

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSE

COURT OF APPEAL

CIVIL APPEAL NO. 13/95

In the matter between:

JACOB PHALADI ZACHARIAH
BENJAMIN SEGWAPE

First Appellant
Second Appellant

and

BOTSWANA POWER CORPORATION

Respondent

Mr. M. Motswagole for the First and Second Appellants
Mr. R.B. Camp for the Respondent

J U D G M E N T

CORAM: Amissah J.P.
Aguda J.A.
Schreiner J.A.
Hoexter J.A.
Lord Allanbridge J.A.

AMISSAH J.P.:

The appellants are the employees of the respondent. The respondent is a public corporation. The dispute between them arises from the General Conditions of Service of employees of the respondent. In September, 1994, the appellants brought an application before the High Court for an order declaring that a clause in the General Conditions, incorporated by an amendment

which was introduced in October 1993, was in contravention of certain sections of the Constitution which guaranteed the fundamental rights and privileges of the individual in Botswana. That clause, according to the appellants, was also contrary to a number of specified provisions of the Employment Act (Cap 47:01), and the Botswana Power Corporation Act (Cap 74:01). The appellants further claimed that the respondent had acted in breach of the rules of natural justice, as it did not afford the appellants a hearing before the amendment was made. The order which the appellants sought from the High Court, therefore, was a declaration that they were entitled to participate in free political activity of whatever nature they wished; that is, including the right to hold and express political opinion and/or to hold political office. The application came before Nganunu J., who in a judgment dated 17 December, 1994, decided against the appellants. It is this decision of the learned judge of which that the appellants complain in this appeal.

The employment of the first appellant in the respondent's service dates from as far back as 2 December, 1974. The second respondent's service was of a shorter duration, having begun in September 1992. The clause of the General Conditions of Service complained of dates from its introduction in the General Conditions of Service in October 1993.

In support of the assertion that the respondent abridged their fundamental freedoms and rights, the first appellant, in his founding affidavit stated that he was interested in politics and had been active in that field since 1989; that is some seven years, dating from a time fifteen years after he entered into the employment of the respondent. During 1989, the first appellant said, he contested the Local Government Elections. He did not state whether he won or lost, but he stated that he had since then been participating in the structures of the Botswana National Front (BNF) and had held positions at the national

level. Whether this activity was brought to the attention of the respondent, and it took no notice of it, I do not know. At the time that he and his co-appellant brought their application, he wanted to contest the elections to be held that year. He said he believed that he could make an effective contribution to the development of the country at the local level, as he had a definite set of ideas as to how the lives of the people of Botswana could be improved which he wanted to communicate to a larger audience, and to campaign for the acceptance of these ideas.

The second appellant deposed in his affidavit in support of the first appellant's that at the time of his engagement in September 1992 he was in active politics and was a member of the Presidential Commission and Coordinator of Kgalagadi North Constituency Committee of the BNF. According to him, although his letter of appointment made reference to the fact that he was bound by such regulations as the Corporation did approve from time to time, he was neither shown or given a copy of the General Conditions of Service of the respondent. He said he was not aware of clause 12.18, but as this clause was then not in existence, that point does not arise. As he was never informed of any restrictions regarding political activities, he said he continued addressing political meetings and campaigning for his party after working hours and over the weekend after his employment by the respondent. He was mentioned over the public media but the respondent took no action until July 1993 when he received a letter that he was not expected to engage in political activities. Further correspondence followed thereafter, all of which was exhibited in the proceedings before the High Court. From the correspondence, it became clear, said the second appellant, that he was being threatened with dismissal purely because of his political beliefs and practices. There was no allegation that he was engaging in politics during the course of his work or impeding the work of the respondent, nor was there

an allegation that he was using any confidential information gained by virtue of his employment for political pursuits or that he had discriminated against any employee or member of the public during the course of his employment on political grounds. He agreed with the affidavit of the first appellant and endorsed and incorporated in his own affidavit, the challenges to clause 12.18 of the General Conditions of Service of the respondent.

Clause 12.18, the amendment to the General Conditions of Service which the appellants object to, provides as follows:

"12.18 POLITICAL ACTIVITIES

Employees of the Corporation are not debarred from membership of any political party by reason of their employment by the Corporation.

- 12.18.1 However, by virtue of their employment with a public Corporation, employees are not permitted to take an active role in political activities, or to hold an elected political office of any nature, or appointment to any political office.
- 12.18.2 Any employee who has been warned in writing to desist from any political activity, who continues to play an active part in political activity shall be deemed to have committed a dismissable disciplinary offence for which the contract of employment may be terminated with notice.
- 12.18.3 Employees shall not under any circumstances actively campaign in support of any political party, or hold any political meeting, or display any political insignia or political written material on Corporation property, on or off duty. Such activity shall make the employee liable for termination of employment without notice."

