CIV/APN/207/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

EVARISTUS RETSELISITSOE SEKHONYANA	APPLICANT
AND	
THE PRIME MINISTER OF LESOTHO (DR. NTSU MOKHEHLE)	1ST RESPONDENT
THE COMMANDER, LESOTHO DEFENCE FORCE	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu on the 25th day of September, 1995.

In this application, Applicant is asking the Court for an order in the following terms:

"1 - Declaring the Report of the Commission of Inquiry established per LEGAL NOTICE NO. 61 OF

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1994 as void, nugatory and unenforceable as a result of it not having been tabled before the National Assembly and the Senate in accordance with and within the time stipulated by SECTION 8 OF THE PUBLIC INQUIRIES ACT NO. 1 OF 1994;

2 - Declaring the formation by First Respondent and others of an entity known as "The Steering Group" and its mandate as ultra vires and unconstitutional;

3 - Directing First Respondent to cause to be disbanded the entity known as "The Steering Group" designed to make recommendations or implement the recommendations of the Commission of Inquiry established per LEGAL NOTICE NO.61 OF 1994;

4 - Declaring all past, present and future actions of the Steering Group as null and void and of no force and effect;

5 - Restraining, prohibiting and interdicting First Respondent from interfering with in any manner whatsoever with the Defence Commission and its powers and functions as provided for by the

Constitution of Lesotho and all other laws;

6 - Directing Respondents to pay the costs hereof;

7 - Further and/or alternative relief.

Alternatively to prayer 1 above,

1·1 - Directing First Respondent to comply with SECTION 8 OF THE PUBLIC INQUIRIES ACT NO. 1 OF 1994 by tabling before the National Assembly and the Senate, the Report of the Commission of Inquiry established per LEGAL NOTICE NO. 61 of 1994;

1·2 - Upon compliance with prayer 1·1 above, First Respondent be directed to lay before the Defence Commission for purposes of implementation, if need be, the recommendations of the Commission of Inquiry established in terms of LEGAL NOTICE NO. 61 OF 1994 insofar as such recommendations relate to the re-organisation, recruitment, appointments, deployment, discipline and removals within the Lesotho Defence Force."

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Applicant is chief, and a businessman and leader of the Basotho National Party.

The First Respondent is the Prime Minister of Lesotho, Dr. Ntsu Mokhehle. The Second Respondent is the Commander of the Lesotho Defence Force. The Third Respondent is the Attorney-General who is cited as representative of Government in all legal proceedings in terms of the *Government Proceedings and Contract Act* of 1965.

At the root of these proceedings *Legal Notice No.61* of 1994 in terms of which the Prime Minister (First Respondent) by powers vested in him by Section 3 of the *Public Inquiries Act No.1* of 1994 appointed a Commission of Inquiry.

This Commission of Inquiry's terms of reference were to inquire into the following:

> "(a) the events that took place during the period from November 1993 to April, 1994;
>
> (b) the role of the Lesotho Defence Force in those events;
>
> (c) what future action can be taken to prevent a repetition of those events;
>
> (d) In respect of 3(a) the Commission should –
> (i) establish and analyse the sequence of events that took place during that

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period..

(ii) examine the background to those events;

(iii) identify the persons or groups whose activities caused or contributed to those events;

(iv) examine the role of the Officer Corps of the Lesotho Defence Force in those events;

(v) identify and analyse loss to public and private property and loss of life during the relevant period;

(vi) establish and analyse the use of public or service property by the Lesotho Defence Force during the relevant period;

(e) In respect of 3(b) the Commission should –

(i) examine and evaluate the history of the creation, establishment and development of the Lesotho Defence Force;

(ii) examine the recruitment practices of the Lesotho Defence Force since its establishment;

(iii) examine and evaluate the standard of training, competence, professionalism and discipline of the Lesotho Defence Force;

(iv) examine and evaluate the role of the Officer Corps in the training, discipline and leadership of the Lesotho Defence Force;

(v) examine and appraise the demands made by some members of the Lesotho Defence Force during the relevant period;

(vi) examine and evaluate the acquisition, maintenance and control of public or service property by the Lesotho

Defence Force;

(f) In respect of 3(c) the Commission should make recommendations regarding:

(i) the future strength, composition and role of the Lesotho Defence force having regard to the present and future security needs of Lesotho and the economy and finances of Lesotho;

(ii) the redeployment of such members of the Lesotho Defence force as may be found in excess of the requirement of the Lesotho Defence Force;

(iii) whether the institution of legal proceedings against identified persons or groups whose activities caused or contributed to these events is appropriate or desirable;

(iv) the incorporation of former members of the Lesotho Liberation Army into the Lesotho Defence Force;

(v) the internal administration of the Lesotho Defence Force in order to achieve the establishment of a compact, cost-effective and modern professional army;

(vi) the position of the Lesotho Defence Force within Government with special reference to discipline and accountability."

