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Ombudsman’s Report into Alleged Irregularities

by
Mr Lethebe Maine
Parliamentary Ombudsman for Botswana
REPORT INTO ALLEGED IRREGULARITIES

WITH REGARD TO:

a) Public Officers Accompanying His Honour the Vice President Lt.Gen. Seretse Khama Ian Khama on Party Political Activities; and

b) His Honour the Vice President Flying Botswana Defence Force Aircraft

On the 13th September 1999 this Office received a written complaint from the Botswana Congress Party (BCP), one of this Country's registered political parties. For the sake of convenience the complaint is set out in full:
OMBUDSMAN

REPUBLIC OF BOTSWANA

REPORT IN TERMS OF SECTION 8(1)
OF THE OMBUDSMAN ACT
OF 1995

REPORT INTO THE ALLEGED IRREGULARITIES WITH REGARD TO:

A) PUBLIC OFFICER ACCOMPANYING HIS HONOUR THE VICE PRESIDENT LT. GEN. SERETSE KHAMARAN KHAMA ON POLITICAL PARTY ACTIVITIES; AND

B) HIS HONOUR THE VICE PRESIDENT FLYING BOTSWANA DEFENCE FORCE AIRCRAFT.

DATED: 4TH APRIL 2001
The Ombudsman  
Mr. Maine  
Gaborone  

Dear Sir,  

Re: Abuse of Office - the Vice President  
Ian Khama  

“We write with respect to the above matter.  

On Friday the 10th of September, the Mmegi newspaper carried a lead story entitled ‘Khama invades Nkange’. The essence of the story was that the Vice President, Ian Khama had ordered or was accompanied by civil servants when he went to Nkange constituency to address the BDP political rallies. Among the top civil servants who accompanied Khama on the campaign trail was the District Commissioner for Central District, Mr. Nono Macheke; Bamangwato Tribal Regent, Sediegeng Kgamane was also present to land (sic) support to the BDP.

It is common cause that such a trip was made possible by public funds. It is also common cause that both the District commissioner and Bamangwato regent, Sediegeng Kgamane are civil servants whose salaries are paid by all of us (the public) and not the BDP. It follows in our view that the conduct by the Vice President constitutes abuse of office.

It is our understanding that in terms of the Ombudsman Act, you are empowered to investigate among other things abuse of office and/or mal-administration. We cannot imagine an abuse of office worse than this case. Accordingly, we request you to investigate with immediate effect this abuse of office and advise us accordingly.

We look forward to co-operating with you as you discharge this very important national responsibility.

Yours faithfully,

Michael Kitso Dingake  
BCP President  

cc. Office of the President  
Chairman of IEC"
The reasons why the complaint was copied to the Office of the President and the Independent Electoral Commission are not provided.

The complaint was preceded by similar concerns in the media in the form of both editorial write ups and ordinary captions. By way of example, Mmegi the Reporter of the 10th-16th September carried the headline "Khama invades Nkange" and therein stated the following:

"In what was termed a political 'raid of Nkange constituency' by opposition party members, central, local government and tribal administration officers formed part of a BDP contingent which accompanied Khama to witness the launching of BDP candidates in the constituency. The Vice President arrived in style as he flew into Nkange in a Botswana Defence Force Helicopter with him at the controls." (my underlining)

1. THE BOTSWANA CONGRESS PARTY COMPLAINT

Central to BCP's complaint is the propriety or otherwise of his Honour the Vice President being accompanied by public officers, at party political meetings as opposed to when he is on official business in his capacity as the Vice President of the Republic of Botswana. There can be no doubt that in the latter capacity His Honour the Vice President is entitled as a matter of protocol to be accompanied by such public officers as may be necessary for the occasion and in the interest of their security and that the state, to be accompanied security personnel be it members of the Botswana Police or of the Botswana Defence Force. This position was confirmed as correct by the Permanent Secretary to the President, Mr. Molosiwa Selepeng, the former Permanent Secretary to the President His lordship Eijah Legwaila Judge President of the Industrial Court and the Commander of the Botswana Defence Force Lt. General Matshwenyego Fisher. Such security is and must be on a 24-hour basis. It is not for the Ombudsman to investigate and make comments on matters of state security for the reason that section 4 sub-section (b) specifically precludes this matter from our jurisdiction. The provision reads as follows:

"The Ombudsman shall not investigate any action or action taken in respect of the following-

action taken for the purposes of protecting the security of the state or of investigating crime, including action taken with respect to passports for either of those purposes".

