

**IN THE COURT OF APPEAL OF THE REPUBLIC
OF BOTSWANA HELD AT LOBATSE**

**COURT OF APPEAL CASE NO. CACLB-056-09
HIGH COURT CASE NO. MAHLB-000522-09**

IN THE MATTER BETWEEN:

LOUIS GOODWILL NCHINDO	1ST APPELLANT
TOURISM DEVELOPMENT CONSORTIUM (PTY) LIMITED	2ND APPELLANT
LOUIS GARVAS NCHINDO	3RD APPELLANT
JOSEPH MALOPE MATOME	4TH APPELLANT
GOLCONDA HOLDINGS (PTY) LIMITED	5TH APPELLANT

AND

ATTORNEY-GENERAL OF BOTSWANA	1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS	2ND RESPONDENT

J U D G M E N T

**CORAM: McNALLY AJP
RAMODIBEDI JA
FOXCROFT JA
HOWIE JA
LORD ABERNETHY JA**

LORD ABERNETHY JA:

- [1] The appellants in this case have been charged with a number of offences of a dishonest and fraudulent nature in relation to the acquisition by the second and fifth appellants respectively of two plots of land in Gaborone.
- [2] The trial has not yet taken place.
- [3] On 16th October 2008 the second respondent (“the DPP”) filed a Notice of Motion in terms of Section 8 of the Proceeds of Serious Crime Act as amended (Cap. 08:03) (“the PSCA”) making application for a restraining order in respect of each of the two plots of land.
- [4] In addition to a fifteen-page founding affidavit of the DPP, the application was supported by an affidavit of a Senior Superintendent of the Botswana Police Service complying with the requirements of Section 8 (2) of the PSCA as to the statements to be made and the information to be given in the affidavit.

- [5] The affidavit, which runs to some sixty pages, states in considerable detail the basis on which the Senior Superintendent has a reasonable belief that the appellants committed the offences which resulted in the acquisition by the second and fifth appellants respectively of the two plots of land.
- [6] Annexed to the affidavit are eighty-one documents running to some four hundred pages. There are also twenty-seven confirmatory affidavits, which with annexures of ten pages run in total to some sixty-five pages.
- [7] On 16 February 2009 the appellants filed a Notice of Motion in support of their counter-and interlocutory application for a number of orders, as follows:-

“PART A

1. *Declaring that sections 8 to 11 of the Proceeds of Serious Crime Act [Cap 08:03] (“the Proceeds of Serious Crime Act”), alternatively subsections 8(1), 8(2) and 8(4) of the Proceeds of Serious Crime Act, are inconsistent with the Constitution of Botswana (“the Constitution”), and more particularly the rights conferred by subsections 10(1), 10(7) and/or 3(a) thereof, and accordingly invalid;*
2. *Declaring that the powers conferred on the Director of Public Prosecutions (subsequent to the commencement of Act 14 of 2005) to bring an application for a restraining order in terms of section 8 of the*

Proceeds of Serious Crime Act, as well as an application for a confiscation order in terms of section 3 of the Proceeds of Serious Crime Act, and also to perform all other functions in relation to such applications as the Proceeds of Serious Crime Act (as amended) allows, are inconsistent with the Constitution, and more particularly section 51A read with section 86 thereof, and accordingly invalid;

- 3, *In the circumstances, declaring that the application for a restraining order which the Director of Public Prosecution (“the DPP”) has brought against the Defendants under the above-mentioned Case Number infringes the Defendants’ constitutional rights, is in conflict with the Constitution and is contrary to the rule of law, and is accordingly invalid;*
4. *Ordering any party who opposes this portion of the application to pay the Defendants’ costs in respect thereof, including the costs consequent upon the employment of attorneys and two instructed counsel;*
5. *Granting the Defendants further and/or alternative relief.*

PART B

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

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

The Honourable Mr Justice David Newman;

Mr Nicholas Oppenheimer;

The Honourable Margaret Nasha; and

The Honourable Pelonomi Venson-Moitoi;

7. *Ordering the DPP to pay the Defendants' costs in respect of this portion of the application, including the costs consequent upon the employment of attorneys and two instructed counsel;*
8. *Granting the Defendants further and/or alternative relief."*

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

[9] On 8 October 2009 the appellants filed a Notice of Appeal against the whole of the judgment and orders of Walia J. save for his order to allow

consultation with the Hon. Mr. Justice Newman and Mr. Nicholas Oppenheimer.