The report of the Commission of Inquiry was submitted to the Prime Minister on the 31st January, 1995. The Prime Minister was required in terms of Section 8 of the *Public Enquiries Act* of 1994 to table the report before the two houses of Parliament within 15 days of receiving

such a report.

Applicant states that there was a delay of over thirty days before the report was brought by the Minister to the Prime Minister before the National Assembly. The report was never tabled before the Senate. Applicant submits the Prime Minister ought to have presented the report to the National Assembly personally. Because this was not done even this presentation to the House of Assembly does not amount to tabling in terms of Section 8. It is because there was no tabling or the tabling was not proper that Applicant is asking this Court for an order:-

> "Declaring the Report of the Commission of Enquiry....as void, nugatory and unenforceable..."

Before we could go into the merits, the Court had to deal with a preliminary objection from the Respondents. They were challenging the *locus standi* of Applicant to bring these proceedings. I directed that this objection be dealt with along with the merits.

Basically, the setting up of commissions of inquiry is part and parcel of the exercise of the power to govern

which His Majesty's Government exercises in the King's name. Parliament, which has the power to regulate this prerogative and has to do so in terms of the *Constitution*, the Common Law and in terms of the *Public Inquiries Act* of 1994.

Prerogative is "the residue of discretionary power left in the hands of the Crown, whether such power is exercised by the King himself or through his Ministers". See *China Navigation Co. Ltd v Attorney General* [1932]2 KB 197. Scrutton LJ dealing with matters concerning the armed forces at page 215 added:

> "Courts of law have nothing to do with such a matter. This is because the administration of the army is in the hands of the King, who unless controlled by an Act of Parliament cannot be controlled by the courts."

In modern times and according to the *Constitution of Lesotho* all the King's prerogative powers are exercised in his name by the Ministers of the Crown. Lord Scrutton in *China Navigaton Co. Ltd v Attorney General* at page 217 concluded the role of the King as follows:

> "The matter is left to the uncontrolled discretion which he exercises by his Ministers. The Courts cannot question it, though Parliament by

> vote of no confidence or pressure in Parliament may influence it."

Courts are only obliged to interfere where rights of ordinary people are infringed in a direct and particular manner to individual persons. Courts will intervene to prevent abuses only in matters relating to the exercise of prerogative, not to review the discretionary exercise of such powers themselves. – *Chandler v DPP* 1964 AC 763.

In respect of Parliament Lord Dinman in *Bradlaugh v Gossett* (1884) 12 QBD 271 (Queen's Bench) as extracted in Keir & Lawson *Cases in Constitutional Law* 4th Edition at page 151 dealing with infringement of rights of Parliament said:

> "In my opinion the House stands with relation to such rights, in precisely the same relation as we the judges of this court stand in relation to laws which regulate the rights of which we are guardians."

This means Parliament can look after itself in respect of the Prime Minister and Ministers of the Crown. Houses of Parliament have judicial powers that are exclusively limited to protect their own traditional activities. In *Stockdale v Hansard* (1839) 9 A & E (Kier & Laws *Cases in*

Constitutional Law page 139 Lord Denman added:

> "But power especially of invading the rights of others, is a different matter, it is regarded not with tenderness, but with jealousy; and unless the legality of it is most clearly established, those who act under it must be answerable for the consequences."

In this area we are dealing with the politics of legislation and the struggle for supremacy between Parliament and the Crown. The prevention or intervention in respect of abuses affecting the rights of individuals is the only real ground of the Courts for exercising jurisdiction. This has been, and continues to be the battlefield of the Crown as represented by the Government and Parliament. Despite the existence of the *Constitution*, nothing is firmly settled. Parliament can adjust the powers of the Government's exercise of both prerogative and existing statutory powers. It is for this reason that in this area of politics no penalties have been provided in the *Public Inquiries Act* of 1994. If Parliament wanted the Courts to interfere it would have made its intention clear in that respect. What Applicant is asking the Court to do is to interfere with the relations between an elected government and Parliament. This is the area of the Crown's prerogative and politics.