This amendment replaced a previous clause of the General Service Conditions. That clause, then clause 15.18, read as follows:

"15.18 POLITICAL ACTIVITIES

Employees of the Corporation are not debarred from engaging in political activities or membership of any party by reason of their employment by the Corporation. Employees may not, however, be seen to take an active part in politics or to hold any

political office or display any party insignia."

Clearly, the old clause 15.18 was shorter than the amendment in clause 12.18 which replaced it. And as will presently be seen from the judgment of the learned judge a quo, one of the questions which he considered was whether the amended version, i.e., the new clause 12.18, was simply an elaboration of the replaced clause 15.18, or whether it altered substantially and to their detriment the obligations of employees imposed originally by clause 15.18. When consideration is given to the averment in the affidavit of the second appellant where he said that he continued with his political activities after his employment and was mentioned over the public media but that the respondent took no action until in July 1993 when he received a letter that he was not expected to engage in political activities, followed by further correspondence, which indicated that he was being threatened with dismissal purely because of his political beliefs and practices, it becomes obvious that the amendment in clause 12.18 was intended, whether it succeeded in doing so or not, to clarify the service condition in the original clause 15.18. The fact that the second appellant was first queried by the respondent for his political activities in July 1993, shows that the query was issued at the time when the operative condition of service was the original clause 15.18, and not the amended clause 12.18 now complained of. I say so because it was common cause that clause 12.18 was first issued in October 1993, a date that is subsequent to the query. And it was the appellants' case that as the then clause 15.18 stood, it was not offensive to the Constitution. The initial exchange of letters between the respondent and the second appellant in July 1993, which was exhibited as part of the founding affidavit by the second appellant, is revealing in this respect.

On 9 July, 1993, a letter was addressed to the second appellant by the Personnel and Administrative Manager of the respondent

which said:

"Dear Sir,

RE: POLITICAL ACTIVITIES

Reference is made to our meeting of June 29, 1993 the purpose of which was to confirm or rebut newspaper reports that you were standing as a BNF parliamentary candidate for the Ngwaketse West constituency and have oftenly addressed political meetings contrary to Section 15.18 of our General Conditions of Service.

At this meeting you were to confirm or rebut newspaper reports that you were actively participating in politics in order to enable management to frame responses to possible queries.

You denied newspaper reports that you were standing as a parliamentary candidate for Ngwaketse West and that you ever addressed political meetings and were to confirm this position in writing.

In terms of Section 15.18 of the Conditions of Service 'employees of the Corporation are not debarred from engaging in political activities or membership of any political party by reason of their employment by the Corporation. Employees may not, however, be seen to take an active part in politics or to hold any political office or display any party insignia.' Subsequent to that meeting you are quoted in the Botswana Daily News of July 8, 1993 No. 128 page 5 addressing a political rally in Jwaneng over the weekend (excerpt from the Botswana Daily News attached).

May I have a written explanation of the true position as promised.

Yours faithfully,

A. N. Mokone
Personnel and Administrative Manager."

To this letter, the relevant page of the Daily News of July 8 referred to in Mr. Mokone's letter reporting the political meeting supposed to have been addressed by the second appellant was attached. It is noted from the letter that at the time, the relevant provision in the General Condition of Service alleged by the respondent to have been infringed by the second respondent

was the original clause 15.18, which in the proceedings before the High Court, the appellants said they could live with, and not the amendment in clause 12.18, which they claim is contrary to the Constitution.

After asking for time to consult with his colleagues in a faxed letter of 12 July, 1993, the second respondent sent the following reply in a letter dated 13 July, 1993 to the Personnel and Administrative Manager of the respondent.

"Dear Sir,

RE: POLITICAL ACTIVITIES

Receipt of your faxed letter dated 9th July 1993 is acknowledged.

I accept that there was a meeting held on 29th June, 1993. But we only discussed one item - newspaper reports that I was a BNF candidate for Ngwaketse West Constituency in the forthcoming 1994 General Elections. For often addressing political meetings was never discussed, let alone in my presence. This has never been raised with me anytime by either you or the Chief Personnel Officer, Mr. N. K. Kejelepula.

It is very difficult to give out a political statement for non-political reasons. I feel you are being highly unfair on me to either confirm or deny my political stand. Maybe the right person would be the Secretary General of BNF!

