THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU **C OF A (CIV) 9/2018**

In the matter between:

DR. KANANELO MOSITO	**1ST APPELLANT**
PRIME MINISTER	**2ND APPELLANT**
MINISTER OF LAW & CONSTITUTIONAL AFFAIRS	**3RD APPELLANT**
MINISTER OF JUSTICE AND HUMAN RIGHTS	**4TH APPELLANT**
ATTORNEY GENERAL	**5TH APPELLANT**
HIS MAJESTY THE KING LETSIE III	**6TH APPELLANT**
THE LAW SOCIETY	**7TH APPELLANT**

And

QHALEHANG LETSIKA	**1ST RESPONDENT**
KARABO MOHAU	**2nd RESPONDENT**
MOTIEA TEELE	**3RD RESPONDENT**
ZWELAKHE MDA	**4TH RESPONDENT**

CORAM: DR. MUSONDA AJA
MOSOJANE AJA
MTSHIYA AJA
HLAJOANE JA
MOKHESI AJA

HEARD : **23** October 2018
DELIVERED : **26** October 2018

SUMMARY

Constitutional Law – Any Constitutional challenge has to comply with standing requirements in S. 22(1) of the 1993 Constitution – Stare decisis – Lower Courts' obligation to follow Higher Court decisions mandatory – High Court refusing to receive its own Orders – Whether juridically appropriate.

JUDGMENT

DR. MUSONDA AJA

BACKGROUND

This is an appeal against the High Court judgment sitting as a Constitutional court.

[1] It is important that the history of this long-running litigation is from the beginning well articulated. The first appellant Dr. Kananelo Everite Mosito K.C. was appointed the President of the Court of Appeal of the Kingdom of Lesotho by His Majesty King Letsie III pursuant to provisions of section 124(1) of the Constitution of the Kingdom. The appointment was brought into public the glare by Legal Notice No. 12 of 2015.

[2] The Learned Attorney General, a member of the Executive arm of Government and Chief Legal Advisor challenged the appointment and cited among other reasons, the Respondents disapproval of the appointment dating back to the year 2014, pursuant to section 98 of the Constitution.

[3] The matter finally came before us albeit a different Bench, which upheld his appointment as valid in ***Attorney General v. His Majesty the King and***

Others[1]. This appointment was made by the then Prime Minister Dr. Thomas Motsoahae Thabane, who soon lost power and Dr. Pakalitha Mosisili became the Head of Government (Prime Minister). The incoming Prime Minister disapproved of the appointment as it came at a time when the Kingdom was to hold a general election. The appointment was also objected to by some professional colleagues, as they perceived the elevation as accelerated, despite the first appellant being in possession of impressive academic qualifications.

[4] This Court observed that during the months that followed the new Prime Minister Dr. Pakalitha Mosisili and the then Attorney General Mr. Ts'okolo Makhethe K.C set in motion a vigorous politico-legal and diplomacy scheme to reverse the appointment of the appellant despite its affirmation in C. of A. (CIV) 13/2015 (see above at para. 3), but unsuccessfully so. Later the learned Director of Public Prosecutions preferred 19 charges of failing to render annual returns (dating back to 1996). Suffice to mention here that the

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C of A (CIV) 13/2015

Returns pertained to income earned as a private practitioner years before occupying the High Judicial Office of the Court of Appeal President. The criminal charges were enrolled for trial on 31st August 2015. The appellant was cherry-picked for prosecution from among other professionals and judicial colleagues, who were similarly circumstanced.

[5] The first appellant brought proceedings against the learned Director of Public Prosecutions, as it was common cause that some of his colleagues holding High Judicial office and his former colleagues in the legal profession had omitted to do the same. Simply put he was pleading discrimination, which is a fundamental right under section 18 of the Constitution of Lesotho. He was unsuccessful (see ***Dr. Kananelo Mosito v. Director of Public Prosecutions and One***[2])

[6[The Law Society of Lesotho filed an urgent application seeking to invalidate the proceedings of the Brand tribunal which had been appointed by His Majesty the King Letsie III to investigate allegations of misconduct

[2] C of A (CIV) 66 of 2015

and fitness to hold office by the first appellant. Initially an interdict was granted to the Law Society to stay both the decisions and the rendering of the advice by the Brand tribunal. The first appellant later joined the Law Society of Lesotho as a co-applicant. The High Court later dismissed the Law Society's and first appellant's application. The Law Society and first appellant dissatisfied with the High Court dismissal of their application appealed to the Court of Appeal, which appeal has not seen the light of the day.