[10] It is appropriate to consider the issue raised in Part A paragraph 2 of the appellants' Notice of Motion first. This raises the question whether the powers conferred on the DPP to bring an application for a restraining order in terms of section 8 of the PSCA, as well as an application for a confiscation order in terms of Section 3, and also to perform all other functions in relation to such applications as the PSCA allows, are inconsistent with the Constitution, and particularly Section 51A as read with Section 86, and therefore invalid.

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

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

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

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

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

...

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

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

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

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

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

[16] One of the statutes amended by the Constitution (Amendment) (Consequential Provisions) Act 2005 was the Proceeds of Serious Crime Act, in which the words “Director of Public Prosecutions” were substituted for the words “Attorney-General” wherever the latter appeared.

Thus Section 8 (1) of the PSCA, as amended, provides:-

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

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

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

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

“The Public Protector has the additional powers and functions prescribed by national legislation.”

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

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

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

“Subject to the provisions of this Constitution (emphasis added), Parliament shall have power to make laws for the peace, order and good government of Botswana”.

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

[19] The appellants contended that in these circumstances the powers conferred on the DPP to bring an application for a restraining order in terms of Section 8 of the PSCA are inconsistent with the Constitution and are accordingly invalid.

[20] In the Court a quo Walia J. rejected the appellants' line of reasoning and held that the DPP was not precluded by the terms of Section 51A of the Constitution from bringing an application under Section 8 of the PSCA. He explained that what he had said about the DPP's powers at an earlier stage in the case, which might suggest that he was of a contrary view and on which the appellants relied, was said in a quite different context and was not applicable in the present context.

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

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

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

[22] Despite the respondents’ argument to the contrary, in my opinion a restraining order is not reasonably necessary for the conduct of the prosecution. It would be quite possible to conduct the prosecution from start to finish without the order. Moreover, in terms of Section 8 (1) of the Act a restraining order may be applied for before a person is charged with a

serious offence. It is also to be remembered that an application for a restraining order is a civil matter and is not part of the criminal proceedings.

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

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

[25] He dealt with the matter quite briefly. At paragraph 36 of his judgment he said this:-

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

[26] In my opinion, having regard to the purpose of a restraining order, it is difficult to resist the conclusion he came to. The learned judge went on to find support for his conclusion in a case which he himself had decided: **Malebogo and Another v Attorney-General MCHLB-000085-08**. In that case the applicants had made an application under Section 18 of the Constitution for a permanent stay of criminal proceedings. The application had been brought against the Director of Public Prosecutions, who argued that by reason of the restricted powers she had under Section 51A of the Constitution, such an application should be brought against the Attorney-

General. In his judgment Walia J. said that “*as the power to stop or stay any prosecution lies with the Director of Public Prosecutions, it accords with common sense that an application for stay of proceedings be brought against her.*” So far as he was aware – and it was not suggested otherwise – that judgment had not been challenged.

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

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

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

[29] In the original terms of the Constitution commencing on the independence of Botswana on 30 September 1966 Section 127 (13) had merely provided that:-

“The Interpretation Act shall apply, with the necessary adaptations, for the purpose of interpreting this Constitution.”

The present Interpretation Act (Cap.01:04) was enacted in 1984 and therefore Section 127 (13) would have applied to it. However, Section 127 (13) had been altered to the present wording of the sub-section by Rectification of the Laws (No. 2) Order 1993, which was made in terms of Section 10 of the Revision of the Laws Act (Cap. 01:03). In that situation, it was submitted that it had not been open to Parliament to enact, as it had purported to do in Section 2 (a) of the Interpretation Act of 1984 (Cap. 01:04), or for Walia J. to hold, that each provision of that Act applied to the Constitution. That was inconsistent with Section 127 (13) of the Constitution and therefore invalid. Accordingly, the provisions of Section

15 (2) could not apply to the Constitution, as Walia J. had held they did, and the tests of reasonable necessity and incidentality provided for in that subsection did not apply.