In our meeting with you, I raised the question that Section 15.18 of the General Conditions of Service was rather vague and not mandatory. I was not convinced that it was in actual fact mandatory for employees not to take active part in politics. I also enquired if at all it was mandatory, where does it get the authority from? I was not answered on that! If we are to say BPC as a parastatal, its employees are not permitted to engage in active politics, then is this a general order affecting all parastatals? How do other parastatals behave? And how about BPC itself? Why pick only me?

In conclusion, I am a BNF member. As a political strategy, it cannot be ruled out that possibly I may stand as newspapers report. However may I please be briefed on the politics I raised.

Yours faithfully

B. K. Segwape."

Thereafter several letters passed between the second appellant and the respondent. I have no doubt that it was the exchange of letters which prompted the amendment of the original condition 15.18 which the appellant had claimed was only permissive and without teeth for the enforcement of its provisions. The replacement condition, that is clause 12.18 was published in October, 1994.

Considering that the amendment now forbade in explicit terms the active participation of employees of the respondent in party political activity, the appellants who were interested in politics and were geared to participate as candidates either in the forthcoming national or local government elections, brought the proceedings before the High Court to have the amendment declared of no force and effect. It is unnecessary to recite the itemised grounds advanced for this request in detail, but basically, sub-clauses 12.18.1, 2 and 3, were alleged to be contrary to sections 3, 11(1), 12(1), 13(1) and 15(2) of the Constitution; they were also contrary to sections 23, 26 and 96 of the Employment Act (Cap 47:01); that in so far as those clauses were intended to regulate the political conduct of the respondent's employees outside working hours they were ultra vires the Botswana Power Corporation Act (Cap 74:01); they were unfair, unreasonable and not justifiable in a democratic society; that the action of the respondent in making the amendment was in breach of the principles of natural justice; that the appellants had a legitimate expectation that they should continue to enjoy their political freedom without hindrance as they did prior to the amendment and should not have been deprived of that freedom without being afforded an opportunity of making representations; and that the appellants were entitled to free political activity of whatever nature including the right to hold and express

political opinion and/or to hold political office.

In a well reasoned judgment given by Nganunu J., the application was dismissed by the High Court. Against that judgment, the appellants have appealed to this Court alleging error on the part of the learned judge on a number of grounds. But the reliefs they seek are comprehensively to be found in these two short paragraphs stated in the alternative:

"(2) That Clauses 12.18 to 12.18.3 of the conditions of service of the Botswana Power Corporation are hereby declared null and void and of no force and effect.

ALTERNATIVELY, the manner which the Respondents or the agents of the Respondent apply clauses 12.18 to 12.18.3 is wrongful and unlawful and accordingly the decision to restrict political activities of the Appellants outside hours and outside the Respondent's premises or property is unlawful and of no force and effect."

Pausing here briefly, I must say that however wrong the learned judge may have been in refusing the appellants' application, I am at a loss to understand why the general provision in clause 12.18 from which exceptions are made in sub-clauses 12.18.1, 2 and 3, should be declared null and void. That umbrella part of the clause, it will be remembered, stated a condition which the appellants, through their Counsel conceded, was not prejudicial to them. It provided merely that employees of the Corporation were not debarred from membership of any political party by reason of their employment by the Corporation. The part of clause 12.18 which the appellants must have found restrictive of their liberties, and, therefore objectionable, were sub-clauses 12.18.1, 2, 3.

After an analysis of the old and the new condition of service governing political activities, the learned trial judge concluded that:

"The new Clause is in replacement of an existing clause which the two Applicants accepted as affecting them. The

new Clause does not change the nature of their rights or provide for a different regime. It merely details the existing concept relating to activities of the employees. In doing so it in fact provides some clarity better than the old Clause and to that extent therefore is an improvement. The fact that it did not specifically mention that the employees can engage in politics, in my view, did not take away the right to engage in politics to the extent previously laid in the old Clause."

When the claim of the second appellant in the exchange of letters between the him and the respondent mentioned above is recalled, it becomes understandable that if the respondent intended that condition to be obeyed, it should seek to clarify matters. Mr. Motswagole stated in his submissions that the old clause 15.18 was bad because it was vague. But the fact that it was vague does not mean that it was not intended to achieve a purpose. And where the persons to whom it was intended to apply openly flout it and argue that they are entitled to do so because of its vagueness, I agree the matter required clarification.

