KGAFELA II AND ANOTHER v THE ATTORNEYGENERAL AND OTHERS In Re: GABAOKELWE v THE DIRECTOR OF PU

Citation: 2012 1 BLR 699 CA

Court: Court of Appeal, Lobatse

Case No: Crim App No 27 of 2012

Judge: Kirby JP, McNally, Foxcroft, Legwaila JJA and Rannowane AJA

Judgement Date: 27 April 2012

Counsel: First appellant in personrnI Melville for the second appellantrnC L Gulubane for the respondents

Flynote

Constitutional law—Constitution—Validity of—No court has power to set aside Constitution of Botswana or any part of it.Constitutional law—Fundamental rights and freedoms—Breach—Application for redress—Application may be brought after appeal only where special circumstances existing which were not and could not have been raised onappeal—Constitution of Botswana, s 18(1).Criminal procedure—Sentence—Death sentence—Stay of—Appellants seeking stay of execution of death sentence after sentence having been confirmed on appeal to Court of Appeal—Whether special circumstances existing which were not and could not have been raised on appeal—Constitution of Botswana, s 18(1).

Headnote

The first appellant was a tribal chief and the second appellant, a human rightsadvocacy organisation. They applied, in terms of s 18(1) of the Constitution of Botswana, for a stay of execution of the death sentence imposed upon a prisoner, Gotlhalosamang Gabaokelwe (Gabaokelwe). They had not been instructed by Gabaokelwe or his family to bring the application and had not been parties to his trial. Gabaokelwe was not a party to the proceedings. The appellants brought their application on the grounds that there existed a pending challengeby the first appellant to the validity of the Constitution of Botswana which, if successful, would put an end to the death sentence in Botswana; and that execution of the death sentence by hanging was a 'satanic ritual' which could not be countenanced in a country governed by Godly values. The High Court dismissed the application and the appellants appealed against that decision to the Court of Appeal.Held: (1) As a general rule, once a court delivered final judgment in a criminal case, it was functus officio and had no jurisdiction to re-open or reconsider the2012 (1) BLR p700KIRBY JPcase. Similarly, once the Court of Appeal delivered its judgment in an appeal, itwas functus officio and could not re-open or reconsider the case.Kobedi v The State(2) [2005] 2 BLR 76, CA (Full Bench) applied.(2) Only where special circumstances existed which were not and could not have been raised on appeal could they found an application in terms of s 18 of the Constitution of Botswana for the re-opening or reconsideration of the case.Kobedi v The State(2) [2005] 2 BLR 76, CA (Full Bench) andNtesang v TheState[1995] BLR 151, CA applied.(3) In the present case, the two issues raised by the appellants, namely, the 'satanic ritual' argument and the pending constitutional challenge argument could have been raised at the appeal stage.(4) Moreover, the pending constitutional challenge could not succeed as neither the Court of Appeal nor any court had the power to set aside the Constitution of Botswana or any part of it. The constitutional challenge hadno prospects of success.Kamanakao I and Others v The Attorney-General and Another[2001] 2 BLR 654 andAttorney-General v Dow[1992] BLR 119, CA (Full Bench) applied.(5) And the Court of Appeal had previously confirmed the constitutionality of the death penalty and hanging as a means of execution.Ntesang v The State[1995] BLR 151, CA andKobedi v The State(2) [2005] 2 BLR 76, CA (FullBench) applied.(6) Therefore, neither the 'satanic ritual' argument nor the pending constitutional challenge argument constituted special circumstances which justified the re-opening of Gabaokelwe's case or reconsideration of his death sentence.(7) The appellants had no locus standi to bring the application as they had no 'substantial interest in the case'.Kamanakao I and Others v The Attorney-General and Another[2001] 2 BLR 654,Attorney-General v Dow[1992] BLR 119, CA (Full Bench) andDitshwanelo and Others v The Attorney-General and Another[1999] 2 BLR 56 applied.(8) None of the grounds of appeal succeeded and the appeal failed.

Case Information

Cases referred to:Attorney-General v Dow[1992] BLR 119, CA (Full Bench)Bozzoli and Another v Station Commander, John Vorster Square, Johannesburg1972 (3) SA 934 (W)Cabinet of the Transitional Government for the Territory of South West Africa v Eins1988 (3) SA 369 (A)Chokolingo v Attorney-General, Trinidad and Tobago[1981] 1 All ER 244(PC); [1981] 1 WLR 106Craig v Boren, Governor of Oklahoma429 US 190 (1976); 50 L Ed 2d 397; 97 SCt 451Dalrymple and Others v Colonial Treasurer1910 TS 372Director of Public Prosecutions v Mothusi[2011] 2 BLR 537,

CA (Full Bench)Ditshwanelo and Others v The Attorney-General and Another[1999] 2 BLR 56Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,1996 1996 (4) SA 744 (CC)Fose v Minister of Safety and Security1997 (3) SA 786 (CC)2012 (1) BLR p701KIRBY JPGabaokelwe v The State[2012] 1 BLR 347, CAGareitsane v The State[2006] 1 BLR 201, CAGeldenhuys & Neethling v Beuthin1918 AD 426.Good v The Attorney-General[2005] 2 BLR 333, CA (Full Bench)Good v The Attorney-General (2)[2005] 2 BLR 337, CA (Full Bench)Hinds v Attorney General of Barbados and Another[2002] 4 LRC 287 (PC); [2001] UKPC 56; [2002] 1 AC 854In re: The Crossing of the Floor by Members of the National Assembly[2007] MWSC 1 (Malawi), unreportedKamanakao I and Others v The Attorney-General and Another[2001] 2 BLR 654Kgafela II and Another v The Attorney-General and Others[2012] 1 BLR 461Kobedi v The State[2002] 2 BLR 502Kobedi v The State(2) [2005] 2 BLR 76, CA (Full Bench)Maauwe v The State and Another[1997] BLR 693, CAMadzimbamuto v Lardner-Burke NO and Another NO; Baron v Ayre NO and Others NNO1968 (2) SA 284 (RA)Medical Rescue International Botswana Ltd v The Attorney-General and Others[2006] 1 BLR 516, CA (Full Bench)Moatshe and Another v The State[2003] 1 BLR 65Molale v The State[2005] 2 BLR 114Ntesang v The State[1995] BLR 151, CAPresident of the Republic of Botswana and Others v Bruwer and Another[1998] BLR 86, CA (Full Bench)Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd1933 AD 87S v Augustine1980 (1) SA 503 (A)Sithole and Others v The Prime Minister of Swaziland and Others(App Case 35/07) (Swaziland), unreportedState v Gabaokelwe[2010] 3 BLR 587State v Maauwe and Others[1997] BLR 381State v Maauwe and Another[2006] 2 BLR 530, CA (Full Bench)Tadubane v The State[2011] 2 BLR 825, CAThomas v Attorney-General of Trinidad and Tobago(No 2) [1991] LRC (Const) 1001 (PC)Wood and Others v Ondangwa Tribal Authority and Another1975 (2) SA 294 (A)APPEAL against dismissal of an application for stay of execution of the death sentence. The facts are sufficiently stated in the judgment.First appellant in personI Melvillefor the second appellantC L Gulubanefor the respondents2012 (1) BLR p702

