



Some Challenges in the Reintegration of Ex-offenders for Appointment as Directors in Botswana

John Mukuna^{1*}

¹Botswana Accountancy College, P/Bag 00319, Gaborone, Botswana.

Author's contribution

The sole author designed, analysed, interpreted and prepared the manuscript.

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ABSTRACT

The aim of this paper is to interrogate key legal perspectives of reintegration of ex-offenders into society with specific reference to their appointment as directors of private enterprises in Botswana. The paper contends that re-integration of ex-offenders is a continuation of their rehabilitation that should start during their incarceration. The paper argues that the Companies Act Chapter 42:01, the principal statutory law governing private enterprises in Botswana, generally fetters the rehabilitation and reintegration of offenders by placing unlimited discretion on the courts in the determination of whether ex-offenders should become directors of companies. Such wide and unrestrained powers of the courts may violate the right of ex-offenders to employment and managing their businesses. The paper adopts a qualitative research design with interpretivist paradigm because of the critical and hermeneutical approach when one is interpreting and analyzing diverse legal instruments. The International Covenant on Civil and Political Rights is considered so as appropriately locate the current discourse. With a view to assessing the magnitude of the treatment of ex-offenders in the private sector for director positions, the paper examines the law on the qualifications for appointment as a director in selected public sector boards. The finding is that whereas the Companies Act Chapter 42:01 leaves the fate of an ex-offender in the hands of the judiciary, that is not the case in the appointment of directors in State-Owned Enterprises (SOEs) that are established by legislation. The paper therefore recommends legal reform for the Companies Act Chapter 42:01 to adopt an approach that clearly re-integrates ex-offenders without any court process. For a proper

*Corresponding author: E-mail: johnm@bac.ac.bw;

appreciation of the approach found in the Companies Act Chapter 42:01, the paper examines South Africa's Companies Act 71 of 2008. The paper finds that there is need for legal reform in Botswana so that the fate of ex-offenders regarding managing their own companies and serving in other companies is not left to the courts without any statutory safeguards.

Keywords: Ex-offenders; rehabilitation; re-integration; human rights; legislation; recidivism.

1. INTRODUCTION

Upon release from prison, ex-offenders or persons who were found guilty by a court, come across many challenges in their effort to be integrated back into society [1]. This paper examines one of the main legal challenges faced by ex-offenders who intend to occupy fiduciary positions in Botswana's commercial sector. The legal challenges are not only found in a developing country like Botswana. Rehabilitation of ex-offenders which includes their reintegration is a process that goes beyond measures put in place by prison authorities during the confinement of an individual for wrong doing [1]. In addition, it is important to view the subject of reintegration of the ex-offender from a human rights perspective. When reintegration of an offender is anchored on human rights as argued in this paper, the right of the public to their own safety is not threatened but may in fact be reduced [2]. The human rights approach for reintegration of offenders. The Quaker Council for European Affairs has observed that reintegrating ex-offenders into society shows respect of the human rights and dignity of the ex-offender [3].

This paper submits that there is need for a comprehensive legal and policy awakening on reintegration of offenders in Botswana by not unreasonably restricting the ex-offenders from appointment as fiduciaries of State and private enterprises. The State has the obligation of embracing the reintegration of ex-offenders [4]. The initiative for reintegration of the ex-offender by the State is a human right of the ex-offender and the State has an obligation to put in place legislative and policy reform for the re-integration of the ex-offenders into society. By so doing, the State would be mitigating the possibility of recidivism [5]. Any legal barrier for the re-integration of ex-offenders into society is a continuation of punitive rationale of imprisonment, a perspective that is losing currency [5].

This paper focuses on the rationale of the reintegration of ex-offenders with specific focus on the legal framework in Botswana in relation to qualification for appointment as a director. The

paper argues that past offences of an ex-offender should not unreasonably impede such an individual from occupying or be appointed as a director by placing such a right at the whims of the judiciary. The argument becomes more compelling when one considers that an ex-offender may have skills that are not easily available in a developing economy like Botswana, a shortage that has been described as a 'scourge' [6] only for a court to prevent him or her from becoming a director of a company.

The Companies Act Chapter 42:01 is the legislation that more than any other drives the private sector which includes listed and non-listed companies. In this connection, the paper finds that the Companies Act Chapter 42:01 vests the reintegration of the ex-offender in the hands of the court thereby giving the courts without stating what the courts should take into account in determining whether the ex-offender should be appointed as a director. The weaknesses of such a legal position become clear by a brief examination of South Africa's Companies Act 71 of 2008. For the purpose of this paper and in particular the Companies Act 42:01, ex-offenders include a person who has been removed from an office of trust because of misconduct. The reason is that such persons require to be reintegrated into society in the same way a person found guilty of an offence requires reintegration. In demonstrating the shortcomings of the Companies Act Chapter 42:01 in connection with its position regarding ex-offenders, the paper makes reference to the disqualification for appointment to the board or management committee of a public entity. It is ironical that in the management of public entities, the State does not leave to the courts the reintegration of the offenders. Legislation is clear on the post-conviction duration to be taken into account before the ex-offender is appointed as a director.

