

IN THE HIGH COURT OF LESOTHO

In the matter between:-

BOFIHLA NKUEBE	1ST APPLICANT
CHARLES S. MOFELI	2ND APPLICANT
JUSTINE S. NTLHABO	3RD APPLICANT
ALEX A. MAKARA	4TH APPLICANT
MOOKI V. MOLAPO	5TH APPLICANT
BERENG SEKHONYANA	6TH APPLICANT
LEKHETHO RAKUOANE	7TH APPLICANT
RAKALI KHITŠANE	8TH APPLICANT
NTJA THOOLA	9TH APPLICANT
THUSO LITŠOANE	10TH APPLICANT
MOTIKOE MOTIKOE	11TH APPLICANT
ANTHONY C. MANYELI	12TH APPLICANT
MAMELLO MORRISSON	13TH APPLICANT
THABO PITSO	14TH APPLICANT
MTHUTHUZELI TYHALI	15TH APPLICANT
LEBONA NTŠASA	16TH APPLICANT
MOEKETSE MALEBO	17TH APPLICANT
PHEELLO MOSALA	18TH APPLICANT
LIMAKATSO NTAKATSANE	19TH APPLICANT
TŠELISO MAKHAKHE	20TH APPLICANT
SEKOALA TOLOANE	21ST APPLICANT

AND

THE MINISTER OF FINANCE	1ST RESPONDENT
THE MINISTER OF LAW & CONSTITUTIONAL AFFAIRS	2ND RESPONDENT
THE ACCOUNTANT GENERAL	3RD RESPONDENT
THE ATTORNEY GENERAL	4TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 10th July, 2001

In this application the order prayed for is couched in the following terms:

- “1. Declaring as unlawful the unilateral cutting of the Interim Political Authority budgets for 2000/2001 and 2001/2002 financial years in particular the remuneration package of the applicants by the 1st respondent.
2. Declaring as unlawful the refusal by the 3rd respondent to honour and release to applicants their housing allowance cheques for financial year 1999/2000 dated the 19th April 2000.
3. Declaring that the decision of the Interim Political Authority (attached hereunto as Annexure “A”) dated the 28th January 2000 to utilize savings as binding on the 3rd respondent’s office.
4. Directing the 3rd respondent to release forthwith the housing allowances due to applicant which had accumulated from 1st April 1999 to date (as per decision in Annexure “A”) and payment vouchers hereunto attached as Annexure “B”.
5. Directing the 1st respondent not to interfere with the original budget of the Interim Political Authority in particular the remuneration item for the financial year 2001/2002.
6. Directing the 3rd respondent to honour payment of the adjusted salaries of applicants in accordance with IPA decision of 8th September 1999.
7. Directing the respondents to pay costs of this application.
8. Granting applicants such further and/or alternative relief.”

The twenty one (21) applicants are duly gazetted members of the **Interim Political Authority (IPA)** a statutory body established by section 3 of the Interim Political Authority Act No.16 of 1998.

Mr Bofihla Nkuebe, duly authorised, has sworn to a founding affidavit and states that under section 11 of the IPA Act a member of the IPA shall receive such remuneration as the Authority may determine; he further states that on the 12th May 1999 the Authority ratified its annual budget for 1999 to 2000 (as formulated by the Authority on the 5th March 1999 and passed to the Lesotho Government through the Minister of Law and Constitutional Affairs on 8th March 1999), and that on the 8th September 1999 the IPA made a decision “to include in the budget those items which had been left out pending further discussion effective April 1999.”

The items are:-

- Adjustment of Co-chairpersons’ salaries;
- Adjustment of members’ salaries;
- Housing allowances for IPA members and secretary;
- Terminal benefits for members and staff.”

On the 25th November 1999 the IPA finally made a decision to adopt its recurrent budget for the financial year 2000/2001 to the tune of **M7,642,608.00** and “decided to pass on the budget to the Government of Lesotho. According to Mr Bofihla Nkuebe “... The new budget included the adjusted items reflected in the decision of the 8th September 1999.” (Paragraph 8 of the founding affidavit).

At paragraphs 9 and 10 of his affidavit he states;

9.

“After submission of the budget as it is the practice, the Chief Accounting Officer of the Authority Chief Ranthomeng Matete, the Secretary of the Authority was duly invited to attend a budget meeting. Myself and other applicants were informed and we verily believe the Secretary that the 1st respondent had unilaterally cut out in the Authority budgets to Parliament the adjusted salaries for co-Chairpersons, members, the housing allowance and gratuities. He did not only cut the budget on items of an administration, but he cut of the members’ remuneration packages as has been decided by the Authority.”

10.

“I submit that his act is a flagrant violation of Section 11 of the Interim Political Authority Act No.16 of 1998. I submit further that even if one may concede that 1st respondent could cut a global figure, but he could not lawfully reduce items which are a prerogative of the Authority. I duly contend that the submission of a reduced IPA budget against its decision by a member of the executive violated Section 14 of the IPA Act. I submit that this Honourable Court should reinstate the remuneration items as agreed as for the decision of 25th November 1999.”