[30] The submission then proceeded as follows. There was nothing in the common law of Botswana that was relevant to cover any “*necessary adaptations*” as provided for in Section 127 (13). Accordingly, one had to go back to the terms of the 1889 Act. There was nothing there to support the conclusion that a proper interpretation of the powers expressly given to the DPP by Section 51A (3) of the Constitution included the power to apply for a restraining order. That conclusion could therefore only be implied. But it was only possible to imply words into a written instrument if they were necessary to ensure the effectiveness of the instrument. Since it was not necessary for the effectiveness of the powers given to the DPP by Section 51A (3) that she also had the power to apply for a restraining order, that power could not be implied. The DPP therefore had no power in terms of Section 127 (13) of the Constitution to apply for a restraining order.

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

[32] These heads of argument were filed only on 4 January 2010, the day before this session of the Court started, so one may perhaps be forgiven for thinking that the submission made at the hearing was something of an afterthought in recognition of the fact that the words “*incidental to*” might present a difficulty for the appellants in this matter, which had not been sufficiently addressed. That does not mean that the submission presented at the hearing is not entitled to be fully considered on its merits. Of course it is but, having considered it carefully, it is in my opinion misconceived. Section 127 (13) of the Constitution, as rectified by the Order of 1993, must be given effect to. But it does not go very far. The Interpretation Act, 1889 is to a considerable extent concerned with the interpretation of words and phrases which, even allowing for any necessary adaptations, have no relevance to Botswana. That said, there are some provisions that, with necessary adaptation, are relevant to Botswana. One example is Section 1 where it is provided that in Acts of the United Kingdom Parliament words importing the masculine gender shall include females and words in the singular shall include the plural and *vice versa*. Another, perhaps more pertinent for this case, is Section 32 which provides for the construction or interpretation of provisions as to the exercise of powers and duties. It provides as follows:-

- “(1) *Where an Act ... confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.*
- (2) *Where an act ... confers a power or imposes a duty on the holder of an office, as such, then unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.*
- (3) *Where an Act ... confers a power to make any rules, regulations, or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exerciseable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws.”*

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

provision of Section 2 (a) of that Act which applies Section 15 (2) to the Constitution.

- [34] Furthermore, I am not aware of any decision of this or any other Court in Botswana which has cast doubt upon the validity of Section 2 (a) of the Interpretation Act. On the contrary, in the well known full-bench case of **Attorney-General v Dow [1992] BLR 119**, Amissah P. said in relation to a submission that Section 2 of the Act applied to the Constitution, at p.129:-

“I agree that the provisions of the Interpretation Act apply to the interpretation of the Constitution.”

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

- [36] For these reasons Walia J. was in my opinion correct to apply s.15 (2) of the Interpretation Act to Section 51A (3) of the Constitution. In my opinion he was also correct to hold that the power given by Section 8 (1) of the PSCA

to the DPP to apply for a restraining order was incidental to the powers given to her by Section 51A (3) and was therefore not inconsistent with the Constitution. The result is the same with regard to the powers given to the DPP to apply for a confiscation order in terms of Section 3 of the PSCA.

[37] Accordingly, the appellants' challenge on this point fails.

[38] I turn now to the issue raised in Part A paragraph 1 of the appellants' Notice of Motion. This is a challenge to the validity of Sections 8 to 11 of the PSCA or alternatively Section 8 (1), (2) and (4) of the Act on the ground that they are inconsistent with the Constitution of Botswana and more particularly the rights conferred by Section 10 (1) and (7) and/or Section 3 (a) thereof.

[39] If successful, the challenge would have far-reaching consequences. On the one hand, the system of restraining orders provided for in the PSCA would be invalidated and it is difficult to envisage any other such system which could validly take its place. As a result the effectiveness of confiscation

orders would be seriously, perhaps fatally, undermined and the purposes of the PSCA defeated. That would not be in the public interest. The terms of Section 26 of the Interpretation Act (Cap. 01:04) would be overridden. That section provides that:-

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

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

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

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

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

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

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

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

(d) *the basis for such beliefs.*

...