2. JURISDICTION

Section 3(1) of the Ombudsman Act of 1995 provides as follows:
Subject to the provisions of this section the Ombudsman may investigate any action taken by or on behalf of government department or other authority to which this Act applies,, being action taken in the exercise of administrative functions of that Department or ministry, in any case where:

a) a complaint is made to the Ombudsman by a member of the public who claims to have sustained injustice in consequence of mal-administration in connection with the action so taken;

b) the complaint is referred to the Ombudsman, with the consent of the person who made it, by the President, a minister or any member of the National Assembly with a request to conduct an investigation thereon; and

c) in any other circumstances in which the Ombudsman on his own motion considers it necessary to investigate the action on the ground that some person has or may have sustained such injustice.

Section 3(4) of the some statute further provides as follows:

"In determining whether to initiate, continue or discontinue an investigation under this Act, the Ombudsman shall, subject to the preceding provisions of this section, act in accordance with his own discretion and any question of whether a complaint is duly made under this Act shall be determined by the Ombudsman."

At the time of the referral of the specific complaint by the Botswana Congress Party, my mind and that of my staff was exercised considerably as to:

1) whether a political party was a member of the public as contemplated by Section 3(1) (a) supra; and

2) Whether it could be found to have sustained injustice in consequence of mal-administration as envisaged by the same section.

I have considered the matter carefully and come to the conclusion that only a restrictive interpretation could lead to the absurdity that I have no jurisdiction. It would lead to absurdity and ridicule to suggest that whenever mal-administration, unfairness, injustice or abuse of office occurs the Office of the Ombudsman would have no jurisdiction to investigate simply because the complaint was lodged by a political party, as opposed to a member of the public. It is common cause that political parties represent constituents or a given number of people and to that extent are representatives of the public. The, rules of justice and fair play in administrative law should be interpreted liberally and I have done so. The Act fortifies the position I have taken by giving the Ombudsman the discretion as alluded to supra. There could be no
merit in any submission to the contrary and I have therefore relegated this concern as being entirely without merit. I have thus come to the conclusion that not only does the Botswana Congress Party have the right to complain in terms of the Ombudsman Act, the Ombudsman has jurisdiction to deal with the matter and that where abuse of office (mal-administration) is established I am obliged to make appropriate recommendations for redress.

The second complainant is what in Ombudsman parlance is known as OWN MOTION INVESTIGATION, which is sanctioned by Section 3(1) (c) of the Ombudsman Act. Simply put, is that we do not necessarily have to wait for a complaint from any person. Where a matter is of sufficient public interest and concern and questions arise whether a government department or other authority has acted mal-administratively, the Ombudsman has authority to investigate. That the matter of His Honour the Vice President flying the BDF aircraft was a matter of public concern at the time is demonstrated by various editorials and write-ups in the national media. That the Botswana Defence Force is a governmental authority there can be no doubt. On that basis I determined that this Institution has jurisdiction to determine the appropriateness or otherwise of His Honour the Vice President flying Botswana Defence Force's aircraft even as he is no longer a member of the Force. The exercise certainly arises out of administrative action or omission on the part of some person or authority as envisaged by Section 3(1) of the Ombudsman Act.

I have already stated that on the question of security personnel accompanying His Honour the Vice President at all times, it is impermissible on our part to exercise jurisdiction and so the matter rests. It is however the propriety or otherwise of other public officers such as District Commissioners and Chiefs accompanying the Vice President on strictly party political activities, that needs to be examined.

