DOW v. ATTORNEY-GENERAL 1991 BLR 233 (HC)

Citation: 1991 BLR 233 (HC)

Court: High Court, Lobatse

Case No:

Judge: Martin Horwitz Ag J

Judgement Date: June 11, 1991

Counsel: Advocate J. Browde S. C. with C. Loxton, for the applicant. I.S. Kirby, Deputy Attorney-General, with him Miss B. Mari

Flynote

Constitutional
law - High Court - Jurisdiction - Statute offending against Constitution -
Whether High Court jurisdiction to declare statute ultra vires.

Constitutional
law - Constitution - Interpretation - Principles governing interpretation of
constitutional enactment - Court to adopt C generous approach to
constitutional construction - Whether rules of construction of statutes
applicable to construction of constitutional enactments - Constitution, s. 15.

Constitutional
law - Locus standi - Citizenship - Enactment providing for acquisition of
citizenship - Application to declare enactment ultra vires - Person entitled to
make application - Denial of citizenship to children born in Botswana to female
citizen married to non-citizen - Whether female citizen locus standi to bring
application - Citizenship Act, 1982 (Act No. 25 of 1982) as amended by D Citizenship (Amendment) Act,
1984 (Act No. 17 of 1984).

Constitutional law - Fundamental rights - Freedom from discrimination -
Citizenship - Enactment providing for acquisition of citizenship - Denial of
citizenship to children born in Botswana to female citizen married to
non-citizen - Whether enactment discriminating - Whether ultra vires
Constitution - Citizenship Act, 1982, ss. 4 and 5. as amended by Citizenship
(Amendment) Act, 1984.

Headnote

It was
provided by section 21 of the Constitution of Botswana as follows:

"Every person born in Botswana on or after 30th September, 1966 shall
become a citizen of Botswana
at the date of his birth: F

Provided that a person shall not
become a citizen of Botswana
by virtue of this section if at the time of his birth-

(i) neither of his parents is a citizen of
Botswana and his father possesses such immunity from suit and legal process as
is accorded to the envoy of a foreign sovereign power accredited to Botswana;
or

(ii) his father is a citizen of a country with which Botswana is at war and the birth occurs in a place then under occupation by that country." G

Section 21 of the Constitution was repealed by the Constitution (Amendment) Act, 1982 (Act No. 32 of 1982), but substituted by the Citizenship Act, 1982 (Act No. 25 of 1982). Sections 4 and 5 of the Citizenship Act, 1982, as amended by the Citizenship (Amendment) Act, 1984 (Act No. 17 of 1984) provided that:

"4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth - H

(a) his father was a citizen of Botswana; or

(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

5. (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth- A

(a) his father was a citizen of Botswana;

(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement." B

The applicant applied for an order declaring section 4 of the Citizenship Act ultra vires the Constitution. The applicant, a citizen of Botswana, was married to a citizen of the United States of America. Prior to their marriage in 1984, a child was born to them in 1979, and during the marriage two more children were born in 1985 and 1987 respectively. In terms of the laws in force prior to the Citizenship Act, the child born before the marriage C was a Botswana citizen, whereas in terms of the Act the children born during the marriage were not citizens of Botswana and therefore aliens in the land of their birth. The applicant contended that sections 4 and 5 of the Citizenship Act offended against the Constitution in that they were discriminatory and an inroad or limitation on her basic rights and freedoms. Section 4, she contended, denied her the rights to, inter alia, protection from being subjected to degrading treatment and not to be discriminated against on the basis of her sex. The applicant D further contended that, since the Act offended against the Constitution, the consequences had the effect of denying her freedoms vis-à-vis her children and she therefore had the locus standi to litigate on their behalf. The respondent,

on the other hand, contended that, not only did the applicant have no locus standi to litigate on behalf of her children, but she herself had suffered no loss of guaranteed rights. The respondent further contended that E since discrimination on the basis of sex was not mentioned under section 15 of the Constitution, it was not a breach of the Constitution.

Held: (1) the High Court has the power and jurisdiction to consider and declare whether in fact a statute offends against the Constitution on the application of any person affected by the provision and if it does, declare it to be ultra vires the Constitution. Attorney-General v. Moagi 1981 B.L.R. 1 C.A. and Petrus v. The State [1984] B.L.R. 14, C.A. applied. F

