IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 15/2017
CONST./7/2017

In the matter between:

MACHESETSA MOFOMOBE **1st APPELLANT**
MOHATO SELEKE **2nd APPELLANT**

and

MINISTER OF FINANCE **1st RESPONDENT**
ATTORNEY GENERAL **2nd RESPONDENT**

And

C OF A (CIV) NO. 17/2017

Const. Case No. 8/2017

In the matter between:

HAAE PHOOFOLO K.C. **1st APPELLANT**
CHIEF JOANG MOLAPO **2ND APPELLANT**

AND

THE RT. HON. PRIME MINISTER	**1st RESPONDENT**
THE COUNCIL OF STATE	**2nd RESPONDENT**
HIS MAJESTY KING LETSIE III	**3rd RESPONDENT**
ATTORNEY GENERAL	**4th RESPONDENT**
THE MINISTER OF FINANCE	**5th RESPONDENT**

CORAM: FARLAM - ACTING PRESIDENT

MAJARA CJ (ex officio JA)

LOUW AJA

MUSONDA AJA

CHINHENGO AJA

HEARD: 2 MAY 2017

DELIVERED: 12 MAY 2017

SUMMARY

Constitutional law – Application by citizen taxpayers interdicting Minister of Finance from withdrawing moneys from the Consolidated Fund when no Appropriation Act passed and Parliament dissolved after vote of no confidence in the Government – Section 20 of the Constitution considered in relation to locus standi of applicants

Powers of Minister of Finance under section 113 of the Constitution as read with section 18 of the Public Financial Management and Accountability Act to authorize withdrawal of moneys from the Consolidated Fund to meet expenditure for the purpose of carrying on the business of the Government of Lesotho and holding of the general elections – Requirements for Minister's authorization for such withdrawal – Meaning of "proceeding year" in section 113 proviso (a)

Appropriation Act not coming into operation at commencement of financial year due to refusal by majority members of National Assembly to consider Appropriation Bill until vote of no confidence in Government passed and parliament dissolved

Dissolution of Parliament by His Majesty the King on advice of the Prime Minister without consulting Council of State and calling general election

The King not required to consult the Council of State where after a vote of no confidence in Government, Prime Minister advises dissolution of Parliament - Dissolution of Parliament not unconstitutional - Section 83 (4) of the Constitution considered

JUDGMENT

MUSONDA AJA & CHINHENGO AJA: -

Introduction

[1] The Constitutional Court (CC) delivered a single judgment in the two matters before us in this appeal on 3 April 2017 after an urgent hearing on 31 March 2017. We will refer to the matters as "*Mofomobe*" and "*Phoofolo*" respectively. Separate appeals were lodged by each of the appellants against the judgment of the CC. We heard the appeals on the same day and at the same sitting. Accordingly this judgment covers both appeals.

[2] The single issue for decision in *Mofomobe* was whether the Minister of Finance may authorize the withdrawal of moneys from the Consolidated Fund in terms of section 113 of the Constitution as read with section 18 of the Public Financial Management and Accountability Act 2011 in the circumstances set out in a written statement of facts supporting a special case for adjudication in terms of Rule 32 of the High Court Rules

1980. Those facts and the issues for the court *a quo*'s decision are set out in the CC judgment as follows –

> "1. The parties are as described in paragraph 1, 2, 6, and 7 of Mr. Mofomobe's founding affidavit.
>
> 2. On 24th February 2017 the National Assembly of the 09th Parliament reconvened following its adjournment *sine die* on 22nd November 2016.
>
> 3. Having caused to be prepared the Estimates of Revenue and expenditure for the Financial Year 2017/2018, the Minister of Finance through his Principal Secretary delivered those to the Speaker on 24th February 2017 for distribution, as is customary, to the Members of the House upon completion by the Minister of his address to the House on 27th February 2017.
>
> 4. The Speaker then through the Clerk of Parliament caused the presentation of the Budget to be set down on the Order Paper pursuant to Standing Order 19(2).
>
> 5. In her remarks on 24th February 2017 The Speaker of the National Assembly informed the House that Monday 27th February 2017 would be budget day.
>
> 6. In the National Assembly Order Paper for the 27th February 2017 a Motion on the Financial Policy by the Minister of Finance was included. A copy of the Order Paper is annexed and marked "A".

7. On the 27th February 2017 the National Assembly did not sit but other than a prayer, failed to conduct its business in terms of the Order Paper for the day. This was for reasons that appear in Hansard, a copy of which is attached hereto marked "B".

8. In particular, the House was adjourned without the Minister of Finance having moved the Motion of the Financial Policy.

9. In the subsequent sittings of the National Assembly after 27th February 2017, the Motion of the Financial Policy was not included in the Order Paper.

10. On 1st March 2017 the National Assembly passed a Motion of No Confidence in the Government of Lesotho. Subsequent to this motion the 09th Parliament of Lesotho was dissolved with effect from 6th March 2017.

11. The 09th Parliament of Lesotho was dissolved without the Motion of the Financial Policy having been moved.

12. THE ISSUE FOR DETERMINATION

A. Re: Mofomobe & another vs Minister of Finance & Another CC 07/2017

Whether on the basis of the afore-going facts the Minister of Finance may authorize the withdrawal from the Consolidated Fund in terms of section 113 of the Constitution as read with section 18 of the Public Financial Management Accountability Act 2011. Accordingly it is primarily section 113 of the Constitution read with section 18 of the Public Financial Management Accountability Act 2011.

B. Re Phoofolo & Another vs Prime Minister & Others CC 08/2017

Whether in terms of Section 83(4)(b) of the Constitution, The King acted constitutionally by acceding to the advice of the Prime Minister on 3rd March 2017 to dissolve Parliament after

> the National Assembly passed a Vote of No Confidence in the Government of Lesotho on 1st March 2017."

[3] The facts as set out by the CC are really common cause and, even though no statement in terms of Rule 32 was agreed upon in respect of *Phoofolo*, no issue arose in the court below or in this Court as to the correctness or otherwise of the facts as stated.

Mofomobe **appeal and issues for decision**

[4] The constitutional application in *Mofomobe* was heard without the respondents having filed any opposing papers because of the parties' agreement to proceed in terms of Rule 32. We did not therefore have the benefit of reading any opposing affidavits or written submissions made to the CC. After hearing the application the CC made the following order:

> "The Court declares that the Minister of Finance may authorize the withdrawal from the Consolidated Fund in terms of section 113 of the Constitution read with section 18 of the Public Financial Management Accountability Act, 2011, not exceeding in total one-third of the estimates of the last financial year (2016/2017). Mofomobe application must therefore fail."

[5] The appeal by *Mofomobe* is based on three grounds, namely-

> "1. The court a quo erred in its interpretation of section 113 of the Constitution of Lesotho, 1993. In particular, and for the purposes of the matter before it, the court erred in its interpretation of the phrase "proceeding financial year".
>
> 2. The court a quo erred in its finding that section 113(a) empowers the Minister of Finance to use the estimates of expenditure for 2016/2017 financial year for purposes of authorizing withdrawal in advance of the Appropriation Act for 2017/2018 financial year.
>
> 3. The court a quo erred in its finding that the section 113(a) and (b) authorizes the Minister of Finance to make withdrawals from the Consolidated Fund for purposes of financing the general election to be held on 3rd June 2017."