[7] Meanwhile, while the appeal was pending before this Court, the tribunal continued its sitting and completed the compilation of its report on 9th December 2016, which recommended the removal of the first appellant from office. The first appellant resigned on 13th December 2016 in terms of section 152 of the Constitution of Lesotho. His removal was published in Legal Notice No. 156 of 2016 on the 23rd of December 2016, 10 days after his resignation.

[8] Based on the recommendation of the Brand tribunal Dr. Pakalitha Mosisili, then the Prime Minister advised His Majesty King Letsie III to appoint Justice Robert Nugent as the President of the Court of Appeal, with effect from 22nd May 2017, but he actually did not assume office.

[9] There was a vote of no confidence in the then Prime Minister Dr. Pakalitha Mosisili, who recommended to His Majesty King Letsie III to dissolve Parliament. The dissolution of Parliament was challenged by ***Mofomofe and Another v. Minister of Finance and Another; Phoofolo K.C and Another v. The Right Hon. Prime Minister and Others***[3], which judgment was a unanimous decision of this Court. Relevant to the appeal before us, we also discussed the issue of locus standi in that judgment.

[10] This Court validated the dissolution of Parliament by His Majesty King Letsie III and the calling for general elections, which the incumbent Dr. Pakalitha Mosisili

[3] C of A (CIV) 15/2017 Consti./7/2017 C of A (CIV) No. 17/ 2017

lost and Dr. Thomas Motsoahae Thabane succeeded the former as Prime Minister.

[11] The new Prime Minister revoked the appointment of Judge Robert Nugent, who later resigned and indicated that he did not wish to contest his removal from office, effective 31st July 2017. The first appellant was re-appointed in the same Legal Notice No. 64 of 2017. On 8th August 2017, the respondents launched a constitutional challenge against Judge Nugent's removal from office and Dr. Mosito's re-appointment.

[12] The respondent brought the matter to the Constitutional Court by way of motion proceedings challenging the second appellant's advice to His Majesty King Letsie III to re-appoint the first appellant Dr. K.E. Mosito K.C on 1st August 2017 as the President of the Court of Appeal of Lesotho.

[13] The first respondent is an attorney by profession and the three co-respondents are senior advocates who are members of the Law Society of Lesotho.

[14] On 3rd October 2017 the first appellant and the Law Society on one hand entered into a deed of settlement with the Acting Attorney General, which annulled the proceedings, findings and recommendations of the Brand tribunal and this was made the order of the court on 18th October 2017. On 26th October 2017 the first appellant was acquitted by the High Court of all the alleged tax violation charges against him.

[15] In the Court quo the appellants as they are in this Court raised a preliminary point that the Respondents had no locus standi to bring the application. The appellants relied on Section 22 (1) of the 1993 Lesotho Constitution. The gravamen of their contention was that the section restrictively gives legal standing only to those whose fundamental rights and freedoms have been infringed without any valid reason and justifiable cause.

[16] Mr. Motinenga for the then five respondents argued that the then applicants had no rights or interest recognized in law, which they are entitled to enforce. It was only Judge Nugent or anyone in the hierarchical line of succession who could bear the right or interest recognized in law.

[17] The then applicants counter-argued that they were entitled to ensure that there is compliance with the rule of law and the constitution, particularly where the Law Society, as a collective, fails in its duty because of its own reasons. They further argued that it was their duty to ensure that they uphold all the laws including the Constitution and in particular they were obliged to ensure that those that are appointed to administer justice meet the legally and constitutionally recognized requirements. It would have been an exercise in futility to engage the Law Society for the purpose of challenging the first appellant's re-appointment, so they argued.

