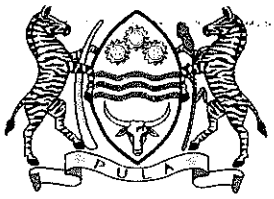

IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-001-25
HIGH COURT CASE NO. UAHGB-000332-24

In the matter between:

ATTORNEY GENERAL **1ST APPELLANT**
DIRECTORATE OF PUBLIC PROSECUTIONS **2ND APPELLANT**

and

CARTER NKATLA MORUPISI **RESPONDENT**

Attorneys Mr. T. Rantao, Mr. L. C. Batsalelwang, Mr. Q. Maduwane, Mr. M. M. Maswabi, Mr. B. S. Pofelo and Ms P G Molokwe for the Appellants
Attorney Dr. O. Jonas, Mr K Kole and Dr T E Makwati for the Respondent

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JUDGMENT

CORAM: **LESETEDI JA**
DAMBE JA
TEBOGO-MARUPING JA
FRONEMAN JA
CAMERON JA

FRONEMAN and CAMERON JJA:

1. The people of Botswana are justifiably proud of its democratic system of government since independence. It has gained recognition and worldwide respect as a beacon of democracy in

Africa. This was reinforced in October 2024 when, after 58 years, opposition parties prevailed in a free and fair election. The then-President immediately accepted this democratic outcome and a peaceful transition took place.

2. Foundational to a constitutional democracy like Botswana is an independent judiciary and the rule of law. One of the features of the rule of law is the hierarchical structure of courts, in which decisions of lower courts are subject to the appellate or review powers of superior courts, culminating in an apex or final court. Botswana's Constitution is no stranger to this feature of democracy. It forms part of the foundational structure of the Constitution. The Court of Appeal, as a final court of appeal, has expressly confirmed this fundamental principle in a number of authoritative decisions. Authoritative, by virtue of another fundamental tenet of the rule of law: that decisions of the highest court of appeal are binding on lower courts.

3. All this was uncontroversial and trite law, accepted in Botswana as elsewhere in democratic societies.

4. Until 3 January 2025.

5. On that day, a three-judge Bench of the High Court by a majority of two to one held that it enjoyed power to overturn a judgment of the Court of Appeal. It did so because, it said, that judgment breached the Respondent's constitutional right to a fair trial. The High Court sought its competence to do so **in section 18(1) of the Constitution**. It held that this provision afforded the High Court original jurisdiction to adjudicate the matter and to give redress once it found that a breach occurred. It declared the Court of Appeal had breached the Respondent's right to a fair trial. It thus pronounced its imposition of imprisonment on the Respondent a nullity and ordered the reinstatement of the non-custodial sentences the trial court had imposed.

6. How did that decision of the High Court come about? To unravel the mystery requires a brief recap of preceding events.

7. The Respondent was charged in the High Court with two counts of corruption and one of money-laundering. On 1 November 2023, the Court found him guilty and passed sentence on 30 November 2023. On the first count of corruption the Court's sentence was two years' imprisonment, wholly suspended. On the second count of corruption, the Court sentenced him to a fine of BWP 50,000.00 or,

in default of payment, five years' imprisonment. On the money-laundering count the sentence was a fine of BWP 80,000.00 or, in default of payment, eight years' imprisonment. If the fines were paid, these sentences entailed no direct imprisonment.

8. The Respondent appealed his convictions to the Court of Appeal. That Court invited the parties to address it on whether it had the power to increase sentence, even in an appeal against conviction only. At this point, the Respondent sought, unsuccessfully, to withdraw his appeal. The Court dismissed his appeal against his convictions. After further argument, the Court, on 22 November 2024, sentenced the Respondent to eighteen months' imprisonment on the first corruption count; five years' imprisonment on the second corruption count; and seven years' imprisonment on the money-laundering count. It ordered that the sentences – an effective seven years' imprisonment – should run concurrently.

9. The Respondent was taken into custody and started serving his sentence in the First Offenders prison in Gaborone. Some four weeks later, on 19 December 2024, he lodged an urgent application, not before the Court of Appeal, which had sentenced him, but before the High Court. He sought a declaratory order that the sentencing

judgment of the Court of Appeal contravened **section 10(1) of the Constitution**. This guarantees any person charged with a criminal offence "a fair hearing" before "an independent and impartial court". The Respondent asserted that the Court of Appeal was not independent and impartial; that the sentencing judgment had to be set aside and the High Court's judgment on sentencing restored; and that he be liberated from prison forthwith. Despite opposition from the present Appellants, a split panel of the High Court granted this relief on 3 January 2025.

10. On 8 January 2025, the Court of Appeal (per Garekwe JA), despite opposition from the Respondent, granted the Appellants an expedited appeal. The appeal was set down for hearing on 31 January 2025, but was postponed at the Respondent's instance to 6 February 2025. On that day this Court heard argument on the Respondent's application for the recusal of two of the Court's members, as well as his application for the stay of these appeal proceedings so that he could bring an application, again in the High Court, setting aside the decision of the President of this Court to empanel the five judges hearing this appeal.

11. After argument, this Court on 6 February 2025 dismissed both applications, the recusal applications with costs, but reserving the costs of the stay application. We indicated that reasons for these orders, and judgment on the reserved costs, would be handed down on 21 February 2025.

12. Argument on the appeal was heard on 11 February and judgment was similarly reserved for delivery on 21 February 2025. This judgment deals with all these issues.

13. We start with the appeal itself, for two reasons. The first is that the issue the High Court judgment raises – whether the High Court has jurisdiction or competence to inquire into or set aside a judgment of the Court of Appeal – is of fundamental importance to this country's credentials as a constitutional democracy, so admired by many outsiders and so cherished by the people of Botswana themselves. It must be settled first, and quickly.

14. The second reason is that the answer to the issue so raised is so obvious that it is relevant in assessing the merits of the dilatory tactics that were sought to be wielded to prevent or at least to postpone the inevitable as long as possible.