It is therefore the thrust of the Applicants’ case that the Minister of Finance who is the 1st respondent in unilaterally excising out of the IPA budgets the adjusted salaries of co-Chairpersons, members, housing allowances and gratuities, the Minister violated the provisions of section 11 of the IPA Act which reads:-

“A member of the Authority shall receive such remuneration as the Authority may determine.”

As to the meaning of the word “determine” see **Public Carriers Association vs Toll Road Concessionaries (Pty) Ltd** 1990 (1) SA 925 at 948-9 i.e. it can mean “fix” or “decide”.

He also submits that, as part of the Executive, the 1st respondent, was obliged to implement the decisions of the Authority by virtue of the provisions of Section 14 of the IPA Act which reads:-

“The Executive shall be obliged to implement all the decisions of the Authority.”

It is important to read these sections along with the provisions of Section 18 (1) of the IPA Act. It reads:-

“The Authority shall be funded from the monies from the Consolidated Fund as may be appropriated therefor.”

Section 14 is indeed a unique section in the IPA Act. In order to avoid absurd results its true meaning should be approached in a constructive and purposive manner. See **Devendish - Interpretation of Statutes** - (1996) p.35-39; **Mokapela vs Minister of Home Affairs** - 1995-96 LLR 224 in which **Leon JA** opined that the interpretation of a constitutional or statutory provision should “avoid the austerity of tabulated formalism” - See **Public Carriers Association** - (supra).

As Section 4 of the Act puts it-

“The objectives of the Authority shall be to facilitate and promote, in conjunction with the Legislative and Executive structures in Lesotho, the preparation for the holding of the general elections ...”

The power of the IPA to make decisions is formulated as follows under section 6 (c) of IPA Act-

6. *“The Authority shall have the following powers-*

- (a)
- (b)
- (c) *to take decisions on all matters relevant to its objectives and to ensure the implementation of such decisions by making recommendations to relevant structures. (Underlining mine)*
- (d)
- (e)
- (f)
- (g)
- (h)

It is singularly important to determine whether any or all of the decisions the IPA including those involving its budgetary estimates or remuneration adjustments should bind the Executive. In such an inquiry one must firstly determine the nature of such decision and its purport. In my view in order to bind the Executive, a decision of the IPA must be upon a matter relevant to the objectives of the IPA as set out in Section 4, the aim of such objectives being to facilitate and promote the preparation for the holding of general elections in Lesotho. If a decision by the IPA is on a matter relevant to one or some of these objectives, then, in my view, the Executive is obliged in the sense that it is compelled to implement such decision. (See **Anglo African**

Shipping Co. (1936) Ltd vs Harris and Others - 1977 (2) SA 213 for the meaning of the word “obliged.”)

A proper scrutiny of the objectives under section 4 indicates that these objectives are notably political in character and have no bearing upon the administrative or financial affairs of the IPA. This is very important. It is therefore my view that it is only those decisions of the IPA which are political in nature as envisaged under section 4, that bind the Executive. All other purely administrative (or budgetary) decisions of the Authority do not bind the Executive because they are outside the purview of Section 4. To hold otherwise, would negatively straddle the administrative activity of Government. I am fortified in so stating by the provisions of section 18 of the IPA Act which states that the Authority shall be funded from monies from the Consolidated Fund as may be appropriated therefor. The fair reading of section 18 of the IPA Act implies that the budgetary affairs of the IPA, which admittedly is not a constitutional but a statutory body, are to be governed by the provisions of the Constitution of Lesotho on matters of finance, and of the Finance Order 1988 and Financial Regulations 1973.

It is in this context that the lawfulness or otherwise of the unilateral cutting made by the Minister of Finance should be looked at before deciding whether the budgetary decisions of the IPA Act must be subjected to the fiscal provisions of the Constitution, the Finance Order and Financial Regulations.

The Lesotho Consolidated Fund is a constitutional Fund into which all revenues and other monies raised or received for the purposes of the government of Lesotho are

paid (Section 110 of the Constitution). It is from this Fund that remuneration packages or budgetary estimates of the IPA are to be appropriated as provided under section 18 of the IPA Act.

Section 111 of the Constitution reads:-

- “(1) No moneys shall be withdrawn from the Consolidated Fund except-*
- (a) to meet expenditure that is charged upon the Fund by this Constitution or by any Act of Parliament; or*
 - (b) where the issue of those moneys has been authorised by an Appropriation Act or by an Act made in pursuance of section 113 of this Constitution.”*

It is not in dispute that the remuneration for the IPA co-chairpersons and members does not fall under (a) but under (b) and that the IPA remuneration must therefore be authorised by an Appropriation Act under section 113 of the Constitution.

