THE COURT OF APPEAL OF LESOTHO

JUDGMENT

C OF A (CIV) 13/2015

CONS/CASE/02/2015

In the Matter Between:

THE ATTORNEY-GENERAL **Appellant**

And

HIS MAJESTY THE KING **First Respondent**

THE RIGHT HONOURABLE THE PRIME MINISTER **Second Respondent**

MINISTER OF LAW, CONSTITUTIONAL AFFAIRS AND HUMAN RIGHTS **Third Respondent**

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **Fourth Respondent**

KANANELO MOSITO **Fifth Respondent**

Neutral citation:

Coram: Brand, Cachalia, Maya, Shongwe and Wallis AJJA

Heard: 1 June 2015

Delivered: 12 June 2015

Summary

Constitutional law – appointment of President of the Court of Appeal – s 124(1) of the Constitution – appointment by the King acting on the advice of the Prime Minister – whether the principle of collective responsibility of the Cabinet in terms of s 88(2) of the Constitution requires the Prime Minister to seek the view of the Cabinet before

advising the King – *locus standi* of the Attorney-General in terms of s 98(2)(c) of the Constitution.

ORDER

On appeal from: High Court sitting as Constitutional Court (Musi AJ and Potterill AJ, Mathopo AJ concurring)

The appeal is dismissed with no order as to costs.

JUDGMENT

Wallis AJA (Brand, Cachalia, Maya and Shongwe AJJA concurring)

[1] On 15 January 2015, in terms of Legal Notice 12 of 2015 and the provisions of s 124(1) of the Constitution of Lesotho, His Majesty King Letsie III appointed the fifth respondent, Dr Kananelo Everrit Mosito KC as the President of the Court of Appeal of Lesotho. Prior to making the appointment the King had been advised by the then Prime Minister, Mr Thomas Thabane, (the Prime Minister), to appoint Dr Mosito, to this position. On the face of it therefore the appointment was properly made, because s 124(1) provides that:

'The President shall be appointed by the King on the advice of the Prime Minister.'

[2] The present appellant, Mr Ts'okolo Makhethe KC, the Attorney-General of Lesotho (the Attorney-General), did not accept that the appointment of Dr Mosito was lawful. He contended that by virtue of the

provisions of s 88 of the Constitution it was impermissible for the Prime Minister to advise the King to make the appointment, because the cabinet had not been informed of the possible appointment and its views on it were neither sought nor obtained. He brought proceedings in the High Court, sitting as the Constitutional Court, to set the appointment aside, but his application was dismissed. He now appeals to this court. In view of the nature of the issues that arise in the case it was thought desirable to have judges from South Africa sit in the appeal and my colleagues and I are honoured to have been appointed as acting judges of appeal for this purpose. The Constitutional Court bench was likewise composed of three South African High Court judges specially appointed as acting judges of the High Court of Lesotho.

[3] The Constitutional Court, in a joint judgment of Musi AJ and Potterill AJ, with which Mathopo AJ concurred, held that the Attorney-General lacked *locus standi* to institute legal proceedings directed at challenging the validity of the appointment of the President of this Court. That gave rise to the first issue in this appeal. It went on to consider the Attorney-General's arguments on the merits of the challenge to Dr Mosito's appointment and rejected them. That gave rise to the second issue in this appeal. While the application papers foreshadowed a challenge to the appointment based on improper motive and a lack of bona fides on the part of the Prime Minister in making the recommendation, these were hotly disputed and were not persisted with in argument before us.

[4] I would ordinarily address the issue of *locus standi* at the outset, but counsel for the King and the other respondents urged us first to form and express our conclusions on the merits of the Attorney-General's

arguments. He did so because they raised issues of great public importance and he submitted that it would be undesirable for this court to dispose of the case solely on the issue of *locus standi* without dealing conclusively with the validity of Dr Mosito's appointment as President of this Court. We did not understand counsel for the Attorney-General to object to our taking this course. It is accordingly the approach adopted in this judgment and I will deal at a later stage with the question of *locus standi.*

The issue

[5] We are concerned in this appeal with a single issue namely whether the Prime Minister was obliged before advising the King on the appointment of a new President for this Court to place the matter before his cabinet. I will expand in due course on the submissions made on behalf of the Attorney-General as to the purpose of that issue going before cabinet. But the primary dispute between the parties was whether the Prime Minister was obliged under the Constitution to do this, or whether, as urged on behalf of the respondents, he was under no such obligation.

[6] It will be apparent from this, and it is as well to stress this at the outset, that we are not concerned with the appropriateness of the advice that the Prime Minister gave to His Majesty the King. Nor are we concerned with Dr Mosito's fitness to fill the high office of President of this Court. Lastly, we are not concerned with an issue that emerged peripherally on the papers, whether he can legitimately fill that office while maintaining his academic position at the National University of Lesotho. These have nothing to do with our decision and are not affected by it.

[7] As refined in the course of argument, the Attorney-General's contentions depended on the principle of collective cabinet responsibility embodied in the Constitution of Lesotho. He submitted that this principle obliged the Prime Minister, before giving advice to the King, to place the matter of such advice before his cabinet, and his failure to do so meant that the appointment was fatally flawed. The Prime Minister contended that he was not so obliged and that the plain wording of s 124(1) of the Constitution referred to him alone as the person who must advise the King on the appointment of the President of this Court. There is a factual dispute as to what the Prime Minister did in this regard so I deal with that at the outset.