15. The hierarchical structure of courts is universally accepted as a necessary feature of a constitutional democracy based on the rule of law. Appeals from and reviews of lower court decisions by a higher court in the hierarchy are a necessary safety feature to ensure that possible mistakes can be rectified and injustice prevented. But in the end the rule of law also requires finality in the interests of clarity, certainty and coherence.

16. That finality is reached at the apex court of a country. Its word on matters coming before it is regarded as final. But even final courts may err: hence it is also a generally accepted principle that the apex court may, in exceptional cases where it is necessary in the interests of justice, correct itself. All of this is found in the Constitution and laws of Botswana and has for long been recognised and applied not only in its apex court, the Court of Appeal, but throughout the court system.

17. The High Court has now sought to upend this orthodoxy. It attempted to arrogate to itself the competence to sit in review or appeal over a judgment of the Court of Appeal. It thus becomes necessary to re-examine the roots of accepted law and practice in

order to see whether the High Court's assay was founded on rock or sand.

18. **Section 99(1) of the Constitution** provides that "[t]here shall be a Court of Appeal for Botswana which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law". **Section 99(4)** provides that the Court of Appeal is "a superior court of record and save as otherwise provided by Parliament shall have all the powers of such a court".

19. **Section 10 of the Court of Appeal Act [CAP.04.01]** provides that in addition to appeals specifically provided for in the Constitution "an appeal shall lie to the Court of Appeal as of right –

> '(a) from any final decision in any proceedings before the High Court sitting at first instance;
>
> (b) from any decision of the High Court in the exercise of its powers or duties under section 18 of the Constitution;
>
> (c) by a convicted person from any order of the High Court in the exercise of its revisional jurisdiction altering a conviction or sentence;
>
> (d) in any case where express provision for such appeal is made under any written law.'"

20. **Section 11 of the Court of Appeal Act** makes provision for appeals from any decision of the High Court to the Court of Appeal with the leave of the High Court, or, if such leave has been refused,

with the leave of the Court of Appeal, in specified cases. These are –

> "(a) from any interlocutory order;
>
> (b) from any order relating to costs only;
>
> (c) from any order made with the consent of the parties;
>
> (d) from any decision in any civil or criminal proceedings given on appeal from any other court to the High Court;
>
> (e) in any case where express provision for such appeal is made in any written law."

21. **Section 7 of the Court of Appeal Act** provides that: -

> "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."

22. **Section 95(1) of the Constitution** provides that *"There shall be for Botswana a High Court which shall have unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law".* **Section 95(3)** provides that the High Court, too, is *"a superior court of record and, save as otherwise provided, shall have all the powers of such a court".*

23. The High Court's appeal jurisdiction is set out in **section 10(1) of the High Court Act [CAP.04.02]**. This provides that:

> "(1) The Court shall have appellate jurisdiction from any decision of a magistrate's court and customary courts of appeal in Botswana and shall have power to -
>
> (a) confirm, amend or set aside any judgment, decision or order, civil or criminal, of any magistrate's court or a customary court of appeal;
>
> (b) order a new trial of any cause heard or decided in any magistrate's court or a customary court of appeal, or to direct that such new trial shall be heard in the Court;
>
> (c) receive further evidence or to remit the case to the court of first instance for further hearing, with such instructions as to further proceedings as the Court may deem necessary;
>
> (d) impose such punishment, whether more or less severe than, or of a different nature from, the punishment imposed by the court of first instance, as in the opinion of the Court ought to have been imposed by that court:
>
> Provided that notwithstanding that the Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the Court that a failure of justice has in fact resulted therefrom."

24. **Sections 11 to 14 of the High Court Act** provide in more detail for that Court's powers in exercising its appeal jurisdiction under **section 10(1).**

25. These Constitutional and legislative provisions make it abundantly clear that the Court of Appeal is the final court of appeal in

Botswana, with jurisdiction to make final determinations on appeal from all the lower courts through the High Court.

26. **Section 10 of the High Court Act** limits the High Court's appeal powers to appellate jurisdiction from any decision of a magistrate's court and of customary courts of appeal. Nowhere in the Constitution or the High Court Act or the Court of Appeal Act, or any other legislation, is the High Court given any appellate or review jurisdiction over decisions of the Court of Appeal.

27. All the provisions set out above create a plain hierarchy of successive powers. **Section 18(1) of the Constitution** fits neatly into this. It empowers the High Court to provide relief in cases of breach of the fundamental rights and freedoms of the individual that are enshrined in **Chapter II of the Constitution**. It provides:

> "Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

28. This provision makes it clear that, besides the High Court's unlimited and original jurisdiction under **section 95(1) of the Constitution**, to hear and determine any civil and criminal proceedings under any

law, it in addition has jurisdiction over any alleged contravention of those fundamental rights and freedoms. Nothing more. No exclusive or final jurisdiction.

29. Nobody has ever suggested that the provisions of **section 95(1) of the Constitution** clothe the High Court with authority to inquire into, nullify or overturn final decisions of the Court of Appeal. The same applies to **section 18(1).** Nowhere does it empower the High Court to interfere in any manner with a final decision of the Court of Appeal.

30. The constitutional logic of the pyramid structure is reinforced also by **section 10(b) of the Court of Appeal Act**. That provision, quoted above, clothes the Court of Appeal with appellate power over High Court decisions exercising powers under **section 18 of the Constitution**. But nothing in the Constitution or in any statute provides the obverse: the High Court is nowhere afforded power to interrogate, question or inquire into any decision of the Court of Appeal regarding fundamental rights or freedoms.

31. This is logically obvious. It has also been enshrined for some two decades in explicit decisions of this Court that were binding on the

High Court that heard this matter. Three five-judge decisions of this Court expressly establish these principles in the law and practice of this country: the High Court has no authority over Court of Appeal judgments, even those affecting fundamental rights and freedoms: **Kobedi v The State (2) 2005 (2) BLR 76 (CA)**; **Gareitsane v The State 2006 (1) BLR 201 (CA)**; and **State v Maauwe 2006 (2) BLR 530 (CA).**

32. In both **Kobedi** and **Maauwe**, the Court of Appeal recognised that there may be exceptional circumstances where the Court of Appeal itself might be called upon to reconsider one of its own previous decisions.

