1IN THE COURT OF APPEAL OF LESOTHO

C of A (Civ) No. 11/05
CC: 135/05

In the matter between:

MOLEFI TS'EPE Appellant

and

THE INDEPENDENT ELECTORAL COMMISSION First Respondent

THE RETURNING OFFICER, LITJOTJELA No. 5 ELECTORAL DIVISION Second Respondent

THE MINISTER OF JUSTICE, HUMAN RIGHTS AND CONSTITUTIONAL AFFAIRS Third Respondent

THE MINISTER OF LOCAL GOVERNMENT Fourth Respondent

THE ATTORNEY-GENERAL Fifth Respondent

JUDGMENT

28, 30 June 2005

Sections 18, 19 and 20 of Constitution of Lesotho - right to freedom from discrimination, right to equality and right to participate in government -
reservation by section 26(1A)(a) and (b) of the Local Government Election Act, 1998 (as amended by the Local Government Election Amendment Act, 2004) of
one-third quota of all local government seats for women for the next three elections - constitutional challenge by excluded male candidate - whether admitted infringement of rights justified by measures aimed at restitutionary equality

Coram:

Steyn, P, Grosskopf, Melunsky, Smalberger et Gauntlett JJA

GAUNTLETT, JA:

[1] This appeal has been heard on an urgent basis, the court convening specifically for that purpose. It relates to a constitutional challenge to key legislative provisions relating to the conduct of the first democratic local government elections recently held in Lesotho.

[2] The appellant is a male, describing himself as a registered voter of Ha Mokokoana, Tsikoane in the district of Leribe. He wished to stand as a candidate, specifically in his home electoral division, designated Litjotjela No. 5. This, he says, had been his set intention and he had worked hard to mobilise support there. However, on reporting to the office of the second respondent (the returning officer for that electoral division) to register his candidacy, he was informed of an insurmountable obstacle. While qualified in all other respects (to the extent that he was provisionally granted, as an independent candidate, the symbol of a lion), he was informed by the second respondent that the particular electoral division for which he was set to stand had been reserved for women candidates only. It is the refusal to register his candidacy for Litjotjela No. 5 on this single ground that has set in train the present challenge.

[3] The essential statutory framework relevant to the case is this. The Local Government Act, 6 of 1997 ("the LGA"), laid the foundation for a new era of local government in Lesotho. It empowered the Minister of Local Government to declare areas for various types of councils, including community councils. Areas in turn were divided into electoral divisions (simply put, seats). Litjotjela No. 5 is one. Thereafter the Local Government Election Act, 9 of 1998 ("the Election Act"), was passed. It provides for the election of councillors and for the division of councils into electoral divisions by name and serial number, as specified by the country's Independent Electoral Commission ("the IEC"). Last year the Election Act was amended, *inter alia* by the introduction of provisions for the reservation of one-third of the seats in every council for women, the remainder to remain open to be contested by men and women alike. It is this electoral quota which is now in issue.

[4] The appellant has invoked the provisions of section 22 of the Constitution. This confers upon the High Court original jurisdiction to adjudicate a constitutional challenge: that is to say, an application in which it is contended that any of the provisions of sections 4 to 21 of the Constitution have been, are being or are likely to be, contravened. He sought an order declaring unconstitutional the provisions of section 26(1A)(a) and (b) of the Election Act, "***[t]o the***

extent that they authorise the exclusion of the [appellant] from participating as a candidate in electoral division Litjotjela No. 5 on the basis of his sex in contravention of section 18(1), (2) and (3) of the Lesotho Constitution". He also sought an order declaring his exclusion from participation as a candidate for Litjotjela No. 5 to be unconstitutional as being in violation of his rights enshrined in section 20(1) of the Constitution, and certain consequential relief.

