

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 16/04
High Court Civil Case No. 2449/03

In the matter between:

**WATER ENGINEERING(PTY) LTD.
JAMES S. DRYNAN**

**1st Appellant
2nd Appellant**

And

**JUSTICE P. H. TEBBUTT
JUSTICE N. ZIETSMAN
JUSTICE C. PLEWMAN
JUSTICE K. R. A. KORSAH
JUSTICE Lord SUTHERLAND
JUSTICE A. M. AKIWUMI
ATTORNEY GENERAL OF BOTSWANA
MURRAY & ROBERTS CONSTRUCTION
(BOTSWANA) (PTY) LTD.**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent

8th Respondent**

**Advocate W. Trengove(instructed by Mr. J. Carr Hartley for the Respondents
No Appearance for the Appellants**

JUDGMENT

**CORAM: MOORE J. A.
McNALLY J. A.
CHINHENGU J. A.**

MOORE J.A.

This is an appeal brought through a NOTICE OF APPEAL by Water Engineering (Pty) Ltd, 1st appellant and James Stewart Drynan, 2nd appellant against 6 justices of this Court of Appeal – respondents 1-6, the Attorney-General for the republic of Botswana, 7th respondent, and Murray and Roberts Construction (Botswana) (Pty) Ltd, 8th respondent.

It is to be observed, however, that only the first to sixth Respondents noted an exception to the appellants' declaration dated 11 July 2003.

Paragraph 2 of the Notice of Appeal reads:

"The decision of the Court below complained of

- (i) the upholding of the 1-6th defendants' exception and/or exceptions to the plaintiff's declaration.
- (ii) the award of costs to the 1-6th defendants on the attorney and client scale
- (iii) the referral of the plaintiffs to the Attorney-General for investigation on grounds of criminal defamation and contempt of court.
- (iv) the refusal to refer the plaintiffs' allegation that the 1-6th defendants are illegally employed to the Attorney-General for investigation.
- (v) The failure to judicially review the judgments of the 1-6th defendants.

Paragraph 3 reads:

- (i) in Botswana law, the Justices of Appeal are not immune from suit where their conduct in the purported discharge of their judicial duty is in any way dishonest.
- (ii) in terms of the Constitution of Botswana the High Court has unlimited original jurisdiction in civil and criminal matters and this extends to civil suits and to the review and sitting aside of dishonest judgments handed down by the Justices of Appeal.
- (iii) the claim for costs on the attorney and client scale was not sought in the 1-6th defendants exception and was introduced before the court *a quo* without notice to the plaintiffs and without application to the court to amend their pleadings;
- (iv) in terms of the Penal Code the allegations made by the plaintiffs against the 1-6th defendants are privileged.
- (v) the court *a quo* has an obligation to the public, in the absence of any denial to the contrary by the 1-6th defendants, to investigate, or have investigated, the plaintiffs' allegations that the 1-6th defendants are

employed in contravention of the Constitution of Botswana.

- (vi) the court **a quo** has not yet published its reasons for its decisions in its order of 19 May 2004, nor is it clear whether or not all the 1-6th defendants exceptions (the document claims to be an exception, but lists what appear to be several) were upheld. It is thus not possible for the appellants at this time, in meeting the six week deadline for noting an appeal to proffer all possible complaints and grounds for those complaints against the court's decisions. It is therefore, the appellants intention to supplement its grounds of appeal, if considered necessary, upon receipt of both the written order and the reasons for the decisions contained therein.

At paragraph 4 the reliefs sought from the Court of Appeal are set out.

These are:

“Relief sought from the Court of Appeal:

- (i) to order that this appeal be head by judges entirely independent of Botswana.
- (ii) to set aside the court **a quo's** holding of the 1-6th defendants' exceptions(s) and to dismiss the exceptions(s) with costs.

alternatively

- (iii) to set aside the court **a quo** in its entirety and to order a re-trial of the 1-6th defendants' exception(s) by a judge likewise entirely independent of Botswana – i.e. a **peregrinus**. the exception(s) with costs.

And

- (iv) to award costs of this appeal to the appellants.”

As telegraphed in ground (vi) of their grounds of appeal, the appellant's later filed a Notice of Supplementary Grounds of Appeal. Some 14 additional grounds of appeal were added to the 6 filed previously.

Since the attack of the appellants is against the judgment and orders of the court a quo upon the respondent's exception, it is necessary to ascertain first, what were the issues joined between the parties at the hearing of the respondent's exception and secondly, the judgment or order made by the court a quo upon those issues. Having done so this court must then go on to examine the grounds and supplementary grounds of appeal advanced by the appellant.

