IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 59/2011

In the matter between:

THE CHIEF JUSTICE	1ST APPELLANT
THE REGISTRAR	2ND APPELLANT
THE DEPUTY REGISTRAR	3RD APPELLANT
THE MINISTER OF JUSTICE	4TH APPELLANT
THE JUDICIAL SERVICE COMMISSION	5TH APPELLANT
THE ATTORNEY GENERAL	6TH APPELLANT

and

THE LAW SOCIETY OF LESOTHO RESPONDENT

CORAM: SMALBERGER, JA
SCOTT, JA
HOWIE, JA

HEARD : 19 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

High Court – ordinary and constitutional jurisdiction – High Court Rules 1980 and Constitutional Litigation Rules 2000 applicable to the invocation of its ordinary and constitutional jurisdiction respectively – constitutional issue raised – Constitutional Litigation Rules to be followed – consequence of failure to do so.

JUDGMENT

SMALBERGER, JA:

[1] In terms of section 119 (1) of the Constitution of Lesotho the High Court has unlimited original jurisdiction to hear and determine any civil and criminal proceedings (what may be termed its "ordinary jurisdiction"). In addition it has "such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law." In this respect section 22 (2) of the Constitution confers original jurisdiction on the High Court to hear and determine any application made by any person who alleges a contravention, or a likely contravention in relation to him, of the provisions of sections 4 to 21 inclusive of the Constitution (what I shall refer to as its "constitutional jurisdiction"). While it is correct to say that Lesotho has no specially designated

Constitutional Court, it appears to be generally accepted that when the High Court exercises its constitutional jurisdiction it sits as a Constitutional Court (see eg MOHAU MAKAMANE v MINISTRY OF COMMUNICATIONS SCIENCE AND TECHNOLOGY C of A (CIV) No.27/2011 (unreported) para 1). The Constitution therefore envisages the High Court sitting as such in the exercise of its ordinary jurisdiction, and as a Constitutional Court in the exercise of its constitutional jurisdiction.

[2] The High Court Rules 1980, made by the Chief Justice under section 16 of the High Court Act 1978, regulate and prescribe the procedure and practice to be followed in the High Court in all causes or matters falling within its ordinary jurisdiction. In 2000 the Chief Justice, in the exercise of the powers conferred

upon him by sections 22 (6) and 69 (5) of the Constitution, made and published the Constitutional Litigation Rules 2000 with respect to the practice and procedure of the High Court in the exercise of its constitutional jurisdiction. In terms of the interpretation provision of those rules (rule 2) "Court means the High Court established by section 119 of the Constitution and exercising its jurisdiction under section 22 of the Constitution." Since 2000, therefore, there have existed two parallel sets of rules, one set applicable to matters in which the High Court exercises its ordinary jurisdiction, and another where its constitutional jurisdiction is invoked. On the face of it there is a lacuna which would not appear to be covered by either set of rules and which may need to be remedied in future. What procedure is to be followed when a matter correctly commenced in the

High Court exercising its ordinary jurisdiction is met with a defence which invokes the court's constitutional jurisdiction? However, this is a matter which need not concern us in the present appeal.

[3] In terms of section 12 of the High Court Act the Chief Justice "shall regulate the distribution of business in the Court, and all actions and proceedings before the Court shall be heard and determined by a single judge, unless the Chief Justice otherwise directs." This would presumably apply when the High Court is functioning either under its ordinary jurisdiction or under its constitutional jurisdiction.