The Public Service Act CAP 20:01 and the Regulations there under are silent on this matter. However General Order number 38 provides inter alia as follows:

- Officers may vote at an election if they are eligible to vote, and may attend but not speak at political meetings.

No officer may:

- Publicly speak or demonstrate for or against any politician or political party;
- be an active member nor hold off ice in any political party or association;
- speak in public or any political matter, except in the course of his official duties;
- publish his views on political matters in writing;
• take an active part in support of any candidate in an election;

• do anything by word or deed which is calculated to further the interests of any political party or association;

My investigations have established that the following are common cause:

1. That the Nkange meeting was a Bots wana Democratic Party (BDP) political meeting;

2. That both the District Commissioner Mr. Nono Macheke and the Acting Regent Kgosi Sediegeng Kgamane attended same.

There is no evidence however that His Honour the Vice President ordered them to accompany him as suggested by the Botswana Congress Party in their letter of complaint, nor that they lent support to the Botswana Democratic Party for that matter.

The Permanent Secretary to the President Mr. Molosiwa Selepeng was interviewed on the specific matter of the two public officers and others accompanying the Vice President on what was admittedly a party political meeting. His view was that this tends to support the perception that by deed the two were furthering the interests of the Botswana Democratic Party which is in essence what the Botswana Congress Party are complaining about. The Permanent Secretary's views are that the two public officers and all other public officers other than security personnel should limit their role to receiving dignitaries at their point of arrival and bidding them farewell at their point of departure whenever they are on party political missions.

I agree with this view. More often than not it is perceptions more then fact that lends credence to conclusions particularly wrong conclusions for that matter. Both the District Commissioner Mr. Macheke and Kgosi Sediegeng may be neutral persons politically, but the perception created at least from the Botswana Congress Party's view is that they were actively supportive of Botswana Democratic Party. I am making no conclusion either way. Circumstances that lead to such perceptions should however as far as it is reasonably practical be avoided. I have on the basis of the above come to the conclusion that the Botswana Congress Party's complaint is sustainable on the basis that the presence of public officers with the Vice President on party political meetings is not only against the spirit of General Order 38 but gives the perception that such public officers are furthering the interests of such political party. For these reasons, I recommend that:

• His Excellency the President directs the Permanent Secretary to the President or the Director of Public Service Management to issue a new
directive to all public officers in the light of these concerns and the conclusions I have reached sustaining the BCP's complaint.

It would be condescending and improper in my view to suggest the form that such a directive should take.

3. BOTSWANA DEFENCE FORCE AIRCRAFT OWN MOTION INVESTIGATION

The evidence of Lt. Gen. Fisher the Commander of the Army, Deputy Commander Major Gen. Masire and the Deputy Chief of Staff Major - Gen. Oitsile offers considerable assistance in this regard.

The interview with the Commander took place on the 23rd of October 2000, three days after interviewing the Deputy Commander and the Major General. The Commander stated that after Lt. General Khame was appointed Vice President the latter informed him that he was authorised by His Excellency The President to continue flying BDF Aircraft as he did when he was in the Force. Lt. General Fisher accepted the Vice President's word and did not deem it necessary to verify this information with His Excellency. The Commander's concerns were that:

- The Vice President was no longer a member of the Force.,

- He could no longer be authorised nor disciplined in the event of contravening the relevant provisions of the Botswana Defence Act as regards offences relating to property.

- His Honour the Vice President could no longer be called upon by the Commander to answer any disciplinary hearing in the event that Army property was used in contravention of the BDF Act, the regulations there under or and other standing orders that the Commander may legitimately publish for observation by officers from time to time.

These are legitimate concerns in my view particularly in so far as they relate to a contravention of the Botswana Defence Force Act. Both the Deputy Commander and the Deputy Chief of Staff materially confirmed these concerns, with the former for the most part providing the answers. The former confirmed that His Honour the Vice President had told him in 1998 that one of his conditions for leaving the BDF was that he would be allowed to fly BDF aircraft. Major General Masire had similar concerns as the Commander and decided to approach the latter. The Commander gave him the same explanation as had purportedly been given by His Honour the Vice President, namely that His Excellency had authorised him to continue to fly BDF aircraft after leaving the Botswana Defence Force to assume a political office.