[5] The relevant provisions of s.26 of the Election Act read:

> "***(1) Subject to subsections (1A) and (2), and subsection (1) of section 5, every person is eligible for election as a member of a Council and may be nominated and elected as a candidate for election in the electoral division delineated by the Independent Electoral Commission under section 8.***
>
> > ***(1A) In accordance with the Local Government Act 1997, one third of the seats in each Council shall be [re]served for women as follows:***
> >
> > > ***(a) for the first local authority elections, one third of the seats reserved for women shall be from every third electoral division in the Council;***
> > >
> > > ***(b) for subsequent local authority elections, one third of the total electoral divisions in each Council shall be reserved by rotation, but such rotation shall not exceed two terms of office.***
> > >
> > > ***(c) No person referred to in subsection (1) shall be eligible for election as a member of a Council and to be nominated as a candidate for election, if he***

> ***or she is disqualified in respect of the disqualifications set out in the Third Schedule***".

[6] The ambit of dispute is narrow. The respondents concede that these measures discriminate against men simply by reason of their sex. But they contend that in Lesotho positive discrimination in these terms is justified, on grounds later considered. The appellant's response is that the respondents have failed to establish that the measures are constitutionally justified: that, indeed, securing a minimum of one-third female representation in local government in Lesotho could have been achieved without debarring men as candidates in specific electoral divisions. Thus, he asserts, the admitted infringement of his rights is unconstitutional, and the provisions authorising this are invalid.

[7] The matter was heard at first instance by a Full Bench of the High Court. It entertained the matter on an urgent basis, handing down a ruling dismissing it after the conclusion of oral argument, and furnishing its written reasons shortly thereafter. These reasons took the form of two judgments: the main judgment of Nomngcongo J (Guni J concurring), and a further judgment by Peete J, expressing his complete agreement with the main judgment, but adding certain further observations of his own.

[8] The appellant has contended before us that both judgments are flawed. His argument in summary is this: that as a departure point, any advantaging of women cannot permissibly be at his expense; that the court *a quo* has misconceived the nature of what the appellant has termed "***the justificatory onus***" in constitutional litigation; that in this regard, it had not applied the decision of this court in **Attorney-General of Lesotho v 'Mopa 2002 (6) BCLR 645 (LAC)**; and that had it done so, it would have held that the respondents had failed to adduce adequate evidence to establish the three essential requirements laid down in '**Mopa supra** as regards the justification of the infringement of a constitutional right. Finally it was said that both judgments of the court *a quo* showed an inappropriate degree of deference to the legislature as regards the model it had devised which is now in issue.

[9] The relevant constitutional provisions in this case are these. Section 4(1), in introducing Chapter II of the Constitution (the Bill of Rights), states that "***every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms***" in the respects there listed. These include specifically "***the right to equality before the law and the equal protection of the law***" (sub-section (o)), and "***the right to participate in government*** "

(sub-section (p)). Section 18 is then in these terms:

"***<u>Freedom from discrimination</u>***

18. (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law to the extent that the law makes provision -

(a) with respect to persons who are not citizens of Lesotho; or

(b) for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or

(c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; or

(d) for the appropriation of public revenues or other public funds; or

(e) whereby persons of any such description as is mentioned in subsection (3) may be made subject to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

Nothing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards of qualifications (not being standards of qualifications specifically relating to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes.

(6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5).

(7) No person shall be treated in a

discriminatory manner in respect of access to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) The provisions of this section shall be without prejudice to the generality of section 19 of this Constitution".

Section 19 thereupon provides simply that ***"[e]very person shall be entitled to equality before the law and to the equal protection of the law"***, while section 20 is in these terms:

"***Right to participate in government***

20. (1) Every citizen of Lesotho shall enjoy the right -

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot;

(c) to have access, on general terms of equality, to the public service.

(2) The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution".

[10] Finally, it is to be noted, Chapter III records certain principles as

forming ***"part of the public policy of Lesotho"*** and which, while ***"not...enforceable by any court...shall guide the authorities and agencies of Lesotho....in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles"***. One of these principles is the following:

"***<u>Equality and Justice</u>***

> ***26. (1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.***
>
> ***(2) In particular, the State shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in society to enable them to participate fully in all spheres of public life".***

Although chapter III records that these principles are not *per se* enforceable, it is to be noted that section 18(4) *ad finem* - quoted above - expressly subordinates that subsection to section 26. In other words, to the extent that laws <u>are</u> made pursuant to section 26(2) directed at "removing any discriminatory law" courts must give effect to them. Such laws are authorised by the Constitution.