Judgement

KIRBY JP:This appeal was dismissed on 21 March 2012, with reasons to follow. These are the reasons. Originally three matters were before the court, namely:— an appeal against the dismissal by Leburu J of an application to stay the execution of the death penalty imposed upon Gotlhalosamang Gabaokelwepending the final determination of an application seeking to invalidate and set aside the Constitution of Botswana;— an appeal against the refusal of Leburu J to stay that sentence pending appeal against his dismissal of the stay application; and— a substantive application to this court for a stay brought under s 14 of the Court of Appeal Act (Cap 04:01).Since criminal appeal case CLCGB-027-12 has now been heard, the need for the other matters to be determined has fallen away. In particular it is not necessary to determine whether a substantive application for a stay of this kind is competent in terms of s 14.A full bench of the court has been convened at short notice at the request ofthe appellants, since the life of a condemned man is at stake, and constitutional matters have been raised.The relief sought in the notice of appeal is narrower than that originally sought. The appellants seek an order that the execution of the death sentence on Gotlhalosamang Gabaokelwe (hereafter Gabaokelwe) be stayed pending the final determination of a suit in which the first appellant is seeking to have theConstitution of Botswana invalidated and set aside.The initial grounds of appeal were distilled in argument, and three broad issues were argued before us:(a) Whether this court or any court has the power to set aside the Constitution;(b) Whether special circumstances had been shown so as to enable the courtto reopen a case in which the conviction and sentence handed down by the High Court had been confirmed by the Court of Appeal; and(c) Whether the first and second appellants, or either of them, had locus standi to bring the application whose dismissal is challenged.The appellants, who were the applicants in the court below, are KgosikgoloKgafela II Kgafela, the hereditary chief of the Bakgatla-ba-Kgafela tribe (and a former practising attorney) who appears in person, and Ditshwanelo (the Botswana Centre for Human Rights), a human rights advocacy organisation based in Gaborone. It is a registered trust, with a board of trustees, but was represented before us by an employee, Ms Ingrid Melville, in person. We have allowed this, despite obvious reservations as to her right of audience, becausethis is a death penalty case, and is being heard as a matter of some urgency. It should not be used as a precedent for future leniency. The respondents are the Attorney-General, the Registrar of the High Court, (in his capacity as sheriff), and the Commissioner of Prisons. The condemned man, Gabaokelwe, is not a party to the proceedings.In the original application, launched on 20 February 2012, the applicants2012 (1) BLR p703KIRBY JPsought the issue of a rule nisi calling upon the respondents to show cause why an order should not be made final for the permanent stay of the execution of the sentences of death imposed upon Gabaokelwe, Modise Tlhokamolelo, and Mangombe Tadubane. Pending determination of the application, they also sought an interim stay, and an order permitting them to have access to the three prisoners and to prison warders for the purpose of gathering evidence.The application was dismissed by Leburu J on the ground that the two applicants lacked locus standi. He also held that an application to set aside the Constitution had no prospects of success, and that the constitutionality of the death penalty had already been confirmed by the Court of Appeal. The judgment in this matter is reported asKgafela II and Another v The Attorney-General and Others[2012] 1 BLR 461.It is common cause that neither of the applicants has consulted with or been instructed by any of the condemned prisoners or their families or lawyers, nor did they play any part in the three trials. Gabaokelwe was convicted on 17 August 2010 of the triple murder of a woman and her two young children, and was sentenced to death by Motswagole J. Reported asState v Gabaokelwe[2010] 3 BLR 587. His conviction and sentence were confirmed by this courton 10 February 2012 and reported asGabaokelwe v The State[2012] 1 BLR 347, CA. No complaint has been raised about the legal propriety of his trial and sentencing process, nor about the conduct of his appeal, and there is no suggestion of any new evidence having been discovered in connection with the murders. The Presidential Committee on the prerogative of mercy is yet to meetto consider his case, as it is bound to do in terms of s 55 of the Constitution.There is only a passing mention of

Tlhokamolelo and Tadubane in the founding affidavits of the appellants. The first appellant states that he is seeking an order which 'stops the future executions of Modise Tlhokamolelo and Mangombe Tadubane in the event that they lose their appeals.' Later he refers to Tadubane as 'remaining on death row.' The director of the second appellant says onlythat 'I seek relief on behalf of death row inmate Gotlhalosamang Gabaokelwe and others who will share a similar experience of being in the shadow of the noose.' Again there is no suggestion of any irregularity or injustice in their trials or appeals, about which no further information is forthcoming. The only other mention of Tlhokamolelo and Tadubane is in the judgment of Leburu J, where he states that it is common cause:'that the other prisoners named herein, Modise Tlhokamolelo and Mangombe Tadubane, have been convicted on a charge of murder, but their appeal in the Court of Appeal has not been heard.'In the latter case at least, both the judge and the appellants are mistaken. The death penalty imposed upon Mangombe Tadubane was set aside by the Courtof Appeal on 29 September 2011, and was replaced by a term of imprisonment. The judgment in this matter is reported asTadubane v The State[2011] 2 BLR 825, CA. The present appeal has been limited to the case of Gabaokelwe, and no further mention need be made of the other two convicts. Their inclusion, with no apparent knowledge of the details of their cases, does demonstrate, however, that the appellants are motivated by a general distaste for the death penalty and the manner of its execution, rather than by the personal circumstances of the2012 (1) BLR p704KIRBY JPcited prisoners, whom they have never met, and know of only through pressreports.In the court below the appellants rested their case on two foundations:— first, that it was prudent to halt all executions pending determination of the first appellant's constitutional case since, in the first appellant's words, 'the cruelty of hanging in Botswana is the fruits [sic] of the fraudulentconstitution,' the argument being that with the demise of the Constitution, the death penalty would fall as well; and— second, that the execution of the death penalty by hanging was 'a satanic ritual' which could not be countenanced in a country governed by Godly values.They each backed up the latter argument with both hearsay and personalaccounts of aspects of past executions of other convicts including Marietta Bosch and Modisane Ping, and of the deliverance from that fate of Gwara Brown Moswetla and Tlhabologang Phetolo Maauwe. I will say more about the latter case in due course because although the 'satanic ritual' argument does not feature in the grounds of appeal, considerable emphasis was placed upon it, andon Maauwe's case by Mr Kgafela in his argument before this court.As regards the constitutional challenge, this has been mounted by Mr Kgafela following his arraignment before the Magistrate, Gaborone, on charges of assault and escape from lawful custody. He has excepted to the charges in terms of ss 144 and 155 of the Criminal Procedure and Evidence Act (Cap 08:02) on the ground that the magistrate has no jurisdiction to try him. This, he argues,is because the courts of Botswana derive their authority to try him from the Constitution and from legislation promulgated under this, and the Director of Public Prosecutions also derives his authority to prosecute from the same Constitution, which is a fraud and must be set aside. The magistrate has been persuaded to issue an order commanding the State to produce to the defence a raft of historic and other documents to assist him in proving that the Constitutionis a fraud and must be set aside.The magistrate has referred this issue to the High Court for determination, and has stayed the criminal proceedings for that purpose. To supplement that referral, the first appellant has launched an application in the High Court under case no MCHLB-0002861 of 2011, to which he annexes his affidavit in which he attempts to justify the setting aside of the Constitution, and also seeks additionalrelief — including privileged treatment not normally accorded to the accused in a criminal trial, and the issue of subpoenas compelling many witnesses to attend court to testify on his behalf as to the fraudulent nature (in his view) of the Constitution of Botswana. These include the President of Botswana, two former Presidents, several Cabinet Ministers, High Court Judges, the Attorney-General, Chiefs, and academics (some living abroad), who have written on Botswana.The grounds upon which he relies, as set out in the affidavit and annexures thereto, are that the negotiations which preceded the promulgation of the Constitution were improperly conducted by persons who did not enjoy a genuine mandate from the people of Botswana. The Constitution in the format agreed by them was objected to by opposition parties and by the chiefs of several tribes, who claimed that there had been no proper consultation on the matters being2012 (1) BLR p705KIRBY JPagreed. Those matters will become relevant for court purposes, and will be examined further by the High Court, only if it can be shown that the High Court has jurisdiction or power to set aside the Constitution.The first appellant's affidavit in that case was annexed to the application brought before Leburu J for a stay, and it is before us as well. It runs to 152 typed pages, and is accompanied by a number of annexures as well. It is peppered withinstances of the use of immoderate language and with calumnious accusations levelled against past and present holders of the highest offices in the land, and also against institutions of State and the public and private media. He alleges, inter alia, that the Constitution is a fraud, the Presidency is a fraud, the Ministry of Local Government has usurped the authority of kings (like himself) which is God-given, the Minister of Tourism is corrupt, the Cabinet is 'a completefraud manned by gangsters masquerading as important public figures,' the justice system is a fraud, as is the entire court system; the Attorney-General is 'a generator of chaos,' and a named judge of the High Court is labelled as corrupt. It seems that no department of government, and most are specifically mentioned, escapes his condemnation. As for the press, he enjoins the court to 'ignore political rhetoric which is constantly drummed up by the media' andrefers to 'false media reports' which led to his incarceration.This is not conduct to be expected of any rational and respectful litigant, and especially of one who has served as a legal practitioner and officer of the court for some 12 years, before his investiture as chief. I am reminded of the words of Amissah JP inPresident of The Republic of Botswanaand Others v Bruwer and Another[1998] BLR 86, CA (Full Bench) at p 108H-109B, when he said:'Anybody who cares to read the first respondent's replying affidavit would be struck by its intemperance of language. It is a sad day for any country when lawyers practising before its courts permit a party or client, however aggrieved he may feel, to level gratuitous and baseless insults at the highest officers of State ... the processes of the court should not and cannot be allowed to beused as a licence for unjust showering of invective on holders of public office trying to perform their duties as they see fit.'Those sentiments are equally applicable in the present case.It is not for this court to analyse or attempt to vindicate or otherwise the many comments on both past and current events and personalities made bythe first appellant in his attempt to have the Constitution annulled. Those who