In their Notice of Exception in terms of Order 20, rule 20, the first to sixth respondents in their capacity as the first to sixth excipients, noted an exception to the Plaintiff's Declaration dated 11 July 2003 on the basis that the High Court lacks jurisdiction to entertain the plaintiff's action and further, that the plaintiff's declaration fails to disclose a cause of action.

The particulars of the Exception were then set out as follows:

"Absence of Jurisdiction

1. In their Declaration the Plaintiffs seek (in paragraphs 94.4 to 94.5 thereof) to set aside various rulings and

judgments delivered by the Excipients sitting as a Court of Appeal on 21 January ("the first hearing") and 8 July 2002 ("the second hearing") and an order directing that the appeal heard by the Court of Appeal under CAP 6/2001 be re-heard.

2. The High Court has no jurisdiction to review or set aside orders, directions or judgments made or delivered by the Court of Appeal nor to direct the Court of Appeal to re-hear any appeal.

Failure of the Declaration to make out a cause of action.

3. The relief sought in paragraphs 94.1 to 94.3 of the Declaration constitutes claims for compensation for wasted costs and for time spent by the Second Plaintiff in connection with the First Plaintiff's appeal.
4. The Plaintiffs fail to indicate whether compensation is sought by the Plaintiffs severally, jointly or jointly and severally. The Plaintiffs furthermore fail to indicate whether the costs which are sought to be recovered were paid or incurred by the First Plaintiff or the Second Plaintiff.
5. Insofar as the costs were allegedly incurred by the First or Second Plaintiffs in connection with the second hearing, such costs were not wasted and accordingly do not constitute damages.
6. Insofar as the costs were incurred by either Plaintiff in relation to the first or second hearings, they are recoverable only to the extent to which they constitute taxable costs and then only in terms of the costs order made by the Court of Appeal in the second hearing.
7. Insofar as the Plaintiffs seek to be compensated for costs incurred by the Second Plaintiff, or time spent by him in connection with the appeal, such compensation is not recoverable because the Second Plaintiff is not entitled in law to be compensated for performing legal work nor for disbursements made by him in the course of performing such work.

- 8 Insofar as the First Plaintiff seeks to be compensated for work done or costs incurred by the Second Plaintiff, no cause of action is made out, since the First Plaintiff has suffered no loss in consequence thereof.
- 9 Insofar as the Plaintiffs seek to be compensated for work done and costs incurred after the second hearing such compensation is not recoverable in the present action since the relevant work was done, and the costs were incurred, in establishing the Plaintiffs' prospects of success in the present action and are either recoverable from the Excipients as costs in the present action or not at all.
10. In any event, no damages are recoverable in consequence of losses sustained by a litigant as a result of the performance by a judicial officer of his or her judicial duties in the circumstances pleaded by the Plaintiffs.
11. More particularly, since as a matter of law the Second Plaintiff is not and was not entitled to represent the First Plaintiff in judicial proceedings in the High Court or the Appeal Court, no damages flow from the decisions and rulings of the Excipients, acting in their judicial capacities, to that effect.
12. In the circumstances the Plaintiffs' Declaration fails to make out a cause of action."

Particular attention must be paid to the orders sought by the excipients in order to determine, by reference to the order of the court *a quo*, the extent to which the orders prayed for were either granted or rejected.

The order of the court ***a quo*** is set out on pages 26 to 27 of the judgment on exception. It reads as follows:

- “1. The Exception to the Plaintiff’s claims against the first to sixth Defendants, is upheld with costs on the scale as between attorney and client.
2. The Plaintiff’s claims against the first to sixth Defendants are dismissed with costs on the scale as between attorney and client.
3. The Plaintiff’s allegations about the first to sixth Defendants and the judiciary generally in:
 - (a) Their declaration in this action;
 - (b) Their reply to the exception dated 25th November 2003;
 - (c) Their undated “Notice of Discontinuation” filed with this court on 3rd February 2004;
 - (d) Their heads of argument dated the 21st January 2004;
 - (e) Their letter to the Registrar of this court dated 27th January 2004, and;
 - (f) Their letters to Messrs Armstrong dated 7th March 2004 and 13th April 2004.

Are referred to the attorney General for investigation and prosecution if so advised and the Registrar is directed to bring this order and the reasons for it to the attention of the Attorney General as soon as possible.”