[6] It seems to us that the issue raised in the appellants' third ground of appeal arises by implication from the court's declaratory order. The court did not make a specific order in that regard but it follows that if the Minister can withdraw moneys in terms of s 113 of the Constitution for the purpose of meeting expenditure necessary to carry on the government of the country, then the expenditure relating to the general election in June 2017 must be included as one of the purposes for which moneys may be withdrawn in terms of that section unless there is a clear provision to the contrary. By singling out the funding of the general election as specifically

impermissible, the appellants were, in our view, zeroing in on their main concern in instituting the proceedings, that being to stop the Minister from authorizing the withdrawal of moneys from the Consolidated Fund in terms of s 113, to fund the general election. We do not, for a moment, think that the appellants' real purpose or design in instituting the application was to bring all government activities to a complete stop. Their main target must surely have been to ensure that the general election scheduled for 3 June 2017 was not held in view of what transpired in the House of Assembly resulting in the Appropriation Act not being passed and in the vote of no confidence in the Government carrying the day. The move by the majority in Parliament to deny the incumbent administration access to the national purse until the fallout from the no confidence vote resolved itself, it seems, did not appear to them to be sufficiently effectual without at the same time ensuring that the general election did not take place. The debate in the House as recorded in the extract from *Hansard* attached to the appellants' founding affidavit shows very clearly that those members of Parliament who supported and passed the no confidence motion did not want to pass the Appropriation Bill for 2017/2018 as a means of compelling the

incumbent Prime Minister to hand over power to the leader of the opposition coalition.

[7] The issues for decision by this Court in *Mofomobe* are –

(a) whether the CC was correct in its interpretation of s 113 of the Constitution and in its general finding that the Minister of Finance (Minister) is empowered by that section to withdraw moneys from the Consolidated Fund;

(b) if he is so empowered, whether he can use the estimates of expenditure for 2016/2017 for that purpose; and

(c) whether s 113(a) and (b) empowers him to authorize the withdrawal of moneys from the Consolidated Fund for the purpose of financing the general elections to be held on 3 June 2017.

Phoofolo appeal and issues for decision

[8] The Constitutional Court refused to grant all the relief sought in the *Phoofolo* application. Its order simply reads-

"Prayers 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10 and 2.11 are hereby dismissed."

[9] The final relief sought in *Phoofolo* and refused by the CC was the following, including paragraphs 2.12 to 2.13 to which the court did not refer:

"2.4 The decision of 3rd Respondent of dissolving parliament pursuant to the advice rendered to him by 1st Respondent be reviewed, corrected and or set aside as irregular and or unlawful.

2.5 That it be declared that the 3rd Respondent's act of yielding to the advice of 1st Respondent which caused for the dissolution of parliament and eventual calling of national general elections in spite of a formally endorsed vote of no confidence by the National Assembly of the Kingdom of Lesotho was both unconstitutional and/or unlawful.

2.6 That it be declared that failure by the 2nd Respondent to advise the 3rd Respondent in relation to the dissolution or otherwise of the Parliament of Lesotho is a violation Section 95(1); 82(4) and 91(2) and (3) of the Constitution of the Kingdom of Lesotho (as amended).

2.7 That it be declared that the dissolution of the parliament by 3rd Respondent acting in accordance with the advice of the 1st Respondent without consideration of the advice of the 2nd Respondent pursuant to s 83(4)(a) is a violation of 3rd Respondent's constitutional duties and obligations in terms of Section 44(1), 83, 91 and 95(1) and (7) of the Constitution of the Kingdom of Lesotho of 1993 (as amended).

2.8 That it be declared that Legal Notice No. 22 of 2017 issued by the 3rd Respondent pursuant to the advice of the 1st Respondent purportedly dissolving the Parliament of the Kingdom of Lesotho is a nullity.

2.9 The dissolution of the Parliament of the Kingdom of Lesotho pursuant to a Legal Notice 22 of 2017 is hereby uplifted and the *status quo* restored forthwith.

2.10 The 2nd Respondent is directed to exercise its constitutional obligations envisaged in terms of Section 95 and 91 and convene and or cause to be convened its constitutional meetings for the purposes of issuing an advice to the 3rd Respondent pursuant to Section 83(4)(a) of the Constitution of the Kingdom of Lesotho within 3 working days after the granting of this order.

2.11 That 3rd Respondent acting pursuant to the advice rendered by 2nd Respondent pursuant to prayer 2.10 above, confirm and appoint Hon. Monyane Moleleki MP as the

Prime Minister of the Kingdom of Lesotho pursuant to a motion of no confidence formally endorsed by the National Assembly of the Kingdom of Lesotho.

2.12 That it be directed that 1st Respondent be removed from office on account of a formal vote of no confidence passed against him by the National Assembly of the Kingdom of Lesotho.

2.13 That 5th Respondent be interdicted from accessing and or diverting the public funds in The Consolidated Fund for purposes of executing the proposed general elections of the Kingdom of Lesotho without express authorization of the National Assembly pursuant to the provision of Section 113 of the Constitution of the Kingdom of Lesotho 1993 (as amended)."

[10] It will be noted that the last ground of appeal deals with the same matter raised in the *Mofomobe* case, namely that the Minister may not authorize the withdrawal of moneys from the Consolidated Fund in terms of s 113 of the Constitution for the purpose of funding the June 2017 general elections but contains a rider that he may only do so with the express authorization of the National Assembly. In the circumstances this meant that the money to fund the general election could not be made available because the National Assembly would not pass the Appropriation Act.

[11] We have set out in detail the relief sought by the appellants in the court below. We do not do so in respect of the grounds of appeal but endeavor to summarize them. The appellants contended that the CC erred-

(a) in holding that -

(i) the King is not required to act on the advice of the Council of State (Council) when making a decision to dissolve Parliament;

(ii) that s 91(5) precludes a review of the King's decision to dissolve Parliament without obtaining the advice of the Council;

(b) in not declaring Legal Notice No. 22 of 2017 to be invalid on the basis that whereas the Prime Minister's advice to dissolve Parliament was given in terms of s 83(4)(b), the Notice erroneously stated that he did so in terms of s 83(4);

(c) in failing to adopt a purposive approach to interpreting sections 83 and 91(5) of the Constitution and instead applying a "strict and literal" interpretation of the sections;

(d) in failing to understand and hold that s 83 was intended to establish who may dissolve Parliament, in particular, in terms of whose advice and under what circumstances may the King dissolve it and the effect of the vote of no confidence on the rendering of advice to dissolve Parliament by a Prime Minister in respect of whose Government a vote of not confidence had been passed;

(e) in reading 's 83(b)' in isolation and not considering "Westminster Constitutional Practices and Conventions and Lascelles Principles";

(f) in holding that the advice given to the King by the outgoing Prime Minister was binding on him and that the King may act without the advice of the Council in dissolving Parliament;

(g) in holding that the King acted properly when he dissolved Parliament without considering, after receiving the Council's advice, that it was possible to carry on the government of Lesotho without going to elections and with Hon. Moleleki as Prime Minister and without considering the interests of Lesotho;

(h) in holding that it had no jurisdiction pursuant to s 91(5) of the Constitution; and

(i) in "not granting prayer 2.14 when the reasoning and ruling of the the court warrants the granting of prayer 2.14.".

[12] The appellants' grounds of appeal are all answered by a consideration of the single question whether his Majesty The King acted in terms of the Constitution and the law when he dissolved Parliament. In our opinion the CC's rendering of the issue before it was correct but we think that the court did not couch it in such terms as covered the appellants' contention that the King had to act on the advice of the Council. For purposes of clarity the issue is as we have formulated it.