[18] The Court a quo went on to factualise its assumptions that, it may well be that the majority of the members of

the 7th appellant would have embraced the cause pioneered by the respondents. Such a reasonable possibility could not be excluded, so the Court a quo stated.

[19] The Court a quo disallowed the two Court Orders, one acquitting the first appellant and the other setting aside the findings and recommendations of the Brand tribunal on the ground that the first appellant ought to have applied for leave in terms of High Court Rule 8(12), which stipulates that any party who wishes to file a further affidavit must first seek and obtain the leave of the court.

[20] We now turn to the grounds of appeal. The first ground of appeal was or is that the respondents have no *locus standi*. The second ground was that the court *a quo* misdirected itself by holding that the first appellant was unfit to hold office as found by the tribunal, whose findings and recommendations had been set aside. The appellants attack the holding of the Court *a quo* that the recommendation by the second appellant to his Majesty

the King Letsie III relating to the appointment of the 1st appellant was irregular and unconstitutional.

[21] **Parties' respective submissions**:

The respondents have sought to assail the judgment of the Court of a quo on a number of grounds, three of which are relevant for purposes of this judgment, viz,

i. the locus standi of the respondents to launch this Constitutional challenge against the appointment of Dr. Mosito as the President of the Court of Appeal, and the removal of Judge Nugent from the same position.

ii. the issue of disregard to the High Court Orders.

iii. declarators relating to the removal of Judge Nugent. It needs to be mentioned that the 7th appellant made it plain that their Heads of Argument serve the purpose of complementing the 1st -5th appellants argument and so for this very fac,t where the 7th appellant argument is merely repetitive of what is contained in 1st – 5th appellants' arguments, those of the 7th appellants will not be highlighted.

[22] **Locus standi**

The 1st – 5th appellants argued that the Court *a quo* erred in holding that the respondents had *locus standi* to launch the Constitutional challenge against the removal of Judge Nugent and appointment of Dr. Mosito in view of the fact that they failed to allege that the provisions of section 4 to 21 (inclusive) of the Constitution had been, was being or likely to be contravened in relation to themselves, in terms of section 22 (1) of the Constitution. Mr. Maqakachane for the 1st – 5th appellants argued that the standing requirements contained in section 22 (1) are restrictively interpreted as to allow access to Court to mount Constitutional challenge only when the applicant's fundamental rights and freedoms are being or likely to be infringed. In support of this argument he cited the decision of this Court in ***Mofomobe and Another v. Minister of Finance and Another***[4]; ***Phoofolo KC and Another v. The Right Hon. Prime Minister and Others***[5]. This Court said:

[4] C of A (CIV) 15/2015 Const/7/2017
[5] C of A (CIV) 17/2017

"[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 had been (or likely to be) a contravention of the Declaration of Rights, in the case of S.20 (1) (a) when a person alleging to be aggrieved in given the right to go direct to the Constitutional Court. The litigant's right to bring an application, and therefore his standing to do so, is circumscribed by S. 22(1)..."

[23] Adv. Maqakachane, in support of the restrictive interpretation of S.22 (1), referred to a plethora of authorities from jurisdictions where similarly worded provisions in the Constitutions of those countries was restrictively interpreted; ***Zimbabwe – United Parties v. Minister of Justice, Legal and Parliamentary Affairs***[6] (ZS) ***Botswana – Attorney General v. Dow***[7], Mauritius – ***Marie Jean Nelson Mirble and Others v. The State of Mauritius and Others***[8]. Mr

[6] 1998 BCLR 224
[7] 1992 BLR 119
[8] (2010) UKPC 16 (16th July 2010)

Maqakachane argued that *in casu* the respondents in their founding affidavit alleged that the basis of their instituting the proceedings is that they are Legal Practitioners and that the administration of justice will be brought into disrepute should an unqualified person be appointed to head the apex Court, and further that as Legal Practitioners they have 'legal' and 'ethical' obligations and duties to uphold the rule of law: he argued that these bases disqualified the respondents from being bestowed with standing in terms of S.22 (1) of the Constitution as the respondents are not alleging infringements of their fundamental rights and freedoms.