The appellants case was that in terms of the old clause 15.18, employees were not debarred from engaging in political activities or membership of any party, but the new clause 12.18 restricted permissible political activities to party membership alone. Appellants' Counsel, therefore, submitted that the conclusion of the learned judge on this point was wrong, and sought to demonstrate the differences by a detailed comparison of the wording. But a detailed comparison of the words showing differences in the two provisions does not necessarily help in finding out whether the appellants had been put under a greater restraint by the new clause in comparison with the restraint which the old clause imposed. It is the broad sense of the provisions which has to be compared. Under the old clause, although employees were permitted to belong to political parties and to take part in party political activities, they were not to be seen taking an active part in such activities or to hold any political office or display any party insignia. Much was made

of the fact that the old clause merely said that the employee "may not" be seen taking an active part in politics, which, so the argument proceeded, meant that it was discretionary whether the employee decided to take or not to take part in active politics. But if that were correct it would make nonsense of the clause. If the employee had a discretion on this, why was it necessary to state it at all? I agree with the learned judge a quo that in the context used, "may not" can only mean that the employee was enjoined not to engage in political activity in a manner which would cause him to be seen by the public to be taking an active part in party politics or holding political office. Employees of the Corporation are not debarred from membership of any political party by reason of their employment by the Corporation. It seems to me that the purpose of the rule in both clauses is to ensure that employees do not take active part in party politics or hold party political office. To that extent, the prohibition in the two clauses is the same: an employee may belong to a political party but he must not take an active part or hold office in it. The detail in which this prohibition was spelt out in clause 12.18 as compared with the old clause 15.18 is, in my view, in order to clarify what was always the rule, but which the brevity of expression in clause 15.18 had made arguably unclear.

Both the old clause 15.18 and the new clause 12.18 prohibited the display by the employee of political insignia. Clause 15.18 did not say where the insignia should not be displayed. It did not confine the prohibition to display on the premises of the respondent. To my mind that would mean that they should not be displayed at all by the employee, whether on or off the premises of the respondent. Indeed, the display of political insignia, whether on the premises or not, is a manifestation of active participation in politics which the respondent sought to prevent. But because the new clause 12.18 took the trouble to state that the political insignia should not be displayed "on or off duty",

this has been taken by the appellants to involve a change in the scope of the prohibition. If a person is not permitted to display any insignia at all, I find it difficult to understand how an elaboration of the rule to say that he should not display it on or off duty becomes an additional burden. It may be that in a situation where the appellants thought they had a discretion, as a result of the use of the words "may not" in the old rule, to display or not to display the insignia, a view which I think wrong, they may have thought that the new phraseology added a new dimension to the rule. But as I disagree with their interpretation of the word "may not" in the context of the old clause, that argument will not avail them. In any case, it was the element of doubt exposed by their argument which the new clause sought to dismiss. The new input introduced into clause 12.18 was the statement of the penalties attached to the infringement of the rule, i.e., the liability to dismissal or termination of employment. But although not expressly stated in the old clause 15.18, it must have been known by all employees that activities in contravention of the rule, would lead to the imposition of sanctions by the respondent. In the old clause these sanctions were left unexpressed, but the omission did not mean that no sanction could be imposed by the respondent. The power to impose a penalty was implied in the rule: The statement of the sanction in the new clause 12.18, in the circumstances, would be no more than a clarification of the liability which the infringement of the rule may lead to.

Taking the broad sense and objective of the two clauses, I find myself in agreement with the learned judge a quo that clause 12.18 was merely an elaboration of the prohibition, which was a positive prohibition and not a matter of employees' discretion, in the old clause 15.18.

The appellants also objected to the new clause 12.18 as infringing the constitutional rights and freedoms, and an

infringement of provisions of the Employment Act and the Botswana Power Corporation Act. Taking the arguments on the two Acts first, it is firstly conceded by the appellants that in terms of the Employment Act, the employer has a right of control over its employees within defined work limits, but that section 94 obliges the employer to grant the employees a rest period of at least 24 hours in every 7 consecutive days and that failure to do so is punishable. Under section 95, continues the argument, an employee may in specified circumstances work during rest periods but in that case he is entitled to compensation. Section 96(1) prohibits the requirement of an employee to work more than five consecutive hours without a period of rest which shall not be less than half an hour. All this, argued Counsel, meant that the control by the employer of the employee was confined to specific working hours; outside these limits, an employee was free to pursue whatever interest he might choose. Imposing a restraint on the manner in which the employee disposed of his free time was, as I understand it, an infringement of the provisions of the Act. Constitutional rights and liberties apart, this argument is, within the context of this case, unimpressive. This case is not one of making an employee work beyond legal or agreed working hours. It is a case of conduct of an employee which is not consistent with his employment. I have no doubt that there are certain cases of employment in which certain types of conduct of the employee, whether at or after work, would reflect adversely on the business of the employer. Public servants, for example, are one such class of employees whose conduct reflects on the business of the Government. It would be intolerable for a public servant, who is expected by the public to be even-handed in his work, to claim that he could behave publicly in as partisan a manner as he liked, just because such behaviour was outside working hours. Nobody would in that case believe that because he was only acting in a partisan manner outside working hours, this had nothing to do with his employer's business or image. It would be ludicrous to contend that the public to whom public