At page 27 of his judgment, the judge in the court **a quo** thought that the order in paragraph 3 also required a short explanation. It was not prayed for specifically by the excipients and it is doubtful whether a prayer for “the order in paragraph 3” could be implied under the omnibus prayer for the court, “granting the excipients such further or alternative relief as this Honourable Court may deem fit.”

It would be out of order for this court to make any pronouncement upon the matters contained in the order in paragraph 3 except to say that it certainly was within the judge's province to refer the materials enumerated in the order "to the Attorney General for investigation and prosecution if so advised". There this question must rest since the Attorney General must be left free to exercise his own independent judgment in the matter and to advise himself as to what action, if any, he would deem appropriate in the circumstances. Indeed, there may well be other material within the court file which may be of interest to the Attorney General in this context.

The order of the court **a quo** at paragraph 1 may be bisected into two components:

1. Upholding the exception to the Plaintiff's claims against the first to sixth defendants;
2. The award of costs on the scale as between attorney and client.

The Appellants complained specifically about both these components in paragraph 2 (i) and (ii) of their NOTICE OF APPEAL. In support of their appeal against the upholding of the exceptions the appellants contended that "the Justices of Appeal are not immune from suit where their

conduct in the purported discharge of their judicial duty is in any way dishonest.” A critical reading of this ground suggests that the appellants are contending that the Justices of Appeal have been guilty of dishonesty in the purported discharge of their judicial duty. Upon such a reading of the appellants’ contention, an onerous burden would lie upon them of proving by a balance of probabilities that the conduct of the judges in the purported discharge of their judicial duty was in any way dishonest.

The allegation of dishonesty is extremely grave, particularly against judges of the Court of Appeal. This is because under Section 10(2) of the Constitution, a judge of the Court of Appeal shall not enter upon the duties of his office unless he has taken and subscribed such oath for the due execution of this office as may be prescribed by Parliament. By the oath which he swears, a judge of the Court of Appeal assumes a sacred obligation to well and truly serve the Republic of Botswana in his office; to do justice in accordance with the Constitution of Botswana as by law established, and in accordance with the laws and usage of the Republic without fear or favour, affection or ill will.

The most astonishing feature of this extraordinary appeal is that the first appellant has actually been completely successful in the case which it brought before the courts. The very judges whom the second appellant accuses of corruption, fraud and dishonesty have consistently found in

favour of the first appellant. It was successful in obtaining a rescission of an arbitral award made against it. It was successful in obtaining leave from this court to appeal against a failure by the High Court to grant it its costs. And finally its claim for those costs was upheld in this court.

So why are we here? We are here because the second appellant suddenly and without notice decided that he, as a director of first appellant, would represent the company before this court. He was told that was not possible. He persisted. He was advised that the matter would have to stand down. The first appellant was ordered to pay the wasted costs of the day.

At the second hearing, which out of deference to the second appellant was heard by an entirely different bench of judges, the second appellant again purported to appear for his company. He did, however take the precaution of having a legal representative with him. When he was again advised that the court, having done some research on the matter, was not prepared to allow him to speak for his company, he handed over the conduct of the case to his lawyer, who proceeded to win it.

It is not thus the result of the litigation which has prompted these intemperate outbursts. It is simply the injured pride of the second appellant. He has arrogated to himself a level of Solomonic wisdom

orbiting above the competence of the collective Court of Appeal. Counsel for the respondents has argued that:

“Dr. Drynan in any event does not have any claim because he was not a party to the appeal before this court. Even if it committed all the wrongs of which it stands accused, they were wrongs committed against Water Engineering and not against Mr. Drynan. He in other words in any event does not have any cause of action.”

I am in complete agreement with this submission.

For the 2nd Appellant to write, for example that the Court of Appeal “stated (dishonestly) that ‘In Botswana the matter of representation is a matter of statute law’” is to leap beyond the yawning chasm separating that which is permissible criticism or comment, from that which could very well become the subject matter of contempt proceedings. Further, it is only by a dangerous combination of arrogance and hubris that a layman - however learned he might otherwise be - unlettered in the law, could rashly conclude that a finding by experienced judges of our Court of Appeal, which differs from his own artless perception, is a dishonest judgment.

Under the Constitution of Botswana, the Court of Appeal is the highest court in the land. Its decisions are final. It is a superior Court to the High Court. There is no further appeal. A litigant who is willing to

abide by the rule of law will obey the orders of the Court of Appeal. He may, however, petition the Legislature to overturn a decision of the Court of Appeal if he thinks that it is erroneous. But it is no part of the democratic or legal process for a disgruntled litigant to bring unmeritorious actions in the High Court against the judges of the Court of Appeal arising out of judgments given by them in their judicial capacity, while hurling verbal brickbats of the most injurious opprobriousness at their Lordships.