[24] Mr. Maqakachane, in an argument not contained in the written Heads of argument, argued in the alternative that, perhaps the respondents could have sued in terms of S.2 of the Constitution – the Supremacy clause. He argued that the supremacy clause permits public interest litigation in certain circumscribed circumstances and referred this Court to the approach in Canada as evidenced by the decision in ***Minister of***

Justice (Can) v. Borowski[9]. While we agree that there maybe much force in this submission, it needs to be remembered that the respondents were not challenging "any other law" for being inconsistent with the Constitution. This argument, in our considered view does not find application in casu.

[25] In reply Mr. Suhr, for the respondents, argued that the respondents had "*sufficient interest to protect*" and that they had a direct interest in the matter (citing ***Mofomobe v. Minister of Finance,*** above). He argued that he endorsed the reasoning of the Court a quo on the issue of *locus standi* of the respondents. In relevant parts the Court a quo in paras. 31 – 32 of the judgment said the following:

"[31] The four applicants are senior lawyers in the country. In the nature of things, often appear in all the courts in the country. By virtue of their senior status, they will also necessarily have to appear before the 1st respondent in the Court of Appeal. Consequently, we are of the view that there is substance in the submission that by virtue of their vocation coupled with their

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[9] (1981) 2 S.C.R. 575 (dated 01-12-1981)

status they, individually and collectively, have a direct interest in the legality of the appointment of Judges in general and that of the most senior Judge in particular. Besides they are asserting their civic rights. This matter raises serious concerns of national interest as to whether the appointment of the preferred candidate who has been designated as the President was constitutionally competent.

[32] *Given all these considerations we are persuaded that the alleged constitutional violation directly relates to each one of the applicants, that it would probably have adverse impact on their vocations and that they accordingly have direct and substantial interest in the matter before us...:*

[26] **Unfitness of the 1st appellant to hold judicial office.**

It is the appellants' contention that the Court *a quo* erred and misdirected itself in declaring that the appointment of the 1st appellant is unconstitutional as he is not fit and proper on the basis of the findings of the tribunal appointed to probe his fitness to hold judicial office. The appellants argued that as the findings of the tribunal were annulled by the Court Order of the 18th October 2017, it was therefore wrong for the Court *a quo* to base its decision on it despite

knowing about the existence of the order of court nullifying the same, and a further judgment clearing the 1st appellant of tax evasion charges, handed down on 26 October 2017. Both these orders were brought to the attention of the Court *a quo*. Mr. Maqakachane argued that as the substratum of the application, in the form of Brand Tribunal Recommendations and the impending tax evasion charges, having been rendered nugatory by orders of court, there was simply no basis upon which the Court a quo could conclude that the 1st appellant was unfit to hold judicial office. He submitted that since the two were judgments of the High Court they were binding on the Court a quo.

[27] In reply Mr. Suhr, for the respondents, argued that the evidence relating to the annulment of Brand Tribunal Recommendations was correctly rejected by the Court a quo as it smacked of questionable underhand dealings. In page 3 of their Heads of Argument the respondents submits that:

"[6] The attempt by the appellants to introduce evidence regarding litigation subsequent to 1st August 2017 was correctly

rejected by the Court as no attempt had been made to follow the correct procedure for adducing such evidence.

[7] Furthermore, the Court correctly regarded the evidence to be adduced with distaste as it smacked of a collusive agreement to reverse the findings of the tribunal without addressing the merits and without the members of the tribunal being properly represented".

[28] **A declarator that the removal of Judge Nugent was unconstitutional.**

The appellants argued that the Court a quo erred and misdirected itself in issuing a declarator that the removal of Judge Nugent violated the provisions of section 118(2) and (3) read with section 12(1) and (8) of the Constitution. The argument went further to say, because the respondents failed to demonstrate an existing, future or contingent right or obligation, in terms of S.2 of the High Court Act 1978 as Amended by High Court (Amendment) Act of 1984, the respondents were therefore disentitled to a declarator, as only Judge Nugent was the only interested person who could have sued to vindicate his rights.