servants ought to show even-handedness in their work would distinguish between the public servant's actions at work and in his free time. That, I think is the reason why public servants are specifically excepted by the Constitution from the application of laws which infringe the general protections of the freedom of expression or assembly and association. But the fact that the Constitution did not mention exceptions affecting other persons, such as employees of public corporations, specifically does not mean that only public servants may be deprived of the full benefit of these guarantees. Other persons, as I will presently show, may be restricted in certain relationships into which they voluntarily choose to enter. And although the definition of "public officer" in the Constitution is a person in the Civil Service, the respondent, being a public corporation, has responsibilities to the public which would be akin to services performed by the Civil Service. As Mr. Motswagole, himself, volunteered at the opening of his submissions, the respondent is a commercial arm of Government. It would be demanding great intellectual subtlety on the part of the public to ask it to distinguish between Government in its recognised functions qua Government, in the performance of which its servants must show no bias, and Government in its pursuit of commercial objectives, where bias in its servants is acceptable.

It was also contended with respect to the Employment Act that section 23 prohibited the termination of an employment on the ground of the employee's political opinion, and no contract term or service condition can change or abridge this provision. The relevant part of section 23 is as follows:

"23. Notwithstanding anything contained in a contract of employment, an employer shall not terminate the contract of employment on the ground of -

- (d) the employee's race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour or creed." [emphasis supplied]

I accept the submission in that form. The only implication with which I disagree is the contention that clause 12.18 in its form contravenes the section. Counsel for the appellants argued that the expression "political opinions", emphasised for effect in the citation, in the context of this prohibition necessarily involved active political participation. One can, according to his argument, be said to hold a political opinion only if he can freely to express it and actively to propagate it. That, in turn means that he should not be prevented from holding office in a political party or running for election to, or membership of, Parliament or a local council. I do not accept that view. Holding an opinion does not necessarily include require political party campaigning or holding party political or parliamentary office. On the contrary, clause 12.18 in fact permits the holding of political opinions. Further, as will be seen from the sections of the Constitution conferring the fundamental rights and freedoms, the protection of freedom of conscience, which gives the protection to the right to hold free political opinions, freedom of expression, and freedom of association and assembly are all freedoms which may be surrendered by the consent of the holder. If the circumstances show that the person entitled to those freedoms has voluntarily agreed to the circumscription or surrender of any of those rights, the limitation or surrender will prevail.

The argument of Mr. Motswagole with respect to the alleged infringement of Botswana Power Corporation Act involved section 11(4) of the Act. That provision is as follows:

"11. (4) The Corporation shall, on consideration of the recommendations of the chief executive officer, from time to time determine the staff deemed necessary for the proper discharge of the Corporation's function and the terms and conditions of employment."

Counsel asked the Court to read the sub-section placing emphasis on the words "necessary", "proper discharge" and "Corporation's functions", and argued that the terms and conditions determined

by the Corporation must be reasonably necessary for the proper discharge of the functions of the respondent. These functions are stated in section 13(1) of the Act which provides that:

"13. (1) The functions of the Corporation shall be the generation, transmission, supply and distribution of electricity in areas approved by the Minister in terms of legislation relating to the supply of electricity."

There is, to my mind, nothing inconsistent with section 11(4), however read, in a public corporation charged with such functions taking the position, as the respondent seems to have done, that for a public corporation performing the functions specified in section 13(1), active participation in party politics by its employees should be proscribed. The corporation is given the power by section 11(4) from time to time to determine the terms and conditions of service of its employees. Pursuant to that power, it had set condition 15.18 of the Terms and Conditions of Service of its employees. That condition has been found wanting in clarity. The Corporation had explained it further in the new condition 12.18. The appellants' have not satisfied me that this condition, whether in its old form or the new, is inconsistent with the respondent's discharge of the public nature of its functions. In fact, there is in evidence a letter written by the first appellant's lawyers (who apparently also represent the second appellant) to the respondent after the dispute between the parties had begun, which leads to a contrary view. That letter which was attached to the founding affidavit filed by the first appellant pointedly demonstrates, even if unconsciously intended, the need for the respondent to forbid the active participation of its employees in party politics. That letter dated March 31, 1994, in the relevant portion reads:

"Our client is desirous to contest for the forthcoming General Elections but at the same time retaining his work. He feels that he can contribute useful ideas on the development of the motherland. Our client is now in a conflict situation, being torn apart between loyalty to your Corporation and his country. This conflict situation can be avoided if your Corporation abides by the Constitution of Botswana and other relevant laws."

