IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) No 66/2018**

In the matter between:

JUSTICE MASESHOPHE HLAJOANE	**1ST APPELLANT**
THE PRIME MINISTER	**2ND APPELLANT**
THE MINISTER OF LAW, HUMAN RIGHTS & CONSTITUTIONAL AFFAIRS	**3RD APPELLANT**
THE MINISTER OF JUSTICE & CORRECTIONAL SERVICES	**4TH APPELLANT**
THE ATTORNEY GENERAL	**5TH APPELLANT**

AND

QHALEHANG LETSIKA	**1ST RESPONDENT**
KARABO MOHAU	**2ND RESPONDENT**
ZWELAKHE MDA	**3RD RESPONDENT**

CORAM **DR MUSONDA AJA**
CHIHNENGO AJA
PEETE JA
MOKHESI AJA
MTSHIYA AJA

HEARD : 7th December, 2018.
DELIVERED : 1st February, 2019.

SUMMARY

Mootness of the appeal - where there is an existing costs order against the appellant - The sanctity of Stare decisis- willy-nilly departure from Court of Appeal decisions can generate disorder in the justice system- Court of Appeal can only depart from previous decisions for compelling reasons - locus standi is governed by Section 22 (1) of the Constitution of Lesotho - Judgment of the High Court contrary to the court Appeal Judgment - Validity of.

JUDGMENT

DR MUSONDA AJA

Background

[1] This is an appeal from the judgment in ***Qhalehang Letsika and 2 Others v Justice Maseshophe Hlajoane and 4 Others***[1] delivered by the High Court **(Ledwaba, Victor and Matojane AJJJ)** exercising constitutional jurisdiction. In that application, the applicants (now respondents) moved the High Court for an order:(i), declaring the removal of Madam Justice Mokgoro from office as Acting President of the Court of Appeal as null and void and of no force and effect to the extent that it has not met and

[1] **Qhalehang Letsika and 2 Others v Justice Maseshophe Hlajoane and 4 Others** Const Case No.4 of 2018.

followed the provisions of section 125 of the Constitution; (ii), the reviewing and setting aside as irregular and unconstitutional, the decision of the Prime Minister to recommend the appointment of Justice Maseshophe Hlajoane to His Majesty the King and the subsequent appointment of Justice Maseshophe Hlajoane as unconstitutional; (iii) declaring that appointment of Justice Maseshophe Hlajoane is unconstitutional in that she could not be validly appointed into a position that had not been validly vacated in terms of the Constitution and; (iv), declaring the removal of Justice Mokgoro as Acting President of the Court of Appeal and the appointment Justice Maseshophe Hlajoane into the same position violates the provisions of section 118(2) and (3) read with section 12(1) and (8) of the Constitution invalid and null and void.

[2] The learned Judges decided the application in favour of the present respondents. They likewise rejected the further grounds of opposition raised by appellants and granted the application. The court a quo also awarded the applicants costs of the application. This is the order which this Court is now asked to set aside.

[3] I may mention in passing that, before the judgment in ***Qhalehang Letsika and 2 Others v Justice Maseshophe Hlajoane and 4 Others***[2] could be handed down, this Court delivered a judgment in ***Dr. Kananelo Mosito and 6 others v***

[2] **Qhalehang Letsika and 2 Others v Justice Maseshophe Hlajoane and 4 Others** Const Case No.4 of 2018.

Qhalehang Letsika and 3 others.[3] In the latter judgment, this Court set aside the judgment of the High Court in which the High Court had held that the present respondents had locus standi to challenge the appointment of ***Dr. Kananelo Mosito*** as President of the Court of Appeal. The Court set aside the said judgment *inter alia*, on the basis that, the applicants lacked *locus standi* within the context of section 22 (1) of the Constitution of Lesotho 1993 on 26th October, 2018.

[4] The judgment in ***Qhalehang Letsika and 2 others v Justice Maseshophe Hlajoane and 4 others*** (supra), is the subject of this appeal. Unusually the date when the judgment was heard and the date of its delivery have not been indicated, save and except that we were informed from the bar that the Acting Chief Justice delivered the ***Dr. Kananelo Mosito and 6 others v Qhalehang Letsika and 3 others*** judgment on 30th November, 2018.