The facts

[8] On the issue of whether the Prime Minister consulted the cabinet before he advised the King to appoint Dr Mosito, Mr Makhethe said:

'I aver that there has never been a discussion in Cabinet, even in general terms, that the present Government recommends the appointment of the President of the Court of Appeal to replace Justice Ramodibedi who had since resigned.'

[9] This attracted a curious response from Mr Thabane. In his answering affidavit he said:

'The factual premise for this contention is immediately misconceived. My recommendation was "referred to cabinet". On [insert date] at a Cabinet meeting I informed Cabinet of the proposed appointment. The Attorney-General (together with Deputy Prime Minister) chose not to attend Cabinet on that day, although given notice.'

No attempt was made at any later stage of proceedings to rectify the omission of the relevant date or to identify the occasion or the manner in which Mr Thabane 'referred' the issue to cabinet.

[10] In reply to these allegations Mr Makhethe said:

'I reiterate the fact that there was no Cabinet meeting held in which the issue of the appointment of the President of Court of Appeal was discussed. I have minutes of all meetings that I attended and those that I did not attend. I am entitled to such minutes by virtue of my office. There is nowhere in any of the minutes in my possession where the issue of the appointment of the President of the Court of Appeal is discussed. It would be impracticable and burdensome to attach all the minutes of Cabinet in my possession referred to earlier.'

[11] The Constitutional Court held that this factual dispute fell to be determined against the Attorney-General. It was particularly critical of his failure to annex the minutes in his possession that did not refer to the question of a possible appointment of the President of this Court. I do not agree with the criticism or the conclusion. It would have been pointless for the Attorney-General to annex to his affidavit a number of cabinet minutes merely to show that they did not mention such an appointment. In addition it would have raised acute questions of his right to do so, bearing in mind both the fact that cabinet minutes are confidential in accordance with the principle of cabinet responsibility, and that the attorney-general attends cabinet meetings and receives minutes of those meetings because he is the chief legal adviser to the government.

[12] On the other hand, if the matter had been referred to cabinet, it would have been a matter of simplicity for the Prime Minister to have identified the occasion on which, and the manner in which, this was done. It was plainly the intention of those who prepared his affidavit that he would do so, but he failed in that regard. It is a long established principle that where a matter is peculiarly within the knowledge of the opposite

party less evidence will be required from the party bearing the onus to establish a prima facie case requiring rebuttal.[1] Here the means of rebutting the Attorney-General's allegations, if that were possible, were readily to hand as far as the Prime Minister was concerned and he refrained from deploying them.

[13] For those reasons the Attorney-General's allegations that the matter was never placed before cabinet for its consideration prior to the Prime Minister making his recommendation to the King must be accepted. It is against that background that I turn to deal with the primary question whether that failure resulted in the appointment being constitutionally defective.

The legal position

[14] In order to address the respective arguments of the parties it is desirable to set out the relevant provisions of the Constitution on which the Attorney-General relied in support of his argument. They are ss 86, 88(1) to (3) and s 91(1). They read as follows:

'86 The executive authority of Lesotho is vested in the King and, subject to the provisions of this Constitution, shall be exercised by him through officers or authorities of the Government of Lesotho.

88 (1) There shall be a Cabinet of Ministers, consisting of the Prime Minister and the other Ministers.

(2) The functions of the Cabinet shall be to advise the King in the government of Lesotho, and the Cabinet shall be collectively responsible to the two Houses of Parliament for any advice given to the King by or under the general authority

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[1] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4; *Ex Parte The Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 479 and *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39G-H.

of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.

(3) The provisions of subsection (2) shall not apply in relation to –

(a) The appointment and removal from office of Ministers and Assistant Ministers, the assignment of responsibility to any Minister under section 89 of this Constitution or, save in circumstances set out in the proviso to section 90(3), the authorisation of another Minister under section 90 of this Constitution to exercise the functions of the Prime Minister during the latter's absence or illness; or

(b) The dissolution or prorogation of Parliament.

91(1) Subject to the provisions of section 137(4) of this Constitution, the King shall, in the exercise of his functions under this Constitution or any other law, act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution or any other law to act in accordance with the advice of any person or authority other than the Cabinet.'

[15] Although s 86 vests the executive government of Lesotho in the King he exercises that power through officers and authorities of government. This is consistent with his position as a constitutional monarch and head of state.[2] To ascertain how he then exercises the power of executive government one turns to s 91(1), which provides as the basic rule that he should act in accordance with the advice of 'the Cabinet or a Minister acting under the general authority of the Cabinet'. That in turn is linked to the statement in s 88(2) that the function of the cabinet is to advise the King in the government of Lesotho. The latter section also contemplates that the King will sometimes be advised 'by the Cabinet' and sometimes 'under the general authority of the Cabinet'. That explains

[2] Section 44(1).

the reference in s 91(1) to the King being advised by a minister under the general authority of the cabinet.

[16] Thus far the constitutional scheme is clear. The King will be advised, either by the cabinet, or by a minister acting under its general authority. He is then obliged to follow that advice. However, as s 98(2) makes clear it is the cabinet, and not the King, that is responsible to parliament for that advice and its consequences.