[11] At the outset the majority judgment correctly notes the concession

by the respondents that the impugned measures infringe the provisions of s.20 (1) (a) and (b) of the Constitution and that they are discriminatory in the sense expressed by s.18 (1) read with s.18 (3) of the Constitution. It is clear that statutory preference has been given to women because they are women; men are concomitantly disadvantaged by reason of their sex alone. This constitutes an infringement of each of the constitutional rights identified. What remains is the inquiry as to whether the infringements are justified, and hence the impugned measures saved from unconstitutionality (and, if not, what relief is appropriate).

[12] An initial question, raised by the approach advanced on behalf of the appellant, presents itself.

[13] This relates to his departure point, to which reference has already been made: that "***while there is nothing wrong in increasing the participation of women in public bodies / affairs"*** , as it was put in the heads of argument, "***this should not be done to his detriment and in a discriminatory manner***".

[14] This evokes an approach to equality provisions which subordinates substantive to formal equality. It is inimical to any form of handicap

(positive or negative) and to quotas. If section 18(3) of the Constitution stood alone, it would be a valid point of departure in an inquiry such as the present. But the Constitution, like that of many other countries, does not prohibit outright measures which confer advantage on some over others. In the careful language of section 18(4)(e), the inquiry in relation to any such preference is whether "***having regard to its nature and to special circumstances pertaining to those persons or to persons of any such description, [it] is reasonably justifiable in a democratic society***".

[15] It is well-established that in general principle, provisions in a Bill of Rights are to be purposively and generously interpreted (**'Mopa's case, supra at 650D-F**, and **Lesotho National General Insurance Company Limited v Nkuebe C of A (CIV) 18 of 2003,** 7 April 2004, para [3]**,** and earlier cases there cited). In relation to South Africa's equality clause in particular, its Constitutional Court has noted:

"***....what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow".***

Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC) at par [31]).

Or as it was put in **National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) at pars [60]-[61]**:

"***It is insufficient for the Constitution merely to ensure...that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the constitution of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied...One could refer to such equality as..restitutionary equality"***.

[16] But, contends the appellant, Lesotho's international treaty obligations suggest a different answer, and its municipal law should be interpreted to avoid a conflict. The true principle appears in fact to be that where there is uncertainty as regards the terms of domestic legislation, a treaty becomes relevant, because there is a *prima facie* presumption that the legislature does not intend to act in breach of international law, including treaty obligations **(Salomon v Commissioner of Customs and Excise [1966] 3 All ER 871 (CA) at 875; The Andrea Ursula [1971] 1 All ER 821 (PDA); Binga v Cabinet for SWA 1988 (3) SA 155 (A) at 184F-185F; AZAPO v President of the RSA 1996 (4) SA 671 (CC) at 688B-**

689A). There is no uncertainty, in the light of section 18(4)(e), that the Constitution authorises (on the conditions laid down by it) the advantaging of some over others. Of course ***"[t]he giving of preference to one group of applicants necessarily [works] to the disadvantage of any group of applicants to whom preference was not given"***

(Bishop of Roman Catholic Diocese of Port Louis v Tengur [2004] UKPC 9; 2004 (16) BHRC 21).

[17] In any event, Lesotho's treaty commitments do not support the appellant. Lesotho (it was common cause before us) has ratified the International Covenant on Civil and Political Rights (ICCPR), 1966; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981; and the African Charter on Human and Peoples' Rights, 1981.

[18] The ICCPR provides in article 3 that

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant".

Furthermore it provides in article 26 that

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

A report of the Human Rights Committee of the ICCPR in 1989 published a general comment (General Comment 18 (Thirty-seventh session 1989) Report of the Human Rights Committee Vol 1, UN doc A/45/40 as reproduced in Eide et al (eds) Economic, Social and Cultural Rights (2nd ed 2001) 173-5) on the implementation of article 26. Paragraph 8 states:

"***The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance".***

In fact, the Committee (paragraph 10) further comments on the adoption of special measures to ensure the attainment of equality as follows:

"The Committee also wishes to point out that the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in special matters as compared with the rest of the population. However as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".

Measures must thus be taken under the ICCPR to ensure the attainment of restitutionary equality, which are temporary and

aimed at eliminating inequality in a specified segment of society.