I cannot imagine a worse situation for a public corporation to guard against than one which places an employee in a position which would enable him to openly castigate the policies and practices of the corporation in Parliament, but nevertheless allows him to retain his position as an employee, however highly or lowly placed. The provisions of the Constitution or the alleged laws of Botswana do not resolve the conflict which the first appellant's representatives neatly demonstrate. Besides, just as in the case of public servants, as strictly defined in the Constitution, in judging the concern the employer wishes to avoid, it is not what the employee has actually done or even will do which should be the test to apply, but the public perception of what an employee so polarised in his political beliefs and actions might do to potential opponents. In this respect, a division of employees between those with discretionary powers, whom, so the appellants concede, ought to be restricted in their activities, and those not exercising discretionary powers who should be permitted the full exercise of their political rights, would be quite impractical as well as impossible to enforce or to justify. It is not inconceivable for a committed political opponent even in a lowly position to use all sorts of devices, including delays in passing on applications, letters and files to appropriate senior officers, or misfiling such documents, to ensure that proper attention by the appropriate authorities, is not timeously given to the affairs of the employer. When the appellants come to the courts protesting with indignation about the limitation of their fundamental rights and freedoms by the respondent's service conditions, it hardly lies in their mouths to advance the argument that some employees in the same organisation need to be restricted, but others, including themselves, should be allowed the free enjoyment of their freedoms without hindrance.

All that which I have said before is based on the overriding condition that the rule determined by the respondent for its

employees does not contravene the provisions of the Constitution with respect to the fundamental rights and liberties of the individuals. If there is any such contravention, then the rule must be null and void.

With regard to the argument to the constitutional issues raised that these sub-clauses infringed the appellants' fundamental rights and freedoms guaranteed by the Constitution, Nganunu J., in his judgment prefaced his review by saying that:

"... In relation to each of the constitutional arguments, it must be borne in mind that this court is of the view that the present case is one of employment between master and servant; and the servant has (a) on engagement accepted that he will be governed by the terms and conditions of employment promulgated by the Corporation from time to time. Such terms and conditions are additional to those contained in the employee's signed contract or letter of appointment. (b) That a similarly worded clause had been in operation and applying to the employees, in particular the applicants, without their demur, prior to the introduction of the present clause to which exception is taken."

I agree that the basis of the relationship between the appellants and the respondent was one of employer and employee. The appellants challenge the learned judge's view that the employees had accepted the terms and conditions of employment promulgated by the employer from time to time, or that a similarly worded clause had been in operation and applying to the appellants without demur. I have already dealt with the last objection with regard to the similarity between the old clause 15.18 and the new clause 12.18 by ruling that the latter clause was merely a clarification of the terms, both express and implied, in the earlier clause. The clarification having been called for by the necessities of administration. As to the objection to the acceptance of the terms and conditions of service on the ground that there was no evidence that the appellants had intimated such acceptance, I find that a surprising submission. There is the clear provision of the Botswana Power Corporation Act cited

above, which empowered the respondent to determine the terms and conditions of employment. That, in my opinion, does not depend on the consent of the employees. In the case of the second appellant, his affidavit in support of the founding affidavit stated in paragraph 3 that his letter of appointment stated that he would "be bound by such regulations as the Corporation [meaning, the respondent] may approve from time to time." He had no excuse for saying that he was not aware of his obligation to observe the service conditions as made from time to time. The first appellant, on the other hand, was not able to annexe a letter of appointment to his founding affidavit, but paragraph 4 of that document said that "At the time of my employment I was not aware of the existence of a set of rules called General Conditions of Service. However, I subsequently learnt about the same and acquired a copy thereof." In any case, the first appellant had by the time of the proceedings initiated against the respondent been in the latter's employment for nearly twenty years, and could hardly be heard to say that he had all this time been ignorant of the respondent's service conditions.

The relationship which the parties had entered into being consensual in nature, it is for either side to terminate it according to law, if the continuation of the relationship he had voluntarily entered into has become too onerous or unendurable. Of course, the law recognising that certain relationships confer a disproportionate strength to one party vis a vis the other, has sought to protect the weaker party against the stronger. Such a protective legislation is the Employment Act. But the protection given by such legislation has to be construed to determine its extent, and in the case of contract, unless there is reason to conclude that it completely displaces with the consensual nature of a contractual relationship, the principles governing the contract should apply. And where on the proper construction of the law which purports to abridge the freedom of the parties to contract, the conclusion is reached that the

contractual provision is not touched by the abridgment, the contract prevails. To claim in such circumstances that the continuation of the contract has become too onerous but nevertheless the claimant elects to continue with the relationship is to invite the comment that the employee does so at his own peril.