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In modern times as Wade & Bradley in *Constitutional and Administrative Law* 11th Edition at page 262 have stated prerogative "has to be maintained not for the benefit of the sovereign but to enable government to function". In *Attorney General v de Keyser Hotel* 1920 All ER 80 it has been shown that prerogative has to yield to statutes and so long as enacted laws are in operation. Prerogative exists insofar as it is not inconsistent with the Acts of Parliament. In *Attorney General v De Keyser Hotel* the Ministry of Defence had taken occupation of De Keyser hotel under the claim that it was exercising the Crown's prerogative in war. The Courts intervened because the violation of specific rights of the De Keyser Hotel was involved. *Locus standi* of the De Keyser Hotel flowed from the need of protection against specific injury to the rights and interests of the said hotel.

In the area of prerogative such as this one, of how government governs and deals with armed forces and appoints Commissions of Inquiry and the like, the jurisdiction courts is circumscribed. The individual right to challenge acts of government is similarly limited. In matters of constitutional law, we follow the old pre-1966 English law as modified by the existing Constitution of Lesotho.

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The power to organise the army and the public service, defend the realm, maintain law and order, and govern the country generally form what is called the Crown's prerogative. The armed forces and matters pertaining to them fall under the Ministry of Defence. The exercise of this Crown's prerogative is through the Minister of Defence and the courts have not got the power under law to interfere unless their intervention is sought by aggrieved parties whose clear rights are infringed.

In *Burmah Oil Co. v Lord Advocate* [1964]2 All ER 348 the aggrieved party had had its property damaged during the war by the army and was claiming compensation and had *locus standi*. The Government in order to avoid compensation was asserting the traditional prerogative powers in respect of the army and the defence of the realm generally. Lord Atkin at page 372 H, dealing with the property of a British subject damaged by the retreating British army, speaking of the Crown's prerogative said:-

> "The sovereign power in a State has the power of eminent domain over the property of subjects, but may exercise its powers for the public welfare or advantage or in case of necessity.... If it is exercised, compensation to the person dispossessed is 'manifest equity' (Pufendorf), since it is not fair that one citizen should be required against his will to make a disproportionate sacrifice to the commonwealth."

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The sole reason for the intervention of the Court in *Burmah Oil Co. v Lord Advocate* was that the Crown was abusing its legitimate powers to the detriment of that particular individual. But for that abuse the Court would not have interfered. Even when this happens, the government has a discretion which courts will not interfere with unless there is an abuse of power. In our Constitution all powers of government are exercised by the government in the King's name and like in Britain, courts will not interfere in the proper use of such discretionary powers.

It follows therefore that Applicant had no title to sue in this matter because in bringing this application, he is in fact interfering with the government's prerogative to govern. Applicant could only do so if he is specifically authorised by an Act of Parliament. Dealing with this right of people to sue government, the courts jurisdiction, and what many people would like to see, Bradley & Wade in *Constitutional and Administrative Law* 11th Edition at page 708 said:

> "When an administrative body's decision is challenged by a private individual, the question arises whether that individual has sufficient interest in the decision to justify the court's intervention. Some would wish the courts to entertain a challenge to an authority's conduct from any member of the public. But English law

> has never openly recognised *actio popularis*, the applicant for a prerogative order usually has to show a personal right or interest in the matter. According to case-law, the nature of the interest could vary with the particular remedy being sought."

This principle is fundamental in our law. Courts will not interfere with prerogative powers, nor will they question the wisdom of the exercise of the discretion built into that power. What the courts are obliged to do is to protect individual rights, to put it in words of *Chandler v DPP's* 1964 AC 763 at 810 Courts will not "review proper exercise of discretionary power but will interfere to correct excess or abuse."