[17] But s 91(1) contains an exception to this general scheme. It does not apply where the Constitution or some other law requires the King to act in accordance with the advice of any person or authority other than the cabinet. There are a number of instances in the Constitution itself where this occurs. Thus, for example, it provides that the King must act on the advice of the Council of State in declaring a state of emergency;[3] in appointing[4] or removing[5] the prime minister; in appointing members of the National Planning Board;[6] and in appointing the Chief Electoral Officer.[7] He must act on the advice of the Judicial Service Commission, in the appointment of judges[8] and judges of appeal,[9] or the appointment of members of the Public Service Commission[10] or the Constituency Delimitation Commission.[11] He must act on the advice of the Pardons Committee when exercising the prerogative of mercy[12] and on that of the Public Service Commission in suspending the Director of Public

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[3] Section 23(1) and (2).
[4] Section 87(1).
[5] Section 87(5).
[6] Section 105(1)(a).
[7] Section 138(1).
[8] Section 120(2).
[9] Section 124(2).
[10] Section 136(1).
[11] Section 66(1).
[12] Section 101(2).

Prosecutions.[13] Plainly these are authorities referred to in s 91(1) and where the King is obliged to act on their advice he does so to the exclusion of the advice of the cabinet.

[18] Turning then to persons in accordance with whose advice the King is obliged to act under s 91(1) there appear to be only two mentioned in the Constitution, namely the Chief Justice and the Prime Minister. He is obliged to act in accordance with the advice of the Chief Justice, in regard to the possible suspension of a judge;[14] the appointment of a member of the Judicial Service Commission; [15] and, the removal and replacement of that appointed member of the Judicial Service Commission.[16] As with the authorities mentioned above, where the Constitution requires that the King act on the advice of the Chief Justice it excludes any need for the advice of the cabinet.

[19] It was submitted on behalf of the King and the Prime Minister that the various provisions of the Constitution that provide that the King must act on the advice of the Prime Minister are further examples of instances where in terms of s 91(1) the King must act on the advice of a person, and not that of the cabinet. There are a number of such provisions. In terms of s 83(4) of the Constitution the King is required in the first instance in exercising the power to dissolve or prorogue parliament to act on the advice of the Prime Minister. The King also makes a number of appointments under the Constitution on the advice of the Prime Minister. These include the Chief Justice;[17] an acting Chief Justice;[18] the President

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[13] Section 141(7).
[14] Section 121(7).
[15] Section 132(1)(d) and 132(7).
[16] Sections 132(6) and (7).
[17] Section 120(1)

of the court of appeal;[19] an acting President of the court of appeal;[20] the Ombudsman;[21] the Attorney-General;[22] the Auditor General[23] and Ambassadors, High Commissioners or other principal representatives of Lesotho in any other country.[24] In regard to all of these office bearers the King may be required in certain circumstances to suspend them on the advice of the prime minister, but it would be a work of supererogation to list all the relevant provisions. The point is clear that there are a number of instances under the Constitution where the King is required to act on the advice of the Prime Minister. In all other instances falling under the exception in s 91(1) the person or authority's advice excludes the advice of the cabinet. Why then, it is submitted on behalf of the respondents, should it be any different in the case of the Prime Minister?

[20] This view of the role of the Prime Minister is consistent with the view of the latter's role in the Westminster system on which many of Lesotho's constitutional institutions are modelled. Writing in 1957, nine years before Lesotho's independence, Sir Ivor Jennings[25] said of the Prime Minister in Great Britain:

'In the Cabinet and, still more, out of it, the most important person is the Prime Minister. It is he who is primarily concerned with the formation of a Cabinet, *with the subjects which the Cabinet discusses*, with the relation between the Queen and the Cabinet and between Cabinet and Parliament, and with the co-ordination of the machinery of government subject to the control of the Cabinet.' (My emphasis.)

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[18] Section120(4)
[19] Section 124(1).
[20] Section 124(4)
[21] Section 134(1).
[22] Section 140(1).
[23] Section 142(1).
[24] S 143(1).
[25] Sir Ivor Jennings *Cabinet Government* 3ed at 1.

With the substitution of the King for the Queen in that passage it aptly summarises the role that the Prime Minister is expected to play under the Constitution of Lesotho. And in the United Kingdom at that time and in 1966, when provisions in terms the same as those we are considering in this appeal were incorporated into Lesotho's Independence Constitution, the Sovereign was responsible for the appointment of the higher ranks of the judiciary, such as the Lord Chief Justice and the Master of the Rolls, as well as the members of the Court of Appeal and the Law Lords, always acting on the advice of the Prime Minister.[26] To that extent therefore there is nothing surprising or unusual in those provisions of the Lesotho Independence Constitution, now carried into the 1993 Constitution, that provide for the King to appoint the two most senior members of the judiciary on the advice of the prime minister.

[21] The Attorney-General's answer is that this ignores the important principle of collective cabinet responsibility embodied in s 88(2) of the Constitution and qualified by s 88(3) thereof. He submitted that in terms of s 88(2) the Cabinet is collectively responsible for any advice given to the King by or under the general authority of cabinet and for all things done by or under the authority of any minister in the execution of his office. The Prime Minister is a minister, and under the Constitution the execution of his office includes his responsibility for advising the King in regard to various matters, some of which were enumerated in the previous paragraph of this judgment. When he gives this advice the cabinet is

[26] The judges of the Supreme Court as well as the Lord Chief Justice and the Master of the Rolls continue to be appointed by the Queen on the advice of the Prime Minister, but the latter now acts in accordance with the recommendation of a special selection committee in respect of the members of the Supreme Court (ss 26(2) and (3) of the Constitutional Reform Act 2005) and the Judicial Appointments Commission in respect of the other two posts. The Prime Minister has greater power in regard to the appointment of the Archbishop of Canterbury where he advises the Queen on the recommendation of the Crown Nominations Commission, which gives the Prime Minister the name of a preferred candidate and a second appointable candidate.

collectively responsible to the two houses of parliament for that advice and its consequences. The only circumstances where there is no such collective responsibility are in the four instances mentioned in s 88(3). These are the appointment and removal of ministers and assistant ministers; the assignment of responsibilities to ministers; the authorisation of another minister to fulfil the functions of the prime minister during the latter's absence or illness; and, the dissolution or prorogation of parliament. In all other cases where the prime minister gives advice to the King in terms of the Constitution the cabinet bears collective responsibility to both houses of parliament for that advice and its consequences.

