

**IN THE COURT OF APPEAL OF LESOTHO  
(HELD AT MASERU)**

Case Number C of A (CIV): 66/2015  
Constitutional Case Number: 06/2015

In the matter between:

**DR KANANELO EVERRIT MOSITO  
APPELLANT**

and

**THE DIRECTOR OF PUBLIC PROSECUTIONS      1<sup>ST</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL                              2<sup>ND</sup>  
RESPONDENT**

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**JUDGMENT**

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**Kriegler AJA (Musonda, Nugent, Van der Westhuizen and  
Shongwe AJJA concurring):**

[1] This is an unusual judgment in an unusual case. My colleagues and I constitute a Bench of the Court of Appeal of Lesotho that was specially empaneled to deal with an appeal involving the President of that Court personally. He is appealing against a judgment and order in the High Court discharging

with costs certain interim orders that had been granted involving his tenure as the President of the Court of Appeal of Lesotho.

[2] The appellant's appointment was contentious from the outset, both politically and professionally. His appointment early last year during a political window preceding a general election was made on the recommendation of a man who was soon to lose office as Prime Minister to a bitter opponent. The incoming Prime Minister made plain that he thoroughly disapproved of the substance and timing of the appointment. Professionally the nomination was contentious as the appellant's elevation to such high judicial office straight from the ranks of the Bar was seen as arguably unduly swift.

[3] During the ensuing months the new Prime Minister and his Attorney General made vigorous politico-legal and diplomatic attempts to have the appointment nullified. These came to naught and in mid-July 2015 the appellant presided in the Court of Appeal for the first time. His tenure was to prove stormy. Within a matter of weeks the first respondent issued an indictment charging the appellant with 19 counts of failing to render annual returns of income (dating back to 1996), followed by a notice of trial in the High Court for 31 August 2015. This was to trigger a succession of interrelated urgent applications, raising a flurry of allegations and counter-allegations.

[4] The first of these was a swift and formidable pre-emptive strike by the appellant. Characterising the prosecution as a malicious stratagem on the part of the executive aimed at his dismissal, he

launched an urgent *ex parte* application, enrolled without notice for 31 August 2015. In it he applied for a *rule nisi* staying the criminal prosecution pending a substantive application for its invalidation, coupled with a number of declaratory orders and an award of costs on the attorney-and-client scale including costs consequent upon the employment of no fewer than five advocates and an attorney.

(The court *a quo* labelled the various applications that figure in this case numerically, though not always chronologically, i.e. as “the first application”, “the second application” and so forth. In the interests of clarity we adopt the labels used by the court *a quo*.)

[5] In the first application the High Court there and then granted the appellant interim relief by way of

an interdict, and the adjudication of the substantive issues proceeded on an opposed basis. The respondents joined issue with the appellant on his formidable array of contentions, vehemently denying the averment of bad faith and defending the decision to prosecute as a proper exercise of the first respondent's powers. The appellant in reply no less vehemently persisted in his original contentions.

[6] While these affidavits were being exchanged in the first application, the appellant launched a second urgent application in the same court ("the second application"), once again *ex parte* and without notice. On this occasion the respondents were the Commissioner General of the Lesotho Revenue Authority and the Authority itself. In an attempt to substantiate a complaint of unfair and unconstitutional discrimination that he had made

in the first application, the appellant now effectively sought disclosure of the income tax data of all the other judges in the country and a number of legal practitioners, the latter identified by their income tax numbers that he had somehow procured.

[7] It is hardly surprising that the second application elicited not only a formal response from the two respondents concerned but also a vociferous reaction from several of the affected legal practitioners. Some of them attended court at the hearing of the second application and procured an undertaking from the appellant that he would apply for their joinder and an order was made requiring him to do so. The appellant failed to do so, which prompted four of them, an attorney and three advocates, to launch another urgent

application (“the third application”) seeking leave to join in the second application.