33. In **Maauwe** it was made clear beyond contest that **section 18(1) of the Constitution** does not afford the High Court jurisdiction to set aside an order by another judge of the High Court that has been confirmed by the Court of Appeal. The Court held that, were the High Court to find merit in a constitutional complaint, the matter must be referred to the Court of Appeal. This is because the High Court lacks jurisdiction to deal with the matter.

34. How did the High Court majority in this matter then get past the clear constitutional and legislative structure of the judicial hierarchy in Botswana, as well as the binding judicial precedent of this Court? The only answer is that they ignored it. The majority noted the three decisions referred to above, but insisted that the Respondent's case was "one of the rare exceptions justifying the court" itself "to revisit" the Court of Appeal decision sentencing the Respondent to imprisonment. The Judges in the majority took it upon themselves, in defiance of clear binding precedent, to determine whether there were exceptional circumstances justifying intervention.

35. This they did without any warrant in logic or in the Constitution or in any statute, and in plain violation of longstanding appellate precedent. What moved the two Judges to do so is incapable of explanation on the papers before us and we refrain from venturing any possible reason for their conduct.

36. It must be made plain that the exceptionality principle applies only within the Court of Appeal itself. It does not apply to grant the High Court power to inquire into or interfere with decisions of the Court of Appeal. The principle serves merely to define the extremely rare

circumstances under which the Court of Appeal, as the supreme court of Botswana, may revisit its own decision in a matter.

37. This Court suggested in **Maauwe** (at 641E-F) that a High Court judge may be obliged to consider the merits of an application brought under **section 18 of the Constitution** before, should there be merit in the application, referring it to this Court. We consider, on the principles and constitutional provisions we have set out above, that this is mistaken. It is only this Court, and this Court alone, that has constitutional and statutory power to consider whether a **section 18** challenge to one of its previous decisions has any merit at all.

38. **Maauwe** was a most exceptional case, where a letter of complaint by accused persons under sentence of death had been received but buried in a High Court file before this Court heard their appeal. Those extreme facts no doubt led Zietsman JA to consider that the High Court could ponder the merit of the challenge to the previous Court of Appeal decision, before referring it to this Court for consideration and correction. The correct position, which we now affirm, is that the High Court has no power at all to assess challenges to Court of Appeal decisions on section 18 grounds.

39. In **Kobedi v The State (2)** at 91B-C, the Court noted that an attempt in the High Court to meddle with a Court of Appeal decision "would amount to an abuse of the provisions of **section 18(1) of the Constitution** and [be] subversive of the judicial process of this country and of the rule of law". Sadly, this observation applies to the conduct of the majority Judges in the High Court.

40. It follows that the appeal must succeed and the High Court's order must be set aside. In **Maauwe**, even though it found that the High Court lacked jurisdiction under **section 18 of the Constitution** to revisit and set aside a decision of the Court of Appeal, this Court nevertheless considered whether **Maauwe** constituted one of those rare cases where the Court of Appeal should intervene in its own earlier decision. The Court concluded that those rare circumstances existed.

41. Since the High Court here had no jurisdiction at all to engage with the question whether the sentencing judgment of this Court infringed the Respondent's fair trial rights, should we inquire at all whether this is one of those "rare cases"? We think we should, since the High Court's judgment, having raised those issues, however improperly, has put them into currency amongst lawyers

and the public. The Respondent has further sought to allege impropriety on the part of the President of the Court in empaneling the members of this Court, and also levelled allegations of perceived bias against some (initially all) of the members of this Court. All this makes it necessary to resolve any question of impropriety or constitutional infraction arising from the prison sentences imposed on the Respondent.

42. In both written and oral argument, the Respondent expounded at length the importance of the right to be tried by a fair, independent and impartial tribunal, urging that this is fundamental to the rule of law and judicial independence in a constitutional democracy. None of this was ever in dispute. It is obvious, on the three precedents that have governed for nearly two decades, that a contravention of that principle could well constitute a "rare case" justifying this Court in revisiting its own earlier decision.

43. Everything needed to determine whether that fundamental principle was indeed contravened is on record before us, namely this Court's sentencing judgment of 22 November 2024. That Court considered it imperative, for reasons of justice, equality, consistency and fairness, to increase the Respondent's sentence to one of

imprisonment. In reaching that conclusion, the sentencing Court first set out the pertinent paragraphs of its previous decision, dated 19 November 2024, that dismissed the Respondent's appeal against his convictions.

> "[8] The first two counts of corruption are based under the Corruption and Economic Crime Act, (Cap. 08:05) (the CECA). In respect of the first count of corruption (the predicate offence of corruption), the accused were alleged to have contravened s 24A (1) of the CECA - an offence punishable under s 24A (3) of the same Act. Quintessentially, the appellant who was a Public Officer at the time is alleged to have abused his public office as Board Chairperson of the Botswana Public Officers Pension Fund (interchangeably referred to as the BPOPF or the Pension Fund) by corruptly signing a contract with Capital Management Botswana (CMB) on behalf of BPOPF, authorising the former to administer the latter's funds, as private equity managers. The signing of the contract is alleged to have taken place without the final resolution of the Board and whilst its business had been suspended by a Court Order.
>
> [9] In the second count, the accused were alleged to have contravened s 26 of the CECA — an offence punishable under s 36 of that Act. It is alleged that having signed the contract as aforementioned, the appellant received a valuable consideration, to wit, a gold Toyota Land Cruiser, pick up Chassis number JTELV 73J0070011353 and engine No. IVDO357877 valued R630 988.99 (the Land Cruiser). The statutory offences, in relation to these two corruption counts, are some of the offences mentioned under Part (IV) of the CECA and they range from s 23 to s 38.
>
> [10] Additionally, the accused were charged with laundering money in the amount of ZAR630 988.99 under the Proceeds and Instruments of Crime Act, (Cap 08:03) (the Proceeds of Crime Act). Allegedly, they contravened s 47 (1) (b) of that Act — an offence punishable under subsection (3). The allegations were that the accused, acting in concert, received and converted to their personal use the Land Cruiser valued ZAR630 988.99. The vehicle was bought from the Republic of South Africa and brought into the Republic of Botswana. The accused were alleged to have known or had reasonable grounds for knowing or suspecting that the Land Cruiser (later registered B 587

BEW) was derived or bought in whole or in part, directly or indirectly from the commission of the predicate corruption offence. At the end of the trial only the appellant, as mentioned earlier, was convicted and sentenced.