On or about the 8th of March 2001 I had a lengthy interview with His Honour the Vice President particularly in light of the concerns raised by his former deputies in the Army. To his-credit His Honour the Vice President considered the concerns raised by his three former deputies and certainly was unable to
suggest that these were without merit. He also confirmed that he was given permission by His Excellency the President to continue flying their aircraft even as he was no longer in the Army. I saw no reason to belabour His Excellency the President on the issue for I believed the Vice President. The latter's former deputies had in any case confirmed his version.

Although the Army Command did not say so, their concerns in essence arise out of the provisions of section 49 of the Botswana Defence Force Act CAP: 21:05 which provides inter alia as follows:

"Any person subject to this Act (my underlining) who -

a) loses, or by negligence damages any public or service property which has been entrusted to his care, or which forms part of the property of which he has the charge or which has been entrusted to his care;

b) is guilty of any act or neglect likely to cause damage or loss of any public or service property;

c) by negligence causes damage by fire to any public or service property;

shall on conviction by Court Marshall or the High Court be liable to imprisonment for two years or any less punishment provided by this act"

Section 2 of the same Act defines service as follows - "when used adjectively, means belonging to or connected with the Defence Force or any part of the Defence or any force cooperating therewith".

By definition Botswana Defence Force aircraft belong to the Force and are therefore service property. That His Honour the Vice President is no longer subject to this Act there can be no doubt, given that he has since assumed political office. To suggest that he could be subjected to the provisions of Section 49 cannot be sustained. I have therefore come to the conclusion that the concerns of the Army Command are legitimate and that they quite properly raised these matters with His Honour the Vice President. In fact it is not so much a question of whether His Honour the Vice President was authorised by His Excellency the President but whether there is due compliance with the Botswana Defence Force Act, and specifically whether the Act allows persons outside the BDF to Use service property. Whether His Excellency has or has not authorised His Honour the Vice President will not legitimise the position. My conclusion is that only persons subject to the Act can properly be authorised to use service property.

For these reasons I recommend that:

- His Excellency the President brings to the attention of His Honour the Vice President the inadvisability of personally flying Botswana Defence Force Aircraft in the light of the provisions of Botswana Defence Force Act CAP: 21:05.
This recommendation is made in terms of Section 8 (1) of the Ombudsman Act, which provides as follows:

1) After conducting and investigation under this Act, the Ombudsman shall send a report of the results of the investigation to the principal officer of the department or authority concerned and if he is of opinion that injustice has been caused to the person aggrieved in consequence of mal-administration, he shall make such recommendations as he thinks fit for remedying the injustice caused.

2) Where the Ombudsman has made a recommendation under subsection (1) and within a reasonable time thereafter no action has been taken which appears to him adequately to remedy the injustice, he may lay before the National Assembly a special report.

During the course of these lengthy investigations I received a letter from the Executive Secretary of the Botswana Congress Party, soliciting from me or my office a donation towards their legal fund challenging His Excellency the President for purportedly granting His Honour the Vice President sabbatical leave. I did not oblige! This was a most inappropriate gesture on the part of the Botswana Congress Party. I sincerely hope that such conduct will not be repeated in the future since this could readily be interpreted as an attempt to influence this office in the determination of a complaint contrary to Section 14 sub-section (d) of Ombudsman Act. The Office of the Ombudsman is a quasi-judicial body, derives its dignity from impartiality and non-partisanship on political matters. For us to make donations to political parties would certainly be disastrous.

Finally, I want to emphasise that investigations into these matters were a collaborative exercise for which I thank my Chief Administrator, Ofentse Lepodise, and the two senior investigators Matshidiso Bokole and Mpho Ngwato. I nevertheless take full responsibility for writing the report and conclusions therein.

I also apologise to those concerned for the time it has taken to complete this matter; this is both a result of the complexity of the matters therein raised and our involvement in other matters some of similar complexity.