[29] The starting point of reasoning in this judgment is whether the respondents had *locus standi*. ***In Mofomobe and Another v. Minister of Finance and Another*; *Phoofolo KC and Another v. The Right Hon. Prime Minister and Others*** (above) where this Court said:-

> *"[27] As we see it, the issue will always be whether there has been an infringement of an individual's fundamental rights or freedom, and that may, as contended in this appeal, involve the right to take part in the conduct of public affairs. This section 22(1) contemplates the situation in which it is clear from the orbit 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 section 20(1) (a) when the person alleging to be aggrieved is given the right to go direct to the Constitutional Court. The litigant's right to bring an application, and therefore his standing to do so is circumscribed by section 22(1)."*

[30] Ground one, which is dispositive of this appeal stands and falls with whether we follow ***Mofomobe*** or not. Our view is that we are bound by ***Mofomobe***. There are a plethora of authorities from the SADC region, which

comport with our decision in ***Mofomobe*** and section 22(1) of the Constitution as alluded to by Mr. Maqakachane.

[31] Beyond the Region *locus standi*, is sometimes referred to as the "sufficient interest" The Supreme Court Act of England 1981 whose law on Judicial review was transported to former colonies provide that:

> *"The Court must not grant leave for an application for Judicial review unless it consider that the applicant has sufficient interest in that matter to which the application relates".*

[32] The justification for standing requirement lies in the need to limit challenges to administrative acts, which need is predicated on the need to limit the challenge to administrative decision-making to genuine cases of grievance and to avoid unnecessary interferences in the administrative process by those whose objectives are not authentic. This is the philosophy underlying section 22(1) of the Constitution of Lesotho.

[33] The doctrine of stare decisis is of fundamental importance to the rule of law, which was sadly ignored by the Court a quo. Our precedents are sacrosanct (see also ***Citizens United v. Federal Election Commission***[10], ***Helvering v. Hallock)***[11]. "Stare decisis" is a principle of policy and not a mechanical formular of adherence to the latest decision, ***State Oil Co v. Khan***[12]

[34] The Court a quo created a totally different criteria unsupported by the common law, constitutional jurisprudence, statute law and the Constitution of Lesotho. This was judicial overreach.

[35] For what we have said, the upholding of the first ground of appeal is inevitable and this is dispositive of the whole appeal. The appellant succeeds.

[36] However, as the final Court of Appeal and notwithstanding the fact that we have disposed of the

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[10] 558 US 310 363 (2010)
[11] 309 US 106, 119 (1940)
[12] S22 US 3, 20 (1997)

matter on the basis of *locus standi*, some comments to make on the non-reception of Court orders by the Court a quo, non-interrogation of the right to resign under section 152, the right to equality before the law and the equal protection of law and granting of declaratory orders

[37] **Settlement Orders and issue of the first appellant's fitness to hold office**.

The argument advanced by the appellants, perhaps at the risk of being repetitive is that the Court *a quo* misdirected itself in declaring that the 1st appellant is unfit to hold judicial office on the basis of the Brand Tribunal Report, despite its annulment by an order of the High Court consequent to a compromise being reached between the Government and the 1st appellant. This order, it was argued, was brought to the attention of the Court *a quo* but was not given recognition. In reply, the respondents argued that the annulment of the Tribunal Recommendations by means of settlement order smacked of 'collusive' underhand dealing. It will be observed that the respondents' line of argument is reflected in the attitude of the Court *a quo* to the

annulment of the Tribunal findings. In para. 70 of its judgment, the Court *a quo,* regarding the Tribunal findings said:

> *"There has been no successful legal challenge to those findings of the Tribunal. Until set aside by* ***competent Court*** *those findings have specific legal consequences. The King acted on them as he was constitutionally obliged. He removed the first respondent from office owing to his unfitness to hold such office...." (our emphasis)*

[38] There are policy reasons why the Courts' attitudes towards settlement of disputes by means of compromise is positive, and these were stated in ***Ex parte Le Grange and Another in re: Le Grange v. Le Grange***[13] ***at para. 36***

> *"The Policy underlying the favouring of settlement has as its underlying foundation the benefits if provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on judicial system. By disposing the cases without the need for trial, the case load is reduced. This gives the*

[13] (2013) EC GHC 75

Court capacity to conserve its limited judicial resources and allows its functions more smoothly and efficiently..."

