) that S49 violated the spirit and broader scheme of separation of powers entrenched in the Constitution.

iv) that Parliament and Parliament only, not a Minister, can legislate to abrogate or diminish the rights conferred by the Constitution or by law on its citizens (see Section 13 of the Constitution).

142. Ordinarily, this should be the end of the matter, and it would not be necessary to consider the next argument or the balance of the arguments advanced by the applicants; but in the event I am wrong in holding as I do that Section 49 of the TDA is *ultra-vires* the Constitution and therefore invalid, it may be prudent to consider the next argument.

143. I turn now to the Section 144 argument.

The Section 144 of the Employment Act Cap 47:01 Argument

144. As indicated above, the applicants argue that should the constitutional argument fail for whatever reason, then SI 57 which constitutes "subsidiary legislation" ought to be annulled on the basis that the Minister did not consult the Board as required by Section 144 of the Employment Act, when it was "reasonably practicable to do so".

145. Section 144 of the Employment Act provides that:

> *"144. (1) The Minister shall, where it is reasonably practicable to do so, consult the Board before introducing any Bill relating to employment into the National Assembly or before making any subsidiary legislation relating to employment. (Emphasis mine)*

> (2) *Without prejudice to the generality of subsection (1), the Minister shall consult the Board before introducing any Bill into the National Assembly or before making any subsidiary legislation, as the case may be, which –*
>
> > (a) *makes fresh provision for contracts of employment;*
> >
> > (b) *amends this Act in any respect; or*
> >
> > (c) *relates to the productivity of employees." (Emphasis mine)*

146. The respondents aver that the question whether Section 144 applies to the Trade Disputes Act is not without controversy and suggests in effect that the aforesaid section may not apply to the TDA as it relates to matters related to the Employment Act.

147. The respondents further argue that the consultation required by Section 144 is not a mandatory requirement for the validity of any Bill or Subsidiary Legislation. They also argue that the consultation was not reasonably practicable because the situation in schools was threatening to get out of control and that the urgency of the situation surrounding the public service strike militated against consultation.

148. The Minister at paragraph 42 of his answering affidavit denies that there was failure to consult the Board and avers that the consultations were incomplete.

149. In my mind, it is plain that there was no consultation, and if any was held at all it was not meaningful, or sufficient.

150. In any event, it is clear from the Minister's own version that the consultation was incomplete. An incomplete consultation cannot be the consultation contemplated by the Act. On the plain reading of Section 144, the Minister is obliged to consult.

151. I hold therefore that incomplete consultation in the absence of an emergency, does not amount to consultation required by Section 144 referred to above.

152. On the papers, I am satisfied that there was no emergency.

153. I turn now to consider whether the respondent's averment and/or argument that it was not reasonably practicable to consult holds any water.

154. It is plain that in the words of the aforesaid section, the Minister is obliged, where it is reasonably practicable to do so, to consult the Board (Labour Advisory Board) before introducing any Bill relating to

employment in the National Assembly or before making any subsidiary legislation relating to employment.

155. In my mind, it cannot be credibly contended that SI 57 is not a subsidiary legislation. The question that arises is whether SI 57 is related to employment? The term "employment" is defined as follows in the Employment Act: "*"employment" means the performance by an employee of a contract of employment"*. The ordinary dictionary meaning of the word "employment" means " the act of employing or the state of being employed." (**The Concise Oxford Dictionary of Current English: by R.E. Allen (8th ed.) Clarendon Press Oxford 1990)**) It follows from the above that SI 57 obviously relates to "employment".

156. At this juncture, one may pose the question: on what basis is it contended that it was not reasonably practicable to consult?

157. Essentially, what the Minister says as a basis for the averment that it was not reasonably practicable to consult is that at the time SI 49 of 2011 was passed the country was reeling from a public service strike which commenced on the 18th April, 2011, and that "the prolonged nature of the strike which in fact had not been called off in June, 2011, made it impossible to conduct long drawn consultations", and

that at the time the situation in schools was threatening to get out of control.

158. The Minister further avers that due to the urgency of the situation, further consultation was not practicable.

159. In my considered opinion, the strike action, even if prolonged, on its own cannot be a basis to subvert the statutory obligation to consult. Strike action is a legitimate tool in collective bargaining between employees and employers. Naturally, tension is inevitable and inherent in a strike situation – and things do get out of control quite often.

160. It is not clear from reading the Minister's affidavit which set of facts surrounding the public service strike militated against consultation. The respondents have not tendered any evidence establishing in what way the situation in schools was getting out of control.

161. The Minister's affidavit falls short of establishing a basis of urgency, with respect to consultation on SI 49, that would justify non-compliance with the peremptory provisions of the Act.

162. Other than the strike and its natural consequences, the Minister does not aver explicitly other circumstances of urgency that made consultations not practicable and why expedited consultation that would have been reasonable in the circumstances was not undertaken. It is insufficient to aver, as the Minister does, that the strike was merely suspended.

163. Even if I was to assume in the Minister's favour that such was a material consideration, some cogent evidence should have been placed before the court to show that the resumption of the strike was imminent.

164. On the evidence, SI 49 was pushed through the throats of the applicants. It was steamrolled. Here are the facts for the above conclusion: The meeting of the 16th of June, 2011, which was called on the 13th June, 2011, to discuss a proposed amendment to the Schedule was postponed to the 30th June, 2011, following a request by BFTU.