(2) In construing the constitutional guarantees of human rights and freedoms, the court must adopt a generous approach to constitutional construction. The fact that sex is not mentioned in section 15 (3) of the Constitution does not mean that discrimination on the basis of sex is not a breach of the Constitution. An interpretation clause does not have the effect that the meaning of a section is solely and definitely that of the interpretation clause, unless the Act makes it clear that that was the intention of the legislature. The ordinary meaning of the words G used is not taken away by a clause extending the meaning of the words. In the instant case, section 15 (3) of the Constitution is not restrictive to the definition but extends the meaning of, or is explanatory of the word discriminatory, in that it gives examples of different kinds of discrimination which it sought to prohibit. Interpreting it as limiting section 15 (1) to the definition would nullify the spirit of the Constitution because not to be discriminated against because of one's sex, is in accordance with the guarantee of the fundamental liberties H mentioned in the Constitution. Attorney-General for New South Wales v. Brewery Employees Union of New South Wales (1908) 6 C.L.R. 469; Rafiu Rabiu v. The State (1981) 2 N.C.L.R. 293; Smith v. Attorney-General, Bophuthatswana 1984 (1) S.A. 196; Minister of Home Affairs v. Fisher [1980] A.C. 319, P.C.; S. v. Marwane 1982 (3) S.A. 717; Minister of Home Affairs v. Bickle 1984 (2) S.A. 439; James v. Commonwealth of Australia [1936] A.C. 578 and Lister v. Incorporated Law Society, Natal 1969 (1) S.A. 431 applied.

1991 BLR p235

(3) To give locus standi in terms of section 18 of the Constitution, it was sufficient for the applicant to show that A there are consequences upon the application of sections 4 and 5 of the Citizenship Act which would affect her adversely. The consequences would be: (a) both her husband and children would be liable to be expelled from Botswana; (b) if the husband were to leave Botswana, the children could only continue to live in Botswana if they B were granted residence permits; and (c) if the applicant did not want to follow her husband or he did not want her to do so, she would not really have a free decision. She could only do so at the price of her children.

(4) The general effect of the provisions of the Citizenship Act was to interfere with the dignity of the person. The effect was to lower a person in her position and reputation, which could be regarded as degrading treatment. Sections 4 and 5 of the Citizenship Act were therefore discriminatory in their effect on women. The

two sections were ultra vires the Constitution. C

Cases
referred to:

(1) Petrus v. The State [1984] B.L.R. 14, C.A.

(2) Attorney-General v. Moagi 1981 B.L.R. 1 C.A.

(3) Sociètè United Docks v. Government of Mauritius [1985]
L.R.C. (Const.) 801. D

(4) Attorney-General for New South Wales
v. Brewery Employees Union of New
South Wales (1908) 6 C.L.R. 469.

(5) Rafiu Rabiu v. The State (1981) 2 N.C.L.R. 293.

(6) Smith v. Attorney-General, Bophuthatswana 1984 (1) S.A.
196.

(7) Minister of Home Affairs v. Fisher [1980] A.C. 319; [1979]
2 W.L.R. 889; [1979] 3 All E.R. 21, P.C. E

(8) S. v. Marwane 1982 (3) S.A. 717.

(9) Minister of Home Affairs v. Bickle and Others 1984 (2) S.A. 439.

(10) James v. Commonwealth of Australia [1936] A.C. 578;
[1936] 2 All E.R. 1449; 155 L.T. 393, P.C.

(11) Lister v. Incorporated Law Society, Natal 1969 (1) S.A. 431.

(12) R. v. Pearce (1880) 5 Q.B.D. 386. F

(13) R. v. Secretary of State for Home Affairs and Another, Ex parte
Bhajan Singh [1976] Q.B. 198; [1975] 3 W.L.R. 225; [1975] 2 All E.R. 1081,
C.A.

Case Information

Application
for an order declaring section 4 of the Citizenship Act ultra vires the
Constitution. The facts are sufficiently stated in the judgment. G

Advocate J.
Browde S.C. with him C. Loxton, for the applicant.

I.S.
Kirby, Deputy Attorney-General, with him Miss B. Maripe, for the
respondent.

Judgement

Martin
Horwitz Ag. J. This is an application for an order declaring section 4 of
the Citizenship Act, 1982 (No. 25) H as amended by the Citizenship
Act, 1984 (No. 17) ultra vires.

The
applicant Unity Dow is a citizen of Botswana
having been born in Botswana
of parents who are members of one of the indigenous tribes of Botswana. She
is married to Peter Nathan Dow who although he has been in residence in Botswana for nearly 14 years is not a citizen
of
Botswana but a citizen of
the United States of America.