2. METHODOLOGY

The paper adopts a qualitative research design. Qualitative design is anchored on 'inductive theorizing' which because of the arguments and debates involved can fashion a new direction of a

particular discourse [7]. Under the wider qualitative or research design, the paper adopts an interpretivism paradigm. Interpretivism has been expressed as 'post-positivism' paradigm [8]. Interpretivism is a suitable paradigm for the legal-socio enquiry in the paper because it encompasses critical theory and hermeneutics which is 'the art of interpretation' [9]. Hermeneutics approach shall enable the interpretation of the selected legal instruments in Botswana with more emphasis on the Companies Act, Chapter 42:01. To appreciate the approach of the treatment accorded to ex-offenders by Companies Act Chapter 42:01, seven SOEs governing state enterprises are purposively selected out of about twenty-five SOEs. This represents about twenty-eight percent (28%) of the SOEs in Botswana. The selection is based on the significance and role of the seven SOEs to the State and the economy as a whole. The aim is to compare the perspective on ex-offenders as regards appointment to the boards of such entities. In the textual analysis of the Companies Act Chapter 42:01, a comparative perspective of the position in South Africa is made.

By embracing an external methodology in which the subject of rehabilitation of ex-offenders is seen beyond Botswana, the approach contributes directly to the globalization and internalization of legal research and practice [10], a position that is different, and a shift, from the traditional method of legal internal or inward-looking analysis to legal research [11]. The inward-looking approach essentially dwells on textual analysis of legal material. Much as the approach is central to legal research, it cannot be a vehicle for a pragmatic approach to legal research in particular its internalization. The need for a different approach to interpretation of legal text becomes more compelling in a multi-disciplinary enquiry as in this paper, that encompasses legislative law and literature on sociological concepts of rehabilitation and recidivism.

3. RESULTS

3.1 Reintegration of Ex-Offenders: An Overview

The punishment or retribution of the offender has for a long time been the anchor of the criminal justice system [5]. Retribution is based on the right of the public to be protected from offenders when the justice system punishes the offender

[12]. However, rehabilitation of the offender in the course of serving sentence and post-release is now a principal consideration in many countries [5]. Indeed, the international position is that the penitentiary arrangement must be aimed at not only reforming offenders but also their social rehabilitation [13].

The case for the rehabilitation of ex-offenders is that it contributes significantly to the re-integration of the ex-offender into society and is also part of protection of the community [12]. One possible consequence of failure to take appropriate strategies for the re-integration of the ex-offender is that it mitigates against recidivism, the going back to criminal conduct by the ex-offender [12]. Recidivism is a threat to the safety of the community and it increases the costs of dealing with the new offences [14]. In addition, the existence of appropriate measures for reintegration of ex-offenders is that reintegration plays a significant role in reducing discrimination and ostracism of the ex-offenders and therefore upholding the human right of the ex-offender.

In an attempt to reintegrate ex-offenders into society, some countries like South Africa have passed appropriate legislation to respond to that need which, as seen above, is a human right. South Africa has enacted the Correctional Services Act 111 of 1998. One of the main aims of that Act as contained in the preamble of the Act is the establishment of a system of community correction of the offender. Under section 41(1), the Department of Correctional Services "must provide or give access to as full a range of programmes and activities as is practicable to meet the educational and training needs of sentenced prisoners." It is instructive to note that in South Africa, the term 'correctional services' is used in reference to the institution that is in charge of offenders serving custodial sentences.

The main objective of the Botswana Prisons Service is "to provide safe custodial care and correction to offenders through effective rehabilitation and reintegration programmes for the protection of society" [15]. With such a clear statement, one would expect that the same spirit of the State for the rehabilitation and reintegration of the offender into society would not be unreasonably and irrationally curtailed by the same State by way of legislation. Focusing on the safe custody and security of the offender has not produced the desired result and was not a deterrent to recidivism [5]. It is in this spirit that

the treatment of ex-offenders for appointment as directors of State enterprises is examined.

3.2 Ex-offenders Appointment to Boards of State-owned Enterprises

This part of the paper examines the treatment of ex-offenders in the appointment. From the outset, it should be stated that ex-offenders are treated with some dignity in the appointment of directors of State-Owned Enterprises (SOEs). The purposively sampled SOEs under consideration are those established by legislation. Their selection is based on their relatively significant role they play in the economy. These are about twenty-five entities [16]. In Botswana, there are some SOEs that are established under the Companies Act Chapter 42:01. Such SOEs are companies limited by guarantee established under Part II of the Act. For this reason, the treatment of ex-offenders for appointment as directors for those entities falls under the next part of the paper that examines the qualifications for appointment of directors for entities incorporated under the Companies Act Chapter 42:01.