are impugned have not had the opportunity of reply before us. Nor need we comment on the fact that there is no indication or analysis of the clauses therein to which he objects. It will be our task to determine the broader and definitive issue of whether any court has power to set aside the Constitution or indeed any part of it. If there is no such power, it will be incompetent to stay the executionof any sentence pending resolution of a suit seeking that relief. Suffice it to say that much of the material placed by the first appellant before the court consists of a litany of his personal religious and political beliefs and grievances rather than legal or factual material to assist the court in arriving at a proper decision.It is also apparent that the purpose of the High Court challenge is principally to exonerate the first appellant personally and to invalidate the criminal charges levelled against him, rather than for any more public spirited motive.2012 (1) BLR p706KIRBY JPHe says specifically in a letter addressed to His Excellency the President thatthe constitutional challenge is 'raised in my defence against the efforts of your government to convict and imprison me.' And in his affidavit he confirms that:'I have made gestures and very humble efforts to speak to some senior members of the executive, especially the President, in order to alert him to the fact that this challenge will arise in the event that their government isadamant to prosecute me.'There is every indication that if the prosecution is not pursued, nor will the constitutional challenge be pursued.These are matters which may be of relevance in deciding whether the constitutional challenge amounts to a special circumstance justifying therevisiting of a sentence properly imposed after a criminal trial, and confirmed on appeal to the highest court.Any of the three issues raised could be determinative of the appeal, and normally the issue of locus standi would be decided first to determine whether or not it is necessary to consider the other arguments at all. However, this is an appeal involving the life of a human being, which should not be decided on thetechnical issue of locus standi in judicio alone, so we have given full attention to each of the three issues raised, as well as to the correct approach in determining applications for stay of sentences in criminal cases brought after the normal court processes have been exhausted.Res adjudicata and functus officio — the power to reopen finalised criminalproceedings.The case of Gabaokelwe has been finalised and sealed on appeal by the Court of Appeal, as the highest and final court, in respect of both his conviction and his sentence. The first question to be answered is whether there are any circumstances under which the court or any other authority can interfere withor overturn his conviction or sentence. If there are none, then no stay can be granted.In the case of a conviction there is no statutory provision or procedure in Botswana which specifically authorises this, as there is in some other countries. In England, for example, the Criminal Cases Review Commission was established in 1995, with the power to refer cases back to the Court ofAppeal where new evidence or new arguments raise a real possibility that the conviction or sentence would not be confirmed by that court. Prior to 1995 the Court of Appeal Act of that country empowered the Home Secretary on petition to refer such a case back to the Court of Criminal Appeal for re-examination.Where a sentence is concerned, the President is empowered by s 53 of the Constitution to exercise the prerogative of mercy. This provides that:'53. The President may—(a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment on that person for any offence;2012 (1) BLR p707KIRBY JP(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and (d) remit the whole or any part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Government on account of any offence.'These are wide powers, and would encompass either a permanent stay of execution of the death penalty, as originally sought by the appellants, or an interim stay, which is what they now seek. In terms of s 55 of the Constitution the President is obliged in every case where the death penalty has been imposed to convene a meeting of the advisory committee on the prerogative of mercy to consider that case. It is at that meeting that the President will considerany petition for clemency or any representations made by or on behalf of the condemned person.In the present case the committee has not, on the evidence before us, yet met for this purpose. There is no suggestion that the appellants have been authorised to, or intend to, petition the President for the stay which they seek from the courts, notwithstanding his clear power to grant this, if he so decides,on the material placed before him. On the contrary, both aver that the President is unlikely to exercise his prerogative in favour of Gabaokelwe. The first appellant says that this is because the President was 'grossly unreasonable' in allowing an earlier execution to proceed notwithstanding his knowledge that the constitutional challenge was pending. In the case of the second appellant,its director avers that she is 'aware that under the current President there have been no successful clemency appeals conducted.' She does not say how many cases there have been, or what the circumstances of these were. She goes on to say 'I am convinced that it is highly unlikely that the current death-row inmates and subsequent inmates will be granted clemency by the President.' This is a presumptuous statement, and an opinion that this court is unable to endorse.Each case will no doubt be considered by the President and his committee on its own merits.Previous applications for a stay of execution, or for other relief subsequent to the usual court processes having been exhausted, have been mounted under s 18(1) of the Constitution, there being no other statutory authority for these. Invariably these have been on the constitutional ground that, for some reason,the applicant has not had a fair trial, or that his sentence was cruel and inhuman. Such grounds would, at least prima facie, bring the application within that section which provides that:'18. (1) Subject to the provisions of subsection (5) of this section [relating to rules of court], if any person alleges that any of the provisions of sections3-16 (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.'The competence of such collateral challenges, as they are termed, being raised after finalisation of a case by the Court of Appeal, was comprehensively considered by a full bench of this court inKobedi v The State(2) [2005] 22012 (1) BLR p708KIRBY JPBLR 76, CA (Full Bench). After a thorough review of local and internationalprecedents, which there is no need to traverse afresh, Tebbutt JP (Korsah, Zietsman, Plewman and Lord Sutherland JJA concurring) held that in order to preserve the integrity of the constitutional hierarchy of the courts, and to uphold the principle of finality in litigation:(1) Once a court has delivered final judgment in a criminal case, it is functusofficio and has no jurisdiction to re-open or reconsider the case. (p 84)(2) Once the Court of Appeal has delivered its judgment in an appeal, it is