165. It is a matter of grave concern to this court that despite the agreement to postpone reached on the 16th of June, the very next day the Minister promulgated SI 49. It should be recalled that on the evidence, the basis for the postponement of the meeting to the 30th June, 2011,

was that members had not had sufficient time to consult. In my respectful view, those entrusted with public power must always proceed with caution, deliberation, and reflection and avoid undue haste. This was not done in this case. In my mind, it is crucial that a repository of power should not seek unilateral decisions when the law requires consultations.

166. With respect to the critical SI 57, there is no dispute at all that there was no consultation. The reasons for not consulting with respect to SI 49 are not repeated with respect to SI 57. What the Minister simply says is that: “there was no consultation with LAB due to the urgency of the matter which had continued to evolve”. It is a bald averment not supported by any facts or substantiation. The fact of the matter is that the subsistence of the strike could not explain the lack of consultation because at the time SI 57 was gazetted, there was no strike taking place – the essential services employees having been dismissed on the 16th of May, 2011, and the remaining employees having suspended their strike on the 10th of June, 2011.

167. On the whole, I am of the considered view that having regard to the evidence and the context that explain the passage of SI 57, the urgency the Minister refers to in his affidavit, is, with respect self-created. Here is the context: All along, Parliament in its wisdom had

not seen it fit when promulgating the TDA, to include teaching services and other services reflected in the aforesaid instrument. Parliament has always known or ought to have known that the employees now sought to be barred to strike, may in future wish to lay down their tools of trade in order to bolster whatever demands they may wish to make on the employer.

168. The view I take is that even if it could be said that there was some urgency, which on the evidence has not been proven, it was reasonably practicable for the Minister to have issued abridged timelines consonant with the urgency he perceived and invited LAB to make presentations in writing or orally. Objectively considered, the Minister cannot be heard to say this was not permissible because the "sky was falling" on the 17th of June, 2011, or soon thereafter with the result that LAB could not be afforded even a few days to make representations.

169. On the facts/evidence before me, I cannot say that this was a matter in which the Minister could not wait for a week or so to effect the consultation decreed by the Act. If the promulgation of SI57 could not wait, because it was urgent, then that fact must be brought home to the court. The affidavit must establish that the respondents would suffer some irreparable harm or prejudice if it were to consult as

required. This was not done. A matter is not urgent because a strike, let alone a lawful strike, has been suspended and may be resumed.

170. In my opinion, it is significant that Section 144 does not say that the Minister should not consult, "where in his or her opinion it is not practicable to do so". He or she is required to consult, "where it is reasonably practicable to do so". The words employed by the Legislature import an objective test. This test requires the court on a proper assessment of the evidence before it to come to a determination whether consultation was not reasonably practicable.

171. In the case of **Liversidge**, which I referred to earlier, the crisp issue was whether the words in the regulation: "If the Secretary of State has reasonable cause to believe…" required the Secretary of State to satisfy the court that there was objectively reasonable cause for his belief or as the Attorney General argued on the other side, was it enough that the Secretary of State simply asserted that was his belief?

172. The majority position seems to have accepted that the words, "has reasonable cause to believe", could mean that there must be some objective assessment, and they ultimately held that, because the thing to be believed was essentially one within the knowledge of the Secretary of State, all that the words meant is that it was enough for

the Secretary of State himself to think that there was reasonable cause.

173. In his celebrated dissent, Lord Atkin disagreed with the majority decision, saying that its effect was to clothe the Secretary of State with absolute power. He held that the words, "if a man has reasonable cause to believe" cannot mean if he thinks he has reasonable cause to believe. Lord Atkin put his disapproval of the majority judgment in perhaps overly strong terms. He wrote:

> *"I view with apprehension the attitude of judges who on mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive".*(at page 244)

174. The above constituted the pith of Lord Atkin's landmark dissent. It was a passionate indignation expressed with breathtaking eloquence and vigor. Close to seventy years after the judgment was delivered, I find the reasoning in the **Liversidge** case compelling. I have therefore reached the conclusion that on an objective assessment of the evidence before the court, the Minister failed to comply with the mandatory provisions of Section 144 of the Employment Act, in that it has not been shown that it was not reasonably practicable to consult.

175. The result of the above conclusion is that the passage or promulgation of SI 57 is a nullity.

176. It is trite learning that where a repository of power fails to follow the mandatory procedures prescribed by statute, the result is a nullity. (**See R v Social Services Secretary, ex parte Association of Metropolitan Authorities (1986) 1 ALL ER 164**)

177. It is also trite that the validity of subsidiary legislation may be challenged notwithstanding the fact that it has received parliamentary approval. (**Hoffman –La Roche v Secretary of State for Trade (1975) AC 295**)

Breach of Section 9 of the Statutory Instruments Act (Cap 01:05)

178. Assuming I am wrong in my conclusions with respect to all the preceding arguments, I wish to consider the above argument.