1991 BLR p236

MARTIN HORWITZ AG J

Prior to
their marriage on 7 March 1984 a child was born to them on 29 October 1979
named Cheshe Maitumelo A Dow and after the marriage two
more children were born, namely, Tumisang Ted Dow born on 26 March 1985 and
Natasha Selemo Dow born on 26 November 1987. She states further in her founding
affidavit that "my family and I have established our home in Raserura Ward
in Mochudi and all the children regard that place and no other as their
home". B

In terms of
the law in force prior to the Citizenship (Amendment) Act, 1984, the daughter
born before the marriage is a Botswana citizen and therefore a Motswana,
whereas in terms of the Citizenship (Amendment) Act, 1984 the children born
during the marriage are not citizens of Botswana (although children of the same
parents), and are therefore aliens in the land of their birth. The applicant
contends that sections 4 and 5 of the Citizenship Act, 1982 as amended by the
Citizenship (Amendment) Act, 1984 offend against the Constitution in C
that they are discriminatory and an inroad or limitation on her basic rights
and freedoms. Sections 4 and 5 of the Citizenship Act as amended in 1984 read
as follows:

"4. (1) A person born in Botswana shall be a citizen of Botswana by
birth and descent if, at the time of his birth - D

(a) his father was a citizen of Botswana; or

(b) in the case of a person born out of
wedlock, his mother was a citizen of Botswana.

(2) A person born before the
commencement of this Act shall not be a citizen by virtue of this section
unless he was a citizen at the time of such commencement. E

5. (1) A person born outside Botswana shall be a citizen of Botswana by
descent if, at the time of his birth -

(a) his father was a citizen of Botswana;

(b) in the case of a person born out of
wedlock, his mother was a citizen of Botswana. F

(2) A person born before the
commencement of this Act shall not be a citizen by virtue of this section

unless he was a citizen at the time of such commencement."

In order to fully understand her contentions it is advantageous to record that at Independence and up to 1982, the qualifications for citizenship were set out in the Constitution at sections 20-29. Section 21 reads as follows: G

"Every person born in Botswana on or after 30th September, 1966 shall become a citizen of Botswana at the date of his birth:

Provided that a person shall not become a citizen of Botswana by virtue of this section if at the time of his birth- H

(i) neither of his parents is a citizen of Botswana and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited toBotswana; or

(ii) his father is a citizen of a country with which Botswana is at war and the birth occurs in a place then under occupation by that country."

1991 BLR p237

MARTIN HORWITZ AG J

These provisions were repealed by the Constitution (Amendment) Act (Act 32 of 1982), but substituted by the A Citizenship Act, 1982 as amended by the Citizenship (Amendment) Act, 1984.

It is clear therefore and it is common cause that a child born out of wedlock of a citizen mother and a non-citizen father is a citizen but if born of a marriage between its mother and a non-citizen father that child is an alien. B

It is also necessary to set out the sections of the Constitution upon which counsel for the applicant relied. Section 3 of the Constitution reads as follows:

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

(c) protection for the privacy of his home and

other property and from deprivation of property without compensation, D

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." E

Section 5
guarantees the right to personal liberty and the right to the protection of law. Section 7 (1) of the Constitution reads: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." And section 14 (1) of the Constitution reads: "No person shall be deprived of his freedom of F movement ... "

The crisp
question before me is "does the provision that the children born in Botswana of a female citizen married to a non-citizen are not citizens of Botswana,
offend against the Constitution?" G

This
provision, argues Mr. Browde has the effect of denying to the applicant those fundamental rights and freedoms guaranteed to her by the Constitution.

It is
settled that this court has the power and jurisdiction to consider and declare whether in fact a statute offends against the Constitution on the application of any person affected by the provision and if it does, declare it to be the ultra vires the Constitution. See Petrus v. The State [1984] B.L.R. 14, C.A. and Attorney-General v. Moagi 1981 B.L.R. 1 In his judgment in the Petrus case Aguda J.A. said as follows at p. 33d-e: H

"Under a written
Constitution such as we have in the Republic
of Botswana, the National
Assembly is supreme only in the exercise of legislative powers. It is not supreme in the sense that it can pass any legislation even if it is ultra vires any provision of the Constitution."

1991 BLR p238

MARTIN HORWITZ AG J

Section 3 of
the Constitution guarantees every person in Botswana fundamental rights and freedoms without A distinction as to their race,
place of origin, political opinions, colour, creed or sex. In Sociètè United Docks v. Government of Mauritius
[1985] L.R.C. (Const.) 801, Rault C.J., construing a similar provision in the Constitution of Mauritius, said at p. 815e:

"The fundamental rule is
that a Constitution is a meaningful document: its voice carries higher
and further than that of ordinary B legislation, and ... every
pronouncement of a Constitution must be presumed to enshrine a principle of abiding value ... "

It was
submitted that the importance of a Constitution such as exists in Botswana is
that its great purpose is to guarantee that there will be no discrimination on
any basis against all the citizens or any of them governed by it. It C
has been held that in interpreting the constitutional guarantees of human
rights and freedoms the court must adopt a generous approach to constitutional
construction. In the Petrus case (supra), Aguda J.A. in dealing with the
approach of courts to constitutional construction said at p.34e:

"It was once thought that
there should be no difference in approach to constitutional construction from
other statutory D interpretation."