similarly functus officio, and cannot re-open or reconsider the case. (p 85)(3) The principle of res judicata is of equal application, and on this ground too the courts are precluded from re-opening or reconsidering cases upon which they have delivered final judgment. (p 91)(4) To bring a constitutional application under s 18(1) on grounds of fact or law which were or could have been raised in the Court of Appeal is impermissible and an abuse of the process of the Court. (p 91)(5) In rare cases where an appeal has been concluded, but where special circumstances emerge which were not and could not have been raised in the appeal, a s 18 application may be permissible but this will be a very rareevent indeed. (p 91)(6) In such a case, an applicant to lead further evidence would have to show that there is no doubt that such evidence would affect the result of the case. (p 98)See alsoMolale v The State[2005] 2 BLR 114;Gareitsane v The State[2006]1 BLR 201, CA (Full Bench).InKobedi(2), as in this case, issues as to the alleged unconstitutionality of the death penalty, and as to the degrading and inhuman nature of its execution by hanging were raised, as well as allegations that new evidence had been assembled which tended towards the innocence of the appellant. It was held that all those matters should properly have been raised at the trial, or, in appropriatecircumstances, at the latest during the appeal. Further, the court held that the constitutionality of the death penalty and of its method of execution had been reaffirmed inNtesang v The State[1995] BLR 151, CA (Full Bench). The application was dismissed and in dismissing it, Tebbutt JP at p 91E ofKobedi (2)(supra) repeated that:'It must again be emphasized that the raising of special circumstances must be exceptional, be very sparingly exercised and, as stated in some of the Privy Council cases, be a very rare event indeed.'See alsoChokolingo v Attorney General of Trinidad and Tobago[1981] 1 All ER 244 (PC);Hinds v Attorney-General of Barbados and Another[2002]4 LRC 287 (PC);Thomas v Attorney-General of Trinidad and Tobago(No 2) [1991] LRC (Const) 1001 (PC).The learned Judge President was constrained to remark that he had difficulty in conceiving of any such exceptional circumstances, save perhaps, what transpired inS v Augustine1980 (1) SA 503 (A), where, following the appellant's conviction for culpable homicide by stabbing, the 'victim' subsequently re-2012 (1) BLR p709KIRBY JPappeared, alive and well. Another possibility might be when DNA technology not previously available subsequently proved the innocence of the convict.The court did, however, accede to counsel's request for a stay of execution to be ordered in that case, pending the filing and consideration of a petition for clemency to the President, which was then being prepared.Subsequently there did arise in this court a case where exceptionalcircumstances were found to be present. It is the case ofState v Maauwe and Another[2006] 2 BLR 530, CA (Full Bench) where Zietsman JA remarked at p 543, 'The facts of this case are unusual, probably unique.'Since this is a case much relied upon by the appellants, I will set out briefly the facts of that case, so as to distinguish it from this one.The appellants inState v Maauwe and Others[1997] BLR 381 had beenconvicted of murder, and sentenced to death in April 1997. Their appeal (Maauwe v The State and Another[1997] BLR 693, CA) was dismissed in July 1997 and thereafter clemency was denied by the President. At midnight on 15 January 1999, just hours before they were to be executed, a High Court judge issued a stay of execution at the behest of Ditshwanelo pending an application for a declaration that execution by hanging was cruel, inhuman and unconstitutional.This was well beforeKobedi (2)(supra) was determined. I will say more about that urgent application when I deal with locus standi.By the time the application was heard, the original ground had been abandoned, and new claims were made relating to the unfairness of the trial — in particular a letter had been unearthed in which the then appellants asked the Registrar to appoint new counsel for their appeal, since the lawyer assigned tothem could not understand their language, Sesarwa, had not consulted them, and had formally admitted the confession statements on which they had been condemned, when in fact they claimed that these were false and had been extracted from them by force. This letter had not been brought to the attention of the Court of Appeal. Reynolds J set aside their convictions and ordered a retrial.For reasons unexplained, the State delayed, and when, by July 2004 thenew trial had not commenced, the two men applied for a permanent stay of prosecution, as by that time several potential witnesses had died. Walia J granted the application and acquitted them. On appeal by the State, it was held that Reynolds J had no power to second guess and set aside a final decision of the Court of Appeal. His order was nullified, as was the subsequent and consequential order of Walia J. The court held that the proper course to beadopted by Reynolds J if he saw merit in the application, was for him to refer the matter to the Court of Appeal, since he had no jurisdiction to grant the orders sought.Since by that time the accused men had spent many years in prison on death row, and had subsequently been set at liberty, the court held that it would be cruel and inhuman to subject them to a new trial, particularly since a fair trialwas unlikely as witnesses had died. The case was also extraordinary as it was the fault of the administration of justice as represented by the Registrar, and not of the accused persons, that their letter was not drawn to the attention of the Court of Appeal. In exercise of the wide powers conferred by s 18(3) of the Constitution, the court permanently stayed the execution of their death penalty, and ordered that they should remain at liberty.It can be seen at once that this case is as different from the present one as2012 (1) BLR p710KIRBY JPchalk is from cheese. The two issues raised, namely the 'satanic ritual' argumentand the pending constitutional challenge argument, could equally have been raised at the appeal stage, and, in the case of the former, even at the trial stage. The constitutional challenge was mounted in September 2011, while the appeal was heard in February 2012. There is no allegation that Gabaokelwe's trial or appeal were in any way unfair, nor has any new evidence been uncovered relating thereto. So, on general principles, the High Court was correct not tocountenance the application for a stay on the grounds advanced. This is also a case where the post-judicial process is not yet complete, since it has yet to be considered by the committee on the prerogative of mercy. The outcome of that exercise is unknown, nor is it known whether the prisoner's own lawyers have or have not made representations or launched a petition on his behalf.This notwithstanding, I will consider whether either of the grounds raisedcould, on any view, constitute a rare and exceptional circumstance which could open the way to the consideration of a substantive s 18(1) application designed to permanently stay or overturn the sentence confirmed by the Court of Appeal.Special circumstances — the constitutional challengeIn his application to the High Court the first appellant states that 'Therelief I seek in the exception is that this honourable court must set aside the Constitution.' It is pending the determination of that application/exception that the stay of the execution of the death penalty imposed upon Gabaokelwe is sought. It is

argued that if the Constitution is annulled, the death penalty will fall as well. That is not necessarily so, as will appear, but what is immediately apparent is that, if the High Court has no power to set aside the Constitution orany part of it, then no stay can be ordered pending the outcome of an application for such relief, and the appeal must fail. It is for that reason that the parties were asked to present argument as to whether or not the High Court, or any court, has power to set aside the Constitution, and the first appellant and the respondents have filed Heads on that issue. Should the courts be found to have no suchpower, then the evidential matters relating to its promulgation and operation (which are not in any event for the present appeal) will not fall to be investigated further, and the exception too will fall away.The first appellant argues that the court does have such power, arising from both the Constitution itself, and from what he describes as the law of God. Mr Gulubane, for the respondents, argues to the contrary. The second appellant haspresented no argument on the issue.This is not the first time that the nullification of the Constitution or at least a part of it has been sought. InKamanakao I and Others v The Attorney-General[2001] 2 BLR 654, a full bench of the High Court (Nganunu CJ, Dibotelo J (as he then was) and Dow J) considered an application to set aside ss 77, 78 and 79 as being inconsistent with the entrenched clauses of the Constitution. The panel h held at pp 666-668 that:'The case very much brings to the fore the question of what is truly justiciable in a court of law and what ought not to be so justiciable, and be left to the political and legislative arenas to deal with ... The first inquiry ... [is] whether the High Court has the power to strike down any part of the Constitution on any ground that may be advanced by any litigant. To us it is fundamental to2012 (1) BLR p711KIRBY JPnote that the Constitution was enacted as the grundnorm of the new State of Botswana i.e. it is the basic and founding law of the Republic. It both ended the colonial era and founded the new State. It is not difficult to see that in the negotiations that preceded the adoption of the Constitution both the negotiators and some of the people in the country may at the time have been dissatisfied with some of the provisions in the Constitution; or indeed theomissions from it. Some of those dissatisfactions may represent unfinished business that arises from time to time to haunt new generations. However, it should be remembered that the Constitution was to be received, and was indeed received warts and all with all its weaknesses and strengths. The new Constitution, once negotiated and promulgated, became the new law. It seems to us that every institution in the land, especially those created bythat Constitution had to recognise and accept the Constitution as it is ... one of the new institutions created under the Constitution was the High Court of Botswana. It has extensive jurisdiction and powers under section 95 of the Constitution and also the extended jurisdiction under section 18, which we cited earlier. Powerful as the High Court is, was it intended to secondguess the founders and makers of the Constitution, with powers to reorganise the Constitution in the ways it sees fit? To us, to strike out one section of the Constitution as offending another is to rewrite the Constitution . to be able to do so the High Court would need to have express powers from the body of the Constitution itself, enabling it to be the revisionary instrument for the alteration of the Constitution ... "That is not normally the functionof a Court. That function is usually left, as has been done in the Botswana Constitution, to representatives of the electorate who can, through discussions and consultation among themselves and with their constituents, agree new provisions to right what is wrong or lacking . We do not think that such awesome powers as to rewrite the Constitution can be assumed to exist unless they are clearly and expressly granted by unambiguous language.'I have quoted at some length from that judgment because we endorse fully the sentiments expressed in those passages. And, as Amissah JP remarked succinctly, speaking for the full bench of this court inAttorney-General v Dow[1992] BLR 119, CA (Full Bench) at p 150H.'We cannot declare a provision in the Constitution unconstitutional. Thatwould be a contradiction in terms.'And if the court cannot set aside a single clause of the Constitution, then a fortiori it cannot set aside all 127 clauses of the Constitution.The main pillar of the first appellant's constitutional challenge is that the process of its adoption over 45 years ago was (so he has heard or read) flawedby inadequate consultation. This is fully answered in the passages reproduced fromKamanakao'scase (supra) There is also a remedy, provided by the Constitution itself, if the people of Botswana are, as he alleges, unhappy with the Constitution. That is provided in s 89 of the Constitution which provides an elaborate political and legislative process for its amendment or for the replacement of parts of it if so desired, including holding a referendum if certain of the more important provisions are to be changed. It is not for judges, who are2012 (1) BLR p712KIRBY JPnot elected representatives of the people, to presume, at the urging of one or twoor more dissatisfied litigants, the power to unravel the very fabric of society as woven in the political process by the people of Botswana. That is the function of Parliament, acting in terms of s 89 of the Constitution, if change is desired.The powers of the High Court are set out in ss 18, 95 and 105 of the Constitution. These are extended to the Court of Appeal by s 99 of the Constitution, as read with s 7 of the Court of Appeal Act (Cap 04:01). Section 18 gives the High Courtpower to enforce the entrenched provisions protecting rights of the individual; s 105 empowers the court to determine any controversy relating to interpretation of constitutional provisions; s 95, on which the first appellant relies, provides in subsection (1) that:'95. (1) There shall be for Botswana a High Court which shall have unlimitedoriginal 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.'The argument is, as I understand it, that since the High Court's jurisdiction is 'unlimited' and since it may exercise powers conferred on it by 'any other law,'then the law of God, which is said to forbid untruth, fraud or deceit, may be called in aid to set aside a fraudulent Constitution. The quotations relied upon by Mr Kgafela are from the Old Testament of the Christian Holy Bible, so it is to the ecclesiastical law of Christianity that he turns. There are a number of problems with that argument.First, the Constitution itself is non-denominational in character. It grants,by s 11, freedom of conscience, which accords to every person the right to practise his own religion, within the boundaries of the law. There is no mention of Christianity in the Constitution, although no doubt it is the faith of many Batswana, just as many others adhere to different faiths. There is also no compulsion in the Promissory Oaths Act (Cap 26:03), as Mr Kgafela suggested, for such oaths to be sworn on the bible.Second, no jurisdiction is granted to the courts of Botswana by any ecclesiastical law, as far as we are aware, and nor are the courts required or empowered to apply or adhere to any such laws, some of which (such as Sharia law) may contain beliefs and practices which would offend against certain of the entrenched provisions of the Constitution.Third,