The Facts

[5] The facts relevant to the determination of this appeal are not seriously disputed. They are that Justice Mokgoro was

[3] C of A (CIV) 9/2018.

appointed on 27 February 2018 as Acting President of the Court of Appeal by His Majesty the King acting on the advice of the Prime Minister pursuant to the provisions of section 124 (4) of the Constitution. The Gazette publishing her appointment was attached and marked annexure "A". Thereafter, Justice Hlajoane was appointed acting President of the Court of Appeal through Legal Notice Number 21 of 2018. This was also made pursuant to the provisions of section 124 (4) of the Constitution by His Majesty the King acting on the advice of the Prime Minister.

[6] The founding affidavit for the applicants was deposed to by Mr Qhalehang Letsika, whom I shall henceforth refer to simply as Mr Letsika. According to Mr Letsika, the purpose of Legal Notice Number 21 of 2018 is to seek to terminate by implication and without due process contemplated in section 125 of the Constitution, the appointment of Justice Mokgoro. Mr Letsika contends that the purported removal of Justice Mokgoro is invalid and unconstitutional in the manner set out below.

[7] Mr Letsika deposes that, the removal followed an e-mail correspondence from the Assistant Registrar that the hearing date of the was yet to be communicated to the parties in due course. The e-mail message, a copy of which was attached, made it clear that Justice Mokgoro in her capacity as the acting President of the Court of Appeal, had instructed the Assistant Registrar to stop (for the time unspecified) the preparation for

the hearing of the appeal in Constitutional Case Number 16/2017 and any other matters that were supposed to be heard during the April 2018 session.

[8] Mr Letsika further deposes further that, the removal of Justice Mokgoro as Acting President of the Court of Appeal was not only unlawful to the extent that she was not given a hearing, but mainly because it had not followed the due process contemplated under the provisions of section 125 (3) and (4) of the Constitution. He further deposed that the removal goes against the spirit and letter of the provisions of section 118 (2) and (3) of the Constitution in so far as it sought to undermine the independence, dignity and effectiveness of the judiciary. Mr Letsika deposes further that, the appointment of Justice Hlajoane achieves the same result of undermining the independence of the courts particularly the Court of Appeal.

[9] In his affidavit, Mr Letsika further avers that, the removal of Justice Mokgoro, is unlawful and unconstitutional. He contends further that, the mere fact that Justice Mokgoro was appointed Acting President of the Court of Appeal as opposed to permanently in that position does not mean she is removable at will and at the behest of the Prime Minister without following the removal procedures set out under section 125 (5) of the Constitution. For Justice Mokgoro to be removed Mr Letsika further avers, the necessary tribunal contemplated in section

125 of the Constitution ought to have been established to investigate her suitability to continue to hold that office. The tribunal would then recommend to His Majesty as provided for in the Constitution.

[10] Mr Letsika goes further to aver that, the Prime Minister was not empowered to advise His Majesty to remove the acting President of the Court of Appeal without rhyme or reason and without following the constitutional procedure. Alternatively, so avers Mr Letsika, an Acting President of the Court of Appeal may cease to hold office on the return of the incumbent, being the substantive President of the Court of Appeal.

[11] He goes further to aver that the purported removal of Justice Mokgoro as the Acting President of the Court of Appeal and the purported appointment of the first respondent are unconstitutional, null and void for the following reasons:

> "*22.1.In so far as the purported removal of Justice Mokgoro is concerned this contravenes the provisions of section 125 (3), (4) and (5) of the Constitution.*
>
> *22.2. In terms of section 125 (3) an appointed judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of section 125 of the Constitution. Justice Mokgoro has not been shown to have been removed consequent upon the satisfaction of the requirements set out in section 125 (3) of the Constitution.*

22.3. Justice Mokgoro could, as alluded earlier, also be removed if the incumbent of the office of President of the Court of Appeal is available to assume his/her duties. I aver that the office of President of Court of Appeal remains vacant as things stand.