The learned
judge of the Court of Appeal then pointed out that this was the British
approach. The British system adopted this attitude because there is no written
Constitution in Britain
and all statutes are alike and Parliament is supreme. He continued at p. 34f
"But the position where there is a written Constitution is
different"; and came to E the conclusion relying on Attorney-General
for New South Wales v. Brewery Employees Union of New South Wales (1908) 6
C.L.R. 469 at pp. 611-612 and Rafiu Rabiu v. The State (1981) 2 N.C.L.R.
293 at p. 326 where the judge said:

"[The Constitution is] the
supreme Law of the Land; that it is a written, organic instrument meant to
serve not only the present F generation, but also several generations yet unborn . . .
that the function of the Constitution is to establish a framework and
principles of government, broad and general in terms, intended to apply to the
varying conditions which the development of our several communities must
involve, ours being a plural, dynamic society, and therefore, more technical
rules of interpretation of G statutes are to some extent inadmissible in a way so as to
defeat the principles of government enshrined in the Constitution."

The approach
of a court in Botswana
in deciding whether a statute is in breach of the Constitution or not was laid
down by Aguda J.A. in the Botswana Court of Appeal in the case of Petrus already
referred to. It is instructive to H see how other jurisdictions
approach the same problem. In Smith v. Attorney-General, Bophuthatswana
1984 (1) S.A. 196 at p. 199h Hiemstra C.J. said:

"The bill of Right is a
declaration of values and a statement of the nation's concept of the society it
hopes to achieve. It is the duty of the Court to make it identifiable as
such."

1991 BLR p239

MARTIN HORWITZ AG J

The approach
to interpretation of a Constitution and the principles to be applied when
dealing with a declaration A of human rights was discussed
by the Privy Council in England
in the matter of Minister of Home Affairs and Another v. Fisher [1980]

A.C. 319. I have already pointed out that since there is no written Constitution in England the canons of construction normally applying in English law are of little assistance to a court seised with a matter B involving the interpretation of a written Constitution. This judgment of the Privy Council however was concerned with an appeal from the Court of Appeal for Bermuda which does have a written Constitution. Section 11 of the Constitution of Bermuda dealt with who should be a person "belonging to Bermuda", and included "a person under the age of 18 years, who is the child, stepchild or child adopted, of a person belonging to Bermuda."

The Bermuda court had held that the word "child" did not refer to an il- legitimate child. This was reversed on an C appeal brought by the mother, and her husband, and the Minister of Home Affairs appealed to the Privy Council. The headnote sums up the decision admirably and I set it out. It is significant that the guidelines which I am about to quote were laid down by the Privy Council - especially having regard to the fact that the normal English rule is that all statutes of the English Parliament are to be dealt with on the same basis. D

Lord Wilberforce in giving the unanimous judgment of the Privy Council said this at pp.329b - 330a-d:

"the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are E to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a F starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law. G

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. H Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a

statement of which the Constitution commences. In their Lordships' opinion this must mean approaching the question what is A meant by 'child' with an open mind. Prima facie, the stated rights and freedoms are those of 'every person in Bermuda.' This generality underlies the whole of Chapter I which, by contrast with the Bermuda Immigration and Protection Act 1956, contains no reference to legitimacy, or illegitimacy, anywhere in its provisions. When one is considering the permissible limitations upon those B rights in the public interest, the right question to ask is whether there is any reason to suppose that in this context, exceptionally, matters of birth, in the particular society of which Bermuda consists, are regarded as relevant.

Section II opens with a general declaration of the right of freedom of movement, including that of residence, entry and immunity C from expulsion. These rights may be limited [section 11 (2) (d)] in the case of persons 'not [belonging] to Bermuda' - a test not identical with that of citizenship, but a social test. Then, among those deemed to belong to Bermuda are (section 11 (5)) a person who

'(a) possesses Bermudian status; ... (c) is the wife of [such a person]; or (d) is under the age of 18 years and is the child, stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this D subsection applies.'

In their Lordships' opinion, paragraph (d) in its context amounts to a clear recognition of the unity of the family as a group and acceptance of the principle that young children should not be separated from a group which as a whole belongs to Bermuda. This would be fully in line with article 8 of the European Convention on Human Rights and Fundamental Freedoms (respect for family E life), decisions on which have recognised the family unit and the right to protection of illegitimate children. Moreover the draftsman of the Constitution must have had in mind (a) the United Nations' Declaration of the Rights of the Child adopted by Resolution (1386 (xiv)) on November 29, 1959, which contains the words in principle 6: F

'[the child] shall, wherever possible, grow up in the care and under the responsibility of his parents ... a child of tender years shall not, save in exceptional circumstances, be separated from his mother.'

and (b) article 24 of the International Covenant on Civil and Political Rights 1966 which guarantees protection to every child without any discrimination as to birth. Though these instruments at the date of the Constitution had no legal force, they can certainly not be G disregarded as influences upon legislative policy."