[11] Following the conviction the High Court sentenced the appellant as follows:

> 'Count 1 [corruption in contravention of s 24A (1) of the CECA]:
>
> 2 years imprisonment wholly suspended for 3 years on condition that he does not commit an offence of this nature.
>
> Count 2 [corruption in contravention of s 26 of the CECA]:
>
> Pay the sum of P50 000.00 or in default 5 years imprisonment
>
> Count 3 [Money laundering in contravention of s 47 (1) (b) of the PICA]:
>
> Pay the sum of P80 000.00, or in default 8 years imprisonment.
>
> **Order:**
>
> i) Fines in respect of Counts 2 and 3 are to be paid in 90 days from today.
>
> ii) The Land Cruiser, registration number B 587 BEW is forfeited to the State.
>
> iii) The accused person is informed of his right to appeal against conviction and/or sentence. Such appeal shall be filed within a period of six weeks from the date of sentence.'" [Footnote omitted.]

44. The Court then turned to its task of sentencing the Respondent. Its reasons on sentence best speak for themselves. The Court started by quoting the written argument of the Respondent's own Counsel,

who, the Court said, recognized the "egregious nature" of the Respondent's offences. The Court then reproduced the relevant portions of that argument as follows:

"43. We harbour no illusions that the offences for which Mr Morupisi stands convicted are quite serious attracting serious penal consequences. This is also reflected in the opening words of Nkabinde JA in her judgment, dismissing the appeal when she writes that 'it is trite that white-collar crimes, such as corruption and money laundering are social evils striking at the very foundations of a developing country's economy.' Indeed, it has been said about corruption that:

> *Not only does it constitute one of the fundamental causes that hinder access to and compliance with human rights, but it also becomes a source of conflict, exacerbating poverty, weakening the rule of law and paving the way for the illicit use of goods and services and public resources.*

44. In the South African case of S v Shaik & Others [2006] ZASCA 105 it was held that:

> *The seriousness of the offence of corruption cannot be over emphasized. It offends against the rule of law and principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights... Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is haltered. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.*

45. In *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22 the Constitutional Court held that 'corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution... If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.

46. In *S v Yengeni* [2005] ZAGPH 117 it was stated that:

> *To state that corruption and other crimes of dishonesty on the part of elected office-bearers and officials in the public service have become one of the most serious threats to our country's well-being, is to state the obvious. Their*

incidence may well be characterized as a pandemic that needs to be recognized as such and requires concerted and drastic efforts to combat it.

47. In *S v Selebi* judgment on sentence [2010] ZAGPJHC 58 it was said corruption can be likened to a cancer. It operates insidiously destroying the moral fibre of the nation. When it is discovered the damage has already been done. Whilst the particular act of corruption may be excised, just as a malignancy may be removed in a surgical intervention, society is not what it was prior to the corrupt act. The roots of justice and integrity, so vital in a fair and democratic society, have been permanently scarred by the corrupt act. The moral fibre of society has to be re-built after the excision of the corruption.

48. The aggravating factor in the present case is that the corruption was perpetrated by a senior government official -- a head of the civil service who was entrusted with the responsibility to prudently husband the financial resources of Batswana. This is a case where ordinarily one would have expected an effective custodial sentence to be imposed on the convict. But because the court *a quo* imposed fines coupled with suspended custodial sentences, it is now undesirable for this Court, being an appellate Court to impose a custodial sentence. See *Ramaloko* case above, where this Court had said: courts *'should be even slower to increase a sentence [than to reduce one] if the effect will be to send to prison a person whom the trial court had not sentenced to imprisonment or to return to prison a person already released.* "" footnote omitted.]

45. The sentencing Court noted counsel's caveat that any power vesting in the courts to enhance a sentence must be exercised sparingly and fairly. The Court then proceeded to explain the sentence it imposed as follows:

"8. The principle that the appeal Court has the power to enhance a sentence imposed by the trial court is trite. See *Oliver v The Queen* (The Bahamas) [2007] UKPC where the judicial committee of the Privy Council said:

'... The principles which have now been established can be summarized in the following propositions:

(a) The power to increase a sentence must be sparingly exercised and then only in cases where the sentence imposed by the trial court was manifestly inadequate, in all cases the reasons for exercising this drastic power must be explained: *Kailaysur v The State of Mauritius* [2004] UKPC 23; [2004] 1 RVLR 2316, para 9, per Lord Steyn.'

9. The principle has also received the attention of the courts in Botswana. In *State v Regoeng* [1987] BLR 476 (HC) Lawrence Ag J endorsed the following remarks by Murray J in *State v Motlhatlhedi Thagane* High Court/Review Case No. 469 of 1986, (unreported):

> 'In considering whether or not to enhance sentence passed by the court below I remind myself that I cannot simply say that if, [I were] the trial magistrate, ... I would have passed a different sentence and imposed such sentence. I must ask myself whether or not the sentence was grossly inadequate, and (b) wrong in principle. Only if I can answer one of these questions in the affirmative may I be entitled to substitute my own discretion for that of the magistrate' ...

10. The heads of argument filed on behalf of the Appellant and his attorney's impassioned plea against enhancement of the sentence, raise a number of mitigating factors which in the interest of brevity, I summarise hereunder —

(a) the appellant is a first offender;

(b) he is a man of advanced years "in the evening of his life and waiting to meet his maker";

(c) the Appellant who was a man of very high societal standing and that that vanished as a result of the conviction; and

(d) the vehicle forming the subject of the case has been forfeited to the State and the Appellant has not benefited from his crime.

11. I will have regard to counsel's entreaties in due course.

12. The Respondent's argument can be summarised under two heads. Firstly, that the offences committed by the Appellant are serious, and secondly that the sentence imposed by the trial court is so disproportionate to the enormity of the crime as to amount to manifest miscarriage of justice.