179. The common cause facts with respect to this head of argument is that following the annulment by Parliament of SI 49, the Minister, published a further instrument, on the same day as the statutory instrument repealing the initial order that was published, reintroducing the very same order annulled by Parliament. The

applicants contend that SI 57 is also a nullity on the basis that it offends against Section 9 of the Statutory Instruments Act Cap 01:05 that empower the Minister to make a new statutory instrument, which is different from the annulled instrument. They submit that since SI 57 is the same as the annulled SI 49, contrary to Section 9 of the Statutory Instruments Act, it is a nullity and of no force and effect.

180. Section 9(1) of the Statutory Instruments Act provides that:

> "*All statutory instruments shall be laid before the National Assembly as soon as may be after they are made, and, if a resolution is passed within the next subsequent 21 days on which the National Assembly has sat after any such instrument is laid before it that the instrument be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new statutory instrument.*"

181. The respondents do not seem to have given the above argument much thought. They respond in summary form by contending that a thing that begins again can be properly be described as new, and no more.

182. I have had regard to SI 49 and SI 57. The content is identical. The citation is also the same. On plain reading of Section 9 referred to above, it seems to permit the Minister to make a "new statutory instrument". The question that arises is whether SI 57 is "new" within the meaning of the Section referred to above.

183. The new shorter Oxford English Dictionary edited by Lesley Brown says “new” means “Not existing before; now made or existing for the first time”. It follows that on the dictionary definition of new, the SI 57, to the extent that it existed before cannot be new. It follows as day follows night that the promulgation of SI 57 was in breach of Section 9 of Statutory Instruments Act.

184. I am acutely mindful of the famous refrain by that doyen of British jurists, Lord Denning, that the English Language is not an instrument of mathematical precision. Consequently, even if one was to abandon the literal interpretation and embrace the purposive interpretation, the conclusion that Parliament could not have intended, in enacting the Statutory Instruments Act, that it would annul an instrument only for that same instrument to be resurrected by a member of the Executive is compelling.

185. In law there is a presumption that Parliament cannot be presumed to act unreasonably. I ask myself if Parliament’s attention was brought to this provision and it was asked as to the meaning of the word “new” in the above quoted section, it would in all probability have said: “it is inconceivable that we can annul an instrument only to be brought back lock, stock and barrel by the executive without any changes. We

do not gather in this august assembly to waste time." (See **Joosub v Immigrants' Appeal Board 1920 CPD 109 at p111**). In my respectful view, Parliament must be presumed to act with reasonableness and efficiency in mind.

186. In the premises, I hold that failure to comply with the provisions of Section 9 of the Statutory Instruments Act rendered the promulgation of SI 57 a nullity and *void ab initio* and I so hold.

Incompatibility with International Law

187. Under this head, the issue that is sharply posed by the papers filed of record and or the submissions of the parties is whether the amendments to the Schedule effected by SI 57 constitutes impermissible restrictions on the applicants' members freedom to organize and or to strike contrary to international law that is binding on Botswana. Put differently the question is whether SI 57 is incompatible with Botswana's international law obligations?

188. In order to appreciate the arguments put forth by both parties under this head, it is important to understand in some detail the place of international law in the domestic setting of Botswana.

189. International law is a body of rules and principles which are binding upon states in their relationships with one another (**See Generally G. Simpson(ed), The Nature of International Law (2001)**. International law is made up of general principles and particular rules that may be derived from a treaty establishing a relationship between or among States.

190. In dualist States, such as Botswana, a treaty is not directly a part of domestic law. Instead, international treaties have to be incorporated into the national law for their provisions to be legally binding. For a country that embraces dualism, an "*act of transformation*" by an appropriate State organ is needed before the provisions of a treaty can operate within the national legal system. Transformation takes various forms, such as parliamentary enactment incorporating directly the treaty norms into domestic law, or a statute copying all or part of the treaty.

191. In dualist systems, domestic law takes precedence where there is a clear inconsistency between domestic law and international law. The dualist approach preserves the sovereignty of nations whilst accepting the importance of international law.

192. In this country, the courts take the broad view that constitutional and statutory provisions must be construed to uphold international law.

193. After independence in 1966, Botswana retained Roman Dutch law as its common law; and the common law is applied routinely by the courts in Botswana. Botswana shares this legal heritage with South Africa. (**See AJGM Sanders, "The Applicability of Customary International Law in Municipal Law – South Africa's Monist Tradition, (1977) 40 THRHR 147, p 148**)

194. It would seem quite clear that early Roman Dutch scholars, such as Grotius, saw international law and municipal law as components of universal legal order based on natural law. Grotius did not consider international law as foreign law. Although contested, it can be asserted on the basis of Roman Dutch authorities that under Roman Dutch law, international law formed part of municipal law. (**See generally JW Wessels, History of Roman Dutch Law (1908), 285)**

195. The extent to which the above heritage is recognized by the Botswana courts came into doubt in the case of **Agnes Bojang v The State** (**See Miscellaneous Case 6/1993 (unreported)** In that case, the court commented, at page 14-15, *obiter,* on the place of customary

international law in the Botswana legal system, in the context of the right to legal representation, in the following terms:

> "*But even assuming that the right to legal representation is part of customary international law, can it be seriously contended that such a right to legal representation as embodied in international instruments automatically forms part of the municipal laws of Botswana without any act of legislative incorporation. I doubt it. I find nothing in the laws of this country to the effect that international law or for that matter provisions of international conventions can dispense with the theory of incorporation.*"