It follows therefore in the exercise of power to defend the realm, to prevent crime and to see that there is good governance courts will not interfere because appropriate remedies are of a political nature. Purchas LJ in *ex parte Northumbria Police Authority (R v Home Secretary)* 1989 QB 26 at page 53 where the Commissioner of Police wanted to Home Secretary to be restrained from providing the police with extra protective equipment contrary to the wishes of the police authority in the area, the court in upholding the exercise of prerogative by the Minister said:

> "Where executive action is directed towards the benefit of the individual, it is unlikely that its use will attract the intervention of the courts."

If government knows that it has the support of Parliament, there are many decisions that it can take in anticipation of ratification by Parliament. If Parliament later does not support what has been done, the Prime Minister of such a government would have to back-down or resign. Another leader of a group within Parliament might then form a government. If no such a leader is available to form a government, then Parliament would have to be dissolved and fresh general elections called. See Section 82(4) and (5) of the *Constitution*.

Mr. *Tampi* in his heads of argument dealt with the effect of not laying a statutory instrument before Parliament. In so doing, he was dealing with the merits of applicant's submission that failure to lay the report before Parliament rendered whatever was done under it "void, nugatory and uneforceable". He cited the following passage in Erskine May's Parliamentary Practice 21st Edition page 544 (Foot Note 2):-

> "Breach of a statutory duty to lay an instrument before Parliament will not of itself invalidate

> the instrument. Older Statutes...had expressly stipulated that instruments made thereunder, if not laid should be of no effect. In the absence of such stipulation the requirement has been deemed to be merely directory."

I do not have to go into the merits. I would have to do so once I had determined that Applicant has *locus standi*.

Nevertheless it seems to me that Lesotho has inherited a tradition whereby failure to lay an instrument does not render it invalid. This is an internal Parliamentary matter which ought not to be decided by this court. Had courts been invited to go into it at the invitation of Parliament itself, I would be obliged to decide this issue.

It seems to me it is a historical fact from what Erskine May has stated that Parliament has over the years omitted the penalty of invalidation of statutory instruments that have not been laid before Parliament. Courts interpret the intention of Parliament in making laws. When Parliament changed policy about its internal machinery, and decided no more to punish government by rendering its acts invalid for failure to lay a statutory instrument before Parliament courts will not easily read the omitted sanctions into Acts of Parliament. I do not think in the

case before me the Court has been invited to go into this issue by a proper authority.

In the realm of Parliament and government generally, there is a history of conventions or practices which work though strictly not provided for in the law. The Speaker of the National Assembly and the President of the Senate are the ones who interpret the rules. These Houses of Parliament do not resort to the courts for the interpretation of their rules. Whether the report of the Commission of Inquiry was properly laid or laid at all, that is only known to Senators and Members of the House of Assembly only. Whether the ritual of tabling has or has not been followed in the matter and whether Parliament accepts this, is a matter for the Parliament and its members alone to know or determine. It follows therefore that even where there are delays, failure to comply with the letter of laws and procedures, Parliament can condone this or act in whatever manner it deems appropriate. No one else ought to interfere.

Once we realise that government can act regardless of where it gets its advice, our problem becomes easier. It can already begin to set up a "steering group" even before the report of the Commission of Inquiry has been tabled

before Parliament. In doing all this Government has to weight the support that it enjoys in Parliament. Indeed the Prime Minister in his discretion can choose to with-hold most of the report from Parliament. See Section 8(3) of the *Public Inquiries Act* of 1994 which provides:-

> "The Prime Minister need not table any portion of a report where, in his opinion the public interest in disclosure of that part of the report is outweighed by other considerations such as national security, privacy of an individual or the right of a person to a fair trial."

There is no doubt that matters involving the armed forces are matters of "national security". Applicant's fair name and reputation which the report deals with is one of "privacy of the individual". There however, seems to be no intention to with-hold publication of portions of this report on the ground that it invades the privacy of Applicant. That is a matter for the Prime Minister alone to determine. Nevertheless, the fact that the report speaks of Applicant, does not entitle Applicant to make internal parliamentary affairs or those of the Defence Commission his concern. It is a matter for parliamentarians and Members of the Defence Commission (who are insiders alone) not the general public.

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It seems to me that whether the government calls a "steering group" as a result of a Commission of Inquiry or not, this is the government's prerogative. It is therefore in my view irrelevant for purposes of setting up the "steering committee" whether the Commission of Inquiry report has been tabled before Parliament or not. In other words, the Government is within the law in setting up a "steering group", to begin looking into ways of dealing with problems within the army. Applicant cannot therefore ask for curial intervention on the basis of the fact that the report of the Commission of Inquiry has not been laid before Parliament. He has no right to interfere, this is a matter between Government and Parliament.