[22] Moreover, the Attorney-General submitted that it is a necessary corollary of the cabinet's collective responsibility for these matters that the prime minister is obliged to place them before the cabinet for its views before he may give advice on them to the King. As he did not do so in relation to the appointment of Dr Mosito as President of the Court of Appeal, a prerequisite to his advising the King to make that appointment was missing. The appointment itself was therefore constitutionally defective and falls to be set aside.

[23] The statements by the Attorney-General in his affidavit, as well as the submissions on his behalf, as to the purpose for which these matters had to be placed before cabinet, fluctuated. In his founding affidavit he complained that the appointment of Dr Mosito was 'never referred to Cabinet' and occurred without cabinet's knowledge. Later in the affidavit he spoke of the need for a discussion in cabinet 'even in general terms'. That conveyed that he had in mind no more than that the members of the cabinet should have an opportunity to provide input on the appointment.

But in the notice of motion he went further and sought an order declaring that the prime minister was not entitled to recommend the appointment 'without the approval of Cabinet' which went considerably further than the allegations in his founding affidavit. The Constitutional Court appears to have been unclear whether the contention was that the referral to cabinet was for the purpose of obtaining advice or a recommendation and in the heads of argument delivered on behalf of the Attorney-General it was criticised for allegedly ignoring his case 'namely that cabinet had to approve'. What was required was a decision of cabinet 'either by unanimity or majority'.

[24] When this Court explored with counsel precisely what case was being advanced, and exposed certain of the difficulties attaching to the contention that the Prime Minister could not give advice that he was constitutionally obliged to give, without the approval of the cabinet, counsel retreated from this stance. He sought an amendment to the declarator in the notice of motion, confining its scope to a declaration that any recommendation by the prime minister would be invalid if made 'without seeking the approval of Cabinet'. The respondents opposed this amendment, but we permitted the argument to proceed on the footing that it would be dealt with in the course of this judgment.

[25] At the core of these contentions is the proposition that the collective responsibility of the cabinet has as its corollary an obligation on the part of the Prime Minister to place before the cabinet any matter in respect of which its members will thereafter bear collective responsibility. The attempt by counsel to restrict this to situations where the Prime Minister is required to give advice to the King in terms of the Constitution was untenable. Either collective responsibility entails

reference of a matter to cabinet or it does not. There is no scope in the language of s 88(2) to pick some topics, such as advising the King on appointments, and to exclude others, such as the provisions of the annual budget, or a decision to institute a public works programme, or the recognition of a foreign government, but to require the cabinet to accept collective responsibility in respect of all of them. Either collective responsibility carries with it, as a necessary corollary, collective decision-making, or it does not. No halfway house is apparent to me and counsel was unable to identify one.

[26] In its original form the declarator sought by the Attorney-General grasped this particular nettle and said that collective decision-making was necessary. But in practical terms that is impossible and it would bring the process of government grinding to a halt. Taking by way of example the annual budget, there is no more important item placed before parliament in any year. Unless it can pass a budget, the government has no means of paying the members of the public service; or providing schools and hospitals; or building roads; or paying social security grants and pensions; or undertaking any of the other multifarious activities of government in a modern state.[27] Yet the budget is not ordinarily the subject of cabinet deliberations, because the need for secrecy as to its contents, and the avoidance of conflict between different ministries within government in their demands for resources, precludes it. It is usually disclosed to cabinet shortly before it is placed before parliament.[28] However, if any

[27] In recent memory, during the presidencies of both President Clinton and President Obama, the failure of Congress to pass a budget has led to a partial shut-down of the American government.
[28] As to the earlier English practice see Jennings *supra* 237-238. The current position is that the budget is made available to the Cabinet on the day of the Chancellor of the Exchequer's annual budget speech. Halsbury's Laws of England, 5 ed, Vol 20, para 215.

government is to remain in office it is essential that all the members of the cabinet support and defend the budget.

[27] If collective decision-making was an essential corollary to collective responsibility, the immediate problem that would arise would be to determine which issues required to be brought before cabinet for discussion and decision and which could be dealt with at ministerial level without engaging cabinet colleagues. At what level of detail would it be necessary to secure the cabinet's approval for a course of action? A cautious minister would always be inclined to seek cabinet approval. A less timorous spirit might hardly ever do so. According to the Attorney-General, the latter's actions could be challenged as constitutionally deficient and the courts, rather than the politicians, would have to decide what should be discussed at cabinet. A more effective mechanism for casting grit into the engine of government, already inclined to be slow and easily bogged down in bureaucracy, is difficult to imagine.