13. The seriousness of the offences having been acknowledged by the Appellant, I find it unnecessary to burden this judgment with details in the Respondent's heads of argument and argument before us.

14. The mitigating factors advanced by the Appellant are not novel. Leniency towards a first offender is not immutable. It must be placed in the scales with other relevant factors and a balance struck to arrive at a condign sentence in the circumstances.

15. The Appellant's age is certainly a factor but that too must be weighed against aggravating circumstances. While courts have leaned towards leniency where advanced age is a factor, they have not baulked at imposing lengthy sentences in proper cases. *Moatlhaping v The State* [2012] 1 325 (CA) provides examples of both circumstances.

16. In that case, the Appellant had been convicted of murder with extenuating circumstances and sentenced by the High Court to a term of 15 years' imprisonment.

17. Having regard to the Appellant's age, the Court concluded as follows at 341 H-342 A:

'The use of the expression "relatively" connotes an element of elasticity which is an essential ingredient of the sentencing process. It allows the sentencer the freedom to exercise his or her judicial discretion based upon all of the essential matters arising out of the particular case which must be taken into account in arriving at the appropriate sentence.

It may be too early at this stage to detect what the minimum figure for a relatively advanced age ought to be. However, it would be correct to say that the higher the chronological age of the offender, the greater would be the likelihood of his falling into the advanced age category for sentencing purposes. It would all depend on the facts and circumstances of each particular case.'

18. The Court, having regard to the Appellant's age, reduced the sentence to 11 years imprisonment, by no means a lenient, merciful sentence.

19. At the other end of the scale, is *S v Munyai and Others* 1993 (1) SACR 252 (A) quoted in *Moatlhaping* above where an 80 year old was convicted of murder and sentenced to death. Given his age, the death sentence was set aside and substituted with a sentence of life imprisonment. The significance of that sentence, in the context of this case is that a life imprisonment sentence was imposed on an 80 year old.

20. Returning to the sentence in this case, while the land cruiser looms large in the three charges faced by the Appellant, it would be foolhardy to overlook the catastrophic consequences of the Appellant's actions.

21. As a Public Officer (a senior executive) holding a position of high trust, he orchestrated an unlawful agreement while (a) the Board he was chairman of was suspended, (b) no resolution existed to enter into a contract and (c) due diligence had not been concluded.

22. As a result, large amounts of money were siphoned from the Botswana Public Officers Pension Fund. Some details appear in the judgment on conviction. The total

is, however, significantly higher and some, if not all details appear in the judgment of this Court in *NBFIRA v Capital Management Botswana (Pty) Ltd* [2018] 3 BLR 87. Paragraphs D-E at page 110 are telling:

> 'In the case of BPOPF it was alleged that it had placed P447 500 000 of pensioners' funds in the care of CMB through its management of BOP, in which BPOPF was 99 percent partner, and that CMB had purported on disputed contractual grounds to 'dispose of' BPOPF's share of BOP (and of the investment) in doubtful circumstances, for only P50 000 000 to an unnamed beneficiary, whose identity it refused to disclose. Thus, nearly P400 000 000 of pensioners' funds was lost, or would be lost if urgent action was not taken.'

23. This was theft and corruption in amounts unknown in Botswana and can no doubt be traced directly to the Appellant's unlawful action. It is not without significance, either, that witnesses to the suspect contract were those directly responsible in the felonious enterprise.

24. By its very nature white collar high-end financial crime is not easy to detect, investigate or bring to court. An example of this is the inefficacy of the special corruption court based at Francistown, where few, if any high-end financial crimes become subject to prosecution.

25. While punishment and sentencing is pre-eminently in the discretion of the trial court, the appellate court is duty bound to impose the correct and condign sentence where the sentence by the trial court is manifestly out of proportion to the gravity of the crime.

26. Sentencing principles were articulated in *Bogosinyana v The State* [2006] 1 BCR 206 (CA) at 208 B-D:

> '... It is no doubt opportune for me to say something about the correct principles involved in sentencing. A good starting point is that the determination of sentence is a

matter pre-eminently within the discretion of a trial court. An appellate court will not interfere with the sentence imposed by a trial court unless there is a material misdirection resulting in a miscarriage of justice. Nor will an appellate court interfere merely because it considers that it would itself have passed a different sentence if it had sat as a trial court. That proposition is so well established in this jurisdiction, as indeed it is in other Commonwealth jurisdictions, that it hardly requires authority.

It is equally important to bear in mind that punishment should fit the offender as well as the crime while at the same time safeguarding the interests of society. It is thus a delicate balance which should be undertaken with utmost care. In this regard it is important to remember the age old caution not to approach punishment in a state of anger. The justification for such caution, as one has read, lies in the fact that he who comes to punishment in wrath will never hold the middle course which lies between the too much and the too little. See for example, *S v Sparks and Another* 1972 (3) SA 396 (A) at p 410.'

27. No empirical formula exists for the assessment of sentence as each case must be judged on its own peculiar circumstances and where the offence and its punishment are clearly spelt out in the enacting statute, it is a matter of little more than applying the facts of the case to the dictates of the statute.

28. There is a dearth of law in Botswana and elsewhere in the range of punishment for corrupt practices and high-end corruption related crime. However, the case that comes to mind readily is *Selebi* supra where the Appellant, a former commissioner of police and head of Interpol was sentenced to a term of 15 years imprisonment for corrupt practices involving sums of money sounding in millions. The South African Supreme Court of Appeal dismissed the appeal and confirmed the trial court's sentence.

29. I have agonised over the sentence to be imposed on the Appellant bearing in mind that this Court would be failing in its duty and seen to be eroding public

confidence in the judicial system if the Appellant were to escape with a rap on the knuckles. The Court would also be seen to undermine the Honourable President's stated desire to see an end to corruption.