In ***Slabbert v. M.E.C for Health and Social Development, Gauteng***[14] the Court said, in para 7:

"An agreement of compromise creates new rights and obligations as a substantive contract exists independently from the original cause. The purpose of a compromise is twofold; (a) to bring an end to existing litigation and (b) to prevent or avoid litigation. When a compromise is embodied in an order of court the order brings finality to the lis between the parties and it becomes re judicata. The Court changes the terms of a settlement agreement to an enforceable Court order – through execution or contempt proceedings. Thus, litigation after the consent order will relate to non-compliance with the consent order and not the underlying dispute".

Furthermore in the often-quoted statement in ***Smith v. East Elloe Rural District Council***[15] Lord Radcliffe said:

"An order, even if not made in good faith, is still an act capable of legal consequence: It bears no brand of

[14] 432/2016 (2016) ZASCA 157 3 Oct. 2016
[15] (1956) 1 All ER 855 at 871 G-H,

invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the impeccable of orders". (See also ***Moraitis Investments (PTY) Ltd. v. Montic Dairy (PTY) Ltd.***[16]

[39] In light of the above-stated principles, it was not open to the Court *a quo* to have a dim view of the settlement orders annulling the Brand Tribunal Report. Whether or not one dislikes the way the Report was dealt with, in final analysis it was annulled by an order of a competent Court. That order has to be obeyed, as to do otherwise would be to sow the seeds of anarchy, and concomitantly undermine the Rule of Law which the respondents claim to uphold.

[40] **Declarator:**

In the Court *a quo,* in terms of prayer 1 of the Notice of Motion, the respondents sought a declaratory order that the removal of Judge Nugent was unconstitutional, and the Court *a quo* issued an order to that effect. This is despite the fact that Judge Nugent had resigned by the

[16] (799/2016 [2017] ZASCA 54 (18 May 2017] para 10

time the application was launched and was not even a party to the proceedings. The power of the High Court to issue declarators derives from the provisions of section 2 of the High Court Act 1978, which provides that:

> *"2. (1) The High Court for Lesotho shall ... be a superior Court of record, and shall have....*
>
> *(b) in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contigent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination".*

[41] In Casu the respondents sued, seeking to vindicate the rights of Judge Nugent, and sought a declaratory order upon a matter which quite frankly, was academic as Judge Nugent had resigned and was not party to the proceedings. This, the Court *a quo* should have disallowed. Regarding declarators, the Supreme Court of Appeal in South Africa, in the matter of ***Rumdel Cape v. S.A. National Roads Agency***[17] said:

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[17] 234/2015 (20160 ZASCA 23 18th March 2016 at para. 15

"The immediate difficulty is, of course, that even if this Court was of the view that the judgment in the Court below was wrong, it would not as a matter of course issue the declarator the appellant seeks. The mere fact that parties are locked in dispute on a point of law or fact does not necessarily entitled either of them to an order declaring which standpoint is correct. Generally speaking, a Court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issues. Instead, in order to entertain an application for declaratory relief, a Court must be persuaded that the applicant has an interest in an existing, future and contingent right or obligation that will be determined by the declarator and its order will be binding upon other interested parties. If it is so satisfied, the Court then exercise a discretion whether to grant or refuse the order sought. In doing so the Court may decline to deal with the matter where there is no actual dispute, where there is no actual dispute, where the question raised is, in truth, hypothetical abstract or academic, or where the declarator sought have no practical effect".

In this case Judge Nugent had resigned, and clearly intimated his disinterest in the matter, and so the declaratory order sought served no purpose at all.