196. The dictum in the case of ***Bojang,*** cited above, is broadly consistent with the dictum of Lord Denning MR in the case of **Trendtex Trading Corporation v Central Bank of Nigeria(1977) QB 529(CA)p 553-4** when he stated as follows:

> "*A fundamental question arises for decision: what is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except insofar as they have been already adopted and made part of our law by the decisions of judges, or by Act of Parliament, or long established custom… As between these schools of thought, I now believe that the doctrine of incorporation is correct…*"

197. The case of **Agnes Bojang** referred above, gives support to the dualist adoption theory as discussed earlier. It seems to me that the correct preposition is the one that asserts that international law and/or customary international law should be regarded as the common law of Botswana unless there is a specific law to the contrary. This

preposition is given credence by the South African case of **Nduli v Minister of Justice 1978(1) SA 893**, in which the court held that "*the fons et origo"* of the preposition that international law is part of the common law of South Africa is derived from the Roman Dutch law. That customary international law is part of the common law of Botswana may be traced to the writings of Blackstone, who in 1769, stated that: *"The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land."* (**See W Blackstone, 4 Commentaries on the Laws of England 67 (1st ed. 1765-1769)**

198. Indeed, it appears credible to suggest that since customary international law is a species of common law, it is for that reason subordinate to an Act of Parliament. Put differently, common law rules and decisions of the courts based on those rules are subordinate to the Constitution and Acts of Parliament.

199. In Botswana, the power to enter into treaties is entrusted to the executive. As a general rule, the provisions of an international treaty concluded by the executive are not embodied in our law except by an act of parliament. It follows, therefore, that in the absence of incorporation, an international treaty concluded by the executive is

generally not legally binding, save in certain circumstances, that may be warranted by the circumstances.

200. The Constitution of Botswana does not make any provision for the integration of international law into domestic law. The negotiation, signature and ratification of treaties are executive acts. The Constitution of Botswana vests executive power in the President and the ratification of conventions and treaties is a presidential prerogative. Although in terms of the Constitution only the President is authorized to conclude and ratify international treaties, only Parliament has the power to incorporate treaties into domestic law. It should be indicated that although there are no specific legislative provisions referring to the use of international law, there is some reference to international law in the Interpretation Act, Cap 01:04.

201. Section 24 of the Interpretation Act provides that for purposes of ascertaining that which an enactment was made to correct, and as an aid to construction of the enactment, a court may have regard to any textbook or other work of reference; to the report of any commission of inquiry into the state of the law; to any memorandum published by authority in reference to the enactment or to the Bill for the enactment; to any relevant international treaty, agreement or convention; and to any papers laid before the National Assembly (but

not the debates in parliament) in reference to the enactment or its subject matter.

202. It seems plain therefore that by just reading Section 24 of the Interpretation Act, the courts in Botswana whenever they have to interpret any legislation, including the Constitution, must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

203. It seems to me that it is entirely possible, as an aid to construction of an enactment, for the court to have regard to international law as stated in the decisions of tribunals dealing with a particular and or relevant rule of international law.

204. Put differently, decisions of tribunals dealing with a comparable issue, such as the European Commission on Human Rights, the United Nations Committee on Human Rights, The African Commission on Human and Peoples Rights, Inter-American Court of Human Rights, and in appropriate cases, reports of specialized agencies, even though not legally binding, may be used as a guide as to the correct interpretation of a particular provision of an enactment or constitutional provision.

205. In other words, although ratified international treaties, in dualist systems, are not automatically part of the municipal law, they may nevertheless be used as aids to interpretation of statutes.

206. Our courts occasionally use international law to resolve disputes that come before them. There is nothing wrong with the approach; in fact there is a case to be made for the courts to use international law more than they have done before, especially in the area of human rights. After all, customary international law has always been part of our common law, with the result that it is always open to the courts of Botswana to apply those norms of human rights law that have crystallized into custom, unless such norms are in conflict with legislative provisions. It could also be argued that it is also open to the courts to use international human rights conventions and declarations (that are not binding) as a guide to develop the law where necessary.

207. The *locus classicus* case of **Attorney General v Dow,** cited earlier, demonstrated a refreshing approach to international law and how it can shape domestic law.

208. In the above case, the court stated that it found it “difficult, if not impossible” to believe that the word “sex”: was left out of the Constitution because Botswana wanted sexual discrimination to be permitted. The court confirmed its belief by placing reliance on Botswana’s status as a signatory to the then Organization of African Unity (OAU), now African Union (AU) Convention on Non-Discrimination.

209. Although the terms of the convention did not have the power of law in Botswana, the court recognized that the state had obligations under the treaty. The court held that it would be difficult if not impossible to accept that Botswana would deliberately discriminate against women in its legislation whilst at the same time internationally support non-discrimination against women. Thus, the court interpreted national legislation in conformity with an international convention, which was ratified but not yet implemented into national law.

210. In holding that the Constitution should be interpreted in the light of international law, the court (per Amissah JP) held at page 154 that:

> “*Botswana is a member of the community of civilized states which has undertaken to abide by certain standards of conduct, and unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken*”.

