

RELATIONSHIPS BETWEEN THE PARTIES, THE JUDGES AND THE LAWYERS. THE CASE OF BOTSWANA

Geoffrey MATTHEWS KAKULI

SUMMARY: I. *General Introduction*. II. *Structure of the Courts*. III. *Delineation of the Subject Matter*. IV. *The Machinery of the Adversarial System*. V. *The Relationship of the Parties to Each Other and with the Lawyers*. VI. *The Parties and the Judge*. VII. *The Relationship of the Lawyers to Each Other and with the Judge*. VIII. *Conclusion*.

I. GENERAL INTRODUCTION

Botswana has an area of 582,000 square kilometers about the same size as France and the by the 2001 censuses, is assessed at 1.7 million. The country is accordingly vast and sparsely populated. Botswana is subject to two extreme weather conditions, summer and winter. The average temperature during summer, from November to April is 30 degrees centigrade. The winter months can at times be very cold. Rainfall is very irregular, varying between an annual average of just over 650 mm in the North to less than 250 mm in the South. The vegetation of Botswana is made up mainly of savanna. The Kalahari Desert, for instance, occupies a large section of the country.

Botswana became a British Protectorate in 1891, the Bechuanaland Protectorate, as it was known but it did not receive British common law: Roman/Dutch law as was enforced in the British colony of Cape of Good Hope was introduced on 10th of June, 1891.

The colonial courts were enjoined to enforce Roman/Dutch law and to respect “native law and custom” subject to what is generally referred to as “condition of repugnang” (*i.e.* repugnang to morality, humanity, or natural justice or injurious to the welfare of the natives). The purpose was to invalidate indigenous laws deemed violative of some undefined universal minimum standards.

II. STRUCTURE OF THE COURTS

The two most important categories of courts in Botswana are the higher and the lower courts. The higher courts include the court of appeal, which is the highest Court of Appeal in all matters and the High Court. These two categories of courts, constitutes the superior courts of records. The Magistrates’ Courts and Customary Court make up the lower or subordinates courts. The structure reflects the dual system of laws operating in the Country in that the Court of Appeal, the High Court and the Magistrates’ Courts and concerned primarily with administering the common law (Roman/Dutch and English law) and statutes enacted by the legislature while the customary courts deal primarily with the indigenous law. The Magistrates’ also preside over special lower courts, for example, children’s and Juveniles courts. Mention should also be made of the Industrial Court, deemed a superior which is a specialist court dealing with labour matters and whose appeals lie with the Court of Appeal. There is no separate hierarchy of administrative courts.

III. DELIMINATION OF THE SUBJECT MATTER

The relationships between, the parties, the Judges and the lawyers in civil justice is largely governed by statute and common law, principles. These statutes span from the Constitution, which establishes the political legal system, defines the role of the various organs of the State, and sets the general tenor and constitutional framework, within which all laws must operate. Next are the Court of Appeal Act (Cap. 04:01 of the laws of Botswana), the High Court Act (Cap. 04:02), The Magistrates’ Courts Act (Cap. 04:04) and the Customary Courts Act (Cap. 04:05), and the rules made under those Acts. The Acts establish the courts, define their powers and lay down the respective procedures that govern the proceedings before them.

In civil matters, the Botswana civil procedure and practice is basically derived from that of the Republic of South Africa, which in return is quintessentially English. The early rules of procedure in Botswana were based on Cape model until 1969, when new rules were promulgated modeled on South African uniform rules of the Supreme Court of 15th January 1965. However, in 1989 an extensive grafting of English procedural rules, were introduced in order to improve what was perceived as the inadequacies in the existing laws.

IV. THE MACHINERY OF THE ADVERSARIAL SYSTEM

Botswana adheres to the adversary system of trial. It underscores the extensive and wide spread influence of English civil justice, in almost all countries in which English laws was introduced and has continued to operate their civil procedure, with appropriate modification to meet the separate national and local conditions and social aspirations, on the model of the English adversary system.

The main alternative method of conducting civil procedure is that prevailing in civil law countries of Europe, the Franco-ponic States of Africa and the states of Latin America.¹

The underlying philosophy has two central motions. “First, it is for the parties and for the parties alone, to fix the scope of their litigation by their allegations of fact”. Secondly, it is this, which is distinctive; of the adversary system, the Judge must find the facts, taking account exclusively of such evidence as the parties choose to put forward.² He may take into account any allegations that the parties have included in their pleadings, and of the evidence that they chose to put before him at the trial. He has no power to act of his own motion to order an investigation of fact, to require an amendment of the pleadings to hear a witness whom the parties would prefer he did not hear, or to summon the parties to appear before him for interrogation if the do not choose to give evidence. The judge is precluded from calling witness of his own in a civil dispute whom the parties do not either of them choose to call.³

¹ Jacob, Sir Jack, *The Fabric of English civil Justice*, London, Stevens Sons, 1987.