The first constitutional provision alleged by the appellants to have been breached by clause 12.18 of the respondent's Conditions of Service is section 3. That is the section which comprehensively but in general terms states the fundamental rights and freedoms of the individual under the Constitution. It provides that:

"Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinion, 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;
- (b) freedom of conscience, of expression and assembly and association; and
- (c) protection of the privacy of his home and other property and from deprivation of property without compensation,

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."

Pronouncing on the meaning of this section in my judgment delivered on 3 July 1992 in the case of The Attorney General v. Unity Dow [Civil Appeal No 4/91, unreported], I said that although the section opens with the word "whereas" giving the initial impression that the section is a preamble, the section really is the one which states in comprehensive form the fundamental rights and freedoms conferred by the Constitution on the individual, and that:

"... the wording of section 3 itself shows clearly that whatever exposition, elaboration or limitation is found in sections 4 to 19, must be exposition, elaboration or limitation of the basic fundamental rights and freedoms conferred by section 3. Section 3 encapsulates the sum total of the individual's rights and freedoms under the Constitution in general terms, which may be expanded upon in the in the expository, elaborating and limiting sections ensuing in the Chapter."

I still adhere to that ruling. That ruling was followed by the learned judge a quo when he said in his judgment that:

"Although it was argued that the Clause is ultra vires Section 3 of the Constitution, that Section is more than anything else a general declaration of the fundamental freedoms that every person in Botswana is entitled to, the actual individual freedoms thus declared is (sic) section 3 are more clearly defined in the subsequent sections of Chapter II and those subsequent also define the extent of the protection availed such freedoms and the circumstances, when such freedoms may not be protected."

He therefore did not further dwell on section 3, but turned to the ensuing sections which elaborated upon the relevant freedoms and rights alleged to have been infringed. It seems to me that the relevant part of the section which the appellants seek to enforce is in sub-section (b), which protects "freedom of conscience, of expression and assembly and association." Those freedoms and rights are further elaborated upon and limited by sections 11, 12 and 13 of the Constitution to which he correctly turned to find out whether the new clause was in breach of any of them. After examination, he found that:

"... in respect of all the sections, there is allowance for the deprivation of the freedoms granted by each of those sections with the consent of the person whose rights are interfered with. So that even where the rights of the Applicants to guaranteed freedom are reduced or interfered with, there would be no violation of those 3 sections of the Constitution where the applicants have given their consent to such reduction."

Is that statement of the law correct? Section 11(1) which deals with the freedom of conscience, states that:

"11. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and

for the purpose of this section the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public or private, to manifest his religion or belief in worship, teaching, practice and observance.

Clearly, the freedom or right conferred can be abridged with the consent of the party concerned. Then section 12(1) which elaborates on the protection of freedom of expression conferred in section 3, states that:

"12. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."

And section 13, which deals with freedom of assembly and association, states that:

"13. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests."

In all these three sections, the freedoms and rights conferred may be abridged with the consent of the person affected. The learned judge a quo must, therefore, be right when he held that, "there would be no violation of those 3 sections of the Constitution where the applicants have given their consent to such reduction." Where a person comes to court, therefore, claiming that any of his constitutional freedoms and rights protected by the three sections had been breached, he has to show in every such case that he had not consented to the breach. Otherwise, there would be no infringement of the Constitution. Apart from the question of consent, it will be noticed that each of the three sections has its own limitation. For example, sections 12 and 13, in addition, specifically exclude a provision

"that imposes restrictions upon public officers, employees of local government bodies, or teachers", while section 11 makes no such exclusion. The applicant has to show that these exclusions do not apply to him either.

The fact that a contractual relationship such as that arising out of employment depends on consent, necessarily implies that the parties have agreed to abide by the terms and conditions governing the relationship. The respondent has the statutory power to determine the terms and conditions of service of all those who take employment with it. That must mean that those who voluntarily enter into its employment agree to be bound by the conditions of employment which the respondent sets. The respondent had by clause 15.18 determined the service condition that employees may belong to political parties, but should not take an active part in the parties such as by holding office or standing for office. The appellants were aware of this service condition but took a different view of its meaning from that which the respondent intended or the ordinary meaning of the rule suggested. For the avoidance of doubt, the respondent, in a new clause 12.18, clarified in detail what the rule meant. Substantially, the prohibition imposed by clause 12.18 was not different from that with which the appellants say that they had been happy to live. Does this constitute an infringement of the appellants' freedoms or rights under the sections of the Constitution which protect freedoms of conscience, expression, association or assembly? I have no doubt that the answer is in the negative.