22.4. In addition, her removal has not been done in accordance with the provisions of section 125 of the Constitution in that she could only be removed in terms of section 125 (5) by His Majesty acting on the advice of the tribunal appointed in terms of that subsection to enquire into the matter of her removal.

22.5. I verily aver neither the Constitution nor any other law provides for the removal of the acting President of the Court of Appeal by mere publication of that decision in a gazette, unsupported by the procedures set out in section 125 of the Constitution. The purported removal is unconstitutional and unlawful in all the circumstances.

22.6. The second respondent in making the recommendation to His Majesty clearly acted in violation of the principle of legality which is recognized as part of the Constitution and law of Lesotho. First, the second respondent misconducted his powers in terms of section 124 (4) of the Constitution. It was his duty to make sure that when he recommended the first respondent for appointment as acting President of the Court of Appeal, that position was vacant and vacancy had arisen in the circumstances set out in the Constitution. Absent this fact he could not validly appoint the first respondent as acting President of the Court of Appeal.

22.7. In advising His Majesty to appoint the first respondent the second respondent also acted arbitrarily, irrationally an unreasonably. There is no way in which the second respondent could have considered himself authorized to remove Justice Mokgoro as the President of the Court of Appeal and by stroke of a pen replace her with the first respondent. Had he applied his mind he would have known that Justice Mokgoro could only be removed after the due process set out in section 125 of the Constitution.

22.8. The power to advise His Majesty in terms of section 124 (4) of the Constitution for the appointment of the acting President of the Court of Appeal is not unfettered. It must be exercised in good faith and with due regard to the fact that the person to be appointed is appointed into a vacant office as contemplated under the provisions of this section. The vacancy ought to have been one that came about in due course and in accordance with the Constitution and not created by him. The second respondent by purporting to remove Justice

Mokgoro, without due process set out in the Constitution, could only have acted in bad faith.

22.9. The inference is irresistible that Justice Mokgoro was recommended for removal by the second respondent because she was perceived by the latter to the leaning in favour of South African judges in sitting and determining the constitutional appeal in Constitutional Case number 16/2017. This clearly comes out from the letter of the second respondent's letter annexed above.

22.10.Both the first and second respondents acted unreasonably in all the circumstances in that no person acting properly could have done what they have done. The decision of the second respondent to advice His Majesty to appoint the first respondent as the acting President of the Court of Appeal is so unreasonable in its defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it. The first respondent as a sitting judge is aware that she could not be appointed into an office of acting President where the incumbent (Justice Mokgoro) had not been validly and lawfully removed. She must have been aware that the appointment of Justice Mokgoro has not been lawfully terminated.

22.11.The removal of Justice Mokgoro without following due process contemplated in section 125 of the Constitution violates the provisions of section 118 (2) and (3) of the Constitution. The removal violates the independence of the courts particularly the Court of Appeal being the apex court in the hierarchy of the judiciary. The removal further violates the provisions of section 12 (1) and (8) of the Constitution that guarantee litigants in both criminal and civil proceedings the right to be afforded a fair trial by an independent and impartial court established by law.

22.12.A reasonable, objective and informed person would on the basis of facts set out above reasonably apprehend that the first respondent has not or will not bring an impartial mind to bear on the adjudication of all cases in which we are involved. I reasonably suspect she has been appointed as acting President so that she may constitute a panel that is likely to sympathize with the interests of the first and second appellants in the pending appeal in Constitutional Case Number 16/2017.

22.13.It has been widely accepted that the sitting judges of the High Court because of their collegiality with the first appellant in Constitutional case Number 16/2017 are disqualified from hearing and dealing with matters that concerned the first appellant. In

particular the first respondent recused herself from hearing the matter CIV/APN/193/2016 3 June 2016. It was indeed also strange that the first respondent appeared to have been content to accept selection to sit in the appeal in the panel selected by Justice Mokgoro in view of this fact. More importantly, we were informed by the office of the learned Chief Justice that a policy decision had been taken that in all matters involving Justice Mosito foreign judges had to be empaneled.

22.14.In fact that explains why in all cases, except two (2) interlocutory applications that were dealt with by Mr Justice Moahloli and the learned Chief Justice, foreign judges had to be engaged. In Constitutional Case Number 16/2017 the first appellant made it clear that he did not want his case to be heard by any sitting judges of the High Court given that they declined to swear him in as President of the Court of Appeal.