Courts do not interfere where there is another forum in which the matter might be dealt with. For the Court to entertain any interdict whether interlocutory or final, there should be no other remedy available. In this case Applicant is actually seeking a final order. In *Setlogelo v Setlogelo* 1914 AD 221 it was said that an interdict being an extraordinary remedy should not be available to a litigant who has another or alternative remedy. Mr. *Ntlhoki* argued that Applicant wants the matter laid so that his grievance against the report can be ventilated by the Senate on his behalf. It seems to me if Applicant

wanted a Senator to take up his complaint against the report of the Commission of Inquiry in the Senate, he should have approached any Member of Senate of his choice to ventilate his grievance for him in the Senate.

Applicant claims the report has not been laid in Senate, he has no affidavit from any Senator about this. Why should this Court allow a situation in which Applicant wants the help of Senate but will not approach any Senator? Section 8 concerns the laying of the report before Senate and the House of Assembly. All Applicant has to do is to approach a Senator or Member of the House of Assembly. There being another remedy that Applicant can resort to, I do not think it would be wise for the Court to intervene.

The next problem is whether Courts can interfere with the internal workings of Parliament to protect the infringement of the rights of Parliament as a whole or its individual members. Courts do not as a rule interfere in the internal operations of any organisation unless its members invite it. Parliament is clothed with all powers it needs to deal with infringements of its rights and privileges. In the case of *The Sheriff of Middlesex* (1840) 11 A & E 273 Lord Denman CJ (Keir & Lawson *Cases in*

Constitutional Law page 142) Queens Bench said:

> "The Crown has no rights which it can exercise otherwise than through law and through amenable officers; but representative bodies must necessarily vindicate their authority by means of their own, and those means lie in the process of committal for contempt."

The Courts are there for all to look up to. Nevertheless Courts as much as possible do not interfere with Parliament because Parliament can look after itself. Parliament regulates its internal affairs and certain privileges of its members that attach to it and facilitate its work. In *Stockdale v Hansard* (1839) 9 A & E 1 Queens Bench (which was followed in the *Sheriff of Middlesex* case) Lord Denman CJ had said:

> "All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and place implicit confidence in their representatives as to the due exercise of those privileges. But power especially power of invading the rights of others, is a very different thing: it is regarded, not with tenderness, but with jealousy; unless legality of it be most clearly established, those who act under it must be answerable for its consequences."

It has been the right of Parliament to look after itself and its internal affairs. The only limit that the Courts

put to it is that it must not violate the rights of others. Outsiders cannot be allowed to look after its affairs without its permission.

Mr. *Ntlhoki* referred me to the case of *Wood & Others v Ondangwa Tribal Authority & Another* 1975(2) SA 294 where *locus standi* was accorded to friends, fellow church members and even a political party to apply for *habeas corpus* on behalf of detained people who were harassed and assaulted contrary to law. In the case of *Lesotho Human Rights Alert Group & Others v The Minister of Justice and Human Rights & Others* CIV/APN/173/94 (unreported) this Court distinguished it and said that case,

> "...is in many respects different from this one. It cannot be taken beyond its facts. Its importance lies in spelling out the court's discretion in a fitting case to accord *locus standi* to those who for the best of motives felt obliged to move Court to protect those who are detained and cannot have access to the Courts."

In the case before me, Members of the Senate and the House of Assembly are free men who have no impediments from asserting their rights in Parliament. If they so desire they can move this Court themselves (if such an extreme situation were to arise). They certainly do not need a non-member of Parliament to move an application such as

this one. The mantle of a good Samaritan on the basis of which *locus standi* was extended in *Wood and Others v Ondangwa Tribal Authority and Others* cannot fall on the Applicant. I am not sure if members of Parliament might not treat applicant's intervention as a breach of their Parliamentary privileges. The view I take is that Courts like "all persons ought to be very tender in preserving" parliamentary privileges, – *Stockdale v Hansard* (supra), unless this privilege invades the rights of ordinary people directly.