[4] A practice appears to have grown up, at least over the last 12 years, that where the High Court exercises its constitutional jurisdiction in a matter which involves a

challenge to the constitutionality of legislation or delegated legislation, the matter is heard, where possible, by a Bench comprising three judges – see eg SOLÉ v CULLINAN NO AND OTHERS LAC (2000-2004) 572; TŚĒPĒ v INDEPENDENT ELECTORAL COMMISSION AND OTHERS LAC (2005-2006) 169; MINISTER OF LABOUR AND EMPLOYMENT AND OTHERS v TŚEUOA LAC (2007-2008) 289; MAKAMANE's case (supra) and, more recently TŚENOLI NO v THE LESOTHO REVENUE AUTHORITY AND OTHERS C of A (CIV) 25/2011. Litigants will therefore have come to expect that such matters will be heard by three judges of the High Court and, in the event of the matter coming on appeal to this Court, by a Full Bench of five judges of this Court.

[5] This somewhat long, but necessary, introduction brings me to the present appeal. On 30 June 2009 the Chief Justice issued the High Court (Amendment) Rules which amended rules 5, 6, 7, 9, 27 and 36 and inserted a new rule 61. The amendment provided for a wide range of uncontested matters to be heard by a registrar or deputy-registrar instead of a judge. They included unopposed motions, bail applications, hearing unopposed divorce matters and arresting suspects de fuga, matters which until then had been dealt with by a judge.

[6] On 18 March 2010 the respondent (the Law Society, as applicant) brought an urgent application in which it sought, inter alia, the following relief against the appellants (respondents in the court below):

"2. [That a rule] nisi be issued returnable on a date and time determined by the above Honourable Court calling upon respondents to show cause, if any, why an order in the following terms shall not be made final:-

(a) The purported granting of adjudicative authority and or judicial powers on the 2nd and 3rd respondents by the First Respondent shall not be declared null and void and of no force and effect.

(b) The High Court (Amendment) Rules 2009 pursuant to which the 1st Respondent purports to substitute registrar for judge in respect of adjudicative functions to hear and determine matters or cases mentioned thereunder shall not be declared inoperative inasmuch as they are ultra vires under section 131 (a) of the Constitution read with Section 5 of the High Court Act No. 5 of 1978.

(c) First respondent shall not be declared to have no authority to delegate judicial powers and adjudicative functions to the 2nd and 3rd respondents.

(d) 2nd Respondent and her assistants and deputies shall not be restrained and interdicted from exercising any judicial powers and adjudicative functions against ligigants contrary to Section 12 (1) and (8) and section 118 (2) of the Constitution.

(e) Any allocation of work by the first respondent to the 2nd respondent together with her deputy and assistants and their performance in terms of the High Court (Amendment) Rules 2009 shall not be stayed pending the outcome of the present application.

(f) 1st Respondent and others shall not pay costs hereof in the event of opposition."

The application was opposed by the appellants.

[7] In bringing its application the Law Society invoked the ordinary jurisdiction of the High Court and proceeded under the High Court rules. The matter was duly assigned a reference number – CIV/APN/149/10 – which designated it as being dealt with in that manner. In its application the Law Society complained, in paragraph 5.2.9 of its founding affidavit deposed to by the secretary of its council, that "the Chief Justice has substituted Registrars and Assistant Registrars for Judges in terms of the High Court Amendment Rules 2009, to exercise judicial powers and perform adjudicative functions contrary to the Constitutional and legal imperatives under the Constitution and the High Court Act 1978". This presaged an attack on the constitutionality of the High Court (Amendment) Rules. The purpose of the

application was clearly to strike down subordinate legislation as being contrary to the Constitution.

[8] In paragraph 6.1 of her answering affidavit the Registrar of the High Court, Mrs. M.P. Sekoai (the second appellant) raised the issue of jurisdiction in the following terms:

> "6.1 I deny that the High Court in its original jurisdiction can hear this matter. The dispute relates to the interpretation of the Constitution and alleged conflict between the Constitution and the amended High Court Rules. The only Court which has jurisdiction to hear it is the Constitutional Court."

The Law Society's response to that, in paragraph 3.1 of its replying affidavit, was to deny:

> "that there is a Constitutional Court in Lesotho; the correct position is that the Constitution confers the

> jurisdiction to interpret and enforce its provisions on the High Court. Consequently, the High Court can deal with this matter in its constitutional jurisdiction".