the expressions 'any law' or 'any other law' clearly refer to lawshaving effect in Botswana, and not to the tapestry of foreign laws world wide governing the lives and conduct of a multitude of foreign and exotic nations and faiths. These are, first, the statute laws of Botswana promulgated prior to the enactment of the Constitution, which were retained in force by s 4 of the Botswana Independence Order No 1171 of 1966 which had as its Second Schedule the Constitution of Botswana; second, the statutes and instrumentsenacted by Parliament since the promulgation of the Constitution, as authorised by s 86 of the Constitution; third, the customary law of Botswana, as applied by s 3 of the Customary Law Act (Cap 16:01), but subject to the limitations contained therein; and fourth, the common law (derived from the Roman Dutch law) as applied by s 3(b) of the General Law (Cape Statutes) Revision Act (Cap 14:04).2012 (1) BLR p713KIRBY JPBut all of these laws are themselves subject to the Constitution as the grundnorm or supreme law. Section 86 of the Constitution provides that:'86.Subject to the provisions of this Constitution,Parliament shall have power to make laws for the peace, order and good government of Botswana.' (my emphasis)This was refined inMoatshe and Another v The State[2003] 1 BLR 65, at p 85, as follows:'The Constitution is the mother of all laws and institutions in Botswana. It is the creator of parliament and of the judiciary. It gives legitimacy to existing laws and authorises the promulgation of new laws. As the "grundnorm", orsenior law, its provisions take precedence over those of any other law passed by Parliament, and where there is any conflict the constitutional provision must prevail.'InKamanakao I(supra) at pp 686-687, Dow and Dibotelo JJ held that:'... all laws in this Republic whether pre- or post the Constitution, can and must, at the instance of the right litigant with the necessary locus standi, be tested against the Constitution . In view of the supreme nature of the Constitution, to argue that it is subject to customary, common, or statutory law which existed at the time of its adoption, is to completely nullify the great purpose for which the Constitution was adopted.'Finally, Aguda JA, in the full bench decision ofDow(supra) at p 166, stated uncompromisingly, that:'... if any rule of customary law or of the common law is inconsistent with any of the provisions of the Constitution, but especially of the entrenchedprovisions, such rule of customary law or of the common law must be held to have been abrogated by the provisions of the Constitution to the extent of such inconsistency.'A similar argument to that of the first appellant was advanced and rejected inKamanakao I(supra) (p 669), where it was suggested that 'natural law,' which governed all of humankind, could somehow trump the provisions of theConstitution, and particularly sections derogating from the fundamental rights provisions. It was held that the fundamental rights applicable in Botswana were those described in the Constitution, and no others, and that these were subject also to the limitations placed upon them by the Constitution, and no others. That approach is undoubtedly correct. It is open to Parliament, acting in accordance with s 89, to add to or detract from the fundamental rights provisions if it sowishes or to further enhance the jurisdiction of the courts.The same rationale disposes of the alternative arguments advanced by Mr Kgafela, but with less vigour, that the courts of Botswana could derive jurisdiction in some universal way from the principles of the English Magna Carta (on which he did not elaborate), from the wider customary law, from international instruments, or from dicta of past presidents of the United States of America, in order to nullify the Constitution. It has further been held by the full2012 (1) BLR p714KIRBY JPbench of this court that neither the High Court, nor the Court of Appeal, whichare both creatures of statute, enjoy any inherent jurisdiction to make substantive law, or to operate in matters not of a procedural nature, outside the jurisdiction specifically granted to them by statute (SeeKobedi v The State (2)(supra) at p 84).As has been pointed out by Amissah JP, to declare a section of the Constitution unconstitutional would be a contradiction in terms. It would create an evengreater paradox if the High Court, or a judge of this court were to be held to have the power to set aside the whole Constitution (as the first appellant seeks to do). Both the High Court and the Court of Appeal are creations of the Constitution, by ss 95 and 99 respectively. If the Constitution were to be set aside as a fraud, the courts too would cease to exist, being the products of fraud, and the status and powers of judges would be extinguished, rendering all court orders andjudicial decisions null and void. Taking the first appellant's case to its logical conclusion, he would be asking a fraudulently appointed judge, in a fraudulent court, to make a non-enforceable order setting aside a fraudulent Constitution from which the court derives its existence. This is nothing short of absurd. It need hardly be added that no judge may enter upon his duties before binding himself (under ss 98 and 102 of the Constitution) by the judicial oath to 'dojusticein accordance with the Constitution of Botswana as by law established.' (Promissory Oaths Act Second Schedule (my emphasis). There could be no more absolute negation of that oath than by the judge purporting to nullify the very Constitution he has sworn to uphold.Although the outcome is clear, I will mention briefly the further arguments which have been raised by counsel and by the judge a quo which militate againstthe courts having any power to invalidate the Constitution. These may well be of equal strength, but have not been fully argued before us, and we will not pronounce definitively on them.The first is the presumption of constitutionality, as it is sometimes called. This was the argument relied upon by Leburu J in holding that the constitutional challenge had scant prospects of success since the events in question occurredover 45 years previously, and the Constitution had been operating satisfactorily ever since. The presumption is an application of the well-known maxim omnia praesumuntur rite esse acta — that official acts including laws are presumed to be and will where possible be interpreted to be lawful and effective unless the contrary is shown. This is a presumption rebuttable by evidence, so it would not by itself preclude an investigation into whether or not an enactment wasvalidly promulgated. But there is strength in the judge's argument that to stay a lawful derivative of the Constitution pending such a challenge could result in confusion. If a stay of lawful actions by the authorities could be ordered in one respect on account of a constitutional challenge, then a Pandora's box might be opened, with similar stays being sought of the execution of decisions of any of the three arms of government, resulting in an administrative and politicalvacuum.We should state, however, that it is by no means clear that the death penalty is a derivative of the Constitution at all, as Leburu J seems to have accepted. The death penalty and its execution by hanging certainly predated the Constitution. The nullification of the Constitution might well resurrect these earlier laws that it replaced, but that is not a subject for consideration here. The most recent and2012 (1) BLR p715KIRBY JPpresent authority for the sentence of death by hanging is the Penal Code (Cap 08:01), which was enacted in 1964, two years before the Constitution came into being. It is unnecessary to canvas further the consequences of the Constitution being nullified, if