² Jolowicz, J. A., *On Civil Procedure*, Cambridge University Press, 2000, pp. 176-177.

³ *In re Enock and Zaretsky, Bock and CO.S Arbitration* [1910], I KB 327 (CA).

V. THE RELATIONSHIP OF THE PARTIES TO EACH OTHER AND WITH THE LAWYERS

1. *The Parties*

Before an action can be properly constituted there must be at least two parties, one of whom will be the plaintiff and the other whom will be a defendant.

There must also be a course of action. The expression “cause of action” is the entire set of facts, which gives rise to an enforceable claim and includes every fact, which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to discuss a cause of action, such cause of action does not “arise” or “accrue” until the occurrence of the last of such facts and consequently the last cause of action.⁴

A person cannot be a plaintiff unless he has a vested interest in the subject matter of the suit. There are numerous cases, which illustrate the fact that a person cannot be a plaintiff unless he has a vested interest in the subject matter of the suite. For example, a person who is not the owner or occupier of land cannot bring an action against a trespasser on such land.⁵ Likewise where, in terms of a contract between two parties one of the parties is authorized to make payment to a third party who is not the agent of either party, such third party is known as an *adjectus solutionis gratia*. In general an *adjectus solutionis gratia* is not entitled to sue for such payment.⁶ Similarly, in general, it is only the owner of a thing who has such vested interest in it as will entitle him to bring a vindicatory action in respect of such thing. Thus an auctioneer cannot vindicate goods, which had been entrusted to him unless he obtains a cession from the owner.⁷ The right to sue or the liability to be sued depends in the first place on capacity. In order to be capable of either suing or being sued a person must have *locus standi in judicio*. Consequently persons who are wanting in that capacity cannot be parties to any civil action unless that want of capacity has first been implemented.

⁴ Per Watermerger, J., in *Abrahamse and Sons v SAR and H.*, 1933, CPD, pp. 626, 637.

⁵ *Sogiba v Mde* 1915, EDL, p. 205.

⁶ Blackie, *Johnston v Holliman*, 1971 (4), SA 108 (D).

⁷ *Marcus v Stamper and Zontendijk*, 1910, AD, p. 58.

In the adversary system the parties are adversaries and therefore it is left to them to formulate their cases in their own way only complying to the basic rules of pleading. Thus each must take a partisan stance in respect of pursuing his own claim or defense. Each party is bound by his own pleading and would not be allowed to raise a different or fresh case without due amendment properly made. Thus each party knows the case he has met and cannot be taken by surprise at the trial.⁸

A fundamental requirement of our civil procedure is that adequate notice of process and proceedings must be brought to the attention of the opposite party who in turn should be afforded an opportunity to present his side of the matter. This is one of the most basic and important rules of natural justice and is encapsulated in the well-known maxim, *audi alteram partem* (here the other side). The principles underlying many of the fundamental rules of procedure are founded upon this maxim.

2. *The Parties and their Lawyers*

The relationship between parties and their attorneys first and foremost is based on the doctrine of agency. In certain circumstances an individual can only be appointed as agent for another person where he shows a properly and formally executed power of attorney in his favour appointing him to act as an agent for the principal. This is only so in those cases where some law or regulation or established practice requires these formalities to be observed. Our Rules of the High Court require powers of attorney or before, *inter alia*, writ of summons can be issued or notice given of intention to defend.

Thus Order 4 of the rules of the High Court provides: Except as in hereinafter provided no writ of summons and no order of arrest under Order 15⁹ shall be issued by the Registrar at an instance of an attorney on behalf of a plaintiff, nor shall the Registrar's cause appearance to be entered at the instance of an attorney on behalf of a defendant unless there has been filed with him a power of attorney to sue or defend as the case may be.

⁸ Jacob, Sir Jack, "The present importance of pleadings". *Current Legal Problems*, vol. 13 (Stevens and Sons Ltd), reprinted in Jacob, Sir Jack, *The Reform of Civil Procedural Law and other essays in Civil Procedure*, London, Sweet and Maxwell, 1982, p. 243.