The SOEs established by legislation that are considered in this section of the paper with the aim of determining the ease and extent of the SOEs implied reintegration of offenders are Botswana Power Corporation (BPC); Water Utilities Corporation (WUC); Botswana Unified Revenue Service (BURS); Botswana Tourism Organization (BTO); Botswana National Productivity Centre (BNPC); Companies and Intellectual Property Authority (CIPA) and the Non-Bank Financial Institutions Authority (NBFIRA). The Act of Parliament that establishes each of these SOEs also states the objectives of the entity. Most importantly, the legislation provides for qualifications for the appointment of members of the management board.

BPC is established by Botswana Power Corporation Act Chapter 74:01. Section 4(3) of the Act provides for disqualification from appointment as a member of the corporation. The members of the corporation are its governing body and are appointed by the Minister under section 4(3). Section 4(3) provides for disqualification of a person from appointment as a member of BPC. The section does not provide for disqualification on the basis of previous convictions or sentences. The only section relevant to offenders is section 5(f) which provides that a member of the corporation may

be removed from office if a member is sentenced to imprisonment without the option of a fine or is convicted of an offence involving dishonesty. The WUC is established by the WUC Act Chapter 74:02. As regards offenders, the WUC Act adopts the same position as the BPC Act which is not necessary to replicate here. It is therefore evident that these two key SOEs in Botswana have unambiguously vested the appointing authority with the power and discretion to appoint an ex-offender to the governing body.

The BURS is the nation's 'tax man'. The entity is formed by the BURS Act Chapter 53:03. Regarding the appointment of ex-offenders to its governing board established under section 6, section 10(b) of the Act states that a person is disqualified from appointment to the board if within ten (10) years preceding the date of appointment, the person has not been convicted of a criminal offence in any country with a penalty of a minimum of six (6) months imprisonment without the option of a fine. Therefore, the BURS Act does not give a blanket prohibition against the appointment of an ex-offender to the board of directors. In addition, and most importantly, if the ex-offender was given the option of a fine within the period mentioned, then he or she is not barred from becoming a member of the board.

This position in the BURS Act is similar to the appointment of the membership committee of the BTO under section 8(b) of the Botswana Tourism Organization Act Chapter 42:09. That Act establishes the BTO. The same approach is adopted by section 12(b) of the Companies and Intellectual Property Authority Act Chapter 42:13, the Act that creates CIPA. Section 8(2)(b) of the Non-Bank Financial Institutions Authority Act is on similar terms. The Act establishes NBFIRA. Section 4(5) of the Botswana National Productivity Centre Act Chapter 47:05 prohibits a person who has been convicted of any offence involving dishonesty or fraud from being appointed a member of the BNPC board of directors. It is interesting to note that the other ex-offenders whatever the offence, may be appointed to the board. It is evident from the analysis of the sampled SOEs that to a certain extent, they do not holistically prohibit the appointment of ex-offenders to the board of directors or committee of members. Most importantly, none of the Acts discussed above leaves the decision on the appointment of a director to the courts. The Acts are clear on the post-conviction duration for an individual to be appointed as a director. It is in this context that

the Companies Act Chapter 42:01 is interrogated.

3.3 Ex-Offenders and the Appointment of Directors under the Companies Act

Qualification for appointment as a director of a company formed under the Companies Act Chapter 42:01 ('the Act') is found in section 146 of the Act. Every person or persons who intend to form an entity that is separate from its owners or members can only do so under this Act. The State can also form an entity under this Act as an alternative to a separate legislation that would establish the entity as discussed in part four above. In so far as section 146 of the Act is concerned, what is relevant to this paper is section 146(2)(c)-(e).

Under section 146(2)(c), a person is disqualified from being appointed or holding office as a director of a company if the person is prohibited by sections 500 and 501 of the Act. Section 500 states that a person convicted of certain offences cannot be appointed to manage a company within five years of the conviction or judgment without the leave of the court. Offences include those committed during the promotion, formation of a company, insider trading and other offences covered in other sections for instance stock market manipulation. Section 501 is not relevant to the thesis of this paper because it covers situations in which a court may disqualify an existing director from continuing to hold the office or position of director.