[28] By contrast, it is said in Halsbury,[29] taking guidance from the Cabinet Manual in the United Kingdom and the Ministerial Code, that the following are matters that must be referred to cabinet. First, matters of major public importance or those that are likely to lead to significant public comment or criticism. Second, matters having a subject matter that affects more than one department. Third, matters where there is an unresolved conflict between departments. More explicitly the Cabinet Manual lists decisions over military action; the legislative priorities of government; constitutional issues; the most significant domestic policy issues; the most significant international issues; issues having an impact

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[29] Ibid para 215.

on all members of cabinet and national emergencies as issues that should in the ordinary course be placed before cabinet.

[29] Were the business of cabinet to be compelled to include matters going beyond these high issues of state, it is hard to see how ministers would find any time to attend to the running of their departments. For it to be meaningful, it would require ministers to acquire expertise in areas in which they had none and that were of no concern to the tasks allocated to them under s 89 of the Constitution.

[30] Over and above these logistical problems, there was no answer to the question of what was to happen if the cabinet deadlocked over an issue. The possibility was mooted in argument of a pet project of the Prime Minister being rejected by a narrow majority in cabinet. What was to prevent him from having a sufficient number of dissentient ministers removed under s 87(7)(d) of the Constitution and replacing them with more compliant ministers before resubmitting the proposal to cabinet? The answer is clearly nothing at all beyond personal political popularity. But, if that is so, then the suggested requirement of cabinet agreement where there is cabinet responsibility cannot be correct.

[31] No doubt that is why counsel moved for an amendment setting the bar at the lower level of placing a matter before cabinet with a view to seeking its agreement. But that compounded the problems. Not only did the ones mentioned in relation to the stronger standard continue to arise, but the amendment raised starkly the problem of the Prime Minister failing to obtain approval. Was the Prime Minister entitled, in the words of a well-known song to ‘listen very nicely and go out and do precisely what he wants’? And if that was indeed the case, what was the purpose of

the Prime Minister having to lay the matter before the cabinet and seek its consent? It would be a mere matter of form having no substance, if from a constitutional perspective, apart from any possible political fallout, the Prime Minister could legitimately ignore the cabinet's views on a matter.

[32] If the obligation is set at an even lower level of referring the matter to cabinet in order to afford ministers an opportunity to give advice and make a contribution, or merely so that ministers are informed, then the language of the relevant sections is inexplicable. Section 91(1) distinguishes between cases where the cabinet gives advice to the King and cases where advice is to be given by other persons or authorities. If this were the Attorney-General's contention (and the submission was pitched at a higher level) it involves implying a provision of the familiar type that the Prime Minister must act 'in consultation' or 'after consultation' with the cabinet. To do that, on the basis of a section providing for collective responsibility of the cabinet to parliament, would stretch the language of the Constitution beyond permissible limits. And even then it would not be possible to say which of these two possibilities would apply.

[33] Throughout the argument counsel was unable to define with any clarity the purpose of requiring that these questions be referred to cabinet or the standard of debate and decision-making that needed to occur in order to achieve constitutional validity. That is a powerful indication that what he termed the corollary to collective responsibility, which was nothing more than an implication to be derived from the terms of the

Constitution, was unsound. Trollip J pointed out in the context of implying something in a statutory instrument in *The Firs*,[30] that:

'Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious … I think that the same must apply to implying a term in a statute, for the process is the same … Here there is appreciable difficulty in formulating and locating any such term precisely.'[31]

[34] There is in my view a clear reason for counsel's difficulties. It is that he sought to attach to the obligation of collective responsibility that rests upon cabinet ministers a further duty resting upon the Prime Minister that has never formed part of that obligation. A brief explanation of the background to and content of the obligation of collective cabinet responsibility will illustrate why this is so.

[35] Cabinet government developed in the United Kingdom in the early to middle parts of the Nineteenth Century, although its roots lay earlier in the relationship between the King and the Privy Council.[32] According to Professor Maitland in his celebrated lectures on the constitutional history of England[33] the cabinet 'is unknown to law'. However, he recognised both its factual existence – like that of the Prime Minister – and said that cabinet government was dependent upon political unanimity; common

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[30] *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E-G.
[31] Approved in *Rennie NO v Gordon and Another NNO* 1988 (1) SA (1) at 22G-H. See also *Desai and Others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522C-523A.
[32] As to the history of the development of the cabinet in English political thought see Sir William R Anson *The Law and Custom of the Constitution*, vol II: The Crown, Part 1 (1907) pp 76 to 135 and House of Commons research paper 04/82 by Oonagh Gay and Thomas Powell entitled *The collective responsibility of Ministers – an outline of the issues* published on 15 November 2004 available at researchbriefings.files.parliament.uk/documents/RP04-82.pdf.
[33] F W Maitland *The Constitutional History of England* 402. The lectures were delivered in 1877 and 1888 but were only published in 1913 after his death.

responsibility to parliament; and submission to a common head (the Prime Minister). In regard to cabinet responsibility he said:

'… The law … not very indirectly compels harmony among ministers … However unity is secured in the main by extra-legal rules; rules which require that ministers shall either agree with their colleagues or resign, which requires that as regards important practical questions ministers shall have the same policy.'

[36] The convention of collective responsibility is discussed in Bradley and Ewing.[34] They cite the following statement by Lord Salisbury in 1878:

'For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues … It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the most essential principles of parliamentary responsibility established.'