⁹ This Order deals with orders for *arrest tanquam suspectus de fuga*.

A power of attorney is therefore a formal document in writing granting authority upon an agent to act for his principal, either in specific matter or matters or in general to perform on behalf of the principal all acts which the principal might himself perform.¹⁰ Consequently Order 4 refers to a special type of power, namely the power which is given by the party to his attorney in order to authorize the Attorney to initiate or defend a legal proceeding on party's behalf and to act in regard to certain matters incidental to the lawsuit. The reason for obtaining such power is to prevent a party whose name is used in the proceedings as plaintiff or defendant from subsequently repudiating the process and stating that he had not given any authority. It also prevents the bringing of an action or filling of a defense in the name of a person who never authorized it. The institution and prosecution of legal proceedings is an important step, which may involve a party in great expenses. As soon as an attorney has accepted a mandate in his favour then the relationship of attorney is bound to give his client the benefit of his legal skills and judgment and will continue to act in the matter until its conclusion unless there is good cause for terminating the relationship.

3. *The Role of Lawyer in Adversary Proceedings*

In adversary proceedings the lawyer's function as an attorney is openly and necessary partisan. Accordingly he is not obliged, except as required by law, to assist an adversary or advance matters derogatory to the clients case. However the attorney must not deliberately refrain from informing the court of any relevant authority which considers to be directly in point and which has not been mentioned by his opponent. Where opposing interests are not represented, for example, in *ex-parte* applications or uncontested matters the attorney bringing it is required to disclose fully all material facts which may affect the decision, even though some of the facts may be adverse to the application. Therefore utmost good faith is required.

Trial attorney's, while treating the courts with courtesy and respect have a duty to represent the client's resolutely and honorably within the limits of the law. He has a duty to raise fearlessly every issue, advance any argu-

¹⁰ Herdstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4a. ed., Juta and Co., 1997, p. 210.

ment, ask any question however distasteful, which the attorney thinks will help the clients case and to endeavor to obtain for the client the benefit of every remedy and defense authorized by law. The attorney must discharge this duty by fair and honorable means, without illegality and in a manner consistent with attorney's duty to treat the court with candour, fairness courtesy and respect. (Professional Conduct Hand Book rule no. 10. The law society of Upper Canada, 1987).¹¹ It is submitted that the same principles apply to Botswana.

4. *Duty to Preserve the Confidentiality of a Clients Affair*

One of the attorney's main duties is confidentiality. An attorney should not discuss with anyone else something that the client has said in confidence, even when he has ceased to act for the client or the client is dead. The duty to preserve the confidentiality of client's affairs should not be confused with the concept of professional legal privilege. The principal of legal professional privilege protects and prevents the disclosure even in court of law information, which has passed between the attorney and client. In order to be able to prepare a clients case properly an attorney must be able to communicate freely with the client so that any communication that takes place between the client and the attorney of preparing the case should not have to be disclosed for possible use in evidence. Legal professional privilege attaches:

- e) To certain communication between an attorney and client for the purposes of giving or receiving legal advice.
- f) Communication between an attorney and /or client and third parties for the dominant purpose of use impending or contemplated litigation,¹² the privilege is that of a client. Where the privilege attaches to a particular communication the client can insist on non-disclosure by the attorney or third party in question.

¹¹ *Dulux (Pty) Ltd v Attorney General* [1994], BLR, pp. 199, 203 D; *Estate Logie v Priest*, 1926, AD, pp. 312, 323.

¹² *R v Central Criminal Court, ex parte Francis and Francis*, 1988, 3 WLR, 989, HL; *Waugh v British Railways Board*, 1980, AC, p. 521.

5. *Unmeritotius Proceedings*

The attorney must never waive or abandon his client's rights, for example, an available defence under the Prescription Act, without the clients in uniformed consent. In civil proceedings it is important that an attorney must avoid and discourage the client from resorting to frivolous or vexations, objections or attempts to gain advantage from slips or oversights not going to the merits, or tactics which would merely delay or harass the other side because such practices can readily bring the administration of justice and legal profession into dispute.

6. *Encouraging Settlements*

An attorney should take any available opportunity in the client's interest to each a solution by a fair settlement out of court rather that engage in legal proceedings.