Cross appeal

[13] The Attorney General, who is the 2nd respondent in this appeal, was also dissatisfied with the judgment of the Constitutional Court. He filed a cross-appeal based on two grounds, namely-

> 1. Having acknowledged the need for a purposive interpretation of the Constitution of Lesotho 1993 the court erred in failing to apply such purposive interpretation:
>
> > (a) By not finding that, in all the circumstances, there had been compliance with purpose of section 113 of the Constitution and there thus was no necessity to make any form of declaratory or remedial order.
> >
> > (b) *Alternatively*, and in the event that a remedial order was required, in making the restrictive portion of such order subject to the estimates for the 2016/2017 financial year rather than the estimates for 2017/2018 financial year".
>
> 2. The court thus erred in not dismissing the application, *alternatively* in not making the restrictive portion of its declaratory order subject to one-third of the estimates for the 2017/2018 financial year, which estimates had been lodged with the Speaker."

[14] The appellants and the 2nd respondent's grounds of appeal and cross-appeal converge on one point. Both parties contended that the Constitutional Court was wrong in its finding that the moneys to be

withdrawn in advance of the Appropriation Act for 2017/2018 shall not exceed one-third of the sums included in the estimates of revenues and expenditure for the financial year 2016/2017. They share the view that the relevant estimates for this purpose are those of the 2017/2018 financial year. There is a convergence also in respect of the meaning to be assigned to the words "proceeding year". There is no contestation between the parties over this issue but we will deal with it in order to resolve the difference between the parties and the court *a quo* over the interpretation of proviso (a) and (b) to s 113 of the Constitution. However before doing so we are constrained to examine the *locus standi* of the appellants to institute the proceedings in both cases. The court *a quo* did not deal with that issue principally because the Rule 32 procedure was adopted and consequently the parties, in particular the respondents, did not canvass or give to the issue the attention it deserved. We will examine that issue in relation to both *Mofomobe* and *Phoofolo*.

Locus standi **of appellants to institute proceedings**

[15] The agreement of the parties to proceed by way of a special case for the adjudication of the court precluded the CC from considering

the *locus standi* of the applicants, as we have already said. That issue was raised in the appellants' founding affidavit but not included in the agreed statement as one of the issues to be decided by the court and consequently it was not canvassed at the hearing. The issue could have provided another basis on which the application could have been considered and possibly disposed of.

[16] The appellants in *Mofomobe* stated in paragraphs 1-4 of the founding affidavit that they are taxpayers and citizens of Lesotho and as such they "have a right to take part in the conduct of public affairs, [and] this right includes the freedom to scrutinize, criticize, influence and challenge Government's decisions … [and] the right to ensure that public funds are properly utilized and in line with the relevant legal provisions." The appellants in *Phoofolo* asserted as much. By so doing the appellants put in issue their *locus standi* to institute these proceedings. The respondents did not take up, as they should have done, the issue whether or not the appellants had the necessary standing to institute the proceedings. The Court raised this issue and invited counsel to address it. As with non-joinder [see *Amalgamated Engineering Union v Minister of*

Labour[1]] a court may *mero motu* raise the lack of standing (*locus standi in judicio*). The appellants, having asserted their right to institute these proceedings, it becomes necessary, in our view, to examine the question whether they, as ordinary taxpayers and citizens, have the legal standing to do so. The parties filed written submissions on this point on 4 and 5 May 2017.

[17] The appellants' contention in support of their right to institute these proceedings derives essentially from s 20 of the Constitution which provides that –

> "(1) Every citizen of Lesotho shall enjoy the right –
>
> (a) to take part in the conduct of public affairs, directly or indirectly through freely chosen representatives;
>
> (b) to vote or stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot; (c) to have access, on general terms of equality, to the public service.
>
> (2) The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution."

[1] 1949 (3) SA 637(A)]

[18] The right implicated in these proceedings is that set out in s 20(1)(a) as qualified by subsection (2). The general approach of the courts to provisions of the Constitution that confer fundamental human rights and freedoms on the citizenry is to construe those provisions in a way that facilitates and protects the enjoyment of the rights concerned and not one that stifles or impedes that enjoyment. Counsel for the appellants referred to a number of court decisions from other jurisdictions which recognize that one of the ways in which a citizen may be denied the right to enjoy the rights concerned and to enforce their observance by the Government or other public authorities, is to deny him access to the courts through a restrictive application of the standing to bring an action. In this connection they contended that whilst the principles of law relating to *locus standi* are meant "to curb mere busybodies who have no interest whatsoever in the issue at stake", those principles have also been "used to shut out genuine public spirited litigants whose aim is to prevent a legal wrong or alleged legal wrong by government where they may not necessarily have an injury above other citizens." The appellants referred to Lord Denning, *The Family Story*[2], and contended that the role of the courts is to do justice between

[2] Butterworth's, London, 1981 at p 174

parties before them and if there is a rule of law which impairs the doing of justice, then the judge should, subject to the law, do all he can legitimately do, to avoid that rule or even to change it in order to do justice in the case before him. They also referred to the following cases from Nigeria and statements made therein to shore up their contentions:

Williams v Dawodu[3]:

> "… the courts have become increasingly willing to extend the ambit of *locus standi* for public good. The Courts have broken new ground. The significance of this judicial revolution is that whereas in the past the court showed little or no reluctance in any given case in construing the import 'sufficient interest' against the individual and tended to be more executive than the Executive, now the term 'sufficient interest' is construed more favourably in order to give an applicant a hearing."

Shell Petroleum Development Co. Ltd &5 Others v EN Nwaka & Another[4]:

> "It needs the courage, wisdom and proper understanding of our socio-economic environment for an activist judge to widen the scope of the law on *locus standi*. Some judges and advocates have shown some trepidation in handling this matter. I believe we have to take the bull by the [horns] and do justice to a matter before a court without

[3] (1988) 4 NWLR 189 at 218
[4] (2000) 10 NWLR 64 at82-83

bending overly backwards because a matter is on borderline in respect of whether the initiator of an action has the standing to do so. I think where the cause is laudable and will bring peace, justice and orderliness that will reflect the spirit of the Constitution, then we should not shirk our responsibility in this area to help in advancing the cause of social, economic and cultural matters as they affect this society. The development of the law of *locus standi* has been retarded extensively due to the fear of a floodgate of persons meddling into matters not even remotely connected to them. In my opinion let them meddle and let the court remove the wheat from the chaff. I believe that it is the right of any citizen to see that the law is enforced where there is an infraction of that right or a threat of it being violated in matters affecting the public law and in some cases of private law, such as where widows and orphans are deprived, and a section of the society will be adversely affected by doing nothing."

Ladejobi v Oguntayo[5]:

"It is important to bear in mind that ready access to the court is one of the attributes of a civilized legal system and it will amount to setting the clock back at this stage for any court to dismiss or strike out an action based on the pleading without carefully analyzing the averments and ensuring that there is a nexus. Besides I make bold to say it is dangerous to limit the opportunity for one to canvass his case by rigid adherence to the ubiquitous principle of *locus standi,* which is whether a person has the standing in the case. The society is becoming highly dynamic and certain stands of yester years may no longer stand in the present state of our social and political development… The Court should exercise caution in throwing out a case because of the issue of *locus standi*."