[42] **Refusal by Court a quo to receive own orders**

To paint a picture with broad strokes the Constitution of the United States of America makes it mandatory for reception of public Acts, Records and judicial proceeding of every other State. Article IV of the said Constitution is couched in these terms:

> *"Full faith and credit shall be given in each state to the public Acts, Records and judicial proceeding of every other state, and the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the effect thereof".*

[43] If States can be impelled to admit in evidence public Acts, Records and judicial proceedings of every other State, is it not then numbing that in the appeal before us the High Court refused to receive its own orders. Closer to home in the case of ***Shabir Shaik and Others v. the State***[18] where an application was launched on appeal to admit new evidence, chief among which were courts judgments, the Constitutional Court said the following at para. 34:

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[18] (CCT 86/2006 dated 02 October 2007)

> *"The High Court judgments sought to be admitted do not require formal leave for admission into evidence. The application is only necessary in so far as it attempts to introduce as evidence the factual material in the judgments. The relevance of the facts in the said judgments has not been demonstrated..."*

It would seem the Court *a quo* had labored under a misconception that Court Orders could only be admitted into evidence through the vehicle of the provisions of Rule 8(12) of the High Court Rules. This approach in our considered view does not accord with precedent and common practice. The refusal of Court *a quo* to receive orders of the High Court was display of lack of judicial comity.

[44] When it comes to resignation in terms of section 152 of the Constitution, the right is derived from section 9 of the Constitution which prohibits slavery and forced labour. To have rejected the resignation of the first appellant on 13th December 2013, would have amounted to forced labour

[45] The provision has been minored in the Kingdom of Swaziland case of ***Simon Dludlu v. Emalangeni Foods Industries***[19] cited with approval in.

Graham Rudolph v. Mananga College[20] The President of the Industrial Court of Swaziland P.R Dunseith said in paragraph 15-15.2:

> *Resignation is a unilateral act which brings about termination of the employment relationship without requesting acceptance .... whilst the respondent took every effort to ensure that the disciplinary hearing was procedurally fair, its efforts were unnecessary because the employment contract had already been terminated by the applicant himself on 20th October 2000. The question whether the termination of the applicant's service was fair and reasonable does not arise in circumstances where the applicant has resigned and no case of constructive dismissal has been pleaded or established.* ***(see also Mahamo v. NedBank Lesotho Limited)***[21]

[46] We enjoin ourselves to such observation or cite it with approval. The tribunal proceeded with the disciplinary

[19] CIC case No. 47/2004
[20] No. 94/2007
[21] LAC/CIV/04/2011

process, when the first appellant had already resigned that was a misdirection.

[47] We now wish to comment on a duty of any Judge to enquire into violations of fundamental rights and freedoms where that comes to the fore. There was evidence before the Court a quo that the right to equality before the law and the equal protection of the law had been pleaded, but no interrogation was done. This was a misdirection. There is so much liberalism in reception of evidence pertaining to fundamental rights and freedoms. Former Chief Justice of India Bagwati, an eminent jurist of international repute in the commonwealth and beyond removed technicalities in Constitutional adjudication to the extent of triggering a constitutional violation by writing a letter, this what we can call the "Bagwati Doctrine", which has availed liberal access to Indian Courts by Victims of Constitutional violations.

[48] In the United States the most frequently litigated phrase in the Fourteenth Amendment is "equal protection of

the laws, which has figured prominently in many landmark decisions (***Brown v. Board of Education. Roe v. Wade, Bush v. Gore, Reed v. Reed***)[22].

[49] Last but not least. We deprecate the use of language like 'stealth and in haste'. In whatever circumstances Dr. Mosito found himself at that time and now he was senior to those that presided at this hearing, even if he was junior, he deserved some modest language.

[50] **Costs:**

The Court *a quo* did not award costs, but in this court, the appellant had sought costs on the basis that, as they allege, the respondents' application was vexations and frivolous. On the one hand Mr. Suhr, for the respondents, made an impassioned plea that costs should not follow the event in line with ***Biowatch Trust v. Registrar, Genetic Resources and Others***[23]**.** This decision has been followed in this jurisdiction[24]. In

[22] Home (htts://Strondlawyers.com/)
[23] 2009 (6) SA 232 (CC) at paras 21-23
[24] President of the Court of Appeal v. The Prime Minister and Others (C of A (CIV) No 62/2013 [2014] LSCA 1 (04 April 2014

Casu, we are not convinced that the respondents were vexations nor frivolous, our considered view is that they genuinely laboured under the misconception that they had *locus standi* to mount a Constitutional challenge in the manner they did in this case. It therefore follows that there is no basis for not applying the ***Biowatch*** principle that litigants who lose constitutional challenges against government should not be mulcted with costs, unless it is shown that they were frivolous and vexatious.