VI. THE PARTIES AND THE JUDGE

As far as formal constitution of the action is concerned it is for the parties alone, by their respective allegations, counter-allegations and admissions to set the limit beyond which the judge may not go in finding the facts on which his judgment will be based. The general principal is that it is the parties dispute with which the judge must resolve and not the dispute which the judge might have preferred to have before him. The law is for the judge, however, he is bound by the litigants choice of material facts. All that is required of the parties is that they plead facts. Order 20 rule 3 (1) of the Botswana rule of the High Court provides that every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but the evidence by which they are to be proved. The judge should consider and deal with the legal result of pleaded fact, though the particular legal result alleged is not stated in the pleading.¹³ So long as the fact are before the judge, the judge may and should draw upon any rule of law that ap-

¹³ *Lever Brothers Ltd v Bell*, 1931, I.K.B. 557, 583 per Scrutton, L. J.; *Drane v Evangelon*, 1978, I WLR, p. 455.

pears to him to be applicable, whether the litigants have formally relied on the rule or not.

The law of the case therefore, would depend upon the facts of the case and the allegations of facts belong to the litigants and not to the judge. In other words the Botswana judge does not restructure the litigation against the expressed wishes of the parties. The parties of course may amend their pleadings. But the general principal is that it is not the judge's duty to impose on the party's amendments for which they do not ask. The judge may of course; make suggestions to one of the parties that he should apply for leave to amend and such suggestions would normally be acted upon. If the suggestions are not followed then the judge will leave the pleadings as they are and decide the case accordingly.¹⁴

In the normal procedure in the High Court the machinery of the court is engaged when the plaintiff files the write of summons or other originating documents, which is issued by the Registrar of the High Court. The write is prepared by the plaintiff and is addressed to the defendant and calls on the defendant to cause and an appearance to be entered and failure to do Judgment as claimed may be given against the defendant without further notice. The statement of claim must disclose "a cause of action" which means that every fact, which is material to be proved, on the hypothesis that they are true, be such as to entice the plaintiff to obtain judgment in his favour. Similarly the defence must be formulated sufficiently clearly to inform the plaintiff precisely of the basis of the defendants defence. If the plaintiff is left at a loss as to what the defence is, he will be entitled to take exception to the defence on the ground that it is vague and embarrassing in terms of order 20 Rule 17 (1)(b) of the rules of the High Court.¹⁵

The term "cause of action" is defined by means of preference to a distinction between The *facta probanda* and the *facta probantia* of the case. The *facta probanda* (the facts in dispute or the facts that have to be proved) are the facts, which form the basis of the cause of action. This is the fact, on the hypothesis that they are true, that the plaintiff must prove in order to succeed in his action. The *facta probantia* (facts which prove) are the facts, which are used in order to prove the facts in dispute. It is not necessary to set out *facta probantia*. Neither the rules or principals of law relied on nor

¹⁴ 14. (1953) 69 l.q.r.317, lord Asquith.

¹⁵ *Abrahamse and Sons v S.A. and H*, 1933, CPD 626, 637 *Mckenzie v Farmers' Co-operative Meat Industries Ltd.*, 1922, AD 16.

the evidence to be adduced in support of the allegations of fact are mentioned in the claim or the defence. A party may not adduce evidence tending to prove a fact, which has not been pleaded, nor may he seek to invoke a rule or principal of law, which is not capable of application to the pleaded fact. The object of the pleadings is therefore firstly, to determine the questions of fact on which the parties are in controversy and secondly to delimit the matters on which evidence may be adduced and to which legal reasoning maybe addressed. The number of pleadings is limited. The plaintiff may answer the defence (*plea*) and may where necessary file a replication (reply) to the *plea* and a *plea* to any claim in reconvention (counterclaim). (Order 26r1) but no further pleadings are possible without leave of the court, which is rarely given (Order 26r1). The pleadings are deemed closed (*litis contestatio*) fourteen days after the service of the reply (replication) or the defence (*plea*) as the case maybe [Order 21r1(1)]. On the other hand the possibility for amendment of the pleadings are extensive (Order 32). Until the pleadings are closed either party may amend his pleading once without leave. There after at any stage of the proceedings the court may grant leave to amend (Order 32).