22.15.It is also common cause that the first appellant in Constitutional Case Number 16/2017 accused judges of the High Court including the first respondent of non-compliance with the tax laws with which he was charged. In Constitutional case Number 16/2017 the first appellant made it plain that he would not accept local judges sitting in that matter. This is the reason why judges of foreign origin were appointed to hear his case. It again highlights the incongruity of the first respondent having agreed to sit in the appeal panel and her possible inability to constitute fairly the panel of judges as acting President that would hear the appeal in Constitutional Case Number 16/2017.

22.16.For purposes of completeness I wish to disclose to this Honourable Court that the e-mail correspondence from our attorneys indicating that we had no objection to the panel which included the first respondent did not mean that we accepted that she would be independent and impartial as a judge in that matter. The e-mail was simply recognizing the acting President's administrative power to constitute a panel to determine the appeal. We were certainly going to apply judicially for the recusal of the first respondent, Justice Mahase and any of the sitting judges of the High Court. It is also pertinent that all the judges of the High Court were reported to have refused to swear in Dr Mosito as the president of the Court of Appeal because of the pendency of Constitutional Case Number 16/2017 at the time.

22.17.This refusal to swear in Dr Mosito irritated the executive and third respondent started attacking the Chief Justice and all the judges of the High Court. There is litigation pending as a result of the

conduct of the third respondent in Constitutional Case Number 4/2018. We annex for completeness the speech made by the third respondent with its fair translation and it is marked annexure "K".

[12] The above factual averments are disputed by the appellants (respondents *acquo*). In my view, the proper approach where a dispute of this nature exists as *in casu* is to assume the correctness of the version of the respondent. The application was opposed first on the ground that the applicants (now respondents) had no *locus standi in judicio*, it being contended on behalf of the appellants that, the respondents did not have an interest in the relief prayed for, sufficient to give them *locus standi* to attack the impugned decisions and appointment. The appellants further challenged the authenticity of the alleged Gazette purporting to appoint Justice Mokgoro.

Proceedings in the High Court

[13]When dealing with the core issue of ***locus standi*** the Court *a quo* correctly pointed out in para 22 that:

"The Constitution does not make specific provision for broad standing or public interest standing, in our view it follows that in giving effect to the mandate of the constitution, public interest standing is portal to its implementation."

[14] In para 26 of the High Court's judgment, when discussing the central issue of this litigation said:

"It is generally accepted that a person has a direct and substantial interest in the order sought in proceedings if such an order would directly affect such a person's right or interest.

In United Watch Diamond (Pty) Ltd & Others v Disa Hotels Ltd and Others[4] Corbet J said:

> *"…. An interest is the right which is the subject matter of the Litigation and ….not merely a financial interest which is only an indirect interest in such litigation."*

[15] At para 27 the Court ***a quo*** further quoting **Corbett J.** at 4154 said:

> *"This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions … and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court."*

[16] In the view of the court *a quo*, the applicants were not mere busybodies interfering with things that did not concern them, but seeking to vindicate their constitutional rights and their rights as legal practitioners. The respondents had averred that the Prime Minister, who is a party to the pending appeal, in which they are respondents, has manipulated the composition of the panel of the court selected to hear the appeal without their involvement. That was a matter of grave importance as, if true, it would raise the issue of perceived undue influence and interference by the executive in the exercise of the judicial decision-making process contrary to ***Section 118 (2) of the Constitution of Lesotho.***

[4] 1972(4) SA 409

[17] The Court then discussed the legislative framework for the appointment and revocation of appointments of judges. In my view it is not necessary to go into the niceties of that narrative.

[18] Dissatisfied with the High Court's Judgment the appellants noted an urgent appeal to this Court. The High Court's judgment flew in the teeth of two full bench (five judges) Judgments of this Court which were differently Constituted.