[5] (2004) 18 NWLR 153 at 158-159

[19] The appellants' counsel also referred to Lord Denning's statement in *R v Greater London Council, Ex parte Blackburn*[6] to this effect:

> "On the point, I would ask: who then can bring proceedings when a public authority is guilty of the misuse of power? Mr. Blackburn is a citizen of London and his wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has. I think he comes within the principle which I stated in *Mcwhirter*'s case[7] which I would recast so as to read:
>
> > 'I regard it as a matter of high constitutional principle that if there is a good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it in a way which offends or injures thousands of Her Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

[20] Finally the appellants referred to the Indian case, *Fertilizer Corporation Kameger Union v Union of India*[8] wherein KRISHNA IYER J said-

> "Restrictive rules about standing are in general inimical to a healthy system of growth of administrative law. If a plaintiff with a good cause is turned away merely because he is not sufficiently affected personally, that could mean that some government agencies are left

[6] [1972] I All ER 689 (CA)
[7] [1972] I All ER 689 (CA)

[8] (1981) A.I.R. (SC) 344

> free to violate the law. Such a situation would be extremely unhealthy and contrary to the public interest."

[21] The above statements express very lofty ideas indeed but those ideas must be applied with due regard to the law of Lesotho. Appellants' counsel submitted that there is no provision in the Constitution dealing specifically with *locus standi* and that that leaves room or wide scope for the courts to develop the law without being hamstrung by "constitutionally imposed rigidity." At paragraph 15 of the written submissions on *locus standi* he said-

> "In fact it would be wrong under our Constitution to slam the door against complaints on Executive excesses and unconstitutionality under the guise of lack of *locus standi*. Where this is done, the implied objectives of a democratic constitution like our own, being freedom, equity and justice may not be attained. The Constitution or any other law can only be tested in courts; it is access to the courts for such test that will give satisfaction to people for whom the Constitution or the law is made."

[22] The 2nd respondent's response to the issue of *locus standi* is largely based on procedure. It was contended on his behalf that the appellants founded their right to bring the constitutional application on the averment that they are taxpayers and, by implication, that they are citizens

of Lesotho: they did not bring their application within the scope of s 22 of the Constitution, which is foundational in respect of applications wherein the violation of constitutionally entrenched rights is alleged. Subsection (1) of that section reads -

> "If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

[23] The 2nd respondent's counsel went on to refer to the *locus classicus* on this point, *Dalrymple and Others v Colonial Treasurer*[9] and said that that case and other cases referred to in it "remain good law, both in South Africa and Lesotho."

[24] In *Dalrymple* the court held that a taxpayer has no standing to sue the Executive Government for a breach of a statute unless he can prove some personal damage, or the breach of a duty owed to him or an infringement of a right vested in him. That decision has been followed in

[9] 1910 TS 372

many cases in South Africa and is in line with decisions in the USA, England and Scotland, as a reading of the judgment will show. The rationale for this position of the law is very well articulated by each of the three judges involved in the *Dalrymple* case. The case distinguishes the position of a ratepayer vis-a-vis a municipal council and that of the taxpayer vis-a-vis the Government. A ratepayer, it was held, may sue a municipal council because a municipal council stands in a fiduciary relationship to the ratepayer, and in that sense the ratepayer has an interest sufficiently direct to enable him to intervene if the council has violated a statute. A taxpayer is not in a similar relationship to the Government. At p 385 of the report, Innes CJ made the point very eloquently:

> "… I think that when an Act of Parliament creates a corporate council, provides for its election by ratepayers, empowers it to raise moneys in certain ways from the ratepayers, and to expend it only in certain channels and always for their benefit, then the council stands in a fiduciary relationship to the ratepayers, and the latter have an interest sufficiently direct to enable them to intervene when the statute has been violated. But in any event none of the reasons to which I have drawn attention apply in a case like the present. The ordinary taxpayer does not occupy the same position in relation to the Executive Government that a ratepayer occupies with regard to an incorporated council. He does not elect the Ministers: they are appointed by the Crown, and are responsible to the Crown as well as to Parliament. They can in no sense be taken as occupying positions

> analogous to those of directors of a company. Nor is it possible to regard the public revenue as in any legal sense raised only for certain purposes, and no other, and impressed with a trust in favour of taxpayers. It is raised for the general service of the Crown. Parliament votes supplies, and directs the manner in which the revenue shall be expended, but this power is circumscribed by the condition of the Constitution – that no tax may be imposed and no revenue may be appropriated save with the consent of the Governor, first had and signified. ***The control of Parliament and the concurrence of the Crown- these are the balancing forces of the Constitution which govern the expenditure of public money. Their operation leaves no room for the existence, as between the Executive and the taxpayer, of that direct fiduciary or mandatory relationship which has been held to obtain between a ratepayer and the incorporated council, which he elects.*** The provisions of the statutes dealing with the revenue should, of course be observed, and any departure from them is illegal. But the revenue being in no legal sense impressed with a trust in favour of a taxpayer, the mere fact that a statute dealing with its disposition has been broken does not give an individual taxpayer such a personal interest as would justify the institution of legal proceedings." [Emphasis added.]

[25] The position of the law, clearly stated in *Dalrymple*, should be the same in this country. A taxpayer, such as the appellants, has no standing to institute legal proceedings against the Government for a violation of a revenue statute. That is the function of Parliament as the body that authorizes, through appropriation legislation and other instruments, the use or withdrawal of moneys from the Consolidated Fund.

See Chapter X of the Constitution, in particular sections 110 to 114. The mischief which the approach in *Dalrymple* addresses and seeks to avoid is the unnecessary inconvenience occasioned to the courts by, and undesirability of, an individual taxpayer seeking an interdict against the Government in a case in which, in his own judgment, a revenue officer or the Government has not observed a statute, regardless of whether such taxpayer has himself any direct interest in the matter or not.

[26] Section 20 of the Constitution falls within the ambit of s 22(1). In order to invoke it a litigant should allege, as required by the latter provision, that s 20 "has been, is being or is likely to be contravened in relation to him".

[27] As we see it, the issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and that may, as contended in this appeal, involve the right to take part in the conduct of public affairs. Thus s 22(1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the

Declaration of Rights, in this case s 20(1)(a) when the person alleging to be aggrieved is given the right to go direct to the to the CC. The litigant's right to bring an application, and therefore his standing to do so, is circumscribed by s 22(1).

[28] Contrary to what the 1st respondent said in paragraph 1 of the "Additional Note on *Locus Standi*", the position is that appellants in *Mofomobe* averred in paragraphs 1 to 3 of the founding affidavit that they are taxpayers and citizens of Lesotho. They, however, did not go so far as to allege in what way s 20(1) has been violated in relation to them individually so that they may become entitled to bring the application in terms of s 22(1) of the Constitution.

[29] In our view the *ratio decidendi* in *Dalrymple* accords with s 22(1) of the Constitution. Both require that an applicant for relief must allege a violation of a right "in relation to him" and thus demonstrate a direct and peculiar interest or "an interest not too remote" or "some grievance special to him".

[30] The appellants did not allege that they individually or together suffered any damage themselves or that there was a breach of some duty owed to them individually or an infringement of some right vested in them. The *popularis actio*, as stated in *Dalrymple* (at p 386) "has been dead for more than three centuries". Lesotho is a Roman-Dutch jurisdiction and should, we think, follow the sound law set out in *Dalrymple.* If our law were to permit individual taxpayers to sue the Government for violations of revenue law or the Appropriation Act, there would be much confusion and the courts would be inundated with applications of doubtful validity by individual taxpayers who consider, in their own judgment, that revenue statutes have been violated even when they have no direct interest in the violation of the statutes concerned. As in any parliamentary democracy, the violation of revenue laws by the Government is a matter within the province of Parliament and not individual taxpayers. One of the functions of Parliament is to question the use to which the Government puts public resources. It is Parliament that supervises Government expenditure and holds Government accountable for public funds. We subscribe to the notion that provisions dealing with fundamental rights and freedoms should be construed liberally with a view to ensuring that citizens enjoy those rights,

but we do not think that on an issue such as the one under consideration a court should expand its reach without careful consideration of the relevant statutory and constitutional provisions and the implications of widening the right to bring actions to court in the circumstances implicated in this appeal.