This judgment and the sentiments expressed on the interpretation of a written Constitution were quoted with approval by Miller J.A. in S. v. Marwane 1982 (3) S.A. 717 at p. 749 as, being not inconsistent with the H fundamental approach of South African courts to interpretation of a written Constitution. It is worthwhile quoting the following passage from Lord Wilberforce's judgment at p. 328g-h supra: "These antecedents, and the form of Chapter I itself [of the Constitution] call for a generous interpretation avoiding what has been called the 'austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

MARTIN HORWITZ AG J

A similar
approach was taken by Georges C.J. of the Zimbabwe Supreme Court in Minister of Home Affairs v. A Bickle and Others 1984 (2) S.A. 439 at p. 447f-h where he relied on certain dicta by Lord Wright in James v. Commonwealth of Australia [1936] A.C. 578 at p. 613:

"The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in B vacuo but as occurring in a single complex instrument, in which one part may throw light on another."

At p. 614
Lord Wright continues:

"It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, C and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic D statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted': British Coal Corporation v. The King [1935] A.C. 500, 518. But that principle may not be helpful, where the section is, as s. 92 may seem to be, a constitutional guarantee of rights ... The true test must, as always, be the actual language used." E

In that case
the words used were "trade, commerce and intercourse shall be absolutely free." It was held that the section meant exactly that.

I have also
found the words of Miller J. (as he then was) in Lister v. Incorporated Law Society, Natal 1969 (1) S.A. 431 most helpful especially the passage at p. 434a-b to the effect that: F

" the court will not lightly construe a statute in such a way that its effect is to achieve apparently purposeless, illogical and unfair discrimination between persons who might fall within its ambit. If the language of the statute is reasonably capable of an G interpretation which avoids that result, that is the interpretation which the Court will give it rather than one which would attribute to the Legislature a whimsical predilection for purposeless and unfair discrimination."

There are
limits however, and although a court is not bound by the confining rules for the interpretation of H statutes other than constitutional ones, it is still bound by the language. "The great purpose" of the Botswana Constitution is to guarantee the basic freedoms contained in it for the citizens of Botswana. A judge hearing an application of the present kind is not a legislative body, although the Constitution must be interpreted according to its spirit. A judge does not have free reign to interpret it according to his fancy.

I have spent
some time in analysing the approach which I believe I must take because as so

often happens in matters of the interpretation of a Constitution the

case depends
upon an interpretation of a single provision which must suit circumstances not present to the A drafters of a Constitution. If
I may anticipate it will be seen that the interpretation of this Constitution changes dramatically depending on whether a judge takes a "generous" or a "narrow" approach.

I have no
doubt that upon the authorities I have quoted, and they come from different jurisdictions and different contexts, social, legal, political and socio-economic, I am driven to take a generous or liberal approach to the B questions raised in this matter.

Mr. Kirby
for the Attorney-General raised the question of the applicant's locus standi. He submitted that not only had the applicant no locus standi to litigate on behalf of her children but she herself had suffered no loss of guaranteed rights. His argument was put thus: C

"It appears that
applicant's case is based upon a perceived right to 'pass on' her citizenship to her children regardless of the nationality of their father, or to her husband on marriage. It is submitted that such a right is not conferred by section 3 of the Constitution nor indeed by any section of the Constitution - as such it cannot confer locus standi under section 18 of the Constitution. D

It is submitted that a bare
'allegation' of a contravention of section 3 or section 7 or section 14 of the Constitution, unsupported by facts on affidavit is insufficient to create locus standi in terms of section 18. It is clear from the affidavit that no 'treatment' is alleged to have been meted out to applicant so as to bring her within section 7, nor has her freedom of movement been threatened so as to bring her within section 14 of the Constitution. E

[Mr. Kirby contended that] the
applicant can only enforce a right available to her personally or claim redress for an injury suffered by her personally. In the present case applicant has neither suffered any injury nor does she apprehend any, arising out of the Citizenship Act. In fact she is not touched personally by the Act at all. She thus has no locus standi." F

Mr. Browde
submitted that it is artificial to regard the applicant as an individual without reference to her in her family environment. The right, he argues, which the applicant has, not to be deprived of her freedom of movement and her immunity from expulsion from Botswana, (section 14 (1) of the Constitution) are rendered G nugatory if her family, her
husband and or her children are liable to expulsion in terms of section 14 (3) (b) of the Constitution.