The authors go on to summarise the modern understanding of the convention in seven propositions of which the following are relevant for present purposes. So long as politicians serve as ministers, they share in the collective responsibility of all ministers in the sense that they may not publicly criticise or dissociate themselves from government policy. The result is that, although in the course of debate within the cabinet there will be differences of view, once government policy has been settled all ministers are required to support it. In principle secrecy attaches to communications between departments. Collective responsibility may also extend to defending a cabinet colleague in regard to the conduct of their

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[34] A W Bradley and K D Ewing *Constitutional and Administrative Law* 12 ed (1997) at 115-118; Hilaire Barnett *Constitutional and Administrative Law* 2ed (1998) at 37 and 388-9. See Halsbury supra para 123 for the most recent statement of the convention.

departments, even though each minister is individually responsible to parliament for the affairs of their own department.

[37] Nothing in this convention requires that any particular matter of government policy, or any decision by the Prime Minister, should be debated in cabinet. Writers on the topic provide many illustrations of important policy decisions being taken by the Prime Minister alone, or by only certain ministers, yet nonetheless becoming the policy of the government of the day and attracting the application of the convention. The simple proposition is that unless the convention is relaxed, as has occurred on occasions,[35] ministers are bound by it and can only escape from it by resigning their ministerial office,[36] although this does not entitle them to breach cabinet confidentiality. So long as they are bound they must vote with the government on the issue, defend it if required to do so and cannot afterwards claim that they did not support it.[37]

[38] The principle of collective responsibility of cabinet is applicable as a matter of convention in countries such as Canada, South Africa, Australia and New Zealand and, as far as can be ascertained, either by convention or in terms of a constitution in all countries where a form of cabinet government operates. When Great Britain granted independence to its colonies and protectorates after the Second World War it usually did so in terms of a written constitution. It was a frequent feature of these constitutions that they incorporated as constitutional prescripts principles

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[35] E C S Wade in his introduction to A V Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1959, reprint 1979) clxxxix. Halsbury supra para 214.
[36] Jennings supra 277
[37] Jennings supra 278 and 497-499. Jennings wrote in 1957. To similar effect in 1964, a mere two years before the doctrine was incorporated in the Lesotho Independence Constitution A H Birch *Representative and Responsible Government: an Essay on the British Constitution* described the convention in similar terms.

that in the United Kingdom were matters of constitutional convention.[38] Provisions similar to s 88(2) are to be found in the constitutions of India,[39] Malaya (initially and then Malaysia),[40] the 1967 Kenyan independence constitution,[41] Ireland,[42] and those of Barbados[43] and the Bahamas.[44] No doubt there are others for, as Professor de Smith pointed out, in many of the newly independent commonwealth countries British conventions were spelled out in some detail in constitutions.[45] In regard to collective responsibility Professor de Smith described it as a concept whose outlines are vague and blurred and suggested that it goes no further than the following:

'Collective responsibility also implies that all Cabinet Ministers assume responsibility for Cabinet decisions and action taken to implement those decisions. A Minister may disagree with the decision or with the manner of its implementation, but if he wishes to express dissent in public he should first resign.'

[39] Although collective responsibility in many countries is now a constitutional requirement, nothing we were given or found suggested that this has in any way affected its basic nature. Statements about it continue to reflect the same elements as were discerned by writers in

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[38] Ghana and other countries that opted for an executive president were an exception. See Nana S K B Asante *Reflections on the Constitution Law and Development* 35 J B Danquah Memorial lecture, 2002 pp 21-23. Article 41 of the Namibian Constitution has a narrow version of collective responsibility 'for the administration and work of the Cabinet'. In Zambia the cabinet takes collective responsibility for cabinet decisions in terms of s 112(2) of the Constitution.

[39] Clause 75(3) of the Indian Constitution.

[40] Clause 45(3) of the Constitution of the Federation of Malaya, 31 August 1957 and of the Constitution of Malaysia, 16 September 1963.

[41] Section 76(2) of the Kenyan Independence Constitution, which is in terms identical to s 88(2) of the Lesotho Constitution, save for a reference to the Governor-General instead of the King.

[42] See the paper entitled *Constitutional Parameters of Dail Reform* by Dr Lia O'Hegarty dated January 2014 and available at https://www.constitution.ie/AttachmentDownload.ashx?mid=9e1a0de5.

[43] Section 64(2) of the Constitution of Barbados.

[44] Section 72(1) of the Constitution of the Bahamas.

[45] Stanley de Smith and Rodney Brazier *Constitutional and Administrative Law* 8ed (1988) at190-2.

England where it developed. Thus, for example, the Gujerat High Court said of it:[46]

'Collective responsibility means all Ministers share collective responsibility even for decisions in which they have taken no part whatsoever or in which they might have dissented at the meeting of the Council of Ministers. Collective responsibility means the members of Council of Ministers express a common opinion. It means unanimity and confidentiality.'

[40] Were it not for the provisions of s 88(3), it might have been argued that the actions of the Prime Minister in advising the King of various matters under the provisions of the Lesotho Constitution were not subject to collective responsibility on the part of the cabinet. Whether they would be so subject under the looser convention that operates in the United Kingdom is unclear and need not detain us. But s 88(3) makes it clear that, apart from the excepted instances, collective responsibility applies to all things done by all ministers in the execution of their office. That includes the Prime Minister giving advice to the King. However, the next step of the Attorney-General's argument involved saying that this imposed a legal obligation on the Prime Minister to place before cabinet the question of what advice he should give, prior to giving the King that advice. That further step is not justified by the terms of the section or the nature of the obligation of collective responsibility on the part of the cabinet.