The appellants also sought protection from section 15(2) of the Constitution. That is the section which provides that:

"(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."

Section 15(3) of the Constitution defines the word "discriminatory" in the following terms:

"(3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

In terms of this definition, I found it very difficult to understand how clause 12.18 could be described as discriminatory. According to Counsel for the appellants, the clause was discriminatory not as between the employees of the respondent on the one hand and employees not so employed on the other, but as between employees of the respondent who wanted to participate actively in politics, like the appellants, and their fellow employees who did not so wish. The fallacy in the distinction lies in the fact that the clause does not say that employees of one description, for example, those holding a particular political opinion, should be treated differently from those employees holding a different opinion, but it says all its employees are subject to the same regime irrespective of their political opinions. They may not participate actively in party politics or hold party political office. In my opinion, clause 12.18 is not a contravention of section 15(2) of the Constitution.

Finally, the appellants contend that they had a legitimate interest in the position under clause 15.18 of the General Conditions of Service for the employees preserved until given an opportunity to be heard. As I sought to demonstrate in Mothusi v. The Attorney General [Civil Appeal No15/93, unreported]:

"The concept of legitimate expectation has developed in administrative procedures to protect those who have been led either by contract or practice to expect a certain course of action in cases where the expected course of

action has been altered without giving them a right to make representations. Starting from a procedural concept by which the requirement of natural justice could be brought into operation, it has been held in some cases outside this jurisdiction not merely to cover the procedural concept, but to require the fulfilment of a promise made by authority. That is, if the authority has made a promise as to the manner of the exercise of a discretion, the authority ought to be held to that promise."

See also the authorities cited in that case. In this case, nothing has been said about the manner in which the respondent has previously exercised its power of determining the conditions of service for its employees; nothing has been said of any promise in the exercise of the power which had been altered without a hearing. No submission has been made on the question whether the validity of a condition of service, as in this case, involves the exercise of a discretionary power by the person who determines the condition, in spite of the fact that the exercise of such power must be the foundation of a challenge based on the legitimate expectation of the challenger. The only point made by the appellants is that the rules have been changed. As I have said before, the respondent has the statutory power to determine the conditions of service from time to time, which it exercised. I am unable to find, in the circumstances, any fault with that.

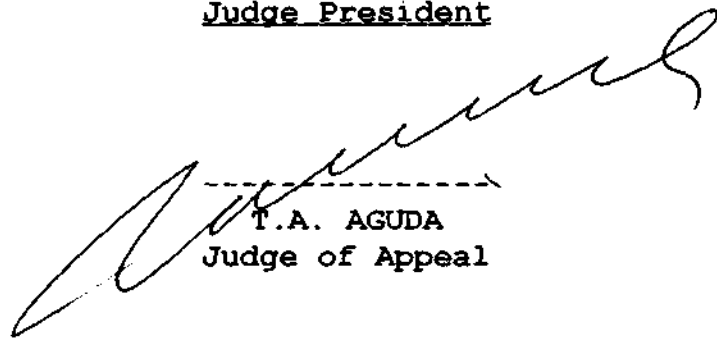
This is not a representative application. The appellants do not come before the court with authority to prosecute this grievance on behalf of all employees of the respondent. They apply to the court because the clause they find offensive thwarts them in their political ambitions. Bearing in mind that the clause is general in its effect to employees, and that even if they, the appellants, prove that they had not consented to the making of the clause, other employees may have expressly or impliedly consented, the request of the appellants that the clause be declared null and void and of no force and effect, or in the alternative wrongful and unlawful, seems to me a singularly inapt

request to make to this Court.

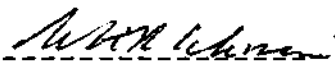
For the reasons given, I would dismiss this appeal with costs.


A. N. E. AMISSAH
Judge President

I agree


T.A. AGUDA
Judge of Appeal

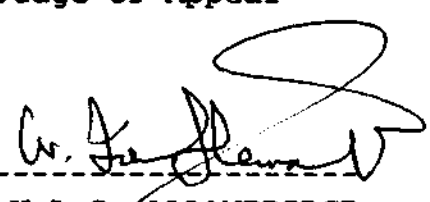
I agree


W.H.R. SCHREINER
Judge of Appeal

I agree


G. G. HOEXTER
Judge of Appeal

I agree


LORD W.L.S. ALLANBRIDGE
Judge of Appeal