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

[42] Section 3 (a) of the Constitution provides as follows:-

"Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for

the rights and freedoms of others and for the public interest to each and all of the following, namely –

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

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

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

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

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

...

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

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

[45] That quotation is taken from the appellants' heads of argument and it is central to their argument that they are forced or compelled to answer the DPP's case in such a way as to disclose information that would result in an infringement of their rights under Section 10. The authorities they rely on likewise proceed on the basis that an accused has no obligation to assist the prosecution and cannot be put in a position where he or she is compelled to do so.

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

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

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

“...this argument proceeds on a misreading of s.3. The first word in the section is ‘whereas’, If ever a word is redolent of a preamble, this is it. The section from the beginning down to the end of (c) appears to be declaratory of all the fundamental rights to which a citizen of Botswana is entitled. After this preamble there follows the substantive part of the section which gives effect to the declaration and aspirations contained in the preamble. It also deals with the permissible limitations on such rights and freedoms, but it does so in a specific way. It provides that the provisions of chap 2 have effect for the purpose of affording protection to the rights and freedoms specified in the preamble ‘subject to such limitations of that protection as are contained in those provisions.’ It follows therefore that one must look at each individual provision to see if it contains any limitation”.

[48] In **Ahmed** the Court was dealing with Section 10(2). No relevant limitations are contained in that sub-section and therefore no implied restriction should be read into it. Similarly, in my opinion, no relevant restrictions are contained in either of sub-sections 10 (1) or 10 (7) and so no implied restriction should be read into either of them. Despite what was said in **Ahmed** counsel for the first respondent made the same submission to this Court (a submission which was adopted by counsel for the DPP) as had been made, and rejected, on behalf of the Attorney-General in **Ahmed**. In doing so counsel relied for support on what had been said by Amissah P. in this Court in **Attorney-General v Dow** [1992] 1 BLR 119 and by Tebbutt J.P. in **Attorney General v Otlhomile** [2004 1 BLR 21].

[49] The particular passage referred to in Amissah P's judgment in **Attorney General v Dow** is as follows (at p.133):-

“From the wording of section 3 [of the Constitution], it seems to me that the section is not only a substantive provision, but that it is the key or umbrella provision in Chapter II under which all rights and freedoms protected under that Chapter must be subsumed. Under the section, every person is entitled to the stated fundamental rights and freedoms. Those rights and freedoms are subject to limitations only on two grounds, that is to say, in the first place, “limitations designed to ensure that the enjoyment of the said rights and freedoms by any

individual does not prejudice the rights and freedoms of others”, and secondly on the ground of “public interest”. Those limitations are provided in the provisions of Chapter II itself, which is constituted by sections 3 (but effectively, Section 4) to 19, of the Constitution.”

[50] In my opinion, when the whole of that passage is properly understood, so far from it being contrary to what was said by Lord Sutherland in **Ahmed**, it is totally consistent with it. The key, in my opinion, is in the last sentence of the passage. What the learned judge is there saying is that it is necessary to look at **each** (emphasis added) of Sections 4 to 19 to discover whether the rights and freedoms provided in that section are subject to one or other or both of the limitations mentioned in Section 3. The passage from Amissah P.’s judgment in **Dow** quoted above was before the Court in **Ahmed**. Indeed, it was quoted by Lord Sutherland and as I have said, counsel for the Attorney-General in that case sought to take from it precisely what counsel for Attorney-General, the first respondent, sought to take from it in this case. That is then expressly rejected by Lord Sutherland in the passage from his judgment in **Ahmed** quoted above. There is not a hint in that passage that the Court in **Ahmed** thought that it was saying anything inconsistent with what Amissah P. had said in **Dow**.

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

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

[53] Interestingly counsel for the first respondent was then a member of the High Court judiciary and was the Judge a quo in **Otlhomile**.