Put simply, the second appellant, who was not even a party to the litigation in which his company was involved, thinks the Court of Appeal was wrong in refusing him to allow him to represent the company in court. He wants the High Court to rule that the Court of Appeal was wrong. That is self-evidently preposterous. To shore up this preposterous proposition he throws in an allegation that the Court of Appeal was dishonest. There is no shred of evidence that it was dishonest. There is no possible reason why it should have wanted to be dishonest. It was not dishonest. And as final proof that it was not dishonest, it went on to find in favour of the second appellant's company. The company suffered no loss as a result of the ruling.

Later in this judgment I conclude that the Judges of Appeal are immune from claims of this nature, even if they are dishonest. But I must make

it clear that I and my colleagues are satisfied that there is no evidence at all of dishonesty on the part of the Judges of Appeal who are the respondents in this appeal.

THE RECORD OF APPEAL

The following statement appears at the foot or end of the index prepared by the Registrar:

“The inclusion of items 9 (pages 60-62), 14 (pages 107-109), 15 (pages 110-112), 20 (pages 186-187), and 19 (pages 178-185) was objected to by the Respondents but were included pursuant to Rule 17(3) of the Court of Appeal Rules”.

Rule 17 (3) of the Court of Appeal Rules reads as follows:

“If the Registrar of the court below or any party objects to the inclusion of a document on the grounds that it is unnecessary or irrelevant and the other party nevertheless insists upon it being included the document shall be included and the record shall, with a view to the subsequent adjustment of the costs of, and incidental to the conclusion of, such document, indicate in the index of papers or otherwise the fact that the inclusion of the document was objected to and the party who so objected”.

Rules 17 (2), (3) and (4) read together give useful guidance for the preparation of the record of appeal. Their aim is to ensure that, particularly in these days when avalanches of paper threaten to engulf the court, the record is stripped down to its bare essentials lean and manageable, and unburdened by the superfluous and the irrelevant. Equally, because of continuing inflation, an underlying objective of these sub-rules is the curtailment of costs. It behooves all litigants therefore to be ever mindful to seek to include in an appeal record only those materials which are strictly germane and relevant to the resolution of the issues before the court. The record is no place for the plethoric unburdening of a tortured soul.

Rule 17 (2) is of such importance, that it bears inclusion here:

“The Registrar of the court below, as well as the parties, shall endeavour to exclude from the record all documents (more particularly such as are merely formal) which are not relevant to the subject matter of the appeal and generally to reduce the bulk of the record as far as practicable, taking special care to avoid duplication of documents and unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied shall be enumerated in a list at the end of the record. Where part or parts only of any lengthy document are directly relevant to the subject matter of the appeal it shall be permissible to omit to copy such parts of the document as are neither directly relevant to the subject matter of the

appeal nor necessary for the proper understanding of the part of parts that are so relevant”.

It is undoubtedly with the above sub-rule in mind that the Respondents sought the exclusion of the materials enumerated at the end of the index which are:-

Pages 60-62	Seventh Defendant. Notice of Exception CC No. 2449/2003
63-64	Applicant's (Attorney General of Botswana) Notice of Motion CC No. 2449/2003
107-109	Respondent's Heads of Argument – Submissions CC No. 2249/2003
110-112	Applicant's Heads of Argument CC No. 2249/2003
178-185	Appellant's Heads of Argument in support of an appearance by James Stuart Drynan to the Court of Appeal of Botswana
186-187	Letter from Water Engineering to the Hon. Mr. Justice Collins

The inclusion of the above material may be of some relevance when the taxation of costs takes place.

TRANSPARENCY OF PROCEEDINGS

By letter dated 10 January 2005 addressed to the Registrar of this Court, the 2nd appellant Mr. James Stewart Drynan indicated that:

“It is not the intention of the appellant to be present at the hearing as the procedure envisaged by section 25 (2) has been adopted. This, too makes it all the more imperative that justice should be seen to be done by having the hearing recorded.”

The principal feature of open justice in a free and democratic society such as Botswana is that the courts of justice should be administered in the full glare of publicity. Thus, parties to the proceedings and their legal representatives, their witnesses, members of the media and of the public at large are entitled to be present at a public trial in open court.