30. As was correctly submitted on the Appellant's behalf, the aggravating factor in casu is the predicate corruption that was perpetrated by a senior government official — a head of the civil service who was entrusted with the responsibility to prudently husband the financial resources of Batswana. In the general run of things, so the argument went, an effective custodial sentence would have been expected but for the trial court's imposition of the fine. As a matter of fact, that's where the material misdirection occurred.

31. Every sentence, especially where the appellant as it is the case here is convicted of various distinct corruption related charges, reflects a complex amalgam of numerous and various factors and certain imponderables. It follows that in such a case, a trial court must carefully evaluate matters such as public interest, the nature of the offences committed, the convicted person's circumstances and the circumstances under which the offences were committed. Here, other than mere mention of the trite triad sentencing guidelines as set out in case law, for example, the South African decisions in *S v Zinn* [1969] (2) SA at 540 and *S v Rabie* 1975 (4) SA 855 (A) at 862 G-H) and applied in this Jurisdiction (see *Bogosinyana supra*) the trial court neither made such evaluation nor had regard whatsoever to the marked effect of the public service rationale (which is a sentencing principle which refers to the public interests in preventing a loss of confidence in public administration through corruption within — see in this regard *Gho Ngak Eng v Public Prosecutor* [2022] SGHC 254 at para 66) when it decided to impose non effective custodial sentence. The trial court erred and materially misdirected itself. Had it done so and appropriately appreciated the

intrinsic seriousness of the appellant's culpability and harm caused, it would have imposed adequate punishment that included direct imprisonment for deterrence.

32. Relying on the remarks by this Court in *Ramoloko v The State* [1983] BLR 204 (CA) at 206 - 207, counsel for the Appellant submitted that it is undesirable for this Court, being an appellate court to impose a custodial sentence because the trial court imposed fines coupled with suspended custodial sentences.

33. The reliance in selective and self-serving parts of the remarks made by this Court in *Ramoloko* is flawed. Counsel took the remarks out of context. The relevant remarks were these:

> "I turn then to the sentence imposed by the learned Chief Justice on review. It is trite that sentence is very much a matter for the discretion of the trial court; an appellate court will not interfere to reduce a sentence unless the trial court has erred in principle or the sentence is manifestly excessive. In particular it has been stressed over and over again that an appellate court should not interfere merely because it would, had it been sitting as the trial court, have passed a different or a somewhat lighter sentence. An appellate court should be even slower to increase a sentence, particularly if the effect will be to send to prison a person whom the trial court had not sentenced to imprisonment or to return to prison a person already released; the impact of the sentence in such circumstances is far greater than if the same sentence had been imposed by the trial court. But even if one were to ignore this consideration, at the very least an appellate court should not interfere in the absence of an error of principle, unless the sentence was manifestly inadequate."

34. Context is everything. Ramoloko had been convicted and sentenced in the Magistrate Court on a plea of guilty to a charge of illegal possession of mandrax tablets. On review, the High Court described the sentence imposed as "far too low" and not in line with Makhubela's case. The High Court confirmed the fine of P800 but increased the sentence of imprisonment to

18 months with 12 suspended. On appeal the Court remarked that "the basis on which the learned Chief Justice proceeded does not emerge clearly from his judgment." The Court questioned, among other things, the approach adopted by the court saying uniformity should not overshadow the principle that a sentence must be appropriate to the particular offender and the particular offence before the court. The reliance on the remarks by the Court of Appeal in *Ramoloko* is flawed. *Ramoloko* is clearly distinguishable from this case.

35. Besides, the sentences in the amended legislation could not apply retrospectively. In this regard the Court said the following at 207 E - 208 A:

> "... I have grave doubts whether as a matter of language 'far too low' meets the test of 'manifestly inadequate'. But most importantly, I do not think that a sentence which was in fact more severe than sentences which had been passed in similar cases up to the time of trial can be described as far too low because it was not in line with a subsequent decision. It is relevant to note the sequence of events. Mandrax was declared a habit-forming drug by the Declaration (Extension List) of Habit-Forming Drugs Order, 1982 (Statutory Instrument No. 37 of 1982), promulgated on 2 April 1982; thereafter a number of cases came before the courts, including *Makhubela*'s case, in which fines were imposed. The present offence was committed in February 1983 and sentence was passed on 16 March. The decision on review in Makhubela's case was on 20 April. Thus up to the date of sentence in the present case fines, without more, had been imposed in similar cases, but the magistrate, expressing himself to be concerned at the increasing incidences of such offences in such a short time, imposed in addition a wholly suspended prison sentence. In these circumstances the sentence cannot be described as manifestly inadequate. I have every sympathy with the view that offences of this kind normally warrant custodial sentences even on the first offenders, and the legislature has now given expression to its concern by providing a mandatory minimum sentence of two years' imprisonment (see Habit-Forming Drugs (Amendment) Act, 1983 (Act No. 8 of 1983)); the interests of society have thus been protected. But I do not think a sentence which was perfectly proper at the time it was pronounced should be increased on review on the basis of a subsequent decision. And I would observe that in Makhubela's

case there was more room to regard the sentence at first instance as inadequate. There the sentence had been a fine simpliciter, whereas here a sentence of one year's imprisonment, wholly suspended, had been imposed — a significant additional punishment and deterrent."

36. Improperly, the situation in *Ramoloko* was compared with the circumstances here. It was argued that if this Court is inclined to enhance the sentence, the fines imposed by the trial court could be increased to a total amount of more than P500 000,00. That proposition invited an obvious question which counsel could not answer: Where would the Appellant get the money to pay the suggested fines because throughout the appeal hearings he had played impecunious?

37. There are no redeeming features whatsoever in this case and an immediate custodial sentence is called for. It must be said in conclusion, that the sentences below reflect a proper tempering thereof with mercy, being substantially lower than the maximum sentences prescribed by the relevant legislation. This Court was asked to develop a sentencing methodology in relation to corruption cases to assist lower courts as was done, for example in Singapore in *Goh Ngak Eng supra*. We are not convinced that such a development is necessary, especially in the circumstances of this case. It must be said in conclusion, that the sentences aforesaid reflect a proper tempering thereof with mercy, being substantially lower than the maximum sentences prescribed by the relevant legislation.