211. Justice Aguda went further and held that international instruments which had not been ratified could also be of relevance in constitutional and statutory interpretation. The learned judge stated that:

> "*There is no evidence that Botswana is one of the 100 states that have ratified or acceded to the Convention but I take it that a Court in this country is obliged to look at the Convention of this nature which has created an international regime when called upon to interpret a provision of the Constitution which is so much in doubt to see whether that Constitution permits discrimination against women as has been canvassed in this case." (page 170)*

212. The majority of the court read in the word "sex" in Section 15(3) that it prohibited discrimination. The court made reference to international law to reach the conclusion referred to above.

213. Having discussed the place of international law in the domestic setting of the republic at some length, I turn now to a summary of the arguments of the parties.

214. The applicants contend that on a proper interpretation of Section 49, that provision does not empower the Minister to amend the schedule in a manner which is incompatible with applicable ILO instruments. Placing heavy reliance on the case of **Dow** cited supra, the applicants contend in essence that this court is bound to interpret the Constitution and/or any statutory provision in a manner that is consistent with international treaty obligations.

215. The applicants contend that unless the language of Section 49(1) manifest an unambiguous intention to the contrary, it cannot and it should not be interpreted to empower the Minister to make a statutory instrument which infringes Botswana international law obligations. Consequently, the applicants argue that Section 49 must therefore be construed as not empowering the Minister to make a statutory instrument which is incompatible with Botswana's international law obligations.

216. The applicants contend that the services added to Schedule SI 57 do not comply with ILO definition of "essential services."

217. The respondents do not contest that the courts in Botswana should interpret the Constitution and/or any statutory provision in a manner that is consistent with the country's international obligations, but argues that in this case the prepositions in the **Dow** case have no application. The respondents contend that the starting point is to consider Botswana legislation and determine what it provides. The respondents maintain that if what our law provides is clear and does not conflict with the Constitution, then it ought to be applied.

218. Mr. Chamme, learned counsel for the respondents, submitted that Botswana legislation takes precedence over international law and that Botswana labour legislation does not conflict with precepts of international labour law around the issue of essential services. Mr. Chamme submitted that the Minster was clothed with the power to promulgate SI 57 of 2011 and that the work of ILO Committee should not be given precedence over national legislation. He argued that what constitutes essential services depends on the circumstances prevailing in a particular country and that account should be taken of special circumstances in that country.

219. Mr. Chamme submitted that the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger life. He said workers who lose the right to strike are afforded an avenue for arbitration in terms of the Act.

220. It seems to me that that the controversy under this head could be easily settled by reference to the Constitution of the ILO, of which Botswana is a member. It is plain that as a member of the ILO Botswana is bound by its Constitution.

221. It is common cause that on the 22 December, 1997, Botswana ratified the Freedom of Association and Protection of the Right to Organize Convention (Convention No.87) and the Right to Organize and Collective Bargaining Convention (Convention No.98).

222. On the matter of what constitutes "essential services" Convention 87 confines "essential services for the purpose of limiting the right to strike, to "services the interruption of which would endanger life, personal safety or the health of part of or the whole population." (**See 1994 Committee of Experts Report, para 136 -151)**

223. The ILO has a committee of experts made up of 20 top class legal experts. Their opinions are generally regarded as a source of international labour law. That the ILO committee of experts opinions are sources of international labour law was recognized by the Court of Appeal in the case of **Botswana Railways v Botswana Railways Train Crew Union Civil Appeal No CA CACLB -042-09.**

224. The ILO committee of experts has had occasion to deliberate and express an opinion on whether workers in the teaching services, transport, diamond sorting and cutting constitute essential services

within the meaning of Convention 87, which Botswana ratified and expressed the view that they do not.

225. The ILO committee of Experts on the Application of Convention and Recommendation (CEACR) in its Observation report adopted in 2011, published by the Committee at the ILC's 101st session, stated, *inter alia*, that:

> *"The Committee was informed that the Government has adopted the Trade Disputes (Amendment of Schedule) Order 2011, on 15 July 2011, adding the veterinary services, teaching services and diamond sorting, cutting and selling services, and all support services in connection therewith to the existing essential services. The Committee once again recalls that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 159).* ***The Committee considers that the new categories added to the Schedule do not constitute essential services in the strict sense of the term and therefore requests the Government to amend the Schedule accordingly."***

226. Having discussed at length the place of international law in the domestic law of Botswana, the International treaties that Botswana has ratified and Botswana's membership of the ILO, I must say that Section 49 of the TDA, to the extent that it simply provides: "The Minister may, by order published in the Gazette, amend the Schedule", assuming the Section to be *intra-vires* the Constitution, is vague or unclear. It is unclear because it does not say anything about

the parameters and content of the Schedule. Assuming the section is constitutionally valid, how should it be interpreted? Can it be interpreted to authorize the Minister to add a list of services that are incompatible with international law.

227. On the basis that it is settled in our jurisdiction that opinions of the ILO Committee of Experts constitutes one of the sources of international law and having regard to the fact that the committee has expressed the view that SI 57 violates the definition of "essential services" in convention 87, it follows therefore that SI 57 introduce restrictions on workers' rights which are incompatible with Convention 87. Precedent binds this court to interpret any statutory provision in a manner that is consistent with international law. (See also **Section 24 (1) of the Interpretation Act Cap 01:04**)

228. On a plain reading of Section 49, it does not authorise a Minister to pass a statutory instrument that violates international law or Botswana's international law obligations. In the premises, I hold that SI 57 being inconsistent with international law is hereby declared invalid and of no force and effect.