that were possible, but the abolition of the death penalty would not be one of them. It would thus make no sense to stay the execution of a death sentence pending the determination of a suit which would have no effecton the lawfulness of that sentence, nor on the manner of its execution.The second argument, raised by Mr Gulubane, is that in seeking to nullify the whole Constitution the first appellant is inviting the court to rule on a whole host of political matters, which are not within its remit. These include the disenfranchisement of the voting public, the revocation of the Bill of Rights, the unseating of the Head of State, and the dissolution of Parliament, the publicservice and the judiciary, all of which would be unavoidable consequences of the setting aside of the Constitution. As was held by the Constitutional Court of South Africa inEx parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of The Republic of South Africa, 1996 1996 (4) SA 744 (CC) at p 784:'First and foremost it must be emphasised that the Court has a judicial and not a political mandate ... this Court has no power, no mandate and no right to express any view on the political choices made by the CA ...'The mandates of the Courts of Botswana are contained in the Constitution and in their court-specific Acts of Parliament. They are solely judicial in character,including the power to test any law for validity against the benchmark of the Constitution. They have no political or law making function. This is the domain of the elected representatives of the people. Even in countries where, through political instability, the Constitution-making process has been a bumpy ride, with one constitution replacing another from time to time, their courts have consistently refused to declare their Constitutions, or parts of these, invalid, orto set them aside. SeeMadzimbamuto v Lardner-Burke NO and Another NO; Baron v Ayre NO and Others NNO1968 (2) SA 284 (SR);In re: The Crossing of the Floor by Members of the National Assembly[2007] MWSC 1 (Malawi), unreported andSithole and Others v The Prime Minister of Swaziland and Others(App Case 35/07) (Swaziland), unreported.Those cases arose from constitutional dispensations and provisions entirely different from those obtaining in Botswana, and it is not necessary to discuss them further, save to say that in the latter case Tebbutt JA also held at p 42 that:'Were this Court to strike down the Constitution ... [this] would fly in the face ... of the wishes of the people themselves, and may result in sinking thisKingdom into an abyss of disorder, and perhaps even anarchy'.This resonates with Mr Gulubane's argument that a judgment invalidating the Constitution would be a brutum fulmen, a judgment which is incapable of enforcement, since it will disempower the courts themselves and all instruments of State by which judgments are enforced, the rule of law maintained, and sentences in criminal cases carried out. It would, he argues, leave a free-for- all, with no-one in charge. It is not necessary for the purposes of this case to2012 (1) BLR p716KIRBY JPexplore whether that is so or whether a system abandoned 45 years ago wouldbe revived (if that was possible), should the Constitution be invalidated.What is clear, and we so hold, is that neither this court nor any court has the power to set aside the Constitution or any part of it. For this reason the launching of a case seeking that relief cannot be a special circumstance justifying the stay of the execution of a sentence imposed in a criminal case which has been confirmed on appeal by this court. The judge a quo was correct to find that theconstitutional challenge has no prospect of success and that ground of appeal fails.Special circumstances — hanging as a 'satanic ritual'The two appellants argued both that the death penalty should be abolished or be subjected to a moratorium, and that its execution by hanging should beoutlawed, as both, in the words of the first appellant, were 'satanic practices', which were cruel and inhuman. Leburu J found that on both issues he was bound by full bench decisions of the Court of Appeal reaffirming both the constitutionality of the death penalty itself and the constitutionality of hanging as the means of its execution. On this he is correct. The cases wereNtesang vThe State(supra) andKobedi (No 2)(supra).InNtesang'scase Aguda JA (with Lord Wylie JA, Steyn JA, Tebbutt JA and Lord Cowie JA concurring) considered similar arguments to those raised by the second appellant before this court, including the movement in many countries to abolish the death penalty as being cruel and inhuman, the strictures of international instruments to the same effect, and that hanging was in any eventan anachronistic and barbaric means of carrying out that sentence. He pointed out that both the death penalty and its execution by hanging were preserved and validated by s 4(1) and 7(2) of the Constitution, and I need repeat neither those sections, nor the full reasons for his judgment. Suffice it to say that the learned judges held at p 161 that:'. the court has no power to re-write the Constitution in order to give effect to what the appellant has described as progressive movements taking place all over the world and to give effect to the resolutions of the United Nations as to the abolition of the death penalty.'The matter was raised again inKobedi (No 2)(supra), where Tebbutt JP,heading a full bench, came to the same conclusions and endorsed the decision in Ntesang's case, after hearing extensive argument from senior counsel. He concluded at p 96 that:'It is for the legislature to abolish the death penalty or to change the mode of execution of it, should it wish to do so. It is not for this court to do so.'In order to depart from those authoritative precedents, we would need to besatisfied that they were wrong, or that significant new developments had taken place which justified a departure from them on new grounds.What we have before us, as well as the familiar arguments which have been raised before, are firstly a new description of the death penalty and its execution as a 'satanic practice' foreign to the people of Botswana, and secondly a series2012 (1) BLR p717KIRBY JPof descriptions, mainly second hand, of the harrowing experiences of prisoners on death row at and immediately before their executions.The first submission relates to a description of the penalty as 'satanic' and is backed up by religious and other references. It could equally be described by many other unfavourable epithets, but those would not render it unconstitutional. This court has no power to accede to the prayers of persons advancing their personalreligious or moral beliefs to set aside a sentence which is properly authorised by statute and validated by the Constitution. Mr Kgafela's submission that the death penalty is inconsistent with the values of the people of Botswana is not backed by any evidence. On the contrary, the people of Botswana, through their elected representatives have indicated to the opposite effect, by promulgating the Penal Code which prescribes the death penalty as the punishment for murderwithout extenuating circumstances and certain other offences, and its execution by hanging. Available authorities also indicate that the death penalty has been imposed in Botswana for murder since time immemorial, so that its abolition would be a departure from the accepted norm. SeeSchapera Handbook of Tswana Law and Custom(1970 ed), at p 60, where it is said that:'In the olden days all such cases could be tried only by (the Chief) and not in any of the minor courts. Culpable homicide and murder were punished by death. The murderer was escorted

to a large rock, and there either stabbed with a spear or hit on the head with club, according to the manner in which he had killed his victim.'As to execution by hanging, descriptions of the experiences of prisoners on death row will always be harrowing. They could hardly be otherwise. But while the law of Botswana remains that this is to be the prescribed punishment for certain offences, the judges of Botswana, whatever their personal views, must uphold their judicial oath to administer justice in accordance with the Constitution, and must impose the ultimate penalty where the law and theevidence so demands. No evidence has been placed before us that the method and procedures accompanying the execution of the death penalty have in any way changed for the worse since the promulgation of the Constitution so as to justify a new look at this.What is before us is no more than a general complaint against the death penalty and hanging without any reference to the particular circumstances ofthe prisoner in whose name and against whose sentence it has been brought. This certainly does not constitute one of the rare and exceptional circumstances under which this court could revisit a sentence confirmed by the Court of Appeal and it cannot ground a successful application for a stay of execution. Only the President has these powers in exercise of the prerogative of mercy.Requirements for the issue of a stay of execution of a sentence confirmed on appeal by the final courtThere are two situations in which a stay of execution of the death penalty may be sought when this has been confirmed on appeal. The first is when a petition is being prepared for consideration by the President when he decides whether or not to exercise his prerogative of mercy. That application would normally be granted if it could be shown that matters of substance were to be raised,2012 (1) BLR p718KIRBY JPand a real possibility existed that these could influence his decision. In such acase it would also need to be shown that the government, through the Attorney- General, had refused to delay the convening of the advisory committee on the prerogative of mercy pending the filing of that petition. That is not the situation in this case, where no such petition is in issue.The second situation is where, as here, a stay is sought pending the hearing of an application to revisit the original sentence or to reopen the concludedtrial because exceptional circumstances justifying this have arisen. This must be considered in the context of certain remarks made by Zietsman JA inState v Maauwe and Another(supra) at p 540, where he said:'I have no difficulty with the initial order granted by the High Court staying the executions of the respondents. Such orders are often granted. They donot have the effect of altering or setting aside the convictions or sentences. Such orders are usually granted preparatory to the seeking of other relief. The question, however, is whether the other relief can be granted by the High Court if it involves amending or setting aside orders made by the Court of Appeal.'Such orders of stay of execution are certainly not often granted in Botswana,where they are rarely made, so this must have referred to the practice in South Africa. There, stays of execution had sometimes been ordered pending petitions to the State President of South Africa under s 327 of the Criminal Procedure Act No 51/1977 of that country. This empowered the State President to refer a matter back to the Supreme Court of Appeal to hear new evidence which hadsubsequently been discovered. There is no such section in Botswana. It was, however, held here inKobedi v The State[2002] 2 BLR 502 at p 513 that:'... a prayer for a stay, even a permanent stay of execution of a death sentence, is notper seincompetent, and could be granted if that were necessary for the enforcement of the sections of the Constitution alluded to.'(This was in the context of an application brought under s 18 of the Constitution).It must be remembered that no appeal was before the court inMaauwe'scase, (supra) against the granting by the High Court of the stay of execution, nor was one ever lodged. In the present case, the question of when and whether a stay should be granted is squarely before us. The remarks of Zietsman JA inMaauwe'scase (supra) should thus not be taken as general authority for the granting of an interim stay of execution in death penalty cases. The grant in that case was in any event extraordinary. It was made at midnight on hastily assembled papers, with the execution of the prisoner only hours away. A cautious judge, just awakened, would have erred on the side of caution. And it was made in 1999,before the court had laid down the very restricted parameters within which relief could be granted under s 18(1) of the Constitution, where this could have the effect of over-ruling the Court of Appeal. Even then the High Court would be bound to refer the matter to the Court of Appeal, if it found the substantive application meritorious, and would only do so in extremely rare and exceptional circumstances. I have little doubt that with the benefit of the judgments in the subsequent cases, no stay would today be granted in the original circumstances2012 (1) BLR p719KIRBY JPofMaauwe'scase (supra), namely that an advocacy body was seeking the stay on the sole ground of its general opposition to the death penalty and to hanging as its method of execution. Leburu J was right to consider as antecedent issues whether the applicants had locus standi to bring the application, and whether the case advanced could constitute rare and exceptional circumstances justifying the re-opening of an already concluded case.In order to succeed in an application for an interim stay of a death penalty, or indeed of any sentence passed by the High Court, and confirmed by the Court of Appeal, an applicant must satisfy the courts, at least on a prima facie basis, firstly of its locus standi to bring the application, and secondly that there is a real possibility that the basis and facts upon which the substantive application will be brought, will be found to constitute one of the rare and exceptional caseswhere a case can be re-opened or a sentence revisited despite the twin barriers of functus officio and res judicata. In such an urgent or interim application it is necessary to set out the extraordinary facts and circumstances which could lead to that conclusion. It is insufficient to allege merely that an investigation is to be commenced which may lead to the discovery of such circumstances. Aspeculative or remote possibility will not be sufficient.Locus standi in judicioThis appeal does not concern the locus standi of the first appellant to bring proceedings to challenge the constitutionality of any law, or to challenge the Constitution itself. It concerns the much narrower issue of the locus standi of the two appellants to intervene in the execution of a sentence lawfully handeddown in a criminal trial and confirmed by the Court of Appeal. Leburu J found that neither of them had locus standi to apply for a permanent stay or an interim stay of the execution of the sentences of death imposed on Gotlhalosamang Gabaokelwe, Modise Tlhokamolelo and Mangombe Tadubane. There is no appeal against his decision in the cases of Tlhokamolelo and Tadubane, but both appellants challenge his decision as to their locus standi in the case ofGabaokelwe.The first appellant claims locus standi for two reasons. First, as chief (or king as he describes himself) of the Bakgatla-ba-Kgafela tribe, he contends that his traditional duty is to care for the economic, political, social, moral and spiritual well-being of the people he leads. He also has a general duty to