As this judgment is concerned only with what may be termed the jurisdiction issue there is no need to traverse the contentions and counter-contentions in the various affidavits relating to the merits of the Law Society's application.

[9] The matter came before Monapathi J. It is common cause that the issue of jurisdiction, and whether the application should be heard by a panel of three judges, was specifically raised and argued. It is also common cause that he was referred to the remarks of Nomngcongo J in the case of MAMATETE MORIENYANE v NQOSA MORIENYANE and OTHERS CIV/APN/204/2003 (unreported), judgment delivered

on 2 July 2004. That case involved a challenge to the constitutionality of section 3 (b) of the Administration of Estates Proclamation 19 of 1935. In the course of his judgment the learned judge remarked (at page 9):

> "Now I have to advert to another aspect which was not specifically raised nor was argued before me and that is the procedure adopted in making this constitutional challenge to the law. I consider this important enough to express my views on it, in spite of the view I take of this case which will soon be apparent."

After referring to various provisions of the Constitution and the advent of the Constitutional Litigation Rules, Nomngcongo J went on to express the following views:

> "Thus the court sitting in its constitutional jurisdiction should be distinguished from the court sitting in its ordinary civil or criminal jurisdiction. In that jurisdiction its procedure and practice is governed by separate rules. It is therefore not

> proper in my view to lump together in one application constitutional as well as ordinary redress. It may well be that it would be convenient to argue the two together where for instance one relief depends on the other, but that is a matter of the direction of the court hearing the matter in its proper jurisdiction under the relevant rules.
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> It would seem therefore that the constitutional challenge is not properly before me – this court sitting as it is, in its ordinary civil jurisdiction."

[10] Monapathi J heard full argument in relation to both the jurisdiction issue and the merits. On 29 September 2011 he delivered an oral ruling and granted the Law Society's application with costs. According to the note taken down by the appellants at the time of the ruling (the accuracy of which is not in dispute) the learned judge said, inter alia, the following:

> "The Court finds that this Court sitting as a one-man Court has jurisdiction – meaning that it is not necessary for this Court to be competent to have been established as a panel of more than one Judge in terms of the Constitutional Court Rules."

Monapathi J's full written judgment was delivered on 13 March 2012. A striking omission from the judgment is any reference to the issue of jurisdiction argued before him.

[11] The appeal before us by the appellants is against the order made by Monapathi J in favour of the Law Society. We requested that the parties address us on the jurisdiction issue first after which we would determine the further course of the appeal. We proceeded to hear full argument on the question of jurisdiction. We then reserved judgment. We intimated that if we were to uphold the appellants'

argument on jurisdiction we would allow the appeal and make an appropriate order as to costs; if we were to dismiss the appellants' argument on jurisdiction, we intended, because of the importance of the matter, to refer the appeal on the merits to a Full Bench of this Court comprising five judges. The parties intimated their agreement with such course being adopted.

[12] The challenge directed by the Law Society against the constitutional validity of the High Court (Amendment) Rules raises important questions relating to the exercise of the Chief Justice's power to make rules, the proper administration of justice in terms of the Constitution and certain aspects of the rights of litigants and accused persons. Its locus standi to bring the application it did is not in issue. One of the complaints made by the Law Society (see paragraph

9(1) (f) of the founding affidavit) is that the amended rules are contrary to the Constitution in that by substituting registrars for judges to perform what are alleged to be judicial functions in the High Court the rights of litigants are infringed "to have access to a lawfully constituted, competent and appropriately qualified adjudicating authority as provided for by the Constitution in terms of section 12 (1) and (8) read with Section 120".