229. I turn now to the freedom of association argument.

The Freedom of Association argument

230. Under this head, the applicants contend that the list of essential services brought by SI 57 are in breach of Section 13 of the Constitution and that SI 57 stands to be struck down on that basis.

231. The respondents, on the other hand, contend that Section 13 of the Constitution that guarantees freedom of association permits reasonable limitations on that right. Consequently they argue that under Section 13 it would be permissible to impose restrictions on public officer's right to strike.

232. Section 13 of the Constitution of Botswana provides for freedom of association. It provides that:

> "*(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.*
>
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-*

> a) *that is reasonably required in the interests of defence, public safety, public order, public morality or public health;*
>
> b) *that is reasonably required for the purpose of protecting the rights or freedoms of other persons;*
>
> c) *that imposes restrictions upon public officers, employees of local government bodies, or teachers; or*
>
> d) *for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration) and conditions whereby registration may be refused on the grounds that any other trade union already registered, or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought.*
>
> *and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."*

233. Section 13 (1) of the Constitution of Botswana guarantees freedom of assembly and association, but S 13 (2) (d) permits the enactment of a

law which derogates from the aforesaid right to an extent which is reasonably justifiable in a democratic society.

234. A close examination of case law on what amounts to "reasonably justifiable in a democratic society" suggests that the concept is extremely fluid and slippery. It is incapable of precise definition. Gubbay CJ in the case of **Woods and Others v Minister of Justice, Legal & Parliamentary Affairs & Others 1995 (1) SA 703 (ZS)** said the concept is "elusive", adding further that: "there is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has proper respect for the rights and freedoms of the individual" (at 706 D/E-F, read with 704 G/H and 706 B-B/C).

235. The freedom of association/assembly is an indispensable feature of a democratic society, without which no society can claim to be democratic. It encapsulates the right to strike which the world over is recognised as equally indispensable. It is a right which must be jealously guarded and any limitation must strictly meet the standard set in the Constitution. Such restriction must be narrowly interpreted. The SI 57, promulgated by the Minister pursuant to Section 49 of the

TDA is no doubt a limitation, but its validity is really dependent upon whether it falls with the ambit of S 13(2) of the Constitution.

236. I am prepared to assume in favour of the respondents that SI 57 is an enactment that ostensibly was enacted in the interests of the society of Botswana, viewed from the perspective of the Minister. So what the applicants have to show, is that the limitation imposed by SI 57 is not reasonably justifiable in a democratic society.

237. The restriction imposed on the categories of employees characterized as essential workers cannot be looked at in isolation. It must be assessed in the context or background of an industrial action that started on the 18/4/2011 and that at the time SI 57 was promulgated the strike was merely suspended. It seems probable on a consideration of all the circumstances of the case that the employer/government feared that the strike may be resumed.

238. In my considered opinion, it cannot be ruled out that the passage of SI 57 was a possible stratagem by the employer to seek to weaken a party that it was at loggerheads with – so that in the event the strike is resumed – the workers are much weaker. This perspective is strengthened by the fact that hitherto the government seemed not unduly worried by classification of the employees now caught by SI 57

as non-essential service workers. Viewed from this angle, the limitation was in all probability done for an ulterior purpose and cannot pass the test of reasonably justifiable in a democratic society.

239. Secondly, the sweep of SI 57 is unnecessarily broad. It does not seek to effect any balance between the rights of the workers and the interest of society. It simply seeks to protect the interests of society (from the perspective of the Minister) with no accommodation whatsoever of the interests of the worker. It does not attempt to make it more difficult to strike – it simply abolishes in absolute terms the right of the workers mentioned in the statutory instrument from embarking on any industrial action. Because it is manifestly unbalanced, it lacks the quality of reasonableness. It arbitrarily or excessively invades the enjoyment by the worker, the target of SI 57, of his freedom of association; and in particular to strike. It makes it willy-nilly impossible to bargain like free citizens in a democratic society.

240. A balance is necessary because labour is an essential player for the prosperity of any nation. It is not a commodity. This assertion is recognised by labour law. In the case of **In re: Public Service Employers Relations Act (1987) 38 DLR (4th) at page 232 McIntyre J** stated that:

> *"Labour law … is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour – a very powerful socio-economic force – on the one hand, and the employers of labour – an equally powerful socio-economic force on the other. The balance between the two forces is delicate…"*

241. In the case of **Ford v Quebec 1988 2 SCR 712** the court held that while law had sufficient objective of protecting the French language, it was nevertheless unconstitutional because the legislature could have accepted a more benign alternative such as signs including smaller English words in addition to longer French words.

242. Even if the ground alluded to above is considered inapplicable for whatever reason, this court would invalidate SI 57 on the basis that its sweep is unnecessarily broad.

243. I have also considered the criteria set out in the famous Canadian case of **R v Oakes 1986 1 SCR 103**, which laid down that for a limitation to be held to be valid it must meet the following criteria.

    a) There must be a pressing and substantial objective.

    b) The measures taken must be rationally connected to the objective.

c) There must be minimal impairment of rights.

d) There must be proportionality between the infringement and objective.