[31] In the preceding paragraphs we have extensively discussed the law relating to to *locus standi* and it must be apparent from that discussion that there is, as far as we are aware, no direct authority in this jurisdiction on the meaning of s 20(1) of the Constitution and that it is not entirely clear what is meant by the words "Every citizen of Lesotho shall enjoy the right… to take part in the conduct of public affairs, directly or through freely chosen representatives." It seems to us that subparagraphs (b) and (c) indicate that it means more than the right to vote or to stand for election or to have access to the public service. The issue was not fully argued and we think that this is not the right occasion or case to pronounce ourselves definitively on it. So, in view of the conclusion we have come on the merits of these two cases, we are therefore prepared to assume without deciding that the appellants have *locus standi* in these

matters and the question as to whether s 20(1)(a) of the Constitution gives a citizen taxpayer, such as the appellants in *Mofomobe* and Haae Phoofolo in *Phoofolo, locus standi* to approach the court to interdict what he contends is an illegal withdrawal of public money must stand over to another day. We have no hesitation to find that, as a member of Parliament, Chief Molapo's standing to institute the proceedings in *Phoofolo* is clearly established by reason thereof. We observe also that there was some discussion about whether Chief Molapo is a party to the appeal in *Phoofolo*. We are prepared to accept counsel's submissions that he is and that the omission of his name from the appeal papers was due to inadvertence. This is more so because the order of costs that we intend to make is such that he cannot possibly suffer any prejudice.

***Mofomobe* appeal**

[32] We now turn to consider s 113 of the Constitution. In the process we will deal with the funding of the June 2017 general elections raised in both appeals but more directly in *Phoofolo*.

[33] Ordinarily estimates of revenues and expenditure are not disclosed to the members of Parliament or even the Cabinet before they

are presented to Parliament on budget day. The rationale for this was articulated in *The Attorney General v The King & 4 Others*[10] as follows –

> "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.[11] 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.[12]"

[34] In this country the preparation and presentation of the budget is however governed by Part III of the Public Financial Management and Accountability Act (PFMA Act). In terms of s 9 and s 10 of that Act, Cabinet reviews budget submissions and, after the review, the Minister prepares the annual budget for presentation to Parliament.

[10] C of A (CIV) 13/2015 (CONS/CASE/02/2015)
[11] 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.
[12] 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.

[35] The appellants in *Mofomobe* attacked the judgment of the CC on two fronts. The first attack is that the court misconstrued the meaning of the phrase "proceeding financial year." The second attack is that the court erred in finding that s 113(a) empowers the Minister to use the estimates of revenue and expenditure for the financial year 2016/2017 for the purposes of computing the one-third which the Minister is permitted to withdraw from the Consolidated Fund if an Appropriation Act for the ensuing year has not been passed.

[36] Section 113 of the Constitution authorizes expenditure in advance of an appropriation. It reads –

> "Parliament may make provision under which, if it appears to the Minister for the time being responsible for finance that the Appropriation Act for any financial year will not come into operation by the beginning of that financial year, he may authorize the withdrawal from the Consolidated Fund of moneys for the purpose of meeting expenditure necessary to carry on the government of Lesotho in respect of the period commencing with the beginning of the financial year and expiring four months thereafter or on the coming into operation of the Act, whichever is earlier:
>
> Provided that –
>
> (a) the moneys so authorized in advance of the Appropriation Act for any financial year shall not exceed in total one-third of the sums included in the

estimates of expenditure of the proceeding financial year that have been laid before the Assembly;

(b) no sums shall be so authorized to be withdrawn to meet expenditure on any head of expenditure in that financial year if no sums had been voted to meet expenditure on that head in respect of the preceding financial year; and

(c) any moneys so withdrawn shall be included, under separate votes for several heads of expenditure in respect of which they were withdrawn, in the Appropriation Act."

[37] Section 18 of the PFMA Act merely provides that-

"If it appears to the Minister that an Appropriation Act for any financial year will not come into operation by the beginning of the financial year, the Minister may approve withdrawals from the Consolidated Fund in accordance with section 113 of the Constitution."

[38] Section 113 lays down the requirements and sets strictures for authorizing the withdrawal of moneys from the Consolidated Fund in advance of an appropriation in terms of s 112 of the Constitution. Simply put those requirements and strictures are –

(a) the Minister must be satisfied that the Appropriation Act for the ensuing financial year will not come into operation by the beginning of that year;

(b) if he is so satisfied, he may authorize the withdrawal of moneys necessary to meet government expenditure for four months of the ensuing year or until the coming into operation of the Appropriation Act, whichever occurs first;

(c) the amounts he may authorize should not exceed one-third of the sums in the estimates of expenditure for the ensuing year[13] which have been laid before Parliament;

(d) he may not authorize the withdrawal of any sums to meet expenditure on any head of expenditure in that financial year if no sums had been voted to meet expenditure on that head of expenditure in the preceding financial year;

[13] As we explain below this is the meaning of the expression 'proceeding year' which is used in the section.

(e) the money so withdrawn shall be included in the Appropriation Act under separate votes for the several heads of expenditure in respect of which they were withdrawn; and

(f) the estimates of revenues and expenditure for the ensuing year should have been laid before Parliament.

[39] Now, the requirements we have set out in paragraph 10 are easily met. The general expenditure necessary to carry on the government of Lesotho in respect of which the withdrawal of the funds from the Consolidated Fund requires, *inter alia*, that the sums to be authorized for withdrawal should have been voted to meet expenditure on that head of expenditure in the preceding year, is obviously met by merely looking at the expenditure heads of that year, in this case the Appropriation (2016/2017) Act (No. 1 of 2016). Looking at the heads of expenditure in that Act the conclusion is obvious that the Minister, in reliance thereon, may authorize the withdrawal of moneys from the Consolidated Fund up to one third as provided in s 113, proviso (a), to meet the expenditure

necessary to carry on the government of Lesotho falling under those heads.

[40] The only requirement that we will have examine to see if it was met is whether the estimates of expenditure for the 2016/2017 financial year were laid before the National Assembly. The situation is different with respect to any unexpected or unforeseen expenditure. Such expenditure ordinarily cannot, if ever, be funded under s 113 of the Constitution because no similar head of expenditure could possibly have existed in the preceding year's estimates of expenditure. As such the Minister may not utilize s 113 to meet expenditure relating to unplanned or unforeseen needs.

Expenditure relating to a snap general election or one occasioned by a vote of no confidence in the Government or by other cause

[41] In terms of s 84(1) of the Constitution a general election must be held at such time within three months after any dissolution of Parliament

as the King may appoint. A dissolution may be occasioned by any one of several events, namely –

(a) the end of the normal life of Parliament in terms of s 83(2) when Parliament stand dissolved;

(b) a recommendation of the Prime Minster to which the King accedes as provided in s 83(4)(a), resulting in a general election that may properly be described as a snap general election;

(c) advice of the Prime Minister following a vote of no confidence in Government in accordance with which the King must act as provided in the main clause of s 83(4);

(d) if the office of Prime Minister becomes vacant in the circumstances set out in s 84(4)(c).