Before

dealing with the broad question adumbrated at the beginning of this judgment I will set out certain consequences of the Citizenship Act affecting the applicant:

(1) Not only
the husband but the children are liable to be expelled from Botswana. H

It is true
that in the instant case the father can apply for citizenship but for reasons of his own prefers not to do so. In fact there can be no guarantee that it would be granted to him even should he apply.

(2) More importantly
if the husband were to decide to leave both Botswana and his wife (the applicant), the children, assuming they are left

behind can
only continue to live in Botswana
if they are granted residence permits. A

When I
pointed this out to counsel appearing for the respondent, he said of course one would hope she, the applicant, would follow her husband. It may be that this answer would have appealed to the patriarchs of Biblical times but the answer does highlight another consequence should the applicant, having followed her husband, B wishes to return from America
with her children, because her husband leaves her while in the U.S.A. or remains in the U.S.A. When she, because she has become unhappy returns, she would be asked at the border to produce resident permits for the children who are not citizens.

(3) Assuming
she did not want to follow her husband, or he did not want her to do so, she does not really have a C free decision. She can only do
so at the price of her children. (It must be remembered that this would not be the position with a male citizen married to an alien female).

I have
difficulty in accepting the proposition that the applicant, due regard being had to the possible consequences to her, can be said to have "no sufficient interest in the proceedings" to give her locus standi in terms of section 18 of the Constitution. Mr. Browde has argued that since the Act offends against the D Constitution, that the
consequences have the effect of denying the applicant her freedoms vis-à-vis her children she clearly has the locus standi to bring this application. But I do not think I have to go as far as that to find that she has locus standi. In my view it is sufficient if she can show that there are consequences upon the application of sections 4 and 5 of the Citizenship Act which affect her adversely to give her locus standi. And I here refer to the canons of interpretation set out above. E

To argue
that the applicant's case is based upon a "perceived right" to pass

on her citizenship omits in my opinion the important and fundamental fact that having her children declared aliens in her land must obviously affect a mother. This situation arises from section 4 of the Citizenship Act. Had the applicant not married but continued having children, those children would be citizens of Botswana. Because she is married to the alien F father her children are not Botswana citizens. On the other hand if a male citizen marries a non-citizen their progeny will be citizens.

The effect of section 4 of the Citizenship Act on the fundamental liberties of the subject G

Mr. Browde argued that the applicant by reason of section 4 of the Citizenship Act was denied the following human rights and freedoms guaranteed by the Constitution - the right to liberty, protection of the law, immunity from expulsion from Botswana, protection from being subjected to degrading treatment, and not to be discriminated against on the basis of her sex. The applicant suffers from adverse consequences of the relevant H clauses of the section only because she is a woman.

It seems to me that this is a fair and correct conclusion to be drawn from the wording of the section especially in comparison with the original citizenship rights which stemmed from the now repealed sections of the Constitution.

It was submitted on behalf of the applicant that the general effect of the application of section 4 of the Citizenship Act is to encourage women to have children out of wedlock if they happen to fall in love with a non-citizen. It was

further submitted that that could hardly have been the intention or a proper function of the legislature. The general A intention of laws should be to uphold the morality and the sanctity of marriage and family life and not have the opposite effect of encouraging illegitimacy, the splitting of families and putting up obstacles in the way of building a family unit. It seems to me that the effect of section 4 of the Citizenship Act is to hamper unnecessarily free choice, the liberty of the subject to exercise her rights in terms of the Constitution in the way she sees fit. No B evidence of any great national concern such as security and such like has been placed before me to justify the section on such grounds.

This brings me to a discussion of discrimination generally and "is section 4 of the Citizenship Act discriminatory?"

Section 15 of the Constitution of Botswana subsection (1) says: "Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect." C

Mr. Kirby in
his able argument pointed out that in section 15 (3) discrimination refers to different treatment of different persons, and attributable mainly or wholly to their race, tribe, place of origin, political opinions, colour or creed. Sex he stressed is not mentioned and therefore he argues, discrimination on the basis of sex is not a breach of the Constitution. To this end he has cited a number of statutes which make provision for different treatment of men and women largely based on their physical characteristics. These differentiate but do not
D necessarily discriminate.

The word
"discrimination" is defined in the Oxford Dictionary as
"to make or afford difference in between, or to differentiate, to perceive a difference in or between." In other words "discrimination against" is to make "an adverse distinction with regard to". E

Interpretation
clauses may have the effect of "restricting" or "extending" the meaning of a statutory provision.