[19] CEDAW is the definitive international legal instrument requiring respect for and observance of the human rights of women. Article 3 provides a general obligation

"[t]o ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men".

In order to achieve this obligation article 4 provides for a limited form of positive discrimination or affirmative action. Article 4 provides that

"***Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in this Convention, but shall in no way entail, as a consequence, the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved".***

It thus allows State Parties the right to adopt ***"temporary special measures"*** aimed at accelerating *de facto* equality between men and women. While positive discrimination is thus allowed, the Convention is very clear that this does not sanction the maintenance of unequal and separate treatment; once equality of opportunity and treatment has been achieved the measures

adopted must be discontinued.

Lesotho, it may be noted, has filed a reservation to the Convention to the effect that it shall not take any legislative measures under CEDAW if those measures would conflict with the Lesotho Constitution. (**Acheampong** "**The Ramifications of Lesotho's Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women**", **(1993) Lesotho Law Journal vol 9 no. 104**).

[20] The African Charter on Human and Peoples' Rights, 1981 also protects equality. Article 2 states that:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status".

The Charter makes provision for special measures to be taken in the protection of certain groups in society in article 18(3) and (4):

"18 (3) The State shall ensure the elimination of every discrimination against women and also the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

(4) The aged and the disabled shall also

> ***have the right to special measures of protection in keeping with their physical or moral needs".***

Although "special measures" are only mentioned in article 18(4) with regard to the rights of the aged and disabled, the use of "also" in article 8(4) suggests that the expression may extend to women's rights. Furthermore article 18(3) explicitly mentions other international obligations to protect women's rights. As already mentioned, CEDAW makes provision for special measures to be taken to ensure the protection of women's rights.

These articles (as **Acheampong <u>The African Charter and the Equalization of Human Rights</u> (1991) 7 Lesotho Law Journal no. 2 at 29 notes**) are also a clear recognition that the equality entailed in the enjoyment of human rights and fundamental freedoms does not necessarily entail formal equality.

[21] In 1997 the SADC heads of state issued a formal Declaration on Gender and Development. It noted the undertaking by member states in Article 6(2) of the SADC Treaty (to which Lesotho is also a party) not to discriminate on grounds of gender, and recorded that all SADC member states had signed CEDAW (or were ***"in the final stages of doing so"***). It committed SADC members *inter alia* to

"***[e]nsuring the equal representation of women and men in***

the decision-making of member states and SADC structures at all levels, and the achievement of at least thirty percent target of women in political and decision-making structures by year 2005".

(It may be noted in passing that the official SADC website, http://www.sardc.net records the current position as being that set out in the table we annex).

[22] It is accordingly evident that if regard is had to Lesotho's international law obligations, these, if anything, reinforce the interpretation of section 18(4)(e) of the Constitution and require equality which is substantive, not merely formal, and restitutionary in its reach.

[23] Even if this is so, the appellant contends, the respondents have failed to establish a constitutional justification for the infringements of the appellant's rights they are constrained to admit. This is stated to be on each of the main bases summarised in paragraph [8] above.

[24] As regards the first - the asserted misconception by the court *a quo* of ***"the justificatory onus"***, and in particular the contention that it failed to apply this court's earlier decision in **'Mopa**, **supra** - this has to be said. Justification, it should immediately be noted, does not always require evidence. The limitation exercise is ***"a***

process, described in S v Makwanyane and Another as 'the weighing up of competing values, and ultimately an assessment based on proportionality...which calls for the balancing of different interests'" (**National Coalition for Gay and Lesbian Equality v Minister of Justice supra at paras [33]-[35]**). It will often require factual material to be placed before court (**cf. Moise v Greater Germiston TLC: Minister of Justice Intervening 2001 (4) SA 491 (CC) at para [19]-[20]**), but there are also cases where the justification is self-evident (**cf. R v Oakes (1986) 26 DLR (4th) 200 (SCC) at 226-7**).