The Essence of the present appeal

[19] For the appellants three grounds of appeal were filed, which can be summarized as follows (i) the Court a quo erred or misdirected itself by concluding that the appellants had *locus standi* to institute the litigation. Reliance on ***United Watch & Diamond (Pty) LTD Disa Hotels Ltd and others*** (supra) was misplaced, as it is no instructive authority in the Kingdom of Lesotho's constitutional law on jurisprudence (ii) The Court *a quo* erred or misdirected itself by failing and or paying little or no attention to the fact that Madam Justice Hlajoane was appointed to a vacant portfolio of President of the Court of Appeal. This is more so as Madam Justice Mokgoro AJA, had since issued a withdrawal letter from the appointment. (iii), the Court a quo erred and/or misdirected itself by ordering costs as against the respondents.

[20] The grounds of appeal were argued in the order as they appeared in the Notice of Appeal. In the first ground it was argued that the matter was not academic or moot. It was canvassed that the costs order by the Court ***a quo*** against the appellants was still alive and in support thereof this court's decision in ***The Post (Pty) Ltd et al v Africa Media Holdings (Pty) Ltd***[5] was relied on in which case Cleaver AJA, held that the appeal was not moot as the costs order was alive.

[21] The second ground as we perceive it is a narration of ***Section 124 (4),*** of the Constitution, which deals with the appointment of the Acting President of the Court of Appeal. We will therefore only quote provisions relevant to the Acting President of the Court. The tenor of the submission by the appellants is that the Acting President of the Court does not enjoy the security of tenure as his/her appointment is ***ad hoc,*** when the Court of Appeal Presidency is vacant, consequently the termination of an Acting Appointment cannot be equated to removal of a judge from a substantive position.

[22] The Acting Appointment may terminate (i) when a substantive office bearer of President of the Court of Appeal is appointed (ii) when the Mandate of the relevant Court of Appeal President is concluded as specified in the appointing Instrument (iii) when the King so decides to terminate that temporary appointment for any reason whatsoever (iv) when the Acting President of the

[5] C of A (CIV) 21/2014

Court of Appeal withdraws his or her availability to act in the relevant office (v) when the Acting President of the Court of Appeal resigns in that capacity (vi) when the Acting President of the Court of Appeal is removed from office as a Justice of the High Court of Lesotho in terms of the Constitution of Lesotho pursuant ***Section 125*** and or ***Section 121 (5)*** on account of the fact that judges of the High Court of Lesotho are ***ex officio*** judges of the Court of Appeal. This submission is anchored on the common law, as the termination of Acting President position is not provided for in the Constitution.

[23] It was submitted that there is a distinction between a removal of the substantive holder of the Presidency of the Court of Appeal and that of an Acting President, therefore Justice Nugent's removal, must be distinguished from that of Madam Justice Mokgoro.

[24] It was strenuously argued that the provisions of ***Section 125*** of the Constitution are not applicable to Madam Justice Mokgoro, as she was not a substantive holder of the position of President of Court of Appeal.

[25] Madam Justice Hlajoane qualified to be appointed Acting President of the Court of Appeal because she is an ***Ex officio*** judge of the Court of Appeal. The King exercised the power of appointment pursuant to the advice of the Prime Minister. In any

event Madam Justice Mokgoro had withdrawn her availability. The appointment of Madam Justice Hlajoane was long after Madam Justice Mokgoro had withdrawn. There was therefore a vacancy of President of the Court of Appeal, in which position Madam Justice Hlajoane acted.

[26] There was no appearance from the respondents, as according to them the entire appeal was moot as intimated in their memorandum of response, as the substantive holder of the post had been reinstated. The Court was informed by Advocate Ndebele from the bar, that he had actually spoken to Mr. Letsika, the 1st Respondent who indicated that he was not going to appear before us.

[27] After hearing Mr. Rasekoai, the Court ordered that the appeal be allowed and made no order as to costs and said we were going to give our reasons later, we now give those reasons.