[13] By invoking section 12(1) and (8) of the Constitution the provisions of section 22 (1) of the Constitution are brought into play. By its own account the Law Society is seeking redress in the High Court in the exercise of its constitutional jurisdiction. That being the case the Law Society, in bringing its application, was obliged to comply with the Constitutional Litigation Rules (the

validity of which has not been challenged). That it failed to do. Instead it followed the Rules of Court applicable to the High Court exercising its ordinary jurisdiction. As Nomngcongo J pointed out in MORIENYANE's case (supra), in my view correctly, a constitutional challenge cannot properly be brought before a judge exercising his ordinary jurisdiction, which is what happened in the present instance. Monapathi J should therefore have upheld the appellants' objection to the matter proceeding before him under his ordinary jurisdiction.

[14] The objection is not a purely technical one. Where different rules regulate different procedures it is incumbent upon a litigant to follow the correct procedure. Were that not so the Constitutional Litigation Rules might become redundant. The

invocation of these rules, and the allocation of a number by the registrar designating the matter as one raising a constitutional issue, will alert whoever is responsible for arranging the roll that the matter is one which may require a complement of three judges, and presumably the Chief Justice would be advised accordingly. If the proper route had been followed in the present instance then, given the importance of the issues raised in the application and the fact that it involved a challenge to the constitutionality of subordinate legislation involving the determination of matters in the High Court, it is a matter of high probability that the hearing of the application would have been set down before a three-judge panel, particularly having regard to what appears to be the established practice in such matters. Consequently the appellants have been denied a hearing before three

judges in the High Court exercising its constitutional jurisdiction to which they were entitled. In all the circumstances it is somewhat surprising, to say the least, that Monapathi J was prepared to hear the matter as a single judge exercising his ordinary jurisdiction.

[15] In my view the appeal must succeed on the jurisdiction issue. The matter will have to commence de novo in the High Court, exercising constitutional jurisdiction, in accordance with the Constitutional Litigation Rules. The matter should be heard by three judges.

[16] There remains the issue of costs. The appellants have asked for costs on the basis that the Law Society followed the wrong procedure and thereafter

stubbornly persisted in its denial that it had done so. Counsel for the Law Society intimated that if the appellants were unsuccessful on the jurisdiction issue, the Law Society would not ask for the costs of the appeal hearing on 19 April 2012, this despite the fact that it requested, and was granted, costs in the court below. This Court is in principle reluctant to make or sustain costs orders in constitutional matters where large issues of constitutional importance are at stake, or where there has been a substantial constitutional challenge of a public nature. That principle relates chiefly to a policy concern to avoid stifling litigation of public importance (see the remarks of Gauntlett JA in MINISTER OF LABOUR AND EMPLOYMENT AND OTHERS v TŚEUOA (supra) at 302H and TŚĒPĒ v INDEPENDENT ELECTORAL COMMISSION AND OTHERS (supra) at 188E).

[17] Apart from following the wrong procedure there is nothing that calls for censure of the Law Society's conduct. In matters such as this the Law Society, to its credit, acts as a watchdog representing the interests of litigants and society in general to ensure that the provisions of the Constitution are upheld. It must not be discouraged from doing so in appropriate cases. In the circumstances there should be no order as to costs.

[18] The following order is made:

1) The appeal is allowed and the order of the court a quo is altered to read:

   "The application is dismissed. There will be no order as to costs."

2) There will be no order as to costs in respect of the appeal hearing on 19 April 2012.

3) The application is to be commenced de novo before the High Court exercising its constitutional jurisdiction in terms of the Constitutional Litigation Rules 2000.

4) The Chief Justice or, should he excuse himself from allocating the case, the puisne Judge of the High Court tasked with that function, is requested to allocate three judges to hear the application.

5) The Registrar is requested, when the application is due for hearing, to afford it priority on the roll of cases.

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

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D.G. SCOTT
JUSTICE OF APPEAL

I agree:

_____

C.T. HOWIE
JUSTICE OF APPEAL

For the appellants: Adv H.P. Viljoen SC
For the respondent: Adv S.P. Sakoane and
Adv Z. Mda