[42] The above events are not reasonably unforeseeable in a country such as Lesotho. Expenditure in respect of a general election under

subparagraph (a) of the preceding paragraph would ordinarily be provided for specifically. The expenditure under the other subparagraphs may not be specifically provided for because the causal events thereof may or may not occur. But in any event there is always an expenditure head for the Independent Electoral Commission (IEC). The IEC is established by s 66 of the Constitution and one of its main functions is to organize, conduct and supervise elections in Lesotho. Its powers, duties and functions are set out in s 66A of the Constitution. In our view s 113 can be applied where it becomes necessary to fund any general election.

[43] Apart from the applicability of s 113 of the Constitution, it should be noted that Parliament is obliged by s 66D to provide funds to enable the IEC to perform its functions effectively. That section reads –

> "(1) Parliament shall provide funds to enable the Commission to perform its functions effectively.
>
> (2) The funds required to meet the expenses of the Commission in the performance of its functions, including the salaries, allowances and terminal benefits payable to or in respect of the members of the Commission, shall be a charge on the Consolidated Fund."

[44] By making the expenses of the IEC a charge on the Consolidated Fund, s 66D places it beyond any doubt that even if the funds that may be withdrawn in terms of s 113 are not adequate to meet the expenditure necessary to conduct a general election, resort will have to be had to the Consolidated Fund. Parliament must inevitably and without fail avail to the IEC sufficient funds to enable it to conduct a general election should any of the events that compel the holding of it occurs.

[45] The point about funding the election in June 2017 was argued solely on the basis of s 113 of the Constitution and the parties did not deal with s 66D nor did the Court invite them to do so. We however think that a proper consideration of the issue would be incomplete if attention is not drawn to the clear provisions of s 66D.

[46] The appellants' case depended for its success on the inability of the respondents to show that there existed, in the 2016/2017 budget, an expenditure head on general elections. At the hearing of this appeal the 2nd respondent's counsel produced the Appropriation (2016/2017) Act, 2016, published in the Government *Gazette* of 24 March 2016. Item 41 thereof

makes financial provision for the Independent Electoral Commission in the sum of M237 489 050. There was thus an expenditure head in the budget of that year, which means that the requirement in proviso (b) to s 113 is met and therefore the June elections may be funded in terms of that section. In addition the general elections may be funded directly from the Consolidated Fund as provided by s 66D, and so is any shortfall that may arise where s 113 has been used.

[47] The court *a quo* did not approach the matter on the basis of proviso (b) to s 113 of the Constitution. Rather it based its reasoning and finding, as it said, on that court's "inherent jurisdiction to make a just and equitable remedial order". See paragraph [25] of the judgment. The court's full reasoning appears at paragraphs [21] to [25] of the judgment. We need not quote those paragraphs here. This approach of the court attracted the criticism by the 2nd respondent contained in paragraph 1(a) of the grounds of the cross-appeal, to wit, that the court erred "in not finding that, in all the circumstances, there had been compliance with the purpose of section 113 of the Constitution and there thus was no necessity to make any form of declaratory or remedial order."

[48] We pause here to observe that the foregoing analysis of s 113 shows that the reference to "proceeding financial year" in proviso (a) to s 113 can only be a reference to the ensuing year, i.e., financial year 2017/2018 in this case. It is the estimates of that year (2017/2018) which would have been laid before the National Assembly. To talk of any other year would not make sense in the context in which the words "proceeding year" are used. The words have a plain meaning, which must be given effect to. The parties are therefore correct that the CC was wrong in holding that the "proceeding financial year" is a reference to the preceding year. It is, no doubt, a reference to the ensuing financial year, i.e., 2017/2018.

Whether estimates of revenues and expenditure were laid before Parliament

[49] We have determined so far that the general expenditure necessary to carry on the government of Lesotho and to conduct any general election may be funded under section 113 because the requirements therein are all met except one, which is whether the

estimates of expenditure for the 2017/2018 financial year were laid before the National Assembly as required by proviso (a) of that section. That was a matter in contention between the parties.

[50] The appellants contended that when Parliament was dissolved on 6 March 2017, the Minister had not laid before Parliament the estimates of revenue and expenditure for the 2017/2018 financial year. For this reason, so the contention went, the Minister of Finance is not in a position to invoke s 113 of the Constitution; his intention to withdraw money from the Consolidated fund is consequently a violation of the Constitution.

[51] The issue for consideration as we see it is: Did the Minister lay before that august House the estimates of revenues and expenditure for the 2017/2018 financial year before Parliament was dissolved.

[52] It will be noted that in terms of the written statement of facts for a special case for adjudication the parties, at paragraphs 3 and 4, agreed that the Minister delivered the estimates of revenue and expenditure for 2017/2018 to the Speaker of Parliament on 24 February 2017 and that the

budget presentation was included in the Order Paper of 27 February 2017. Of this the CC at paragraph 26 of its judgment had this to say:

> "In the present matter Applicants contend that the lodging of the estimates of expenditure with the Speaker does not constitute 'laying before Assembly' as intended by section 113. On the other hand Respondents contend that it [did] amount to laying before the Assembly as contemplated by the Standing Orders of the Assembly. According to Respondents objectively viewed the estimates were prepared by the Minister for consideration of the Assembly but was frustrated from presenting on the 27th February, serve to determine the one-third limitation provided for in the proviso (a) to section 113. In our view 'laying' or 'tabling' before the National Assembly is a process which commences with the lodgment of the document for discussion by Members in Parliament."

[53] We construe the above statement of the court to be a finding that, in its opinion, the estimates of revenues and expenditure were laid before Parliament. A useful definition of 'laying before Parliament' appears in a a United Kingdom statute, Laying of Documents Before Parliament (Interpretation) Act, 1948,. Section (1) thereof states as follows-

> **"Meaning of references to laying before Parliament.**
>
> (1) For the removal of doubt it is hereby declared that a reference in any Act of Parliament or subordinate legislation, whether passed or made before or after the passing of this Act, to the laying of any instrument, report, account or other document before either House of Parliament is, unless the contrary intention appears, to be construed as a reference to the taking, during the existence of a Parliament, of such

> action as is directed by virtue of any Standing Order, Sessional Order or other direction of that House for the time being in force to constitute the laying of that document before that House, or as is accepted by virtue of the practice of that House for the time being as constituting such laying, notwithstanding that the action so directed or accepted consists in part or wholly in action capable of being taken otherwise than at or during the time of a sitting of that House; and that a reference in any such Act or subordinate legislation to the laying of any instrument, report, account or other document before Parliament is, unless the contrary intention appears, to be construed accordingly as a reference (construed in accordance with the preceding declaration) to the laying of the document before each House of Parliament.
>
> (2) It is hereby further declared that nothing in section four of the Statutory Instruments Act, 1946, is to be taken as indicating an intention that any reference in that section to the laying of copies of certain statutory instruments as therein mentioned is to be construed otherwise than in accordance with the preceding declaration."

[54] In the New South Wales Interpretation Act, 1987 No. 15, the laying of a statutory instrument before Parliament is defined as including a reference to laying it in a written notice of the making of the instrument.

[55] It seems to us that whilst originally the laying of a document before Parliament entailed the placing of a physical copy of the document on a table in the assembly chamber, it is now generally accepted that laying a document before Parliament means making it available to the members to read. Statutes and rules of order largely determine the mode by which a document will be regarded as having been laid. Electronic publishing of a document is in recent times recognized as laying it. There is

nothing really magical about laying a document before Parliament or the mode it must take. We are prepared to accept that when the Speaker, as happened in this case, was advised that estimates of revenues and expenditure were ready for presentation to Parliament and they were delivered to her, those estimates were laid before the House concerned. Estimates of revenues and expenditure in particular are not ordinarily be made available to members of Parliament before the Minister has given his budget speech because their confidentiality and secrecy preclude it. In this case the parties do not dispute that the estimates were delivered to the Speaker. The fact that they were so delivered and that notice was given by the Speaker and the Standing Orders showed that the budget would be presented, that to us was sufficient in the circumstances to constitute the laying of the estimates before Parliament as required by s 113(a) of the Constitution.