It was submitted on behalf of Applicant that this report of the Commission of Inquiry has singled out applicant for special criticism. It was therefore concluded that because of this, Applicant has *locus standi*. Mr. *Ntlhoki* for applicant conceded that applicant has other remedies for personal wrongs. Even if that was not so, the fact that his name appears in the report does not give him a blank cheque to claim whatever he wishes. In *Cape Times Ltd v Union of Trades Directors & Others* 1956(1) SA 105 at pages 120 to 121 Milne J held that:

> "A litigant has no *locus standi* as such to approach the Court for the punishment of his opponent, by way of proceedings for contempt of court for an alleged breach of an order which he has obtained against such opponent in a civil

> proceeding where the punishment is not calculated to coerce the opponent to comply with the order."

It would therefore seem Applicant used the fact that his name was used as a means to obtain a title to sue where he had none. It remains for me to reiterate what Innes CJ said in *Director of Education of the Transvaal v Mc Cagie & Others* 1918 AD 616 at page 621:

> "The principle of our law is that a private individual can only sue on his behalf not on behalf of the public."

In England as Lord Diplock has stated, there has been a rapid rational and comprehensive development of administrative law. This he calls the greatest achievement of the English courts in his lifetime. *R v Inland Revenue Commissioners (ex parte Federation of the Self-Employed Small Business Ltd.)* [1982] AC 617 at 641. This is, no doubt, due to many factors brought about by the industrialisation, increasing role of government in socio-economic affairs and the joining of the European Economic Community. At the end of the nineteenth century and the beginning of the twentieth century Dicey and others were denying the existence of what is now freely called administrative law.

As Wade and Bradley *Constitutional and Administrative Law* 11th Edition page 607 said, the British approach "has been to apply general principles of liability contract and tort to public bodies as well as to private citizens". There remains some debate as to whether this is really administrative law or simply the age old prevention of abuse of power and protection of the rights of the subject from the violation by government through the use of arbitrary power. It seems to me British courts remain reluctant to interfere with, umpire or even review the exercise of the administrative discretion itself. What they have of late done is to show greater willingness to come to the aid of the subject than in the past. Circumstances and the stage of legal, judicial, developmental and financial resources differ between Lesotho and Great Britain. That being the case, independent Lesotho cannot always follow the guidance of British Courts now that Lesotho is independent.

There seems in Britain to be some uncertainty on whether the question of *locus standi* should be determined alone and not along with the merits. In England in the House of Lords case of *R v Inland Revenue Commissioners (Ex Parte National Federation of Self Employed Small Businesses Ltd* [1982] AC 617 it was held that *locus standi*

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should be dealt with along with the merits. Lord Fraser a Scottish Judge dissented on this point. The correct approach in my view seems to be the Scottish one and not the English one. In *Scottish Old People Welfare Council Petitioners* 1987 SLT 179 it was correctly stated:

> "The matter of *locus standi* is logically prior to and conceptually distinct from the merits of a case."

In so holding, I am conscious of the fact that where there is an application for a declaratory order (as in this case) the discretion of the court in making the order is central. Consequently to hold that a litigant has *locus standi* and then to deny him a remedy might seem an exercise in futility. It seems to me that the question of title to sue must be resolved on its own merits, not on an *ad hoc* basis depending on the preference of a court on a case to case basis.

In Britain there is a developing attitude of according *locus standi* to individuals than in the past. Our courts have, for example, not accorded *locus standi* to taxpayers against the Central Government. In England, several years after Lesotho's independence, the House of Lords in *R v Inland Revenue Commissioners (Ex Parte*

National Federation of Self-Employed Small Businesses Ltd [1982] AC 617 at page 644 E changed legal policy and per Lord Diplock said,

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax payer, were prevented by outdated technical rules from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

Our law is still properly expressed in the case of *Dalrymple & Others v Colonial Treasury* 1910 TPD 379 at page 385 where Innes CJ said:

> "The ordinary taxpayer certainly does not occupy the same position in relation to the Executive Government, that a rate-payer occupies with regard to an incorporated council. He does not elect the Minister; they are appointed by the Crown, and are responsible to the Crown as well as to Parliament."

In a town a ratepayer has *locus standi* because the municipality is treated like a company and its high officers like company directors. The control of Government Ministers is the task of Parliament. In our present constitutional order and our tradition controlling the Central Government is a matter for the people as a whole in the political arena. Even in England the court has a discre-

tion to accord *locus standi* in a fitting case. There is still no *actio popularis* even today.