244. The test in the **Oakes** case has been modified by subsequent cases. (See **Sujit Choudhry**, "**So what is the Real Legacy of Oakes, Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 Supreme Court Law Review 501**)

245. The elements set out by the **Oakes** case on proper interrogation may yield contradictory results and it would not be productive to isolate each one of them and deal with it in much detail.

246. The onus to prove those elements rests with the respondents. In my mind, there is no evidence to prove any of the aforesaid elements.

247. From whatever angle one approaches this matter, it seems to me that it would be monumentally difficult to justify the Minister's law (SI 57) of banning the right to strike outright. Under no circumstances can the outright ban meet "the minimal impairment" test, referred to above.

248. There is another approach that commends itself to me and leads to the same conclusion that the limitation imposed is not reasonably justifiable in a democratic society. This approach is aided by standards subscribed to by ILO of which Botswana is a proud member.

249. To the extent that Section 13 is not clear as to whether freedom of association includes the right to strike on not, it is incumbent upon this court, on the authority of **Dow** case referred to earlier, to interpret the said section in a manner that is consistent with international law.

250. Under international law, the right to freedom of association has attained the status of *ius cogens.* The right to freedom of association in international law includes the right to strike. It follows, in my view that if employees are free to associate and to bargain collectively, then the right to strike is necessarily implied in situations where collective bargaining fails to achieve the desired results. (**See National Union of Metal Workers v Bader Bop (Pty) Ltd and Another (2003) (3) SA 513, 544**; **Canadian case of Health Services and Support Facilities Assn v British Columbia (2007) SCC 27, 59**)

251. In trying to come to grips with whether the limitation explicit in SI 57 is reasonably justifiable in a democratic society, it helps to have regard to standards that have been laid down by the international community, of which Botswana is a proud member.

252. It seems to me that international law does not accept the prohibition of strike action to safeguard economic interests as a limitation that is reasonably justifiable in a democratic society. The ILO committee of experts, which should be respected for their learning and scholarship, seems to accept that it is reasonably justifiable in a democratic society to restrict the right to strike only to the extent that meets its definition of "essential services".

253. I have already mentioned that the ILO committee of experts has found that the services mentioned in SI 57 do not constitute essential services.

254. It follows in my view that eschewing arbitrary and subjective value judgment and having regard to the fact that it is the Constitution that we are interpreting and that such interpretation needs to be generous in favour of expanding rights instead of restricting same, the conclusion seems inevitable that the list of services captured in SI 57

constitutes impermissible restriction on Section 13, which restriction is not reasonably justifiable in a democratic society.

255. We, the justices of this court, should never lose sight of the fact that the final cause of law is the welfare of society, of which the workers are a significant part.

256. Justice Benjamin Cardozo of the United States in his much quoted treatise – **The nature of the Judicial Process (Yale University Press, 1967) at pp 66-7** stated that:

> "*The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live." Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was "Be it my will that my justice be ruled by mercy". That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that the judges are commissioned to set aside existing rules at pleasure in favour of any other set of rules which they may hold to be expedient or wise. I mean when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance."*

257. In all the circumstances of this case, I hold that the additions to the list of essential services brought by SI 57 are in breach of Section 13

of the Constitution and that the said SI 57 is accordingly struck down as unconstitutional.

258. I turn to the legitimate expectation argument.

Legitimate Expectation Argument

259. Under this head, the applicants contend that they have a legitimate expectation that the executive will at all times take decisions that are consistent with Botswana's international obligations. They contend that Botswana being a signatory of both ILO Convention No.87 and 98 cannot take any decisions or measures inconsistent therewith.

260. The respondents' response to the above argument is that the applicants are not entitled to any consultation outside Section 144 of the Employment Act. The respondents argue further that in a legislative process, the rights of the applicants are the same as those of other citizens and the consultation process takes place through the National Assembly.

261. The question whether ratification or signing of an international treaty can be a basis of a legitimate expectation was addressed in the

Australian case of **Minister of Immigration and Ethnic Affairs v Teoh 1994-1995, CLR Vol 183, p 273**

262. A brief statement of the facts would be in order.

263. The respondent, Mr. Teoh, a Malaysian citizen, came to Australia in May 1988 and was granted a temporary entry permit. Two months later, he married an Australian citizen who had been the *de facto* spouse of his deceased brother.

264. Mrs. Teoh had seven children, six under the age of ten; the eldest child was of her first marriage, three children were of her *de facto* relationship and three were of her current marriage. He applied for permanent residence status in October 1988. While his application was still pending, he was convicted of offences relating to the importation and possession of heroin. In January 1991, he received a letter informing him that his application for residence status has been refused on the basis that he did not meet the character requirement in view of his criminal record.

265. Mr. Teoh's application for reconsideration on compassionate grounds was rejected. On appeal to the Full Bench of the Federal Court, however, it was ordered that the deportation be stayed until the

Minister reconsidered the application on the ground that Australia's ratification of the Convention on the Rights of the Child (CRC) created a legitimate expectation in parents or children that any action or decision by the Commonwealth of Australia would be conducted or made in accordance with the principles of this treaty. The Minister appealed.

266. In dismissing the appeal, it was held that:

1. The fact that the CRC had not been incorporated into Australian law did not mean that its ratification held no significance for Australian law. Where a statute or subordinate legislation was ambiguous, the court should favour, as far as language permits, a construction which accords with international obligations.