[56] It is agreed by all that a purposive construction is appropriate. What are the purposes of the first two provisos of s 113? Our interpretation should after all advance the purpose so we must endeavour to ascertain what the purpose is.

[57] The purpose of the second proviso is clear: to ensure that advance withdrawals are limited to heads of expenditure which were the subject of parliamentary approval in the previous year.

[58] The purpose of the first proviso is to impose a cap on the amounts that are taken as advance withdrawals. The proviso fixes the cap at one third of the amounts estimated as needed for the ensuing year. This establishes an objectively verifiable limitation on the amount that can be withdrawn. This is to prevent the possible increase of the figure after the need for advance withdrawals has become apparent. The figure must have been estimated beforehand and be incorporated in a document (hard copy or electronic) which has left the control of the Ministry of Finance and is already in the custody of the Assembly. This happens when it is handed to the Speaker, the senior presiding officer in the Assembly, who is elected by the members. It is thus clear that the interpretation we favour advances the purposes of the provisos.

[59] In conclusion we find that in respect of the authorization by the Minister of withdrawal of moneys from the Consolidated Fund necessary to carry out the government of Lesotho and to conduct the June general elections all the preconditions stipulated in s 113 of the Constitution were met. The Minister may therefore authorize the withdrawal of those moneys from the Consolidated Fund for those purposes.

Comment on expenditure relating to June 2017 general elections

[60] We are aware that any further comment or observation that we may make in relation to the funding of the general elections to be held on 3 June 2017 would be no more than an *obiter dictum*. We however consider that the funding of the elections was at the heart of the constitutional application and is at the heart of this appeal. It is important to bear in mind that where Parliament has been dissolved funds must necessarily be found and made available to the IEC to conduct a general election. The appellants must have hoped that if it were to be found that the Minister of Finance was not permitted by law to withdraw money from

the Consolidated Fund, then the general election would not be held and the majority coalition candidate for the premiership would have had to be appointed as substantive Prime Minister. Little did they consider that if Parliament has been dissolved it becomes necessary under the Constitution to hold a general election in order that there be a Parliament as required by s 54 of the Constitution because upon dissolution all members of Parliament vacate their seats by virtue of s 60(1)(c). Parliament was dissolved on 6 March 2017. In terms of section 84(1) of the Constitution it is mandatory that "a general election of members of the National Assembly be held within three months after any dissolution of Parliament." In this instance the King appointed 3 June 2017 as the date of the general election, which is only three days before the expiry of the period of three months within which a general election must be held after dissolution of Parliament. It is clear that the Constitution compels the holding of a general election. It equally compels the funding of such a general election and adequately provides for such funding to be accessed. Thus even if it is to be assumed that a snap general election or an election following a vote of no confidence in Government was an unforeseen and unbudgeted for eventuality and cannot be funded in terms of s 113 of the Constitution, the

general election must be held nonetheless. At paragraph [28] of its judgment the CC struggled to find a solution to the problem. It observed:

> "the applicants in the *Mofomobe* case proposed that the harshness of Government shutdown would be circumvented by an order that Parliament be reinstated for it to specifically deliberate on the estimates to end the impasse. We hold that we lack jurisdiction to prescribe the agenda of Parliament since we cannot enforce its compliance. That would undermine the separation of powers and constitute an unwarranted interference with the prerogative of Parliament."

[61] The CC may be correct but to us the answer is simply that what the appellants in *Mofomobe* prayed for cannot simply be done in the circumstances. Section 84(2) of the Constitution provides that –

> " If, after a dissolution of Parliament and before the holding of a general election of members of the National Assembly the King is advised by the Council of State that, owing to a state of war or of a state of emergency in Lesotho, it is necessary to recall Parliament, the King shall recall the Parliament that has been dissolved and that Parliament shall be deemed to be the Parliament for the time being….".

[62] There is no state of war or nor was a state of emergency declared in Lesotho. Parliament may therefore not be recalled without

violating the Constitution. The framers of the Constitution were careful to ensure that provision was otherwise made for the funding unforeseen and necessary expenditure. Section 114 of the Constitution provides that –

> "(1) Parliament may make provision for the establishment of a Contingencies Fund and for authorizing the Minister for the time being responsible for finance, if satisfied that there has arisen an urgent need for expenditure for which no other provision exists, to make advances from that Fund to meet that need.
>
> (2) Where any advance is made from the Contingencies Fund, a supplementary estimate shall be presented and a supplementary Appropriation bill shall be introduced as soon as possible for the purpose of replacing the amount so advanced."

[63] Section 17(1) of the Public Financial Management and Accountability Act establishes the Contingencies Fund and provides in subsection (2) that –

> "If the minister is satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists and which cannot be postponed without causing an adverse effect to the public interest, the Minister may make advances from the Contingencies Fund to meet that need."

[64] There can be no doubt even if the general election set for 3 June 2017 were an unforeseen and urgent need as contemplated by the Constitution and the Act, it can also be funded from the Contingencies Fund, subject to the requirement in that section relating to the replenishment of that Fund. And this must also be the case in the event that the funds available in terms of s 113 of the Constitution are insufficient to meet the purpose. We have highlighted s 66D and s114 of the Constitution in order to underscore that the framers of the Constitution were careful to ensure that expenditure for conducting the general elections can always be met.

Relief sought by appellants in *Mofomobe*

[65] Whereas in the notice of motion, the appellants sought the relief that the Minister be interdicted from authorizing the withdrawal of moneys from the Consolidated Fund after 31 March 2017, it be declared that the Minister did not lay estimates of revenues and expenditure for the 2017/2018 financial year before Parliament and that on account thereof -

(a) any withdrawal from the Consolidated Fund is a contravention of s 113 of the Constitution as read with s 18 of the PFMA Act;

(b) any withdrawal of funds from the Consolidated Fund for the purpose of conducting the general elections to be held on 3 June 2017 is a contravention of s 113 of the Constitution as read with s 18 of the PFMA Act;

(c) any withdrawal of moneys from the Consolidated Fund for the purpose of using any unspent appropriations under the Appropriation (2016/2017) Act is a contravention of s 14(3) of the PFMA Act, *alternatively* in the event that the Court finds that the estimates of revenues and expenditure were laid before Parliament, it be declared that the dissolution of Parliament terminated all business of the National Assembly and rendered *pro non scripto* the estimates of revenues and expenditure for the 2017/2018 financial year and such estimates may not be

> relied upon when invoking s 113 of the Constitution, at the end of the hearing of the appeal counsel for the appellants informed the Court that the appellants no longer wanted the Court to grant any relief the effect of which would be to stop the holding of the general elections on 3 June 2017 and that instead if it found for them it should restrict itself to making a declaration on the import of s 113 of the Constitution. On the issue of costs, both parties submitted that an order similar to that made by the court *a quo* would be appropriate.

[66] We do not think that the appellants' prayer for a declaratory order only would meet the prayer and legitimate expectation of the 2nd respondent in circumstances where this Court has reached a conclusion at variance with that of the court *a quo* in the respects indicated in this judgment. The 2nd respondent specifically prayed for an order setting aside the CC declaration, and in its place making an order dismissing the appellants' application. We think that that is the proper route to take. In regard to the appeal in *Mofomobe* and the appeal in relation to the funding

of the general election in *Phoofolo* our orders will respectively be to set aside the declaratory order of the CC and substitute it with an order dismissing the application with no order as to costs and an order upholding that CC's order, also with no order as to costs.