[8] Meanwhile the Director of Public Prosecutions, the first respondent in these proceedings – whose indictment of the appellant had initiated this whole series of interrelated procedures – had also applied to the High Court for leave to join as a respondent in the second application, i.e. the applicant’s case against the revenue authorities. This then became the fourth application relating essentially to one central dispute, being the appellant’s objection to his prosecution under the Income Tax Act 1993 that he had challenged in the first application.

[9] As if that was not enough, there was yet another application (“the fifth application”) in the running battle between the appellant and his adversaries. While affidavits in the first application

were still being exchanged, and possibly in reaction to the appellant's main contention in that case, the Prime Minister by formal letter invited the appellant to show cause why dismissal proceedings should not be instituted against him in consequence of his alleged offences under the Income Tax Act 1993. The response of the appellant was to apply for an order, among others, declaring the issue of the notice invalid and irregular for violation of the Rule of Law.

[10] To summarise: there were ultimately five separate applications involving an impressive array of opponents ranging from the Prime Minister, the Attorney General and the appellant's colleagues on the Bench and at the Bar to the Director of Public Prosecutions and the Commissioner General of the Revenue Authority. But, notwithstanding this ostensibly wide-ranging and tangled skein of



litigation, on closer examination the issues on appeal before us fall within a narrow ambit and are quite clearly defined. Some of the original issues have fallen away, others have not been pressed on appeal and what remains has in large measure been disentangled by the court *a quo*. We are indeed in general agreement with the reasoning and findings in the court below and can therefore be relatively brief.

[11] In the first application the appellant, besides challenging the *bona fides* of the prosecution, advanced an array of grounds for its invalidation, principal among them being that the institution of criminal proceedings against a sitting judge is unconstitutional. The essence of the contention was that by reason of the separation of powers enshrined in the Constitution of Lesotho, errant judges must be dealt with under the dismissal

procedure contained in section 125 of the Constitution and not in the criminal courts.

[12] While the founding affidavit seemed to suggest that the contention was that a judge was immune from criminal prosecution - and the respondents understood and answered the contention as bearing such meaning - the appellant in his replying affidavit explained that he did not contend for an absolute bar, merely that the section 125 procedure was a necessary precursor to a possible criminal prosecution of a judge. This remains the appellant's main contention.

[13] In this court, as in the court below, it was strenuously argued that the issue in this case is the independence of the judiciary in Lesotho, independence articulated and guaranteed in the

Constitution, and with it the preservation of the separation of state powers and the Rule of Law. At the same time the vital importance of these values was emphasised by reference to extensive comparative authority. None of this can conceivably be challenged. These values are indeed inviolable and vital for the preservation of democracy in the Kingdom of Lesotho.

[14] But in our view the argument advanced on behalf of the appellant is fundamentally misdirected. It confuses two separate and distinct constitutional mechanisms: on the one hand there is the general power (and duty) of the state to prosecute crime, and on the other hand the power of His Majesty the King, at the instance of the Prime Minister, or the President of the Court of Appeal, as the case may be, to remove errant judges from office. There is no suggestion in

section 125 of the Constitution, however broadly interpreted, nor in any other part of the Constitution, to support the truly startling proposition that the removal mechanism of section 125 overrides or qualifies the prosecutorial power of the Director of Public Prosecutions. In section 99(2)(a) of the Constitution the incumbent of this office is given the “power in any case in which he considers it desirable ... to institute and undertake criminal proceedings against any person before any court ... in respect of any offence”.

[15] There is nothing in the wording or context of section 125 to suggest that members of the judiciary in Lesotho are *ex officio* shielded from prosecution, that a judge is not “any person” within the meaning of section 99(2)(a), that judges are not included in this strikingly widely designated category. On the contrary, such a construction

would not only fly in the face of section 99 but would be in conflict with the Rule of Law and the Constitution's explicit principle of equality before the law enshrined in section 19. The construction, moreover, smacks of elitism and privilege, sentiments at variance with universally accepted judicial ethics. Judges occupy high office and are due respect and governmental support in the exercise of their onerous duties, but they are not princes; they are servants.