The Issues

[28] The issues raised by this appeal are (i) whether the appeal is moot, (ii) whether it was competent for the Court below to rely on a 1972 South African decision, which was decided twenty one years before the current Constitution of Lesotho came into force in 1993, when there were decisions of this Court on the issue of ***locus standi*** as the Apex court interpreting ***Section 22(1)*** of the

Constitution. Co-relative to the doctrine of judicial precedent is the issue as to when this Court can revisit its previous decisions. We note that the appellants in their second ground of appeal have argued the validity of Madam Justice Hlajoane's appointment as Acting President of the Court of Appeal and argued that Madam Justice Mokgoro could not have been removed contrary to ***Section 125*** of the Constitution for two reasons (i) her appointment had not come into 'public glare' (ii) she was not substantive holder of the post..

Consideration of the appeal

locus standi

[29] The crucial question to be decided is whether or not the Court a quo was correct in dismissing the appellants' opposition based on respondents' want of *locus standi.* Furthermore, whether a litigant has *locus standi* is also a constitutional issue.[6] I agree with the South African Constitutional Court in that the issue of *locus standi* is separate from the merits and will usually be dispositive of an own interest litigant's claim. The South African Constitutional Court went on to say that:—

> "an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if

[6] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (*Giant Concerts*) at para 27.

'the right remedy is sought by the right person in the right proceedings'."[7]

[30] It was valiantly argued that the judgment of the court below was flawed for having relied on the case of ***United Watch & Diamond (Pty) Ltd & others v Disa Hotels Ltd*** (supra), for its determination of the issue of ***locus standi,*** when it is not an authority in Lesotho's constitutional jurisprudence on the Subject. In this Kingdom, the issue of locus standi by legal practitioners first arose in ***Khaoue v Attorney General***.[8] Applicant asserted in his affidavit that he had a constitutional right to vote in order to approve the passing of Act No. 10 of 1994. In terms of section 85 (3) of the Constitution if a Bill amends any of the provisions mentioned in paragraph (a) of subsection (3) including section 45, before the Bill is submitted to the King for his assent it must be submitted to the vote of the electors. The applicant alleged that at the time of making his affidavit he was not disqualified to register as an elector in terms of section 57 (3), so he qualified to vote or to be registered as an elector in elections of the National Assembly as envisaged by sections 57 and 85 (3), of the Constitution. The Court held that:

'[t]he fact that applicant is an attorney, a citizen of Lesotho and whatever does not give him a direct or substantial interest in the succession to the Office of the King of Lesotho. This is not a case where the liberty of the subject is involved in which an action can be brought by a person

[7] Ibid, para 34

[8] Khaoue v Attorney General (CIV/APN/53/95) (CIV/APN/53/95) [1995] LSHC 100 (12 September 1995).

who has no direct or substantial interest in the subject-matter....See ***Lesotho Human Rights Alert Group v. Minister of Justice and Others (supra) at 9***[9]., ***Wood & Others v. Ondangwa Tribal Authority and Another***[10].'

[31] I re-affirm the decision of this court in ***Lesotho Human Rights Alert Group v. Minister of Justice and Others (supra) at 9***[11] based on ***Roodepoort-Maraisburg Town Council v Eastern Properties (Pty.) Ltd***.[12], where Wessels, C.J., remarked that:

> *"The actio popularis is undoubtedly obsolete, and no one can bring an action and allege that he is bringing it in the interest of the public, but by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have."*

[32] What a litigant in the position of the applicants was required to show was that his interest in the relief sought is direct, that it is not abstract or academic, and that it is present and not hypothetical. In the Judgment of ***Dr. Kananelo Mosito and 6 others v Qhalehang Letsika and 3 others*** (supra), this Court following ***Mofomobe and Another v Minister of Finance and Another, Phoofolo KC and Another v the Right Hon Prime Minister***[13] said:

---

[9] Lesotho Human Rights Alert Group v. The Minister of Justice and Human Rights; the Director of Prisons and the Attorney-General C. of A. (Civ) No. 27/94 at 8 - 9.
[10] Wood & Others v. Ondangwa Tribal Authority and Another 1975 (2) SA 294 (A) at 306G - 307C.
[11] Lesotho Human Rights Alert Group v. The Minister of Justice and Human Rights; the Director of Prisons and the Attorney-General C. of A. (Civ) No. 27/94 at 8 - 9.
[12] Roodepoort-Maraisburg Town Council v Eastern Properties (Pty.) Ltd., 1933 AD 87 at p. 101.
[13] C of A (CIV) 29/2017