[25] Did the court *a quo* misdirect itself in relation to following our earlier decision in '**Mopa supra**? In that matter we dealt for the first time in some detail with the question as to the proper approach to be adopted in applying the Constitution, more particularly when an issue of infringement which is sought to be justified arises. We did so in general terms, not in relation to the claims made specifically under sections 18 and 20, as they are in this case. The core of our judgment in the relevant respect reads as follows:

"***The Constitution does not provide (as some constitutional instruments do) expressly for the justification of an infringement of a Chapter 2 right, but it is apparent from the scheme of the Constitution that a limitation of a right is authorised where, in accordance with the broad test***

articulated by Dickson CJC in the Canadian Supreme Court in the well known matter of R v Oakes (1986) 26 DLR (4th) 200 (SCC) at 226-7, the limitation of the right is reasonable and 'demonstrably justified in a free and democratic society'. The first aspect relates to the objective or purpose of a limitation, and the second to the aspect of proportionality. The objective must be sufficiently substantial and important so as to warrant overriding a constitutionally protected right, while the proportionality test requires that the means chosen to limit the right are appropriate. Dickson CJC said in this latter respect:

'There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: R v Big M Drug Mart Limited (1985) 18 DLR (4th) 321 at 352. Thirdly there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as 'of sufficient importance'"

The onus of proving that a limitation is justified rests upon the person averring it (S v Makwanyane (supra) at para [102]), and it must be discharged 'clearly and convincingly' (S v Mbatha, S v Prinsloo 1996 (2) SA 464 (CC). In Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality 1999 (2) SA 817 (C) at 831D, it was stressed that:

'[t]here must be a reason which is justifiable in an open democratic society based on human dignity, equality and freedom for the infringement of a constitutional right. Further, the limitation must be shown to serve the justifiable purpose'"

(**at 654H-655F**).

[26] The opening words of the passage from **'Mopa supra** just quoted

refer to the lack of a general limitation clause under the Lesotho Constitution (in contrast, for instance, with that of South Africa). But in relation to some of the provisions of chapter II there are specific limitation provisions. Section 18(4)(e), and the concluding paragraph of that sub-section (quoted in paragraph [9] above), is one such. Section 20(2) is another: it is effectively a cross-reference to section 18(4)(e). The appellant's argument does not address these, in its castigation of the court *a quo* for not applying **'Mopa, supra.**

[27] The proper inquiry is that whether section 26(1A) (a) and (b) are reasonably justifiable measures in the context indicated by the Constitution. The more general test in **'Mopa supra** - with its three components - assists in answering that question.

[28] It is not true that the court *a quo* gave no consideration to '**Mopa, supra**. The main judgment makes frequent explicit reference to it, and its reasoning appears to track its elements, in considering the factors advanced on behalf of the respondents in justification of section 26(1A)(a) and (b) of the Election Act.

[29] Making express reference to this court's decision in **'Mopa supra**, the court *a quo* proceeded to consider the material put before it regarding justification. That material amounts to the following.

Some 51 per cent of the people of Lesotho is female. Yet currently only 12 per cent of the seats in the National Assembly are held by women. Thus while throughout the world, the under-representation of women in public life is marked, in Lesotho the disparity is particularly acute. The holding of the first democratic local government election in Lesotho presented an obvious opportunity to address it. The African Union requires member states to secure equal participation for women (thus 50 per cent), while SADC, as has been seen, sets a target of at least 30 per cent representation by women in political and decision-making structures by 2005.

[30] The impugned provisions, moreover, were supported by the IEC. This, as its name indicates, is an independent institution created by amendment to the Constitution (section 66), appointed by the King acting in accordance with the advice of the Council of State, comprising a chair who has held or is qualified to hold ***"high judicial office"*** and two other members with that qualification or who possess ***"considerable experience and [have] demonstrated competence in administration or in the conduct of public affairs"***. An affidavit was filed before the court *a quo* on its behalf by one of its three members stressing the serious imbalance in the representation of women in public life in Lesotho, and supporting the impugned measures. In this regard, reference is made by the deponent to the fact that seats reserved for women in

one election in respect of a particular seat are open to both sexes in the next election, while the whole system of reservation of seats has a so-called "sunset clause": its remedial effect is intended not to be permanent, but to last for only three elections.