An
interpretation clause does not have the effect that the meaning of a section is solely and definitely that of the interpretation clause unless the Act makes it clear that that was the intention of the legislature. The ordinary meaning of the words used is not taken away by a clause extending the meaning of the words. It is only when the F interpretation clause is
restrictive that it limits the section to its meaning. "[A]n
interpretation clause" said Lush J. in R. v. Pearce (1880) 5 Q.B.D. 386 at p. 389 "should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain."

In my
opinion the effect of section 15 (3) is not restrictive to the definition but it extends the meaning of or is G explanatory of the word "discriminatory", in that it gives examples of different kinds of discrimination which it is sought to prohibit. Applying the canons of construction applicable to a Constitution and which I set out at the beginning of this judgment this conclusion is inescapable. Interpreting the subsection as limiting subsection (1) to the definition would nullify the spirit of the Constitution because not to be discriminated against because of one's H sex, is in accordance with the guarantee of the fundamental liberties mentioned in the Constitution. I do not think that I would be losing sight of my functions or exceeding them sitting as a judge in the High Court, if I say that the time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the

Constitution
was framed deliberately to permit discrimination on the grounds of sex. It seems to me to be a A corollary of the
interpretation contended for by Mr. Kirby that discrimination on the grounds of sex is permitted without limitation.

The
legislature has the power to pass laws reasonably justifiable in a democratic
society, e.g., maternity leave. It is difficult if not impossible to accept Mr.
Kirby's argument that Botswana
is a discriminatory society and that the B word sex was left
out of the section because Botswana
believes that there should be discrimination based on sex.

I am
strengthened in my view by the fact that Botswana is a signatory to the
O.A.U. Convention on Non-Discrimination. I bear in mind that signing the Convention
does not give it the power of law in Botswana but the effect of the adherence
by Botswana to the Convention must show that a construction of the section
which C does not do violence to the
language but is consistent with and in harmony with the Convention must be
preferable to a "narrow construction" which results in a finding that
section 15 of the Constitution permits unrestricted discrimination on the basis
of sex. (It would also make provision of section 15 (3) in so far as it refers
to person of "other such description" unnecessary.)

Botswana also
adheres to the International Covenant on Civil and Political Rights 1966,
article 26 of which D prohibits discrimination.
Applying this provision in Aumeeruddy Cziffra v. Mauritius (1981), the
Human Rights Committee of the United Nations held:

"It follows that also in
this line of arguments the Covenant must lead to the result that the protection
of a family cannot vary with the E sex of the one or the other
spouse. Though it might be justified for Mauritius to restrict the access of
aliens to their territory and to expel them therefrom for security reasons, the
Committee is of the view that the legislation which only subjects foreign
spouses of Mauritian women to those restrictions, but not foreign spouses of
Mauritian men, is discriminatory with respect to Mauritian women and cannot be
justified by security requirements." F

I also note
the words of Lord Denning M.R. in R. v. Secretary of State for the Home
Department, Ex parte Bhajan Singh [1975] 2 All E.R. 1081 at p. 1083.

In this case
the Court of Appeal in England
considered an application from an illegal entrant from India who had G
been arrested and detained in prison pending his deportation from the United Kingdom,
to be released in order to get married. His counsel relied on article 12 (b)
of the Convention of the Protection of Human Rights and Fundamental Freedoms
which guaranteed his right to marry and found a family. Lord Denning M.R.
giving the judgment of the court said at pp. 1082j-1083a-c: H

"In support of this
application counsel for the applicant before us has relied on one of the
provisions of the Convention for the Protection of Human Rights and Fundamental
Freedoms 1950, art 12. It says:

'Men and women of marriageable
age have the right to marry and to found a family, according to the national
laws governing the exercise of this right.'

MARTIN HORWITZ AG J

The national laws are those which cover consanguinity,
bigamy, marriageable age and so forth; and also the formalities such as A registration. So long as those
national laws are complied with, counsel for the applicant urges that the first
words of that article are such that this man has a right to marry the girl and
should be released for the purpose.

What is the position of the
convention in our English law? I would not depart in the least from what I said
in the recent case of Birdi B v. Secretary of State for Home
Affairs. The
court can and should take the convention into account. They should take it into
account whenever interpreting a statute which affects the rights and liberties
of the individual. It is to be assumed that the Crown, in taking its part in
legislation, would do nothing which was in conflict with treaties. So the court
should now construe the Immigration Act 1971 so as to be in conformity with a
convention and not against it." C

It is also
difficult if not impossible to accept that Botswana would deliberately
discriminate against women in its legislation whilst at the same time internationally
support non-discrimination against females or a section of them.