[16] Of course it is important to protect the judiciary against any impairment of its untrammelled independence, to ensure that judges are individually and institutionally free to do justice without fear, favour or prejudice, immune from executive or legislative influence and adequately funded to do so. That is recognised as incontrovertible in common law jurisdictions

around the world, as is manifest from the Canadian, Indian and South African judgments cited in argument. But that is not the issue here. This case does not relate to the judiciary as an institution. The appellant's case has throughout been that he is the target of a malicious *ad hominem* assault – the prosecution and the section 125 proceedings are aimed at him personally. The case does not even relate to his exercise of judicial powers or performance of judicial functions. Cases such as *Paradza v Minister of Justice, Legal and Parliamentary Affairs and Others* [2003] ZWSC 46 are irrelevant. There is no suggestion here that there was any attempt to influence, hamper or impede the appellant *qua* judge. This is a case about a taxpayer who happens to be a judge who allegedly failed to file income tax returns (whether timeously or at all is not clear on the papers). Put differently – and more correctly – the question here

is whether a person, by virtue of his or her appointment as a judge, is shielded from the prescripts of the income tax legislation and ordinary criminal law and procedure of the land.

[17] It is important to note that the argument advanced on behalf of the appellant in the court below, and again here, is not that the decision to prosecute him was taken in bad faith. While that was an essential part of the founding case in the first application, it was forcefully denied by the respondents in the answering affidavits and therefore presented a factual dispute that cannot be resolved in motion proceedings. (It is not for us to decide whether the alleged abuse of prosecutorial discretion could be pursued by way of review or at criminal trial.) The appellant was then obliged to rely on the main contention that

judges have a form of partial or temporary protection against prosecution.

[18] For essentially the same reason the appellant could not in the instant proceedings establish his complaint of unconstitutional discrimination in that he was singled out for prosecution for a transgression that is rife among his peers. Accordingly he abandoned the attempt to have the tax affairs of his colleagues subjected to public scrutiny. But whether and if so how he could raise and prove such discrimination, and what effect it would have on the viability of the charge or the appellant's guilt or blameworthiness, are not matters that can be determined in these proceedings. In the result the main thrust of the appellant's case became - and remains - the constitutional argument based on the principle of judicial independence.



[19] Inasmuch as the argument on behalf of the appellant on judicial independence did not so much seek support in the Constitution but sought rather to rely on general principle, it is necessary to state categorically that we know of no principle that would have the effect contended for here. On the contrary, if there is to be a distinction between judges and other persons facing criminal prosecution, it may well be argued that in such circumstances judicial ethics might in a case affecting probity require the judge to stand down voluntarily or be suspended pending the outcome of the criminal case.

[20] It is necessary to be emphatic on this point. Counsel for the appellant suggested that one of the reasons why there should not be a prosecution before section 125 had been implemented is that it

is undesirable to have a judge under indictment on a serious charge sitting on the Bench. He is perfectly correct. It *is* unthinkable, but the solution does not lie in the quasi-immunity contended for. The man in the street is presumed innocent until proved guilty; a judge's probity must be above suspicion. Consequently a judge accused of conduct seriously impairing his or her integrity, though nothing has yet been proved, may have to step down voluntarily or be suspended in order to preserve the image of the judiciary.

[21] Counsel for the appellant sought to avoid or ameliorate the far-reaching implication of his argument by stressing that the disciplinary mechanism of section 125 was not an absolute bar to prosecution but merely a necessary precursor. Therefore, so it was contended, once the section 125 proceedings had run their course and the

judge in question had been dismissed, a criminal prosecution could lawfully follow and therefore there was no lasting preferment of judges. But this is wrong. It is a necessary consequence of counsel's argument that the judgment of the disciplinary tribunal overrides that of the criminal justice system. In principle that cannot be. The drafters of the Constitution certainly did not say so and it is highly unlikely that they could have contemplated such a radical preferment of judges - and had they done so, they would surely have made their unusual intention plain.