[41] There are of course sound political reasons why the Prime Minister will refer matters to the cabinet, and these matters may include

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[46] *Dattaji Chirandas* v *State of Gujarat and Another* AIR 1999 Guj. 48 at 59, (1999) 3GLR 2189. See also George Marshall *Ministerial Responsibility* (Oxford University Press) 2-4, who identifies the confidence of parliament; the public unanimity of the cabinet and the confidentiality of their deliberations as the essence of the doctrine of collective responsibility.

topics on which, under the Constitution, he is obliged to advise the King. This may be so whether or not collective responsibility of cabinet is involved. For example, one can readily conceive of the Prime Minister raising the question of the dissolution of parliament with cabinet. However, it is a far cry from that to the conclusion that he is required as a matter of interpretation of the Constitution to do so.

[42] There are other contextual indications in the Constitution itself that point in this direction. I mention three that seem to me the most important. The first is the language of s 91(1) and the fact that when it refers to authorities or persons other than the Prime Minister advising the King it is plain that such advice is given without prior reference to the cabinet. There is no clear reason why the Prime Minister as the leader of the government of the day should be treated differently and the language does not support such a difference in approach.

[43] The second indication lies in s 90(3) dealing with the appointment of an acting Prime Minister when the incumbent is either absent from Lesotho or unable due to illness to discharge his functions. The King makes that appointment on the advice of the Prime Minister and in terms of s 88(3) that is a matter for which the cabinet does not bear collective responsibility. However, the proviso to s 90(3) goes on to say that, if it is impracticable for the King to obtain the advice of the Prime Minister, the King then makes the appointment on the advice of the cabinet. The section draws a clear distinction between the advice of the Prime Minister and that of the cabinet. Why then in other sections referring to the Prime Minister advising the King is his advice to be given only after reference to the cabinet? No reason was suggested and none occurs to me.

[44] Thirdly, there is the position of the Council of State. It is plain for reasons already discussed that when the Council of State is required to advise the King it does so without reference to the cabinet. But the Prime Minister is a member of the Council of State. It was accepted that when he performs his functions as a member of that body he is not required first to consult the cabinet. But he is also responsible in terms of ss 95(2)(i) and 95(5)(e) of the Constitution for advising the King on the appointment of three members of the Council of State and advising the King on the removal of those members. Finally if the King does not convene a meeting of the Council of State for the consideration of a matter on which the Council's advice is required, which could include as important a matter as seeking its advice on the appointment of a new Prime Minister after a general election,[47] it is for the prime minister to call such a meeting.[48] I find it difficult to reconcile these functions with the contention that he must whenever he acts, save for the instances set out in s 88(3), consult with the cabinet.

[45] For those reasons I find the submissions on behalf of the Attorney-General unsustainable. It is not correct that the Constitution required the Prime Minister, before advising the King on the appointment of a new President of this Court, to refer the subject of that advice to cabinet. (I repeat that I say nothing about the wisdom of his not doing so, particularly in the context of a coalition government and an impending election.) As I reach that conclusion without regard to the purpose of his doing so, that is, whether he needed their approval, or merely to seek their approval, or whether a lesser purpose was served, the application to

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[47] Sections 87(1) and (2).
[48] Section 95(8).

amend the relief sought served no purpose and it is refused. The fact that the cabinet shared collective responsibility for the advice given by the Prime Minister did not require that he first refer such advice to cabinet as a constitutional prerequisite to its validity.

[46] Before leaving this topic finally I should deal with one aspect of the judgment of the Constitutional Court. In paragraph 34 of its judgment it said that the matters on which the cabinet advises the King are matters relating 'broadly to policy making' and one of the reasons it gave for saying that the appointment of the President of this Court did not need cabinet approval was that it 'is not a policy issue'. This approach was not in my view correct and insofar as it may suggest that cabinet is only to be involved in policy issues, whatever that expression may encompass, it is incorrect and should not be followed. The matters in which cabinet should be involved are to be determined by the Prime Minister and the cabinet and are not to be restricted in the manner suggested. I may add that the making of appointments to high office in the Kingdom of Lesotho, as with other countries, may well involve issues of policy.

Locus standi

[47] The conclusion expressed above renders the question of the Attorney-General's *locus standi* academic. Even if he had *locus standi* it would make no difference to the outcome of the appeal. And in my view it is undesirable for us to go further and make a final determination of that question. My reasons are briefly the following.

[48] The Attorney-General said in his founding affidavit that he relied on s 98(2)(c) of the Constitution for his *locus standi*. That section says that one of the functions of the Attorney-General is to take necessary

legal measures for the protection and upholding of the Constitution and other laws of Lesotho. The Attorney-General contended that, as the appointment of Dr Mosito took place in breach of the relevant constitutional provisions, he was entitled to approach the Constitutional Court for an appropriate order in the performance of his duty to uphold the Constitution of Lesotho.

[49] In the opposing affidavit of the Prime Minister there was no response at a factual level to these allegations. It was merely submitted that the Attorney-General lacked *locus standi* and that this was a matter for legal argument. This prompted the Attorney-General in his replying affidavit to state again that he had come to court in the performance of his duties under s 98(2)(c) of the Constitution.

[50] The Constitutional Court's approach to these contentions was to accept that if there were political interference with the functioning of the Attorney-General, or the office of the Director of Public Prosecutions over which he exercises ultimate authority, it would be open to the holder of the office to approach the court for relief. It held that this flowed from the provisions of ss 98(2)(a) and (b) of the Constitution, read with s 98(4) thereof. But it held that the Attorney-General lacked *locus standi* to challenge the appointment of the President of this Court for reasons that it expressed as follows:

'[16] The Attorney-General acting by the authority and as part of the function of his office is claiming substantive relief against a decision of his Majesty the King. The Attorney-General purports to do so in the interests of the legal profession. However that is the function of the Law Society of Lesotho and not the Attorney-General. On the facts the Attorney-General brought this application based on his interpretation of what would be good or best practice for the appointment of the President of the Court of Appeal. The Constitution however does not authorise him to protect or uphold

good practices. Effectively he is litigating against his own client because the client had not sought his advice as the Attorney-General and a member of cabinet.