Section 112 of the Constitution reads:-

- “112. (1) The Minister for the time being responsible for finance shall cause to be prepared and laid before both Houses of Parliament in each financial year estimates of the revenues and expenditure of Lesotho for the next following financial year.
- (a) When the estimates of expenditure (other than expenditure charged upon the Consolidated Fund by this Constitution or by any Act of Parliament) have been approved by the National Assembly, a bill to be known as an Appropriation bill, shall be introduced in the Assembly, providing for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums, under separate votes

for the several heads of expenditure approved, to the purposes specified therein.

Section 3 of the Finance Order No.6 of 1988 entrusts to the Minister of Finance the responsibility of management, supervision, control and direction of all matters relating to the financial affairs of the Government of Lesotho. The responsibility is indeed a wide and an awesome and one which has to be exercised with corresponding responsibility and sense of probity. The details of the Minister's powers are set out under the various chapters of the 1973 Financial Regulations. Section 3 of the Finance Order 198 is however couched in generality in order to confer upon the Minister of Finance wide power and discretion in the management, control and supervision of public finances - See **Devendish** (supra) p.62. Matters of finance involve intricate issues of economic policy and balancing of various competing claims or interests from many departments of public service, and in my view, the Minister of Finance has to make some administrative decisions under section 3 of the Finance Order, otherwise this section would be meaningless or impotent.

The decision of the Minister of Finance to excise the proposed budgetary increases in the estimates decided upon by the IPA can be described as an executive administrative action (**Cekeshe and Others vs Premier, Eastern Cape - 1998 (4) SA 935**). The decision of the Minister can only be subject to judicial review if such decision adversely affected the existing salary structures of the members of the IPA e.g. by reducing those salaries. See also **South African Roads Board vs Johannesburg City Council - 1991 (4) SA 1**.

From the papers it seems clear that the Secretary to the IPA Chief Ranthomeng Matete was present at the estimates meeting at which the Minister indicated that he would disallow the proposed salary increases.

According to the applicants, the Executive and the Minister of Finance are legally bound to implement the decision of the IPA which determines the remuneration of its members. I have already alluded to the incorrectness of such a submission because, to reiterate, a decision of the IPA is binding on the Executive only if in my view it can be brought within the ambit of the Section 4 (objectives) of the IPA Act. It seems to me that this is the only meaningful and purposive interpretation that should be given to sections 11, 14 and 18 of the IPA Act.

For these reasons Prayers 1 and 5 are dismissed with costs.

I have decided to deal with subsequent Prayers 2,3,4, and 6 collectively because the cause of action seems to be based on similar grounds and remedy. Having given the issues involved serious thought I have decided that the issues cannot properly be decided on affidavit - Mr Bofihla Nkuebe has deposed to a single affidavit from which it is clear that the housing allowances and gratuities were amongst the items that were included by the IPA decision which determined the budget to the tune of M7,642,608.00. (IPA decision of 8th September 1999). In response to this, the 2nd respondent wrote back to the IPA chairpersons informing them that the proposed increases could not be accommodated ("Annexure H" - dated 26 January 2000). On the 28th January 2000 the IPA then decided "to utilize savings from its 1999/2000 budget with effect from 1st April 1999." The legality or propriety of this step was not

fully argued but it seems to me that the Financial Regulations state (Regulation 510) that -

“All votes lapse at the end of each financial year.”

The question is therefore: - when the payment vouchers for the applicants were prepared on the 3rd March 2000, were there any approved funds for these claims? In his answering affidavit, the 1st respondent - Minister of Finance - categorically states that the “three items in the IPA’s draft budget for the year 2000/2001 (upgrading salaries, housing allowances) were disallowed” by him and therefore excluded from the Appropriation Bill and consequently the Accountant General had no authority to sanction their payment “for the simple reason that they were not appropriated by Parliament.” The factual availability of funds is therefore very crucial in this enquiry. Papers as they stand have not sufficiently shown that the IPA’s claims could have been validly met.

I have therefore exercised my discretion under Rule 8 (14) of the High Court Rules.

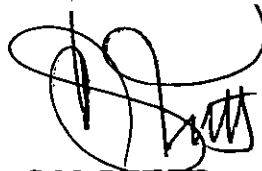
Rule 14 reads:-

“8.(14) If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or may make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with

appropriate directions as to pleadings or definition of issues, or otherwise as the court may deem fit.”

In substance, the applicants are claiming their “housing allowances” and I hold the view that ordering the matter to trial will do justice to the case in order that the specific amounts may be proved and any possible exceptions be made as regards Prayers 2,3,4 and 6. I also order that usual pleadings be filed so that the wide ranging claims may be clearly defined. (**Byng vs Phillips** 1947 (1) PH F 12 c); **van Aswegen vs Droskie** - 1964 (2) SA 391.

In these motion proceedings only the first applicant made an affidavit which does not define the issues with sufficient clarity more so because a question of mixed law and fact is involved (**Conradie vs Kleingeld** - 1950 (2) SA 594). It is ordered that the costs stand over for the determination at the trial.



S.N. PEETE

JUDGE

For Applicants : Mr Mosito

For Respondents : Mr Tampi