Section 146(2)(d) provides that a person convicted of theft, fraud forgery and acts of dishonesty for which the person was imprisoned without the option of a fine or a fine exceeding Botswana Pula Five Thousand (P5,000) is disqualified from appointment for the office or position of a director without the leave of court. Section 146(2)(e) states that a person removed by a competent court from an office of trust on account of misconduct is disqualified from appointment as a director only with the leave of the court. What is clear from the perspective of restrictions for the appointment of ex-offenders as directors under the Act is that the Act leaves their fate to judges to determine whether they qualify for appointment as directors. As argued above, this position is diametrically different from that adopted by specific laws that establish SOEs.

The approach of the Companies Act Chapter 42:01 to vest the courts with discretion to

determine whether an ex-offender can be appointed as a director can be contrasted with the position in neighboring South Africa. In that country, restrictions against the appointment of ex-offenders is not left to the discretion of the courts, a perspective or principle that is similar to that adopted by laws that establish SOEs in Botswana. It is therefore trite to examine the Companies Act 71 of 2008 because it is a statute that is in *pari materia* with Companies Act 42:01 of Botswana.

Section 68(8) of the Companies Act 71 of 2008 gives the court power to disqualify an individual from appointment as a director for various reasons. Disqualified persons include those that have been convicted of theft, perjury, fraud, misrepresentation and dishonesty among other offences and have been imprisoned without the option of a fine. The fundamental difference between the two Acts is found in sections 69(9)(a) and 69(12) of the South African law. Section 69(9)(a) subjects the power of the court to disqualify an ex-offender from being appointed as a director by laying down clear timelines for the disqualification. That section states that the disqualification of ex-offenders expires after five years of the sentence imposed for the relevant offence or as may be extended by the court on application of the Companies and Intellectual property Commission.

Section 69(12) has an approach on disqualification of ex-offenders from director positions that is not found in the Botswana legislation. That section provides that despite the disqualification of an individual from becoming a director, the individual will nevertheless become a director of a private company in which he or she holds all the shares, or the shares are held by the disqualified person and a person related to that person provided the relative has consented to the appointment of the disqualified person as a director. That is a huge departure from the Botswana legislation. The Botswana Act provides for grounds for disqualification from appointment of ex-offenders irrespective of the type of company. It is instructive to note that many SOEs in South Africa are established under the Companies Act 71 of 2008. An example is South African Airways Ltd. [17]. In this regard, the appointment of directors of such entities is made according to that legislation which does not unreasonably deny ex-offenders the right of reintegration.

The distinction in the two laws is that whereas any ex-offender may incorporate and manage his

or her own company in South Africa without any restrictions, the same is not the case in Botswana for reasons advanced earlier. It is possible for a court in Botswana to deny the ex-offender leave or permission to become a director whether the shares are exclusively held by the ex-offender or with someone else. This approach is inconsistent with Pillar 2 of Vision 2036 of Botswana [18]. That Pillar provides for tolerance, inclusivity and opportunities for all by 2036.

4. DISCUSSION

The paper has found that reintegration of ex-offenders is a human right recognized under international law. An analysis of laws establishing SOEs in Botswana has established that ex-offenders are given specific time frames post-conviction, albeit lengthy, for them to qualify for appointment as members of the board of directors or management committees of SOEs. More encouraging are the laws in some SOEs that do not restrict the appointment of ex-offenders into the board. Clear 'cooling off' periods for ex-offenders creates an unambiguous criterion for them to join SOEs boards. Consequently, this approach contributes to the reintegrated of ex-offenders into society and therefore to the enjoyment of their human rights. However, the Companies Act Chapter 42:01 relegates the reintegration of the ex-offender to the discretion of the court. Referring the appointment of ex-offenders to the board of directors exclusively to the courts makes the process unpredictable, arbitrary and vague because it gives the courts absolute discretion. In South Africa, the law is certain on the post-conviction waiting period for an offender to qualify for appointment as a director.

5. CONCLUSIONS AND RECOMMENDATIONS

For ex-offenders in Botswana to enjoy the human right of reintegration into society by making it possible for them to be meaningfully considered for appointment as directors of SOEs and private companies, reforming the relevant law is imperative. Firstly, statutes governing SOEs that provide for the lengthy ten-year post-conviction period for the ex-offender to qualify for appointment to the board of directors should be amended to reduce this period.

The South African experience of five years post-conviction period is more appropriate and a

better recognition of the need for not unreasonably restricting the enjoyment of the right of reintegration of ex-offenders. Secondly, there is urgent need for reforming the Companies Act Chapter 42:01. The reform should remove the discretion vested in the courts by clearly stating the post-conviction period necessary for the ex-offender to qualify for appointment as a director of his or her own company or any other company in the private sector. These reforms would be an indelible mark in the country's endeavor of ensuring the restoration of the dignity and the human right of reintegration of ex-offenders through which they will make a contribution to society and the economy.

COMPETING INTERESTS

Author has declared that no competing interests exist.

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