2. Further, the provisions of an international convention to which Australia was a party, and especially those declaring universal fundamental rights, could be used by the courts as a legitimate guide in developing the common law. Such development would, to a large extent, depend upon the nature of the relevant provision, the extent to which it was accepted by the international community, the purpose which it was intended to serve and the relationship to the existing principles of domestic law.

3. Article 3.1 of the CRC provided that, in all cases concerning children, 'the best interests of the child shall be a primary consideration'. The article was careful to avoid putting the best interests of the child as the primary consideration. It did no more than give the interests of the child first importance along with such other considerations as might, in the circumstances of a given case, require equal but not paramount weight.

4. Ratification of a convention was a positive statement by the executive government of Australia to the world and to the Australian people that the executive government and its agencies would act in accordance with the CRC and, as such, was an adequate foundation for a legitimate expectation.

5. It was not necessary that a person seeking to set up such a legitimate expectation should be aware of the CRC or should personally entertain such an expectation; it was enough that the expectation was reasonable in the sense that there were adequate materials to support it.

6. The existence of legitimate expectation that a decision maker would act in a particular way did not necessarily compel him or her to act in that way. That was the difference between a legitimate expectation and a binding rule of law. But if a decision maker

proposes to make a decision inconsistent with a legitimate expectation, procedural fairness required that the person affected be given notice and adequate opportunity of presenting a case against the taking of such a course. In the present case, there was no indication that the best interests of the children had been treated as a primary consideration. In the result the appeal should be dismissed.

267. During the course of their judgments, Mason, C.J and Deane, J. commented as follows in connection with the status of unincorporated conventions:

> *"…the fact that a Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party… that is because Parliament, prima facie, intends to give effect to Australia's obligations under international law…"*

268. It is accepted that a statute is to be interpreted and applied as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.

269. It must be noted that the court in the Teoh case was not concerned with legislative ambiguity or development of the common law. The question to be determined by the court turned upon the relevance of

the treaty provisions to the exercise by an official of a statutory discretion. The question thus was whether Australia's ratification of the Convention gave rise to a legitimate expectation that the decision maker would exercise his/her decision in accordance with the principles set out in the treaty.

270. It is significant that the Court found that while the ratification by the Executive of the Convention did not, as such, incorporate its provisions into domestic law, it nonetheless affected the lawful exercise of administrative action. The act of ratification gave rise to an expectation that the officers of the Executive would not act in a contrary manner. If they contemplated doing so, they would provide an opportunity to the person affected to argue against such a course.

271. The Court held that the Minister's delegate had not satisfactorily taken the interests of the respondent's children into account as a primary consideration in accordance with the Convention. Instead, the delegate accorded primacy to the policy requirements expressed in the departmental instructions manual relating to the grant of resident status.

272. I agree with the general approach and holding in the above case.

273. Applying the principles and logic found in the **Teoh** case, I hold that ratification or signing of a convention is a positive statement by the executive government of Botswana to the world and to the people of Botswana that the executive government and its agencies would act in accordance with the convention it signed. I hold that the signing of a treaty, by the executive arm of the State, on its own, constitutes sufficient foundation for a legitimate expectation.

274. Consequently, I hold that the applicants had a legitimate expectation that the position of the law, existing before the SI 57 was promulgated, would not have been changed to their disadvantage, in the sense of taking away their members' rights to strike, without being afforded an opportunity to be heard. Conventions No 87 and 98, which have been signed by the Botswana Government have been interpreted by the ILO Committee of Experts, eminent jurists all over the world, as requiring that the classification of essential services be limited to those services the interruption of which would endanger the health, the lives, or the personal safety of part of or the whole nation. I agree that the list of services captured by SI 57 do not meet the definition of "essential services" under international law.

275. The Executive, by failing to afford the applicants or their members an opportunity to be heard, offended against the duty to act fairly with respect to the applicants' legitimate expectation.

276. I am of the considered view that whilst the signing of Conventions 87 and 98 did not, as such, incorporate its provisions into domestic law, it nonetheless affected the lawful exercise of executive action. The act of signing gave rise to an expectation that the officers of the Executive would not act in a manner that contradicts the letter and spirit of those Conventions unless they (applicants) have been afforded the opportunity to argue to the contrary.

277. The above, on its own is sufficient to render the promulgation of SI 57 a nullity and I so hold.

278. In all the circumstances of this case, the applicants are entitled to succeed in the prayers sought for one or all of the reasons appearing in this judgment.

Order

279. In the result, the following order or declaration is made:

a) Section 49 of the Trade Disputes Act 2003 (Act No. 15 of 2004) is incompatible with the Constitution of Botswana ("the Constitution"), and accordingly invalid.

b) The Trade Disputes (Amendment of Schedule) Order, 2011 ("the Order") contained in Statutory Instrument No 57 of 2011 is invalid and of no force or effect.

c) The respondents shall pay costs of the application.

DELIVERED IN OPEN COURT AT GABORONE THIS 9th DAY OF AUGUST 2012.

OBK DINGAKE
JUDGE

OTTO ITUMELENG CHAMBERS – APPLICANTS' ATTORNEYS
ATTORNEY GENERAL – RESPONDENTS' ATTORNEYS