[31] The evidence also stresses that Lesotho - like some other constitutional democracies - has chosen (in relation to local government) to retain a "first-past-the-post-electoral" system in preference to proportional representation. This is for fundamental policy reasons, related to a belief in the value of constituency representation, a concern that proportional representation inevitably intends to exclude independent candidates, and a conviction that Lesotho's model is particularly suitable for local government as it allows wide representation on local councils. Speaking on behalf of the IEC, the deponent also points out that the effect of the legislation on the appellant ***"is not great in that he may not stand in his home division (but may stand in any neighbouring division) for the first election only"***.

[32] The court *a quo* in the majority judgment not only recites, quite explicitly, the three requirements summarised in **'<u>Mopa</u> supra**. It recorded, too, ***"that the objective of the limitation is sufficiently substantial and important, is now common cause and it cannot now be open to doubt"***. Correctly it posed the question whether the means chosen to limit the affected rights were appropriate - in the obvious sense of meeting the **'<u>Mopa</u>** criteria - and whether the respondents had established justification in this sense.

[33] The evidence before the court *a quo* was furthermore that the IEC

had devised a procedure for the establishment of electoral divisions reserved for women in a way to prevent any political party from deriving benefit from the manner of allocating seats exclusively for women candidates. Its proposal was also no arbitrary imposition: it was the subject of a meeting it convened attended by two delegates from all registered political parties; the proposal was put to the delegates, who unanimously supported it.

[34] The procedure for the application of section 26(1A) is in essence this. Each political party may select one of its delegates to represent that party in drawing a ballot to fix the first division from which the count to determine the divisions in a particular council reserved for women commences. The effect of such a ballot is a random determination of reserved divisions, so that parties cannot know beforehand which divisions are to be reserved exclusively for women. The example is given that where a particular council is allocated eleven divisions, the latter is numbered from 1 to 11, the numbers put in a box, and the delegate chosen by the political party to draw for that council draws a number. The division represented by that number, whatever it is, becomes the first division. Thus if division no. 5 is drawn in the ballot, division no. 7 (the third division, counting division 5 as the first division) becomes the division reserved for women, as do divisions 10 and 2. In this way the one-third reservation of electoral divisions for women is indeed randomly

selected. Neither the IEC itself nor any political party has any way of predicting which division is so reserved. The random components make for fairness, not arbitrariness. No challenge was directed at these features.

[35] The appellant however contends that the impairment of his constitutional rights so conceded is not in fact justified: that in particular, other alternatives to enhance political representation by women in local government existed, less intrusive of Chapter II rights. To demonstrate this, he offered one alternative himself. It amounts to this. He refers to electoral provision for the election of chiefs - traditional leaders - by ballot, provision being made for two ballot boxes in each division, one to be used in respect of chief-candidates and another in respect of ordinary candidates. The same, the appellant contends, could be accomplished by pairing with each division reserved for women a division not so reserved, and providing for two ballots - one for the female representative and one for the open representative - in respect of the paired divisions.

[36] As was however pointed out in argument on behalf of the respondents, the model to which the appellant refers in fact (although provided for by section 4(a) of the Local Government Act, 1997) has since been replaced (by section 4 of the Local Government (Amendment) Act, 5 of 2004) and has not been

implemented. This aside, it is pointed out, the proposed model has distinct disadvantages. In the first place, the suggested "pairing" effectively negates delimitation which has taken place. That delimitation has been predicated upon the constituency and "first-past-the-post" systems operative in Lesotho. The appellant's model would undo that, and deprive individual divisions - delimited according to criteria identifying them as appropriately separate - from selecting each its own representative. As the court *a quo* noted, the proposed model is not simple - an important attribute, it might be thought, of electoral provisions, particularly at local government level - and presents obvious opportunities for confusion.

[37] Of course identifying flaws in an alternative model propounded by a litigant in the position of the appellant does not of itself answer the threefold inquiry relating to justification outlined in '**Mopa supra**. Conversely, however, an inquiry as to what is reasonably justifiable is not resolved by presenting a possibly preferable model. A legislative measure is not unconstitutional because arguably, either as a matter of conception in policy or execution in drafting, a better one might conceivably be devised.