The election of the appellants to take advantage of the provisions of section 25 (2) of the Court of Appeal Act Cap. 04:01 represents the exercise by them of their freedom of choosing between being present in court for the hearing of the appeal, or relying only upon the written material which they had already submitted for the court’s consideration. Their self-imposed absence could not, and did not, detract from justice being “seen to be done”. Theirs was the right to be present or not to be present at the hearing.

What is more, when Messrs. Trengove S. C. and Carr-Hartley of counsel indicated their appearance for the respondents, Mr. M. W. Makuyana

rose from the nether region of the court room, where he had been making notes in apparent discomfort by writing upon material resting in his lap, to inform the court that he was there for the purpose of observing the proceedings in the interests of the appellants. He was unrobed and unbanded and evidently not in any fit sartorial state for audience before the court. The impairment of his capacity to appear on behalf of the appellants notwithstanding, and in order to afford him the best available facility for the achievement of his purpose, the court of its own motion, following an example of Megarry J. in a case where he thought it appropriate to do so, permitted Mr. M. W. Makuyana to sit at the bar table accoutered as he was, where he proceeded to make continuous and copious notes of all that transpired for the entire duration of the hearing of the appeal with the obvious intent of conveying to the appellants a complete account of all that had taken place at the hearing.

Of equal importance, was the presence in court of two gentlemen of the press who were there to cover the proceedings. The court both recognized them and welcomed them and reaffirmed their right to be present in court at all of its public sittings in open court, as well as their duty of reporting fairly and accurately for the benefit of the public at large.

In considering the appellant's request to have the proceedings recorded, the court caused enquiries to be made as to what were its previous practices in this regard. The response was that, despite the appellant's assertion of the court's "having done so on the previous occasion", it was not the practice of this court to have its hearings recorded. The court did not consider the appellants' free and voluntary election to absent themselves from the hearing of their appeals to be a sufficient reason to depart from its established practice.

In the event then the court observed every canon and criterion requisite and necessary for the conduct of an open hearing in a democratic society. The appellants' decision to absent themselves from the hearing was of itself an exercise of their democratic right of which they freely availed themselves without fear of hindrance or sanction.

THE APPELLANT'S COMPLAINTS

The appellant's complaints may, for convenience, be dealt with ***seriatim***: under (i) the learned trial judge was entirely correct in upholding the 1-6th defendants' exception and/or exceptions to the plaintiff's declaration for the reasons which he so lucidly set out in his judgment. This judgment will follow the same order which was observed in the court ***a quo***.

JUDICIAL IMMUNITY

Collins J was justified in holding that all judges of superior courts are protected by an absolute immunity against claims for damages arising from their judicial conduct. This common law immunity has been traced as far back as 1607 when Lord Coke explained in **Floyd v. Barker** (1607) 77 E.R. 1305 at 1307 how the immunity was necessary to protect judges against attacks arising from their conduct:

“For this would tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniations.”

In more recent times Lord Denning M.R. restated the same principle thus in **Sirros v. Moore** (1975) 1 Q.B. 118 at 136:

“Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself:

“If I do this, shall I be liable in damages.”

Collins J went on:

“In 1984 Lord Bridge in the House of Lords explained the *rationale* of the immunity in **McC v. Mullan** (1984) 3 All ER 908 (HL) like this:

“The principle underlying this rule is clear. If one judge is a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.”

The principle has been repeated and expanded in Canada, Australia, New Zealand and the U.S.A. I am not required to go further than distilling the essence of the immunity by reference to the citations already made. Accordingly, insofar as the Excipients are concerned who were acting in their judicial capacity (something admitted by the Respondents at paragraph 82 of the Declaration), the Exception is upheld on account of common law judicial immunity for the reasons afore-stated.”

I agree with the authoritative statements from the judgments cited by Collins J. I also agree with his conclusions and respectfully adopt them:

Senior Counsel for the respondents made a comprehensive review of cases from several Commonwealth countries illustrating that the principle of judicial immunity from suit, had been firmly established. This immunity, he said, is firmly entrenched in the jurisprudence of the United States Supreme Court. It also accorded with the Basic Principles on the Independence of the Judiciary endorsed by the United Nations 1985. Principle 16 provides that:

“Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the state, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.”