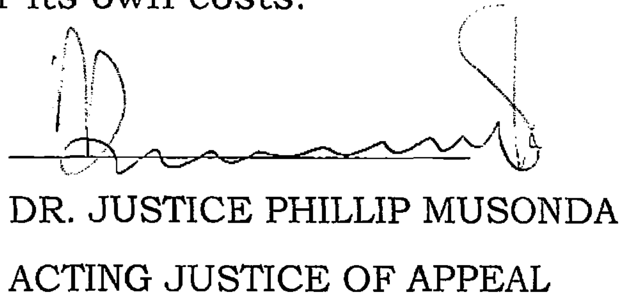
[51] **CONCLUSION**

In the result, the appeal is allowed. The judgment of the Court a quo and orders are set aside. In substitution thereof we make the following orders:

1. Dr. Kananelo Everitt Mosito was validly re-appointed as President of the Court of Appeal with effect of 1st August 2017.

2. The Acting Chief Justice is ordered to swear Dr. Kananelo Everitt Mosito as President of the Court of Appeal as soon as is practicable.

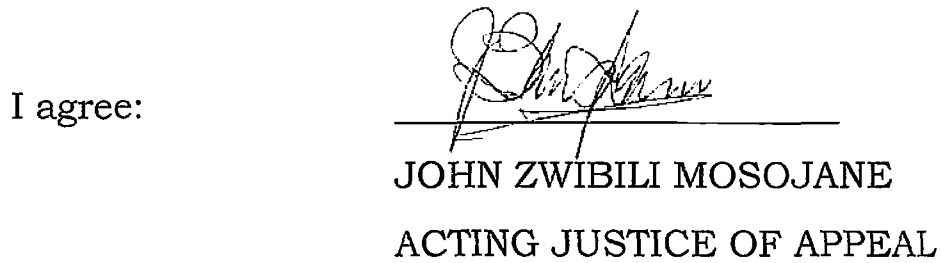
3. Each party to bear its own costs.



DR. JUSTICE PHILLIP MUSONDA

ACTING JUSTICE OF APPEAL

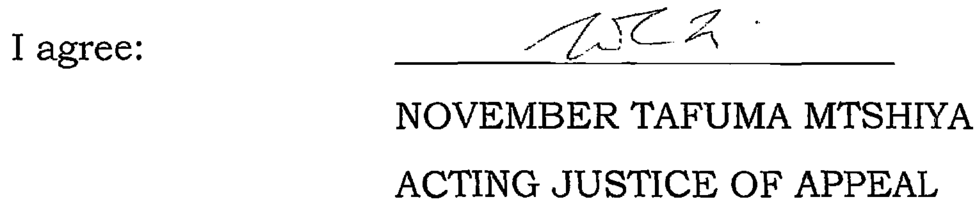
I agree:



JOHN ZWIBILI MOSOJANE

ACTING JUSTICE OF APPEAL

I agree:



NOVEMBER TAFUMA MTSHIYA

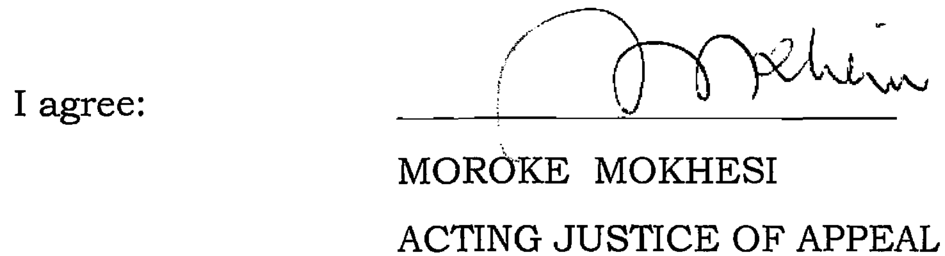
ACTING JUSTICE OF APPEAL

I agree:

ALIDAH MASESHOPHE HLAJOANE

JUSTICE OF APPEAL

I agree:



MOROKE MOKHESI

ACTING JUSTICE OF APPEAL

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