[38] This leads to the last of the appellant's attacks: the contention that the court *a quo* was unduly deferential in accepting the justification

proffered by the respondents. The constitutional function of courts prevents them from being deferential to the legislative or executive, in the general sense of that word, with “***its overtones of servility, or perhaps gracious concession”*** (per Lord Hoffmann in **R (on the application of Prolife Alliance) v British Broadcasting Corporation** **[2003] 2 All ER 977 (HL) at paras [75] to [76]**). But the proper balance to be struck was recently expressed by O’Regan, J in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs** **2004 (4) SA 490 (CC) at para [48]:**

“***[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the Executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A***

court should not rubber-stamp an unreasonable

decision simply because of the complexity of the decision or the identity of the decision-maker".

This was said in relation to administrative acts, but its thrust holds good in relation to legislative and executive acts too.

[39] The court *a quo* adopted just such an approach. It did not act on any bland assertion of constitutional compliance by executive or legislative agencies. It subjected the justification advanced to appropriate scrutiny. The fact that it found it persuasive in the result is not a reason to characterise the process as unduly deferential.

[40] In my view, accordingly, the court *a quo's* reasoning was sound. Contrary to the submission on the part of the appellant, it expressly cited and followed our earlier decision in '**<u>Mopa</u> supra**. It did so correctly. The impugned measures were, in the language of Dickson CJC (in **<u>R v Oakes</u> supra** quoted in **'<u>Mopa</u>** at **654I-655C**), ***"carefully designed to achieve the objective in question"***. They were equally not ***"arbitrary, unfair or based on irrational considerations"***. They were indeed ***"rationally connected to the objective"***. And as regards the means, the court *a quo* correctly considered that those employed to advance greater electoral representation of women indeed impaired ***"as little as possible"*** the rights in question. This is particularly because of their rotating mechanism, their restricted lifespan and the fact that fully

two-thirds of seats remain open to all-comers. Thirdly, in all the circumstances there was a proportionality between the effects of the measures and the objective, conceded by the appellant himself to be ***"of sufficient importance"***, again in the sense used in **R v Oakes supra**.

[41] The appeal must accordingly fail.

[42] There is also a cross-appeal. This was noted conditionally by the respondents, in the event of it being held that the court *a quo* had dismissed their *in limine* objection to the non-joinder of all other candidates in the election (no express order was in fact made). In view of the conclusion in relation to the appeal, the cross-appeal becomes moot. It is accepted by the parties that any costs in relation to it are insignificant.

[43] Counsel for the respondents had asked that, in the event of the appeal being dismissed, the appellant be ordered to pay the costs. There is no single rule relating to order of costs in constitutional matters, as little as there is in other forms of civil proceedings. Nevertheless, there is a general reluctance by courts to make an adverse order of costs in a substantial constitutional challenge of a public nature, as this court most recently has had occasion to note (**Khathang Tema Baitsokoli and Another v Maseru City**

Council (C of A (Civ) no. 4/05, delivered on 20 April 2005, p 21, and further authorities there cited; and **cf. Road Transport Board v Northern Venture Association C of A (Civ) no. 10/05, 20 April 2005, p 13**). The issue raised in the present case was important. The appellant had sought to represent a particular electoral division for reasons related substantially to the public interest. His challenge doubtless applies to a significant number of other would-be contenders. A reasoned argument was advanced on his behalf. In our view, in the particular circumstances of the case, this would not be an appropriate matter to order the unsuccessful appellant to pay the respondents' costs.

[44] The order the court makes is accordingly as follows:

(a) The appeal is dismissed.

(b) No order is made in relation to the conditional notice of cross-appeal.

(c) No order is made in relation to the costs of either the appeal or the conditional notice of cross-appeal.

DATED AT MASERU THIS 30th DAY OF JUNE 2005

J J Gauntlett
JUDGE OF APPEAL

I agree; it is so ordered.

J H Steyn
PRESIDENT

I agree:

F H Grosskopf
JUDGE OF APPEAL

I agree:

L Melunsky
JUDGE OF APPEA L

I agree:

J W Smalberger
JUDGE OF APPEAL

Counsel for the appellant: Adv M.E. Teele (with him, Adv. S. Ratau)

Counsel for the respondents: Adv H.P. Viljoen SC (with him, Mr D.P. Molyneaux) Webbers, Maseru.