stand up for thehuman rights of those without a voice. Second, he avers that as an individual he is deeply concerned with what he describes as 'satanic rituals', including death by hanging, and he cannot stand by while fellow human beings are cruelly treated in this way.The second appellant claims standing in its capacity as a human rights advocacy organisation which promotes the protection and upholding of human rights in Botswana, with particular reference to the marginalised and thedisempowered, and its opposition to the death penalty. Ditshwanelo believes that Gabaokelwe is unable to petition the court on his own from death row. It claims standing also because it was previously accorded locus standi in similar circumstances in the case ofDitshwanelo and Others v The Attorney-General and Another[1999] 2 BLR 56.It is common cause, as I have said, that neither of the appellants has ever met or been consulted by the prisoners on whose behalf or for whose benefit they2012 (1) BLR p720KIRBY JPpurport to act. They have received no instructions from their relatives either, norfrom the lawyers who represented them at their trials and appeals. In the case of Gabaokelwe, he was represented by an experienced legal practitioner, Mr Duma Boko. They claim to have e-mailed Mr Boko offering to assist, but he has not responded. Neither has alleged that he or it has sought and been refused access to the prisoner, either.In terms of the Roman Dutch common law, which is our common law, alitigant has locus standi in judicio, that is, the right to move the court for relief, only if he or she can show a direct and substantial interest in the subject matter of the suit. As was said by Wessels CJ in the well knownSouth African case of Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd1933 AD 87 at p 101:'The actio popularis is undoubtedly obsolete, and no one can bring an actionand allege that he is bringing it in the interests of the public; but by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have.'See alsoDalrymple and Others v Colonial Treasurer1910 TS 372 at p 392, where Wessels J held that:'... courts of law have required the applicant to show some direct interest in the subject-matter of the litigation or some grievance special to himself.'And inGeldenhuys & Neethling v Beuthin1918 AD 426 at p 441, Innes CJ remarked that:'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'See alsoCabinet of The Transitional Government of South West Africa v Eins1988 (3) SA 369 (A) at 387 et seq andAttorney-General v Dow(supra) at p 155.There is an exception, though, in the case of applications for a writ of habeas corpus. InWood and Others v Ondangwa Tribal Authority and Another1975 (2)SA 294 (A) at p 310, Rumpff CJ held that:'... although the actiones populares generally have become obsolete ... it does not mean that when the liberty of a person is at stake, the interest of the person who applies for the interdictde libero homine exhibendoshould be narrowly construed. On the contrary, in my view it should be widelyconstrued, because the illegal deprivation of liberty is a threat to the very foundation of a society... .'See alsoBozzoli and Another v Station Commander, John Vorster Square, Johannesburg1972 (3) SA 934 (W), where a university principal was accorded locus standi to protect the interests of detained students. That, generally, is the governing law relating to locus standi. But what of2012 (1) BLR p721KIRBY JPstanding to bring applications for relief under s 18(1) of the Constitution? That question too has already engaged the courts of Botswana.InKamanakao I(supra) at p 659, it was held that the expression 'any person' as used in s 18(1) includes (in terms of the definition in s 49 of the Interpretation Act (Cap 01:04) which applies by s 2 thereof, to the Constitution), 'a body corporate and an unincorporated body, as well as an individual'. It could thuscover Ditshwanelo, as a Trust, in appropriate circumstances. The court held further, that 'Groups of individuals formally organised or informally organised would also qualify', but that the applicant must show that he/she/it 'has a substantial interest in the case ... an applicant who alleges a breach of his right or a right which he shares with or in a group is entitled to bring an application to vindicate that right for himself and the group'. Thus a tribe, whose rights werebeing trampled would have a right. So there are circumstances in which the first appellant, as a chief, might be shown to have locus standi to represent his tribe, as did Kamanakao I, but are those circumstances present here?Section 18(1) provides that 'any person' who alleges a contravention of the entrenched sections of the Constitution, past, present or anticipated 'in relation to him or her' may move the court for relief.InDow(supra) at pp 155-156A, Amissah JP held that:'The section shows that the applicant must "allege" that one of the named sections of the Constitution has been, is being, or is likely to be infringed in respect of him.He must therefore sue only for acts or threats to himself'(my emphasis)Applying the principle that constitutional provisions conferring rights are to be generously and not restrictively interpreted, he held further at p 156C that these rights are not to be whittled down by common law rules, but that:'Under section 18(1), an applicant has the right to come before the courtsfor redress if he declareswith some foundation of factthat the breach he complains of has, is in the process of being, or is likely to be committedin respect of him.' (my emphasis)So some adverse effect of the constitutional breach upon the applicant personally must be shown, for the applicant to be heard, even if the adverse effect is not immediate. Amissah JP gives the example ofCraig v Boren, Governorof Oklahoma429 US 190 (1976), where a retailer of beer was granted standing to challenge a law restricting sale of alcohol to males under 21 and females under 18 on the basis of sex discrimination. The adverse effects he feared were commercial in character as young men in the 18-20 age group were his active customers. So a personal adverse effect to the applicant alone or to him as a member of a group must generally be alleged to establish standing under s18(1).In their quest for standing, the appellants relied principally on the 1999 case ofDitshwanelo(supra), which was, as I have said, an unusual case. A rule nisi was granted on certificate of urgency to the second appellant herein at midnight on 15 January 1999 to stay the execution due early next morning of Gwara Brown Motswetla and Tlhabologang Maauwe. The order was granted without argument, pending a return day when argument would be heard as to whether the stay should be extended until a prayer to set aside the death penalty2012 (1) BLR p722KIRBY JPand the process of hanging as being unconstitutional had been determined (acircumstance similar to the present case). On the return day, the Attorney- General challenged the locus standi of Ditshwanelo to bring the application, since the condemned men were not parties. He stated at p 67B:'"On the question of locus standi, I challenge the standing of the Applicant to bring these proceedings on its own. If, however, it is shown at the hearingthat Gwara Brown Motswetla and Tlhabologang Maauwe, the condemned prisoners, support this