This is an application for a declaratory order. Section 2(1)(c) of the *High Court Act* of 1978 (as amended) provides:

> "The High Court of Lesotho....shall have, in its discretion and at the instance of any interested person, power to enquire into and determine any existing future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination."

Because Applicant is asking for a declaratory order, even if Applicant could have been deemed an interested person, the Court has a discretion to make or not to make the declaratory order he seeks.

Even assuming the law of Lesotho could be deemed to be the same as British law (and parliamentary privilege and internal autonomy were not in the way) I do not think the Court would be obliged to accord *locus standi* to the Applicant.

Applicant ought to have been in Parliament as the leader of a party that came second in the general elec-

tions but for the electoral system that does not provide for proportional representation. The Court while noting that had the electoral system been different Applicant might have been in Parliament, yet the term Leader of the Opposition is a Parliamentary term according to the Constitution. It would be unconstitutional to extend it outside Parliament.

Once the Court takes judicial notice of this fact, it has to take notice of other facts as well. By the same token the Court has to take judicial notice of the fact that Applicant was offered nomination to the Senate. Applicant refused to join Parliament via the Senate. He cannot therefore have the benefits of being a Senator while being outside it. In any event, the Senate can look after itself, it is not in distress and consequently in need of a good Samaritan, which is the basis on which *locus standi* was extended in *Woods & Others v Ondangwa Tribal authority* (supra). Perhaps in a fitting case the Court in its discretion might be obliged to accord *locus standi* in cases in which it is not doing so at present. If and when it does there will have to be special grounds for doing so and the cause itself will call for such intervention.

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It is not a wise thing to take judicial notice of facts that do not form part of a litigant's case. The reason being that this might lead to a situation in which, one of the litigants is prejudiced because he did not put all the facts he might have put in his papers. The Applicant stands or falls by his founding affidavits and the remedy he seeks in his Notice of Motion. See Herbstein and Van Winsen *Civil Practice of the Superior Courts of South Africa* 3rd Edition page 80. I have to concentrate and decide the case on the facts before me lest I take notice of facts that are not before me and I mistate them without the benefit of Court papers to assist me.

A proper reading of the Court of Appeal judgment in *Lesotho Human Rights Alert Group v Minister of Justice & Human Rights & Others* C of A (CIV) No.27 of 1994 (unreported) is that it found the Court of first instance wrong in having gone beyond what parties were asking for. The Court below had (after finding that the real applicant had no *locus standi* to be the Applicant) been of the opinion that it was the witnesses of applicant who had a *locus standi*. Unasked that court accorded these witnesses *locus standi* and joined them as co-applicants. The Court of Appeal said even for the best of motives the trial court ought not to have done this. The reason being that making

a party a litigant had consequences such as costs and other things which only a litigant has a right to elect to face. The Court of Appeal therefore said that the trial court in its discretion has no right to push a witness into the position of a litigant merely because it thinks this is in the best interests of such a witness.

Applicant chose to bring this application on the basis that (because the Commission of Inquiry report had referred to him extensively) that alone gave him a right to interfere in affairs that are the prerogative of Government and the rights of Parliament. It would therefore be wrong not to follow the principle that an applicant stands or falls by the prayers in his notice of motion and founding affidavits.

I seriously considered denying or mulcting the successful Respondents with costs because I was not happy with the way they stated that the report of the Commission of Inquiry was tabled or made available to the Senate. The question of costs is a matter at the discretion of the court. But even so, it is governed by certain principles. The party in whose favour a favourable order as to costs is made, must have succeeded in some say. In the course of this judgment I have found that tabling is an internal

matter of the Houses of Parliament. Furthermore these Houses have internal autonomy which includes disciplinary powers over those who infringe the rights of Parliamentary chambers. I have also found courts cannot interfere in Parliamentary affairs unless invited by the Houses themselves. Having made the findings, I am of the view that costs have to follow the event.

In the light of the aforegoing, I dismiss this application with costs.

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W.C.M. MAQUTU
JUDGE

For the Applicant : Mr. M. *Ntlhoki*
For the Respondents : Mr. K.R.K. *Tampi*

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