38. In the circumstances, the following Order is made:

    (1) The sentences imposed by the trial court are set aside and substituted by the following:

        a) Count 1: 18 (Eighteen) months' imprisonment.

        b) Count 2: 5 (Five) years' imprisonment.

c) Count 3: 7 (Seven) years' imprisonment.

(2) The sentences aforesaid shall run concurrently to one another and shall be reckoned from the date of this judgment.

(3) The fines imposed by the trial court, if paid, shall be refunded to the Appellant.'"

46. The Respondent relied on certain words in paragraph 29 of the judgment quoted above. These indicated that the sentencing Court considered that, if the Respondent "were to escape with a rap on the knuckles", it would erode public confidence in the judicial system. The Court then added –

"The Court would also be seen to undermine the Honourable President's stated desire to see an end to corruption".

47. It is this sentence the Respondent, and the High Court, seized upon to suggest that the Court of Appeal in sentencing the Respondent was acting on instructions of the Executive. The High Court held that "[by] referencing the President's desires to have corruption cases dealt with more harshly, the Court of Appeal allowed itself to be improperly influenced by the President and thus breached the [respondent's] right to an adjudication before an independent and impartial court".

48. The High Court misquoted the Court of Appeal. In a mission to overturn a judgment, misquoting it is always a grave error. The Court of Appeal nowhere suggested that the President sought to have corruption cases dealt with "more harshly". The words do not appear in its judgment. Nor did the Court indicate that, had it attributed that wish to the President, it would embrace it.

49. A reasonable reader does not clutch sentences in isolation, or misquote them. Instead, a reasonable person would read the statement in the context of the judgment as a whole. Despite the scrutiny to which the High Court and the Respondent's counsel subjected the judgment in written and oral argument, no scintilla of misdirection or impropriety was alleged to be found.

50. It would in truth be difficult to find a more comprehensive and scrupulous judgment on the proper approach to sentencing. An exaggerated misinterpretation of a single sentence inside a fully reasoned judgment would not deflect a reasonable Motswana from assessing the judgment. She will recognize the misinterpretation for what it is, a straw stratagem grasped in pursuit of a desired outcome.

51. It follows that there is no warrant for this Court to revisit the Court of Appeal's sentencing judgment, nor any justification for seeking to intervene in it.

52. We have already found that **section 18 of the Constitution** afforded the High Court no jurisdiction to inquire into or upend a judgment of the Court of Appeal. The Appellants also challenged the High Court judgment on the basis that the author of the majority judgment should have recused himself because of reasonably perceived bias on his part.

53. The Respondent, in supplementary heads of argument filed after the hearing of the appeal, submitted that if we find that the High Court had no jurisdiction under **section 18 of the Constitution**, it became immaterial whether the Judge was compromised. In the limited sense that absence of jurisdiction vitiates the High Court's judgment, regardless of recusal, this is correct. But in the wider context of how this litigation has been conducted, recusal remains highly material.

54. To recap: Garekwe JA granted an expedited appeal. On 6 February 2025, the postponed date of the hearing, this Court heard argument

seeking the recusal of two of the members of the Court, as well the stay of these appeal proceedings so that the Respondent could bring an application in the High Court to set aside the empanelment of the five judges hearing this appeal. We dismissed both applications, with reasons to follow.

55. The application for a stay rested on the following contentions. The decision of the President of the Court of Appeal to empanel the Judges hearing this appeal, acting by virtue of her powers under **section 9(1) of the Court of Appeal Act,** was an administrative act. This was liable to be set aside by the High Court, on ordinary judicial review grounds. The grounds were that the empanelment violated the rules of natural justice, in particular the *nemo judex in causa sua* principle. In addition, the decision was so grossly unreasonable as to be reviewable for illegality under the second general ground for review under Botswana law. The Respondent said he needed a stay to bring this review application.

56. The stay application was preceded by a recusal application, initially for the recusal of this entire panel, but later whittled down to only two members of the Court.

57. The grounds for the stay, respectively, judge-in-own-cause, and irrationality, cohere only if they meet the ordinary tests. In other words, would a reasonable person reasonably see the President's empanelment decision as one in which the Judges she assigned to hear this appeal would not act independently and impartially so as to find in her and her colleagues' favour? Differently put, would the Judges actually be biased, or was there a reasonable perception that they would be biased?

58. This is the very issue that the recusal application directed at two members of this Court raises. Both applications, the one for a stay, and the other for the recusal of members of this Bench, depend on whether reasonable grounds exist for apprehending bias on the part of this panel. The fate of the two applications thus depends on the same underlying question. What is more, the principles to be applied are the same as those that apply to the question whether the High Court Judge whose recusal was sought, Kebonang J, should have acceded to that application.

59. The law in Botswana on recusal of members of the judiciary is by now well settled. It is largely consonant with that of other common law democracies. It amounts to this: (i) actual bias need not be

shown, merely apprehended bias; (ii) the test for apprehended bias is objective; and (iii) the onus of establishing it rests upon the party alleging it.

60. In determining whether the onus of establishing apprehended bias has been met, a court starts by presuming impartiality. This means that the court initially assumes that Judges will properly honour their oath of office. The presumption can be displaced by cogent evidence. This must pass a 'double reasonability' test. It must fulfil a two-fold objective element: (i) the person considering the alleged bias must be reasonable; and (ii) the apprehension of bias itself must be reasonable in the circumstances of the case (see ***Infotrac (Pty) Ltd v Debswana Diamond Company*** **CACGB-117-22** at para 7; ***Gaetsaloe v Debswana Diamonds Co (Pty) Ltd*** **[2019] 1 BLR 109, 110, 127 and 133 (CA); *Mogale v Motor Vehicle Accident Fund* [2016] 1 BLR 458 (CA)).**

61. The basis for seeking the recusal of Lesetedi and Dambe JJA is that they adjudicated in what even the Respondent's written argument characterized as an 'offshoot' case arising from the case before this Court. This was ***Director of Public Prosecutions & another v Timothy Gordon Marsland and another*** **CACGB-211-21.**

62. Yet *Marsland* is of no help at all to the Respondent in alleging apprehension of bias against the two members of this panel. That decision dealt with an issue of law, namely the appropriate test when a decision of the Director of Public Prosecutions to prosecute a matter is sought to be reviewed. The Court upheld the decision of the Director of Public Prosecutions, finding that the charges sought to be prosecuted were reasonable. The *Marsland* adjudication has nothing at all to do with the involvement of the Respondent in any of the issues before it. Nor does it have anything to do with his connection to possible corrupt practices related to the companies Mr Marsland may have been associated with.