[22] The fallacy in the argument is plain when one tries to apply it in practice. Suppose a judge fails to stop his car at a stop sign. Must the charge then be referred for consideration under section 125 or can the offending judge simply be ticketed because the offence could not conceivably be regarded as

impeachable misbehaviour? Common sense would indicate that on counsel's reasoning such relatively trivial offences that do not remotely suggest unfitness for judicial office should not be struck by the section 125 bar. But where does one draw the line? Suppose the judge, in disregarding the stop sign, causes a collision in which someone is killed. Or suppose the judge is drunk. Where along such continuum does the case transmogrify into one that has to be taken up by the tribunal appointed under section 125? It is plain that the regime contended for on behalf of the appellant is not feasible and could not have been intended.

[23] In the court below and again in this court counsel for the appellant addressed well-reasoned and amply researched argument in support of his main contention; and our colleagues *a quo* considered essentially the same argument with

manifest care before comprehensively dismissing it. If necessary we would have endorsed their findings, reasoning and conclusion. But, for the reasons set out above, we find it unnecessary to entertain the impressive argument submitted by counsel for the appellant.

[24] The constitutional complaint of discrimination (the appellant being singled out for prosecution for conduct common among his peers), though not pressed on appeal, has an indirect bearing on a costs order made by the court *a quo* that we were urged to set aside. It will be recalled that the appellant, notwithstanding an undertaking to do so promptly and an order to that effect, failed to apply to join the lawyers whose tax affairs he had wanted to have disclosed in the second application. Instead he abandoned the attempt, thereby rendering the third and fourth applications

redundant. In the result there was no actual appearance on behalf of these litigants and the appellant contends that the court *a quo* erred in ordering him to pay their costs.

[25] There clearly is no merit in the submission. The appellant's conduct in launching the second application triggered the intervention. This was clearly predictable, and the appellant could not have thought otherwise. The lawyers whom he targeted were understandably incensed at the threat to their privacy and it was eminently reasonable for them to take steps to safeguard their rights and consequently incur costs, the extent of which stands to be determined by the taxing master.

[26] In the main the various contentions raised by the parties relating to the legality of the criminal

prosecution have become irrelevant in these proceedings. Thus, the question whether, as the appellant maintained, the prosecution against him was fatally tainted because it was based on information obtained by the prosecution in breach of the confidentiality provisions contained in section 202 of the Income Tax Act 1993, though formally still in issue on appeal, was argued but faintly – in our view rightly so. It, too, cannot be resolved in these proceedings absent an enquiry into disputed facts. There is no evidence to indicate whence and how the information founding the indictment against the appellant was obtained and no basis for a finding that there was an improper disclosure to unauthorised recipients of confidential information relating to the appellant's tax affairs.

[27] We should add, lest we be misunderstood, that we do not endorse the submission that disclosure by the revenue authorities to their prosecution colleagues constitutes a breach of section 202 of the Income Tax Act 1993. On the contrary, we see no merit in the argument. The prohibition is on *unauthorised* disclosure and cannot sensibly be seen to prevent the routine and proper prosecution of tax offenders in which the state's tax authorities must inevitably convey their data to the prosecutorial division of the state for prosecution.

[28] Mention should also be made of another allegedly constitutional challenge that was advanced on appeal. While the appellant's original application was still extant, the Prime Minister, possibly in response to the appellant's resort to section 125 of the Constitution as a pre-condition



to a prosecution against a sitting judge, commenced proceedings under the very section. By formal letter he invited the appellant to show cause why a tribunal should not be convened in terms of section 125(5) of the Constitution to investigate whether his alleged tax offences constituted conduct warranting his removal from office. This was when the appellant launched the fifth application to block the process by attacking this decision on the part of the Prime Minister, submitting that it was improper, a breach of the *sub judice* rule and conduct calculated to prejudice the appellant in his defence.