Phoofolo **appeal**

[67] The central issue in this appeal is whether the King acted constitutionally when he dissolved Parliament on the advice of the Prime Minister, which led to the calling of the general elections in June 2017.

[68] Counsel for the appellants' main argument was that, in essence, the first proviso to s 83(4) i.e., paragraph (a) applied and that the king was obliged to seek (and follow) the advice of the Council on the question as to whether the Government of Lesotho could be carried on without a dissolution and whether a dissolution would not be in the interests of Lesotho. He submitted that it was common cause that the King had not sought that advice from the Council and that as a consequence the

decision to act in accordance with the advice of the Prime Minister was illegal and unconstitutional in that it was in breach of section 83(4)(a). He submitted further that the ouster clause in s 91(5) did not apply because the issue the Court has to decide concerns the question of the legality of the King's action and the ouster clause should be held not to apply so as to exclude the court's jurisdiction to pronounce on that issue.

[69] In support of this latter submission he relied on a decision of the Indian Supreme Court, *S.R. Bommai v The Union of India*[14], in which it was held that s 74(2) of the Indian Constitution, which is similarly worded to our s 91(5), did not exclude the court's jurisdiction to put under judicial scrutiny the question whether any, and if so, what reasons were tendered by the relevant Minister to the President of India before the President issued a proclamation dissolving Parliament.

[70] As will be realized, the question of a possible ouster can only arise, if the King was obliged by proviso (a) to s 83(4) to seek the advice referred to above. If the proviso did not apply then there is no room for s

[14] (1994)AIR 1918

91(5) to apply. We may also add that the ouster clause is restricted to two issues only- namely whether the King received any advice and whether he acted on that advice. The court's jurisdiction is not ousted in respect of any inquiry as to the reasonableness of the decision itself. As such the ouster clause is not applicable because the issue before us is simply whether the King acted lawfully i.e., whether he was entitled to reject the advice given. The power to reject could be derived from proviso (a) and then only if the proviso was applicable.

[71] The question that this Court has to answer is therefore: Did the proviso apply? Before that question is considered, it will be helpful to see what light will be thrown on the matter by s 83(4) (b).

[72] It is clear, in our view that the second proviso to s 83(4), subparagraph (b) does not **directly** apply. This is because the main clause of that subparagraph (which empowers the King, acting in accordance with the advice of the Council to dissolve Parliament without having been advised to do so by the Prime Minister) is qualified by a conditional clause, namely, if the National Assembly passes a resolution of no confidence in

the Government of Lesotho **and the Prime Minister does not within three days thereafter either resign or advise a dissolution**) and that condition was satisfied because the Prime Minister **did** advise a dissolution within the three day period. Though the proviso does not apply (so as to empower the King, appropriately advised, to dissolve Parliament without receiving advice on the point from the Prime Minister) it is still relevant in this case because it makes it clear that the Prime Minister who has been defeated in a vote of no confidence in his Government **is** empowered to advise a dissolution provided he does so within the three days. It follows that the submission made by the appellants' counsel that he cannot give such advice must be rejected.

[73] Section 87(5) tells us what can happen if the defeated Prime Minister does not resign or advise dissolution within the three days period. The King may, on the advice of the Council, remove him from office, in which event it is likely that the member proposed for appointment as the next Prime Minister in the resolution of no confidence will be appointed as Prime Minister in terms of s 87(1) and (2).

[74] Turning to the first proviso, we see that it deals with a *recommendation* by the Prime Minister that Parliament be dissolved and it empowers the King in certain circumstances to refuse a dissolution if he is so advised by the Council. The main clause of s 83(4) uses the words "the **advice** of the Prime Minister" and the second proviso, as we have seen, deals with the situation where the defeated Prime Minister does not, within the relevant period, resign or **advise** a dissolution. Section 87(5), as we have seen, requires the defeated Prime Minister to "resign from his office or **advise** a dissolution of Parliament" and if he does neither he can be removed from office.

[75] As SCHREINER JA said in *R v Sisilane*[15]:

> "It is a general rule of construction of statutes that a deliberate change of expression is prima facie taken to import a change of intention. (See *Barrett NO v Mcquet* 1947 (2) SA 1001(AD) at 1012; *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co. Ltd* 1947(2) SA 1269 (AD) at 1279). That principle should operate particularly clearly, whereas here, Parliament was dealing with two parts of a single provision and cannot be supposed to have lost sight of the one when dealing with the other."

[15] 1959 (2) SA 448 (A) at 453E-F

[76] What is the significance of the change in this case? Do the words "recommend" and "advise" have the same meaning in the provisos or is there a distinction? And why was there this change of language?

[77] In our view the answer is to be found by considering what will happen if it is held that the change of language is not significant and the two words are to be given the same meaning in the two provisos and the main clause. In that event a defeated Prime Minister who advises a dissolution within the three day period, which advice is rejected by the King with the necessary advice under the first proviso, cannot be removed from office. What is to happen? Presumably he will hobble on without his government's bills being passed, in particular the money bills which his Minister of Finance proposes will not be passed and Government will be without supply.

[78] Such a situation, which is clearly most undesirable and contrary to the interests of the Kingdom, can only be avoided if it is held that the advice to dissolve Parliament given by the defeated Prime Minister within

the three day period does not fall to be dealt with under the first proviso, i.e., the King cannot refuse to accept it.

[79] The problem will fall away if it is held that there is a distinction between the words "advice" and "recommendation". It is clear from the sections in the Constitution where the word "advice" is used that what is meant is binding advice, advice that must be accepted. The word "recommendation" is not used anywhere else in the Constitution and as used in proviso (a) it plainly does not mean advice that must be accepted because the proviso itself says that the King may, with the advice from the Council, refuse to accept it. Thus in a case where the Prime Minister recommends a dissolution which the King accepts it may be necessary, in order to ascertain if the King's acceptance of the recommendation complied with the Constitution for the correctness of counsel for the appellants' submissions on the correct interpretation of the proviso, which have been summarized in paragraph [65] to be gone into.

[80] On the other hand if the Prime Minister **advises** a dissolution, the proviso will not apply and the matter will be governed by the main

clause in s 83(4), with the result that the King's action in dissolving on the advice of the Prime Minister must be upheld and the appeal cannot succeed.

[81] As the first proviso does not apply in this case it is not necessary for us to decide whether the submissions of counsel for the appellants on the interpretation of the proviso are correct.

[82] In the result –

[83] (a) The declaratory order of the Constitutional Court in *Machesetsa Mofomobe & Another,* Case No. CC 07/2017 is set aside and substituted with the following order-

> "The application is dismissed with no order as to costs."

> (b)The order of the Constitutional Court in *Haae Phoofolo & Another v The Prime Minister & 4 Others,* Case No CC 08/2017 is upheld.

[84] There is no order of costs of the appeal.

_____ _____

P MUSONDA **MH CHINHENGO**

ACTING JUSTICE OF APPEAL **ACTING JUSTICE OF APPEAL**

I agree

_____

IG FARLAM

ACTING PRESIDENT

I agree

_____

N MAJARA

CHIEF JUSTICE (ex officio JA)

I agree

_____

WJ LOUW

ACTING JUSTICE OF APPEAL

For Appellants: Mr Mosotho assisted by Adv S.O. Selikane

Adv Rasekoai & Adv K Ndebele instructed by M J Rampai

For Respondents for 1st, 4th & 5th: Adv Penzhorn assisted by Adv Suhr