63. Bias or perceived bias which would disqualify a judicial officer must relate to the actual case being tried (***Mapurisa v The State* [2016] 3 BLR (HC) at 35-36**). The fact that a judicial officer may have been involved in a different case where the same litigant was a party, or had made an adverse previous ruling against that litigant, does not sufficiently ground a claim for recusal for actual or perceived bias (***Mmatli v The State* [2006] 1 BLR 4 (CA) at 6A-B; *Radikhoba v Directorate of Public Prosecutions* [2011] 2 BLR 359 (HC) at 360; *July v Mey* [2015] BLR 21 (CA))**.

64. The application for the recusal of Lesetedi and Dambe JJA thus has no merit. This is why the Court dismissed the application. The consequence, both in logic and in substance, is that the averment of apprehended bias on the part of the President in empaneling this Court also lacks substance. Without reasonable apprehension of bias or perceived bias on the part of any of the judges she assigned to the matter, there is similarly no basis to seek to review her decision. That is why the stay, too, was refused.

65. In addition, the contention that the President of this Court was empaneling this Court in her own cause fails because her involvement was purely professional: this appeal is concerned solely with questions of law, in which she has no perceivable personal interest.

66. That brings us back to whether Kebonang J's refusal to recuse himself has become immaterial. It is true that the High Court's assumption of jurisdiction to revisit Court of Appeal judgments has already been rejected. Nevertheless, broader considerations relating to recusation make it necessary in the interests of justice to deal with this matter.

67. A comparison of the recusal application directed at this Court, and the one in the High Court, reveals two pronounced differences. The first is the relative strength of the grounds for recusal in each; the second is the manner in which the merits of these grounds were dealt with in each.

68. We have just pointed out how flimsy the 'offshoot' case argument is in the recusal application against this Court. The ground of recusal in the High Court was radically different. The principal ground on which recusal was sought there was that close family members of the Judge benefitted from funds of a company, following upon the unlawful award of a tender to that company by the very Respondent in these proceedings. There existed an association between the Judge's twin brother and the controlling minds of that company. This association led to his brother receiving an undue payment. The brother was later obliged to return that payment when the liquidator of the company hunted down the money trail.

69. In addition, there was another association: but for the criminal acts of which the Respondent was convicted in these proceedings, the company would not have received the very funds that were used to

purchase a vehicle for the Judge's mother and to make the undue payments to his brother.

70. The reasonable bystander could be readily be pardoned if she apprehended that the Judge would be biased in favour of the respondent. The Respondent was the person who was the root cause of benefits that flowed to the Judge's brother and to his mother.

71. Under those circumstances, it would have been proper for the Judge to step aside from the entire litigation in these proceedings. Instead, the Judge made matters worse, by imputing bad faith to the Appellants for applying for his recusal. He did so, surprisingly, on the basis of matters the Appellants did not raise at all in the recusal application. Nor did he give the Appellants, or those he accused of ulterior motives, a chance to be heard. His outburst does nothing to assuage the reasonable doubts reflected in the actual ground the Appellants advanced for his recusal.

72. Finally, costs. The costs of the application for an expedited appeal before Garekwe JA were reserved for decision in this appeal. Respondent's counsel argued that costs orders are generally

inappropriate for proceedings that are in substance criminal in nature and that similar considerations apply where constitutional issues are raised, even when the constitutional challenge fails.

73. There is some merit in the argument, but the Respondent's pushback against the Appellants' application for an expedited appeal was so entirely lacking in merit that an award of costs in that process is exigent.

74. These considerations apply also in the application for a stay of the present proceedings. This was no more than a transparent stratagem to delay finalisation of the case, brought on the flimsiest of grounds. The constitutional and legal vacuity makes a costs order ineluctable.

75. The same applies to the proceedings the Respondent brought before the High Court, for which there was no plausible warrant, and in which a costs order must follow.

76. In the main application we have decided to stay the Court's hand. What weighs here is an unusual event that took place toward the end of argument, in open court. Mr Jonas, Respondent's counsel,

offered an unreserved apology for the intemperate language in the pleadings and the correspondence. The apology was refreshingly candid and without condition. When confronted with the fact that the language in issue was not that of a lay client, but of a legal practitioner, he embraced personal responsibility, and repeated his unreserved apology.

77. It may be hoped that the beneficent impact of Mr Jonas's apology extends beyond these proceedings, to other cases, where a tendency appears to have emerged of scathing, toxic and unwarranted imputations against the Bench. That hope warrants some amelioration of the costs orders that would otherwise have been appropriate. Costs on a party-and-party scale only will be awarded in the High Court proceedings, in the application for an expedited appeal, and in the application for a stay. There will be no order as to costs in the main appeal.

78. **Orders:**

1. The dismissal of the application for a stay of these proceedings is confirmed, with costs on the ordinary scale.

2. The dismissal of the application for the recusal of Lesetedi JA and Dambe JA is confirmed, with costs on the ordinary scale.

3. The Respondent will pay the costs of the application for an expedited appeal on the ordinary scale.

4. The Appeal succeeds. The order of the High Court set aside and replaced with the following:

"The application is dismissed with costs".

DELIVERED IN OPEN COURT IN GABORONE ON THE 21ST DAY OF FEBRUARY 2025.

J. C. FRONEMAN
JUSTICE OF APPEAL

E. CAMERON
JUSTICE OF APPEAL

I AGREE:

I.B.K. LESETEDI
JUSTICE OF APPEAL

I AGREE:

L. I. DAMBE
JUSTICE OF APPEAL

I AGREE:

G. L. TEBOGO-MARUPING
JUSTICE OF APPEAL