(17) There is no anomaly in section 98(4) excluding 98(2)(c). The Attorney-General must be able to run his own office. In terms of section 98(2)(a) and (b) he could thus foreseeably institute action against the Government if there is political interference in his office, but he cannot on any other basis act against the Government. It was argued that he is not the functionary to protect the interests of the legal profession as the Law Society of Lesotho fulfils this function. His function is *inter alia* in terms of section 50(5) of the Constitution to institute civil proceedings on behalf of the King. If regard is thus had to the text of the Constitution then section 98(2)(c) does not authorise the Attorney-General to institute these proceedings.'

[51] There are a number of flaws in this reasoning. It is not clear on what basis the Constitutional Court said that the Attorney-General purported to bring this application in the interests of the legal profession. His undisputed evidence was that he was acting in his official capacity and seeking to protect and uphold the Constitution, a duty that the Constitution expressly casts upon him. Then there is the proposition that he was effectively litigating against his own client 'because the client had not sought his advice as the Attorney-General and a member of cabinet'. That was never his case. Whilst his first duty is to provide legal advice to the government of Lesotho, he can only do that when such advice is sought and it was not sought in this case. His case was based on the failure of the Prime Minister to consult the cabinet. Thirdly, the Constitutional Court erroneously thought that he was a member of the cabinet. That is not so. As the Prime Minister had pointed out in is affidavit the Attorney-General attends cabinet meetings in order to give advice to the government, but he is not a member of the cabinet. In terms of s 88(1) of the Constitution the cabinet is composed of the Prime Minister and other ministers. Lastly, why the Constitutional Court

thought that s 50(5) of the Constitution was relevant is a mystery. No doubt in order to protect the dignity of the King, while enabling him to pursue by action if necessary legitimate civil claims, that section provides that the Attorney-General will pursue any such claims on his behalf.

[52] What is absent from the decision of the Constitutional Court was any endeavour to grapple with the fact that the Constitution in s 98(2)(c) imposes upon the Attorney-General a duty to take legal measures for the protection and upholding of the Constitution. Assuming, for the purposes of determining his *locus standi*, that there was a defect in Dr Mosito's appointment, was he to sit idly by and ignore that? Could he in all good conscience appear in this Court as litigant on behalf of the government, if he knew that the person presiding as the President of the Court had not been properly appointed? These are difficult questions to which the answer is by no means apparent.

[53] An instinctive response to the questions posed in the previous paragraph may well be to say: 'Surely not'. But that is far too simple an approach. It ignores the fact that the Attorney-General is the principal legal adviser to the government of Lesotho. As such he is in receipt of confidential information from what is effectively his client, albeit that he is employed in the public service. Such information would be privileged and it would not be open to him to disclose it without his client's consent, much less to use it as a springboard to litigate against the government of the day and contrary to its wishes. It is because of this role that he is entitled to attend cabinet and have access to cabinet papers and minutes. Those are subject to a principle of confidentiality. Indeed one of the cases to which we were referred in support of the contention that he had *locus standi* involved the Attorney-General of Ireland seeking to protect the

confidentiality of cabinet minutes from disclosure to a commission of enquiry.[49]

[54] Counsel readily accepted that it would not be open to the Attorney-General to make use of such confidential material for the purpose of engaging in constitutional litigation aimed at challenging the actions of government. He also accepted that the duty imposed on the Attorney-General under s 98(2)(c) could not extend to intervening to protect individual rights guaranteed under Chapter II of the Constitution. He had difficulty in demarcating the areas in which that duty could be exercised by litigation. It was unclear whether it could be directed at challenging the constitutional legitimacy of actions taken by the King, acting on advice, or other government action, or the validity of legislation passed by parliament. Counsel for the respondents rightly raised the spectre of a maverick Attorney-General taking it upon himself to challenge a range of government actions, thereby nullifying his own usefulness as the government's chief legal adviser.

[55] All of this merely illustrates why the question of the proper construction of s 98(2)(c) is a matter of some difficulty and a decision on it cannot affect the outcome of the appeal. It is a topic that may have to be debated in this Court on another occasion and nothing we say here should be taken to affect that debate. I accordingly express no view on it, not even a tentative one.

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[49] *Attorney-General v Hamilton (Number 1)* [1993] 2 IR 250. The case involved a demand by a body called The Beef Tribunal for information about Cabinet discussions surrounding the allocation of export credit insurance to beef exporters. The court held by a 3-2 majority that confidentiality was a corollary to the doctrine of collective responsibility and was absolute. The case led to an amendment to Article 28.4.3 of the Irish Constitution.

Conclusion

[56] In the result the appeal is dismissed. There will be no order for costs.

M J D WALLIS

ACTING JUDGE OF APPEAL

Appearances

For appellant:	M E Teele KC (with him K K Mohau KC and S Phafane KC) Instructed by: Mei & Mei Attorneys Inc, Maseru.
For respondent:	J J Gauntlett SC (with him K Nthontho and F B Pelser) Instructed by: Messrs Nthontho Chambers, Maseru.