[54] There are passages in Tebbutt JP's judgment in **Otlhomile** (with which all the other judges agreed), which if taken out of context might be interpreted as saying something different about Section 3 of the Constitution from what was said in **Ahmed** (and, by extension, from what was said in **Dow**). As I have previously indicated, the context in **Otlhomile** was the position of the reverse onus in Section 4 (a) of the Stock Theft Act in relation to the presumption of innocence in Section 10 (2) (a) of the Constitution. As is clear from Tebbutt JP's judgment, reverse onus is a concept that is to be found in statutory provisions in many jurisdictions. It is recognised that one of its consequences is a limitation on or exception to the presumption of innocence. Whether it is a permissible limitation will turn on considerations of whether it is reasonably necessary to protect the rights and freedoms of others and the public interest and that in turn involves considering proportionality.

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

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

“... it is important to note that the exercise of the rights contained in those provisions of the Constitution contained in Chapter II is subject to the respect for the rights and freedoms of others and to the public interest and the limitations to the protection of those rights, as expressed in the provisions of the Constitution defining such rights, are designed to ensure that their enjoyment does not prejudice the rights and freedoms of others or the public interest.” (emphasis added)

[57] What Tebbutt JP said there was in my opinion totally consistent with what Lord Sutherland had said in **Ahmed**. In my opinion, therefore, the proper interpretation of Section 3 of the Constitution is the one which the Full Bench of this Court unanimously decided in **Ahmed** and is subject to qualification only in special circumstances such as were found to exist in **Othomile** but do not exist here.

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

[59] Taking Section 10 (7) first, the right conferred is quite clear. It is a specific right that no person who is tried for a criminal offence shall be compelled to give evidence **at the trial** (emphasis added). Just as no implied restriction is to be read into the sub-section, so no gloss can be implied which would alter the plain meaning of those words. Restraining order proceedings are not

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

[60] Section 10 (1), in short, guarantees the right of all accused persons to a fair trial. If therefore, the appellants were compelled to respond to the DPP's case for a restraining order in the way they say they are then I accept that that could result in unfairness. Whether it would necessarily do so is another matter. *Walia J.* thought that it was too early to say; it was a matter that could only be decided at the trial. I can understand that approach and there is good authority in support of it, because not every piece of unfairness necessarily results in an unfair trial and it is usually difficult, if not impossible, to decide the matter in advance. I am prepared to accept, however, that there may be circumstances in which it could be said in advance of the trial that if certain matters unfolded in a particular way, it would inevitably lead to an unfair trial. However, I am satisfied that that is not the situation in the circumstances of this case. That is because I am satisfied that the appellants are not compelled to answer the DPP's application in the way that they say they are. On the contrary, whether and, if so, to what extent, the appellants respond to the application is in my

opinion a matter of choice for them. A number of cases in the High Court of South Africa in support of that proposition were relied on by the DPP: **The National Director of Public Prosecutions v Michael James Brennan and Another**, Case No. 06/27382 (Witwatersrand Local Division); **National Director of Public Prosecutions v Kiyaan Rinquest and Others**, Case No. 7202 of 2003 (Cape of Good Hope Provincial Division); and **Davis v Tip NO & Others** 1996 (1) SA 1152 (WLD).

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

“Indeed the respondent has an election whether to file an affidavit rebutting incriminating evidence or run the risk of a finding that there is evidence on a balance of probabilities that the property in question is the proceeds of unlawful activities. To my mind the exercise of such an election does not amount to compelling him to speak in the criminal proceedings. As pointed out in **Davis v. Tip** what distinguishes compulsion from choice is whether “the alternative which presents itself constituted a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so”. In my view, in electing

to adduce evidence to rebut incriminating evidence that the property in question is the proceeds of unlawful activities does not - by any stretch of the imagination - amount to compelling him to speak in the criminal proceedings. It merely requires the respondent to make a choice, "hard as that choice might be" and nothing more. In the event that he elects not to file rebutting evidence he would have legitimately exercised his choice..."