Mr. Browde
also submitted that in discriminating against the applicant and treating her
less favourably than males in a situation similar to her, subjects the
applicant and women generally in her position to degrading D
treatment. He submitted that this offends against the Declaration on the
Elimination of Discrimination against Women proclaimed at the General Assembly
of the U.N.O. on 7 September 1967 in the following terms:

"Discrimination against
women, denying or limiting as it does their equality of rights with men is
fundamentally unjust and E constitutes an offence against human dignity."

In this
connection I refer again to the case of R. v. Secretary of State of Home
Affairs [1975] 2 All E.R. 1081.

Mr. Kirby in
his able argument pointed to certain basic doctrines in Roman Dutch law which
were discriminatory: F

A woman
subject to the marital power is a minor in the eyes of the law ,and

A wife
acquires the domicile of her husband on marriage even if she has never set foot
in the country of his domicile. G

According to
the common law he argues therefore there is no such thing as gender neutrality
and the "discrimination" against women who marry non-citizens is not
out of step with the common law.

It seems to
me that there is no possible analogy between the applicant's contentions and
some of the provisions of the common law to which Mr. Kirby has referred me.
For example the fact that a female citizen if she married H
in community of property would be treated as a minor without the power to enter
into a contract or in former times and to all intents and purposes revert to

the status of a minor has long since been changed by statutory enactments.

There have
been significant alterations to the common law in Botswana, e.g., marriages without
an ante nuptial contract are now no longer in community of

property but
out of community and parties desiring to have their marriage in community of
property must enter A into an ante nuptial contract.
Even before the aforegoing changes the provisions of section 18 (4) of the
Deeds Registry Act (Cap. 33:02) (an Act not noted for its liberal tendencies)
are illuminating.

In any
event, citizenship is a conception quite different from domicile and although
domicile has always followed that of the father as head of the family unit, it
may be convenient for a family unit to have one domicile. The B
Citizenship Act however, is not the common law but an Act of Parliament. By its
provisions it can adversely affect the daily lives of women who marry
non-citizens.

I agree in
general with Mr. Browde that the general effect of the provisions of the
Citizenship Act which have been attacked before me is to interfere with the
dignity of the person. The effect is to lower a person in her position and C
reputation, and that can be regarded as degrading treatment.

I therefore
find section 4 is discriminatory in its effect on women in that, as a matter of
policy:

(i) It may compel them to live and bear
children outside wedlock. D

(ii) Since her children are only entitled to remain in Botswana if they are in possession of a
residence permit and since they are not granted permits in their own right,
their right to remain in Botswana
is dependent upon their forming part of their father's residence permit.

(iii) The residence permits are granted for no more than two years at
a time, and if the applicant's husband's permit were not to be renewed both he
and applicant's minor children would be obliged to E leave Botswana.

(iv) In addition applicant is jointly responsible with her husband
for the education of their children. Citizens of Botswana qualify for financial
assistance in the form of bursaries to meet the costs of university education.
This is a benefit which is not available to a non-citizen. In the result the
applicant is financially F prejudiced by the fact that her
children are not Botswana
citizens.

(v) Since the children would be obliged to
travel on their father's passport the applicant will not be entitled to return

to Botswana
with her children in the absence of their father.

What I have
therefore set out at length may inhibit women in Botswana from marrying the man whom they love. It G is no answer to say that there
are laws against marrying close blood relations - that is a reasonable
exclusion.

Mr. Browde
submitted that in discriminating against females and treating them less favourably than males in a situation similar to that of the applicant, the provisions of the Citizenship Act under consideration subject the applicant to degrading treatment. H

What is
considered degrading treatment today has changed from former conceptions. "Discriminating against women, denying or limiting as it does their equality of rights with men is fundamentally unjust and constitutes an offence against human dignity." So reads the Declaration on the Elimination of Discrimination against Women passed on 7 November 1967 by the General Assembly of the United Nations.

It seems to
me that the effect of section 4 is to punish a citizen female for marrying a non-citizen male. For this A she is put in the unfavourable
position in which she finds herself vis-à-vis her children and her country.

The fact
that according to the Citizenship Act a child born to a marriage between a citizen female and a non-citizen male follows the citizenship of its father may not in fact have that result. It depends on the law of the foreign country. The result may be that the child may be rendered stateless unless its parents emigrate. If they B are forced to emigrate then
the unfortunate consequences which I have set out earlier in this judgment may ensue.

I have
therefore come to the conclusion that the application succeeds. I have also come to the conclusion that section 5 of the Act must join the fate of section 4.

Before
making the order I thank all counsel involved, Mr. Kirby and Miss Maripe for the Attorney-General and Mr. C Browde and Mr. Loxton for the research upon which their arguments were based.

Sections 4
and 5 of the Citizenship Act (Cap. 01:01) are declared ultra vires the Constitution of Botswana.

The
respondent is to pay applicant's costs.

Application allowed. D

M.S.S.