[29] What is required, so it was submitted, is that the criminal case should run its course and only upon its final determination should proceedings under section 125 be started. In the result, what the appellant was contending, at one and the same

time, meant that the prosecution should be stayed pending conclusion of the section 125 procedure (the first application) and (the second application) that the section 125 procedure should be stayed pending the outcome of the criminal trial - deadlock. This patently absurd conclusion is also derived from the failure to distinguish the two distinct mechanisms accepted in general principle and contemplated by the Constitution. Judges are human. They can commit crimes, and if they do they can be prosecuted. They can also behave in ways proving them unfit for judicial office. Then they may be removed from office. Conduct constituting an indictable crime can also constitute impeachable misconduct. But although crimes and judicial misconduct can overlap in this way, they are and remain two distinctly different concepts.

[30] Whether or not the prosecution progresses, falters or fails, and whether or not prudence or fairness would dictate otherwise, it is within the power of the Prime Minister to initiate the removal procedure contained in section 125 of the Constitution. This does not mean that the presiding officer concerned, i.e. the chairperson of the section 125(5) tribunal or the judge in the criminal trial, is not empowered and obliged to consider possible prejudice to the appellant (or maybe the prosecution) resulting from the parallel conduct of the two processes. That is clear, as is borne out by the authorities cited. But the issue does not arise here.

[31] To sum up: We have considered each of the points advanced in support of the appeal and found each wanting. It therefore remains to consider the question of costs. The court *a quo*

made no order as to costs in the first and fifth application but awarded costs “including the costs of two counsel where applicable” in the other three cases. In this court the submission on behalf of the appellant was that the latter award was wrong. As regards the costs on appeal, if the appeal failed, counsel for the appellant submitted there should be no order as to costs, following, so it was submitted, the principle articulated in the South African Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) and followed by this Court in *President of the Court of Appeal v The Prime Minister and Others* [2014] 1 LSCA. The respondents, on the other hand, asked – but did not press – for their costs, including those consequent upon the employment of two counsel, should the appeal fail. The four legal practitioners, the applicants in the third application, intervened solely to protect the

costs order in their favour in the court below and asked for their costs on appeal.

[32] It is not beyond doubt that the *Biowatch* principle was actually applicable in the first and fifth applications. The appellant did indeed raise a number of constitutional arguments bearing on the independence of the judiciary. His founding affidavit in the first application actually presents as a defence of the judiciary in Lesotho against attack by the executive. But at the same time the pith and marrow of his case was and is that he is being personally persecuted. In reality he has not been vindicating the independence of the judiciary – he actually tried in the second application to have the financial affairs of all his colleagues exposed to the world – but has been pursuing his personal interests under the banner of constitutionality. That said, the rule in *Biowatch* is flexible and the

court *a quo*, with a good grasp of the case in all its various facets, clearly exercised its discretion judicially in respect of all five cases. Not only is there no warrant to interfere, but we believe it would be appropriate to adopt the same basic approach regarding costs in the appeal. The costs of the so-called intervening parties in this court, including where applicable the costs consequent upon the employment of two counsel, will have to be borne by the appellant.

Order: 1. The appeal is dismissed.

2. The appellant is to pay the costs of the intervening parties including where applicable the costs of two counsel.

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**JC KRIEGLER**  
**ACTING JUDGE OF APPEAL**

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**P MUSONDA  
ACTING JUDGE OF APPEAL**

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**RW NUGENT  
ACTING JUDGE OF APPEAL**

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**JV VAN DER WESTHUIZEN  
ACTING JUDGE OF APPEAL**

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**JBZ SHONGWE  
ACTING JUDGE OF APPEAL**

**APPEARANCES:**

**Counsel for appellant:** Adv MS Rasekoai, Adv CJ Lephuthing &  
Adv N Pheko

**Counsel for respondents:** Adv GH Penzhorn SC & Adv RA Suhr

**Counsel for joinder applicants:** Adv KK Mohau KC & Adv NC Limema