[62] The test which the DPP has to pass in order to obtain a restraining order in terms of Section 8 (2) of the PSCA is a low one. In **DPP v Daisy Loo (Pty) Ltd and Others**, Criminal Appeal No. 067-08, Tebbutt JP said this (at paragraph 35):-

In considering objectively whether it is satisfied that there is a reasonable cause to believe that the defendant has benefited from the Proceeds of a Serious Crime for which he has been or may be charged, the test to be applied by the court is not whether the applicant has satisfied it beyond reasonable doubt nor on the balance of probabilities. The standard of proof is a low one requiring only that the court must be satisfied on reasonable grounds that there might be a conviction and a consequent confiscation order."

[63] The DPP has gone to very great lengths in her application for a restraining order. So great indeed that the appellants complained that it went well beyond what was contemplated by Section 8 of the PSCA. Be that as it may, the first choice to be made by the appellants is whether to answer the application at all, never mind in the detail that they say they would have to

answer it. Bearing in mind the low standard of proof required, the appellants will have to judge whether there is any real prospect of success in their opposing the application. On the other hand, if they consider that despite the length of the supporting documentation the application has no prospect of satisfying the low standard of proof they can decide to rely on the court coming to the same conclusion and dismissing the application. As Walia J. pointed out, it is not a foregone conclusion that the court will grant the restraining order; the court has to be satisfied that the statutory test has been passed.

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

[65] For these reasons the appellants' challenge in Part A paragraph 1 of their Notice of Motion also fails.

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

[67] Counsel for the first respondent submitted that this point could not stand alone; it was premised on points 1 and 2 of Part A. That was clear from the opening words "*In the circumstances.*" Counsel admitted that he had not taken the point in the Court a quo. In my opinion the point is unsound. In my opinion it is perfectly possible to read paragraph 3 as a stand alone point and I am prepared to deal with it on that basis.

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

go to inordinate lengths in seeking a restraining order but it is impossible to say at this stage what would be inordinate lengths in the circumstances of this case, still less to say, as the appellants invited the Court to do, whether the appellants' rights to a fair trial would be infringed were they to be obliged to answer in detail the allegations in the DPP's founding papers.

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

[70] For all these reasons the appellants' case for the orders sought in Part A of their Notice of Motion in my opinion fails and is hereby dismissed.

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

[72] I turn now to consider Part B of the appellants' Notice of Motion. I can deal with this point briefly.

[73] First, though, counsel for the DPP submitted that the appellants were not entitled to any relief under Part B because notice in respect of that Part had not been served on the second respondent in terms of Section 4 of the State

Proceedings (Civil actions by or against or against the Government or Public Officers) Act (Cap. 10:01). This submission, it seems to me, has an air of unreality about it. The Attorney-General is the first respondent in this case and therefore already has notice of the appellants' Notice of Motion. So the purpose of Section 4, which is to ensure that such actions are not proceeded with without the Attorney-General's knowledge, has been served. It would be patently absurd to insist on notice and so delay matters unnecessarily in that situation. Not surprisingly, counsel for the first respondent did not make a similar submission. In my opinion it is of no merit whatsoever.

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

[75] In my opinion the matter was very much one for the Court a quo. I am not persuaded that Walia J. misdirected himself on it and I would not interfere

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

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

**DELIVERED IN OPEN COURT AT LOBATSE THIS 29TH DAY
OF JANUARY 2010.**

**LORD ABERNETHY
JUSTICE OF APPEAL**

I AGREE:

**N.J. McNALLY
ACTING JUDGE PRESIDENT**

I AGREE:

**M.M. RAMODIBEDI
JUSTICE OF APPEAL**

I AGREE:

**J.G. FOXCROFT
JUSTICE OF APPEAL**

I AGREE:

**C.T. HOWIE
JUSTICE OF APPEAL**

FOR APPELLANTS:

**ADV. P.B. HODES S.C.
ADV. B.J. FARLAM**

FOR 1ST RESPONDENT:

**MR M.P. PHUTHEGO
MR K. NGAKAAGAE
MR. T. BALOI
MR G.T. TLHABOLOGANG**

FOR 2ND RESPONDENT

**MR M.B. MARUMO
MR MOLODI
MR KEBONYEMODISA**