Counsel submitted that the immunity that protects superior court judges, is the product of the development of the common law throughout the Commonwealth and the U.S. He summarized its principal features as follows:

1. The immunity protects superior court judges.
2. It is absolute in that it protects judges against all suits arising from the performance of their judicial functions. They are protected even when they are accused of bad faith.
3. The judges lose the protection of the immunity only if they do something which they know is beyond their power.
4. The rationale of the immunity is that it is “*an essential corollary of judicial independence.*”
5. There is no inconsistency between the immunity and fundamental human rights. On the contrary, “*judicial immunity itself is a fundamental constitutional principle because it is central to the concept of judicial independence.*”

Learned Senior Counsel for the respondents also founded the immunity of Superior Court Judges upon statutory bases. He referred to Section 25 (1) of the High Court Act which affords an absolute immunity to

judges of the High Court against civil suits arising from their judicial conduct. This immunity is absolute and protects even against the allegations of bad faith.

Upon its face, and read in isolation, section 25(1) appears to offer no protection to judges of the Court of Appeal. It provides:

“No judge shall be liable to be sued in any court for any act done or ordered to be done by him in the discharge of his duty whether or not done within the limits of jurisdiction, nor shall any order for costs be made against him, provided that he, at the time, in good faith believed himself to have the jurisdiction to do so under the act complained of.”

By the interpretation section 2 of the Act “judge” means a judge of the Court and includes the Chief Justice. Section 99 (2) of the Constitution provides that:

“The judges of the Court of Appeal shall be –

(c) the Chief Justice and the other judges of the High Court.”

Section 99(4) provides that:

“The Court of Appeal shall be a superior court of record and save as otherwise provided by Parliament shall have all the powers of such a court.”

Section 95(3) of the Constitution provides that:

“The High Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.”

The wording in sections 95(3) and 99(4) is identical following the words “The High Court” and “The Court of Appeal” respectively. An odd feature which does not alter the meaning in any way is that commas appear after the word “and” and “Parliament” in Section 95(3) whereas there are no commas in section 93 (4). From this it is clear that under the Constitution, both the High Court and the Court of Appeal are superior courts of record and enjoy the amplitude of powers devolving under the Constitution or any other law upon a superior court of record.

Furthermore, since by section 99 (2)(c) the Chief Justice and the other judges of the High Court are by the Constitution members of the Court of Appeal, it would be incongruous to say the least if the members of the Court of Appeal who are **not** members of the High Court do not enjoy the same powers and immunities as those who are members of both the High Court and the Court of Appeal. If the argument that members of the Court of Appeal do not enjoy all the powers invested in members of the High Court had any validity, it would mean that a judge of the High Court, upon his elevation to the Court of Appeal would automatically cease to enjoy those powers which are peculiarly powers of the High Court and not powers of the Court of Appeal which sits at the apex of our judicial system.

In plain and simple language, in sections 95 and 99, the framers of the Botswana Constitution deliberately ensured that no such absurdity was at all possible.

But the matter does not stop there. Section 7 of the Court of Appeal Act Ch. 04:01, Act No. 44, 1972 as amended, chiming in tune with sections 95 and 99 of the Constitution L. N. 83 1966 as amended provides:

“For all purposes of and incidental to the hearing and determination of any appeal, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act or the Constitution, the power, authority and jurisdiction vested in the High Court.”

It is true that the word “immunity” does not appear in section 7 of the Court of Appeal Act. Section 2 of the Act provides that “Court of Appeal” shall, where permissible under this Act, include a single member of that court.” This means that all the expression “Court of Appeal” includes each and every member of the Court of Appeal. Section 49 of the Interpretation Act Cap. 01:04, which is the “definitions” section, enacts that “power” includes any privilege, authority or discretion. The New Shorter Oxford English Dictionary published by Oxford University Press Inc., New York in 1993 defines “immunity” as “an exemption or privilege;

an exemption from a secular or civil liability, duty, etc.”; “lack of susceptibility (to).”

Thus Section 25 (1) of the High Court Act protects a judge of the High Court from liability to being sued in any court for any act done or ordered to be done by him in the discharge of his judicial duty. Section 99 (2)(c) makes judges of the High Court members of the Court of Appeal. Section 7 of the Court of Appeal Act confers upon the Court of Appeal the power, authority and jurisdiction vested in the High Court. Section 49 of the Interpretation Act enacts that “power” “includes any privilege, authority or discretion”. The Oxford Dictionary defines “privilege” as meaning “a right, advantage, or immunity granted to or enjoyed by a person or a class of people beyond the usual rights or advantages of others; a right or immunity attaching to some office, rank or station. It defines “immunity” as “an exemption or privilege; an exemption from a secular or civil liability, duty, etc., “lack of susceptibility (to).”