application and wish to be joined as co-applicants, I will withdraw the challenge".'The two condemned men were in fact joined as parties before the application was finally heard eight months later. The Attorney-General did not, however,withdraw his challenge, and persisted in his objection.Following the joinder, Reynolds J remarked at pp 70-71 that:'It is apparent that the first applicant [Ditshwanelo] holds more of an observer status than an active party status in this matter, although it appears to have gone to great lengths, and no doubt to considerable expense in its efforts toprocure material to assist the other applicants. I believe, however, to exclude the first applicant now after it has exercised its rights as a party for the last eight months would be an unwelcome step as far as the other two applicants are concerned, and may in addition amount to a threat to the interests of justice.'It is apparent that by the time the substantive application was heard, Ditshwanelo's status was actually that of a friend of the court, and not a party seeking relief on its own account. To allow its continued participation as a friend of the court was not objectionable. By that time too the general abolitionist ground was no longer pursued, and more potent arguments on new evidence were before the court.In effect, in validating Ditshwanelo's initial standing (at midnight on 15 January 1999) Reynolds J was applying the common law exception referred to inBozzoli'scase (supra) and the case ofWood and Others(supra). He held that:'There is also acceptable evidence ... that the second and third applicants are illiterate, suffer from difficulties of communication, are without resourcesand are otherwise ill-equipped to pursue their allegedly infringed rights.'This permits a party with a sufficiently close interest or connection to bring urgent proceedings on behalf of a supplicant who is held incommunicado, or is otherwise unable to act for himself. The Court will not interpret a statute, including the Constitution, as cutting down common law rights unless that isthe necessary and only interpretation possible of the words used. SeeMedical Rescue International Botswana Ltd v The Attorney-General and Others[2006] 1 BLR 516, CA (Full Bench) at p 522;Director of Public Prosecutions v Mothusi[2011] 2 BLR 537, CA (Full Bench). In the latter case it was held that:'It would be unthinkable to construe any part of the Constitution as2012 (1) BLR p723KIRBY JPdeliberately removing common law rights favouring the individual unless such a construction was inescapable.'Reynolds J added at p 70 ofDitshwanelo(supra) that:'It is obvious that not any and every person or organization will be accordedlocus standi: busybodies and persons who attempt to intrude into the affairs of others for reasons of personal aggrandizement or other discreditable or inadequate motives should be excluded. There must also be some connecting link or common interest disclosed. To my mind the key elements necessary in this respect would include the extent, degree or level of the applicants' interest in the matter, the abilities and resources enjoyed by the applicant as comparedto those of the individual, the limitations and restrictions experienced by the individual, and his status and condition.'I would add, in the case of a person convicted or sentenced in a criminal trial, the essential requirement that, unless he is prevented by circumstances from doing so, the individual should have requested or consented to the interventionby the person seeking to do so on his behalf. A criminal charge or conviction is an intensely personal matter, upon which the convict will have his own strong views. He may for example, be repentant, and have accepted the sentence imposed upon him, and have prepared himself for this. In those circumstances, it would be an intrusion and an affront to his dignity, if an interloper attempted to interfere in his case without consulting him, however noble that interloper'smotives might be.The above quoted passage from Reynolds J was approved by Tebbutt JP for the full court inGood v The Attorney-General[2005] 2 BLR 333, CA, (Full Bench) in the context of an application by Ditshwanelo to intervene as a friend of the court. In that context it is subject to the additional essential requirementabove, a proper approach. Where a third person or body seeks direct locus standi as a litigant, however, this will be permissible only if it is a case falling within the common law exception, which applies to constitutional applications too. A constitutional application is not to be used as a substitute for the now obsolete actio popularis. In some countries (such as Zimbabwe and South Africa), special provisions have been included, granting locus standi to specified categories ofbodies or individuals, as special cases. That is not the position in Botswana, where the usual rules still apply.The appellants asked, in the alternative, that locus standi be granted to them as friends of the court. This was tied in the court below to their application to be granted access to the prisoners so that they could be joined in the stay application. They complain that Leburu J failed to deal with these issues. Theposition of friends of the court was fully dealt with by Tebbutt JP inGood'scase (supra), as I have said. He adopted theBlack's Law Dictionary(7th ed) definition of an amicus curiae, a friend of the court, who is:' "... a person who is not a party to a lawsuit but who petitions the court, or is requested by the court, to file a brief in the action because the person has a strong interest in the matter".'2012 (1) BLR p724KIRBY JPand approved the dictum inFose v Minister of Safety and Security1997 (3)786 (CC) at p 795 that:'.. the underlying principles governing the admission of anamicusin any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by theamicusare relevant to the proceedings and raise new contentions which may be useful to the Court.'In jurisdictions such as England and South Africa, the rules of court lay down conditions for the intervention of a friend of the court. At present we have no such rules and are guided by precedent and the common law. Generally, however, an interested party may be permitted to intervene by filing a brief with the consent of the parties, or, where one of them objects, by leave of the court,which will only be granted if the amicus has some special expertise useful to the court, or has something new to add. It will not be granted to an applicant who merely wishes to join the fray on the side of one or other of the parties as an antagonist. (See the remarks of Tebbutt JP inGood v The Attorney-General (2)[2005] 2 BLR 337, CA (Full Bench) at p 348).Further, it is a sine qua non for the intervention of an amicus curiae that theremust be existing proceedings before the court brought by qualified parties and on specific issues.Against the above principles, was Leburu J correct to find that neither of the appellants had locus standi to bring the stay proceedings on any basis? We hold that he was.Neither appellant knew or had met or had obtained the consent of Gabaokelweto bring the application, and his views, as the person solely affected, are unknown.In the case of the first appellant, there is no suggestion that Gabaokelwe is a Mokgatla tribesman or is one of his subjects. His argument that he has status as a general champion of the down-trodden cannot be sustained. However honourable his motives may be, he is attempting without authority to intervenein someone else's criminal case, which does not concern him personally. This is not permissible.In the case of Ditshwanelo, they too have no mandate from the

prisoner. Theirs is a general complaint about the constitutionality of the death penalty and the cruelty of hanging or its manner of execution. To allow them locus standi in present circumstances would be in effect to revive the action popularis, whichwe do not intend to do, and nor has any powerful argument been presented for its revival, even assuming that this court had the power to do so. So far from having resources unavailable to the condemned man, the second appellant has pleaded poverty before us, and has not briefed counsel as would be expected or filed researched heads of argument raising new issues. Instead it has raised again well-worn arguments against the death penalty and against hanging whichwere fully canvassed and dealt with by the full court inKobedi (2)(supra). It has also failed to show a sufficient interest in or connection with this case specifically as opposed to death penalty cases generally. There is nothing on record to show that Gabaokelwe was inadequately represented by his trial and appeal lawyers, or that he is unable to (or even wishes to) petition either the court or the President with their assistance or otherwise. This case is totally2012 (1) BLR p725KIRBY JPdifferent from the one in which they were granted standing in 1999. There has been no joinder of the condemned man, and no undertaking was given by the Attorney-General, as in that case.In so far as granting access to the prisoner is concerned, we are of the view that there was nothing before Leburu J to justify that, nor has anything been placed before this court in that regard. In terms of s 117 of the Prison's Act (Cap21:03):'117. (1) No person other than the Minister, a prison officer, the medical officer or other medical practitioner in his place, a minister of religion or other person authorized by the Commissioner shall have access to a prisoner under sentence of death:Provided that such prisoner may, subject to any reasonable conditions the Commissioner may impose, be visited by his legal advisers and such of his relatives and friends as he may express the wish to see.(2) Any prisoner under sentence of death aggrieved by any decision of or condition imposed by the Commissioner under this section may appeal to the Minister, whose decision shall be final.'It is not for this court to intervene in the operations of the Commissioner of Prisons or his officers in the absence of any action or decision by them which is shown or alleged to be unlawful. There is no allegation that either of the appellants has been approached by the condemned man or his relatives to visit him, nor that they have applied to do so and have been refused, nor that theCommissioner or the Minister has been engaged in terms of the Act. There is no basis for the court to order the access they request.In the absence of any joinder, and of any substantive proceedings existing independently of the appellants, there is also no basis for the recognition by this court of either of the appellants as a friend of the court and nor was any such basis shown before Leburu J. Either of them could have applied to the court,when it sat on appeal, for leave to file a pro amico brief and to present their arguments, if these satisfied the test of usefulness, but they failed to do so. Their alternative prayer has no merit.In the circumstances, their appeal against the refusal by Leburu J to recognise their locus standi also fails.Since none of the grounds raised has been successful, the appeal as a wholemust fail.There has been no prayer from the respondents for costs.Accordingly:The appeal is dismissed.McNally, Foxcroft and Legwaila JJA and Rannowane AJA concurred.Appeal dismissed.2012 (1) BLR p726