VII. THE RELATIONSHIP OF THE LAWYERS TO EACH OTHER AND WITH THE JUDGE

1. *The Relationship of Lawyers to Each Other*

It is important while conducting a case the attorney must work productively with other attorneys. He must build a constructive working relationship with other attorneys on the same side and on the other side. Attorneys on the opposite side should not be obviously too friendly or accommodating because the client may perceive that he is not being properly represented. A genuine possibility of settlement of the case may be pursued but only if it will achieve something. The attorney's behavior towards opponents should not be different from his behavior towards the court. Both are entitled to courtesy and respect on the same basis as the court. Lawyers who treat their colleagues with rudeness and lack of courtesy are unlikely to earn their respect.¹⁶ He is bound as regents his professional brethren, to

¹⁶ Palmer R., and McQuivid, D., *Basic Trial Advocacy Skills*, Butterworths Durban, 2000, 14.

conduct his business with fairness and properly. Any ill feelings, which may exist or be engendered between clients, should never be allowed to influence attorneys in their conduct and demeanor towards each other or the parties. The presence of personal animosity between attorneys involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with orderly administration of justice.¹⁷ The attorneys should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters which do not prejudice the rights of the clients.¹⁸

The attorney should not take advantage of or act without fair warnings upon slips, irregularities or mistakes on the part of other attorney's not going to the merits or involving the sacrifice of the client's rights.¹⁹ He must answer with reasonable promptness all professional letters and communications from other attorneys which require an answer.²⁰ He should not communicate upon or attempt to negotiate or compromise a matter directly with any person who is represented by an attorney except through or with the consent of that attorney.²¹ He should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other attorneys but should be prepared when the requested, to advise and represent a client in a complete involving another attorney.²²

There is a general prohibition against the solicitation of work by attorneys. This is expressed in the international Code of Ethics for the Legal Profession which proclaims briefly that resorts to advertisement is contrary to the dignity of a lawyer and that a lawyer should never solicit business.²³

Part XI, Regulation 54.3 of the Law Society of Botswana adopted by the Law Society resolution on 12th April 1997 deals with unprofessional

¹⁷ *Professional Conduct Hand Book*, The law Society of Upper Canada, 1987, Rule 14, Commentary 2.

¹⁸ *Ibidem*, Commentary 3.

¹⁹ *Ibidem*, Commentary 4.

²⁰ *Ibidem*, Commentary 5.

²¹ *Ibidem*, Commentary 7.

²² *Ibidem*, Commentary 8.

²³ Rules 8 and 9 International Code of Ethics adopted at Oslo on 25 July 1956 and amended by the General Meeting of the International Bar Association at Mexico City, 29 July 1964 and at Stockholm, 18 August 1976.

or dishonorable or unworthy conduct on the part of a practitioner. The Law Society has chosen to be more specific in describing a number of things that will offend as partaking of the nature of solicitation or advertisement or touting. Regulation 54.1.1 prohibits “touting for work of professional nature”. Regulation 54.3 defines the expression “touting for work of a professional nature” in the several species described in the regulation.

The attorneys are for example obliged to charge proper fees for their services not to undercut fees directly or indirectly to proclaim willingness to do so; not in any circumstances share professional fees with a lay man; not to place any advertisement in which their professional qualifications appear except in a publication which is conferred to legal matters, no to lookout busily for customers like soliciting business from accident victims.

What an attorney must ensure is that the choice of him as an attorney is entering unsolicited and that he deals not insinuate into his relationships any suggestions that he be employed the payment to any of commissions or benefits into considerations of procuring work from him is most improper and that the offer of such payment could be a serious form of touting.

2. *Relationship with the Court*

Attorneys have a duty to act with utmost good faith towards the court. They have a duty to ensure efficient and fair administration of justice particularly in *ex-parte* applications or in those matters where the party offered by the relief, which is being sought, is not yet before the court. In opposed or defended matters the duty might be stated as a duty not actively to mislead the court. They have a duty to provide all legal authorities and to refer to authorities or statutes, which are against their agreement as well as those, which support it. They must not receive or knowingly or recklessly mislead the court. They must at all times be courteous to the court and to all those with whom they have professional dealings. They must act diligently and appear promptly as benefits an officer of the court, thus not waste the courts time and shall always be present at the appointed times. In view of the vital part played by the attorneys in the administration of justice, they are under the obligation to strive to maintain respect for that administration.

VIII. CONCLUSION

We have stated the above in a broad outline the relationship between parties or litigants, the judges and the attorneys in their respective rules in our adversary system. The central person namely the attorney has a paramount duty to the court and he is not a mouthpiece of his client to say what he wants or his tool to do what he desires. He owes his allegiance to the higher cause namely the cause of justice and truth. In the discharge of his office he has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself, and a duty to the state.²⁴

²⁴ Cann, Richard Dn., *The art of the Advocate*, Penguin Books Ltd., 1993, p. 35.