From all that has gone before, therefore, it is obvious that the Constitution, the Court of Appeal Act, the High Court Act and the Interpretation Act read together make it abundantly clear that all the powers, privileges and immunities vested in the judges of the High Court, vest in equal measure in the judges of the Court of Appeal. This conclusion has been reached by reading the constitutional and statutory

provisions, by reading the statutory definition of words, and by a resort to an authoritative English dictionary for definition of English words. Thus aided I have been inexorably driven to the conclusion to which I have come upon this aspect of the matter, which is that the learned judge was right in concluding that the Judges of Appeal involved in this matter are immune from proceedings of the kind instituted by the two appellants. It is not necessary to go further. The exception was properly upheld on this ground alone.

THE AWARD OF COSTS

The appellants complained about the award of costs to the 1-6th defendants on an attorney and client scale. At page 27 of his judgment, Collins, J. justified his order relating to costs in this way:

“I had no hesitation in acceding to counsel’s request for costs to be awarded on an enhanced scale. The exceptions were upheld because they were legally excipiable but it goes further. One only needs to read the scandalous and vituperative language employed in the Declaration (cited earlier) to appreciate that the Respondents not only have no respect for the law and its institutions, they consider themselves so far above it that they are entitled to spit down on it. Never was a punitive costs order more appropriate.”

Counsel for the Respondents submitted that “These accusations and insults are on their face scurrilous and utterly devoid of any justification.

They are obviously designed to scandalize and defame the particular judges to whom they refer, this Court, the High Court and the administration of justice generally. Having made these accusations and insults, the appellants failed to appear to defend them in the High Court. He further submits that the combined effect of making the accusations and insults which were on their face scurrilous and utterly devoid of any justification, on the one hand, and their failing to appear to justify or defend or explain them on the other, made it entirely proper for the High Court to order the appellants to pay costs on the punitive scale of attorney and client.

MISCONDUCT BY A PARTY

A successful party may be deprived of his costs if the court is satisfied that a party has been guilty of improper, dishonest or discreditable conduct. It will mark its disapproval by making a special order as to costs. See the Civil Practice of the Supreme Court of South Africa, Fourth Edition p. 713. Misconduct connected with or which occurred in the course of the transaction upon which the proceedings are based, or arising during the course of or in connection with the litigation itself would suffice. The institution of vexatious litigation, the making of reckless charges of fraud, and scurrilous conduct have been penalized by the making of an adverse order as to costs. A *fortiori* would such

conduct be subject to an award of punitive costs against an unsuccessful party.

AWARDS OF ATTORNEY-AND-CLIENT COSTS

The starting point, as stated in the Civil Practice of the Supreme Court of South Africa at page 717, is that an award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have. See **De Villiers v. Murraysburg School Board 1910 C.P.D. 535 at 538** and the other cases cited in the work. The grounds upon which the court may order a party to pay his opponent's attorney-and-client costs in the context of this case are first that the appellants' motives have been vexatious, reckless, malicious and frivolous. Secondly, that they have misconducted themselves gravely in the conduct of the case. See **Real Estate & Trust Corporation v. Central India Estates Ltd. 1923 WLD 121; Van Dyk v. Conradie & another 1963 (2) SA 413 (C) AT 418 E-F.** The court's discretion in this regard extends to all cases in which special circumstances or considerations justify the granting of such an order. The list of such circumstances or considerations is not closed.

Thus other examples cited in the learning would appear to apply to the appellant's scandalous matter which was listed in the judgment of Collins J and in the heads of Argument of the respondent's counsel which I will not repeat here. Three examples will suffice:

1. "The High Court has unlimited original jurisdiction in civil and criminal matters and this extends to civil suits and to the review and setting aside of **dishonest judgments** handed down by the Justices of Appeal. (Bold type added).
2. "The 4th Defendant **fraudulently misrepresented the law** further **by untruthfully stating** that section 7 of the **Court of Appeal Act** (Chapter 04:01) means that if a party cannot appear in the High Court then it likewise cannot appear in the Court of Appeal." (Bold type added).
3. "In a subsequent judgment, **the 4th to 6th Defendants compounded their wrongful conduct by falsely alleging** that certain aspects had been explained to the 2nd Plaintiff **and by fraudulently misstating what the law is** in regarding the right of appearance before the courts in Botswana." (Bold type added).

