

**2nd Southern African Disability Rights Moot Court Competition**

**3 – 5 November 2014**

**University of the Pretoria, South Africa**

**Hypothetical Case**

**Association of Persons with Intellectual Disabilities (APWID)**

**v**

**The State of Botsa**

1. Botsa is a developing country on the African continent with a population of 10.2 million people according to the 2010 population census. It covers over 300,000 square kilometers of land and is divided into four provinces namely: the Western Province, the Eastern Province, the Southern Province and the Northern Province. There are three main ethnic groups which are spread across the country: The Kukukis, who are predominantly in the West, the Abhayis, who are dominating the North and the Godzas who are found down South. These three ethnic groups live peacefully together.
2. Botsa is a member of the United Nations and the African Union. It has signed and ratified the UN Charter, the African Charter on Human and Peoples' Rights (African Charter), the UN Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (African Children's Charter), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the International Covenant on Economic Social Cultural Rights (ICESCR) and the International Covenant on Civil Political Rights (ICCPR). In 2013, Botsa signed the UN Convention on the Rights of Persons with Disabilities (CRPD) but is yet to ratify it. Botsa is not a state party to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights. Botsa gained its independence from Lemar in 1964 and only in 1991 adopted a new constitution, the 1991 Constitution. Chapter III of the 1991 Constitution contains a Bill of Rights which, amongst other rights, provides for the rights to health, education, prohibition of discrimination and the right of all persons to vote. The same Constitution also designates the High Court as the court of first instance in

matters relating to the enforcement of fundamental human rights. While persons and organisations are allowed to represent victims of abuse in court, they are procedurally required to produce a letter of authorisation from the victim(s) before their case can be heard. Appeals are allowed to be made to the Court of Appeal which is the highest court of the land. The age of majority under the Constitution is 18.

3. According to the figures released by the Bureau of Statistics, 60% of Botsa's population consists of youth below the age of 25. The same document revealed that there are, around 500 000 persons living with disabilities.
4. Botsa is a struggling economy whose main source of national income is diamonds. However, there is hope on the horizon. According to a 2013 World Bank report, Botsa's diamonds are one of the finest in the world and if properly managed, have the potential of catapulting the country into the league of developed nations by the year 2035. On this issue, the Godza people consistently comment that the State should note that the diamonds are predominantly located in the Southern Province.
5. Adu is an 18 year-old orphan. She lost her parents in a car accident at the age of 13. Since then the State took responsibility for her upkeep by placing her in a foster home for juveniles called 'Haven for the Young.' Due to the harrowing experience of losing her parents, she has developed a quick temper which can result in her hurting others, although there has been no occurrence of such an incident.
6. Adu is intellectually disabled as she suffers from fetal alcohol syndrome. This led her parents, prior to their death, to home school her despite their inexperience. They preferred home schooling as they believed the existing educational system did not cater for 'children like Adu'. Even though there were a few special needs schools for disabled learners in Botsa, most of them were lacking in personnel and resources. Furthermore, the government's efforts to address the needs of disabled learners have prioritised funding for making buildings accessible to physically disabled persons. At the foster home, Adu's nutritional needs were met, but she was not being taught because there were no personnel at the home with training in educating disabled learners. Most times, Adu was secluded from the rest of the children.

7. Every year, as part of government's investment in education, 100 scholarships are awarded to students using the criteria of economic background and academic merit. The scholarships are awarded using a donor funding provided to the government as part of its budget for education. Annual reports are provided to the relevant donors. Of the 100 scholarships 5 are reserved for persons with disabilities. On average, the government annually receives around 10 000 applications in total, with about 150 applications from people living with disabilities. Over time, it has been discovered that the Godza ethnic group has been the main recipient of the reserved scholarships. Even though there is no government explanation for this trend, some claim that it is a deliberate discriminatory practice in order to 'give back' to the region from which the nation's resources come.
8. After several years of applying, Adu eventually got selected in 2014 as a beneficiary of a full primary education scholarship. She was the 10<sup>th</sup> non Godza person with a disability and fourth female to get the scholarship in the 10-year history of the initiative.
9. Due to the delay in her education, Adu was placed in Grade 2 in a government school. This eventually became highly problematic for her because parents of other children aged 8 in her class started complaining that they could not allow an 18 year-old to be in the same class with their 8 year-olds. The school administration succumbed to the mounting pressure from the parents and a separate class was created for Adu. She was the only student in this class and the school assigned Ms Bradley to her. Before completing her teacher's training, Ms Bradley qualified as a social worker and worked eight months as a disability coordinator in a shelter for girls who had suffered sexual abuse. Through all this, Adu became more reclusive as most other kids found her unfit and did not associate with her. However, Mr Braimoh, a teacher at the school, who was displeased with the seclusion of Adu spent at least 2 hours a week sitting and discussing with Adu. Being a father of a daughter with visual impairment, Mr Braimoh could relate with the plight of Adu better than other teachers.
10. Gradually, Mr Braimoh grew really fond of Adu, assisted her to make some decisions during times when it was clear that due to Adu's disability she required support in arriving at decisions. One of such decisions was when Mr Braimoh assisted Adu to decide that she should get registered as a voter so she could participate in the 2014 elections.

11. On 3 April 2014, Mr Braimoh went to the National Electoral office with Adu to get her registered but the officers denied them registration claiming that Adu lacked the full mental capacity to make an informed decision without support about who to vote for. Mr Braimoh tried explaining to them that Adu only needed minimal support in her decision making process but all the explanations were ignored. The electoral officers referred Mr Braimoh to the country's National Electoral Act of 2009 which states in Section 7 that persons with intellectual disability do not qualify to be registered as voters. This clearly got Mr Braimoh very upset.
12. Five days later, Mr Braimoh was in a meeting with the legal team of an NGO called Association of Persons with Intellectual Disabilities (APWID). He had contacted them to report cases of discrimination against Adu, which he claimed was a reflection of how society generally treated persons with disabilities. Mr. Braimoh cited the situation at Adu's school and the electoral office as key examples. Upon assessing the facts, APWID decided to file a suit to declare a violation of Adu's constitutional rights before the High Court of Botswana: it alleged that her rights were violated because she was separated from other students and refused registration as a voter.
13. The High Court ruled that it could not hear the matter because the applicant lacked *locus standi*, particularly since they did not have a written authorization from the victim on whose behalf they were seeking an enforcement of fundamental human rights. The case was therefore dismissed.
14. The applicant lodged an appeal which they also lost and by this time they decided to change their strategy. The case was reintroduced and commenced *de novo*. This time, however, they had an authorization from Mr Braimoh but again the High Court deemed it insufficient as it held that there were no records to show that Mr Braimoh was the legally appointed guardian of Adu. The High Court refused leave to appeal this matter to the Court of Appeal.
15. Mr Braimoh consulted with the APWID legal team and, together, it was decided that APWID should take Abu's case and related matters to the African Commission on Human and Peoples' Rights (the Commission). In the light of the given facts, prepare heads of argument for the applicant and the respondent – the State of Botswana, on the following issues:

- a) Does APWID have standing to bring the case to the African Commission? Are the matters raised below admissible before the African Commission?
- b) Do Botsa's scholarship allocations violate the right to equality and are they particularly discriminatory against women and persons with disabilities?
- c) Is Adu's separation from other students in school discriminatory?
- d) Is refusing Adu to register as a voter a violation of her right to participate in the political affairs of her country?