These examples, together with the other material which defaces and pock-marks the court file, fall squarely within the categories of conduct punishable by an award of attorney-and-client costs. These are: 1. where a litigant's behaviour amounted to stubbornness bordering on vexatiousness and was highly reprehensible; 2. where an attempt was made to trifle with the court; 3. where the applicant made an irrelevant, serious and knowingly unfounded accusation, and brought to court an application that was not strictly necessary; 4. where scurrilous and

unjustified attacks on another party and his attorney were made in an affidavit, where scandalous matter was included in affidavits; 5. where a serious but knowingly unfounded attack was made on a party's character; 6. absence of ***bona fides*** in conducting litigation; 7. unworthy, reprehensible or blameworthy conduct; 8. an attitude towards the court that is deplorable and highly contemptuous of the court; 9. conduct that smacks of petulance, and that is vexatious and an abuse of the process of the court; 10. as a mark of the court's disapproval of some conduct that should be frowned upon and where ***inter alia***, proceedings were brought over-hastily on ill-advised grounds.

All of the foregoing examples are supported by authorities which are set out in the footnotes to the text. They show that a wide array of behavioural malefactions may be visited with costs on the attorney and client scale. The Botswana cases of **Botswana Defence Force and The Attorney General v. Oagile Merafhe** Court of Appeal CivApp 13/2000 and more latterly the case of **Botswana Building Society v. Annah Seemule** Civil Application No. 30 of 2001, decided by a strong court of Tebbutt, Ag. President, N.W. Zietsman JA and Sir John Blofeld JA are authority for the proposition that the principles expounded in the excerpts quoted from the Civil Practice of the Supreme Court of South Africa form part of the law of Botswana.

For all these reasons, therefore, Collins J was fully justified in awarding costs upon the attorney-and-client scale. The same considerations lead us to the same conclusion in this court.

REFERRAL TO THE ATTORNEY GENERAL

No judge enjoys the powers conferred upon the Attorney General by the Constitution or by any other law. The judge in the court *a quo* did not attempt or purport to exercise any power or authority of the Attorney General or of any one else. The learned trial judge was careful to make it clear that the materials:

“Are referred to the Attorney General for investigation and prosecution **if so advised** and the Registrar is directed to bring this order and the reasons for it to the attention of the Attorney General as soon as possible.” Emphasis added.

By referring these matters to the Attorney General, Collins, J. was discharging a duty which rests upon every citizen of reporting to the Attorney General any matter which falls within the ambit of the Attorney General's powers as a servant of the public in the office he holds. It is in the public interest that he did so and his action is to be commended rather than condemned. There is, therefore, no merit in the appellant's complaint under this head.

ILLEGAL EMPLOYMENT OF THE EXCIPIENTS

It would unnecessarily burden this judgment to expound the law governing and empowering the employment of the excipients. Suffice it to say that judges throughout the Commonwealth are employed under similar circumstances and conditions, and section 100 (6) of the Constitution of Botswana specifically enables the employment of a person as a Justice of Appeal notwithstanding that he has attained the age of 70 years or such other age as may be prescribed for the purposes of section 101 of this Constitution.

It was therefore presumptuous of the appellants to expect the learned trial judge to refer their allegation that the 1-6th respondents are illegally employed to the Attorney-General for investigation. They themselves are not hindered from referring their views or complaints to any authority in the land. Indeed, they have done so with gusto. They have troubled the Learned Chief Justice and vexed the Honourable President of the Republic with their importunities. This complaint is also without merit. The appellants enjoy no legal or moral competence to demand that 'a *peregrinus*' be appointed to judge their causes. The confusion which would ensue if every man were free to choose his own judge or to embark upon a forum shopping exercise is too self-evident to require elaboration.

JUDICIAL REVIEW OF JUDGMENTS OF THE COURT OF APPEAL

From the earliest developments of Roman and Anglo Saxon law, there has always been a hierarchy of the Courts. Never, since 753 B.C. when the Roman Republic was founded, could an inferior court overturn a decision of a superior court. The appellants' demand that the High Court review the judgment of the Court of Appeal is novel and dangerous. For such a review would introduce the greatest uncertainty and mischief into the well settled system of courts which this Nation now enjoys. This complaint is also in the event, entirely worthless. Simply put, the High Court enjoys no powers of review or no jurisdiction to sit in judgment upon the decisions of the Court of Appeal. Accordingly the appeal is dismissed and the appellants are ordered to pay the costs of the respondents on the scale of attorney and client, jointly and severally, the one paying the other to be absolved.

DELIVERED IN OPEN COURT AT THE COURT OF APPEAL THIS

^{28th}
..... DAY OF JANUARY 2005.

.....
S. A. Moore

S. A. MOORE
JUDGE OF APPEAL

I agree

.....
N. J. McNally

N. J. McNALLY
JUDGE OF APPEAL

I agree

.....
M. H. Chinhengo

M. H. CHINHENGO
JUDGE OF APPEAL