> *"As we see it the issue will always be whether there has been an infringement of an individual's fundamental rights of freedom and that may, as contended in this appeal, in issue is 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 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 the case (a) of* ***Section 20 (1) (a)*** *the person alleging to be aggrieved is given the right to go direct to the Constitutional Court and his or her right to bring an application and therefore his legal standing to do so is circumscribed by* ***Section 22 (1).*** *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).***

[33] In my view, the issue of ***locus standi*** was put to bed and it need not be repeated. The view that I take is that following our decisions in ***Mofomobe and Dr Mosito,*** the Respondents had no ***locus standi*** and the Court below ought not to have entertained the application. Technically, that disposes of the second ground of appeal.

Mootness

[34] I now turn to decide the issue of mootness. The Learned author, **Cora Hoexter** in her book, ***"Administrative Law in South Africa" (Juta, 2007) at pp. 520 – 521*** defines mootness as follows:

> *"Mootness is another doctrine associated with American Constitutional Jurisprudence. It relates to whether a decision, 'presents an existing or alive controversy; which is necessary ingredient if the courts wish to avoid 'giving advisory opinions on abstract propositions of law.' If there is no live controversy, the matter is moot in the sense that the decision of the court will make no difference."*

[35] This Court's jurisprudence regarding mootness is well settled. I embrace the remarks of the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**[14] on the issue of adjudicating moot issues. As a starting point, the Court will not adjudicate an appeal if it no longer presents an existing or live controversy.[15] This is because this Court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result.[16] Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away entertaining abstract propositions of law. The appellants argued that there was alive an order for costs against the appellants. In support the appellants relied on ***The Post (Pty) Ltd et al v Africa Media Holdings (Pty) Ltd,*** (supra) the decision of this Court on a similar issue, where **Cleaver AJA** said the following:

> *"As the period of restraint has by now expired, all that remains is the question of costs. Since the appellants were through no fault of their own, not able to have their appeal heard before the restraint period expired, I consider it only right and proper that they be afforded an opportunity to challenge the orders made against them by means of their appeal. Counsel for the parties were also in agreement that this should happen."*

[14] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (1) BCLR 39 at Para 21.
[15] Ibid.
[16] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18.

[36] In ***Tefo Hashatsi v Prime Minister and Others,***[17] this court said:

> *"The test for mootness which should in my view be applied in Lesotho is that stated in Viscount Simon LC in* ***Sun Life Assurance Co. of Canada v Jervis (1944) 1 A11 ER 469 (HZ) at 471 A – B****, which was quoted with approval by* ***Plewman JA in Coin Security Group v SA National Union for Security Officers 2001 (2) SA 872(SCA) at 875 C – E****. That test is whether there exists between the parties to an appeal a matter in actual controversy which (the court) undertakes to decide as a living issue."*

[37] The matter is moot if all issues in controversy have been settled either by agreement of the parties or have been finally determined by the Court. I therefore hold that the matter was not moot.

Stare decisis

[38] In my view apart from the issue of mootness there is the issue of ***Stare decisis***. **Stare decisis** is defined as:

> *"A doctrine which obliges Judges to make certain decisions according to previous rulings made by a higher court in the same type of case. The purpose of stare decisis is to promote consistent, predictable rulings on case of similar nature."*

[39] The doctrine of ***Stare decisis*** or precedent law, has its beginning in the 12th century England, when King Henry established a unified system of deciding legal matters in this system referred to as the "common law". The decisions of the King's Judges in

[17] C of A (CIV) 5/2006

various regions were respected by other Judges in deciding similar cases. As the Colonialists came to Africa and America they brought with them the Common Law system including the principle of ***Stare decisis***. Over the centuries the ***Stare decisis*** has become known as "binding precedent" or "binding authority."[18]

[40] The doctrine of precedent, obliges judges with no option to make certain court decisions according to previous rulings made by a Higher Court, in the same type of case. The purpose of ***Stare decisis*** is to promote consistency, certainty and predictability in judicial decision-making.

[41] Under ***Section 129 (1)*** of the Constitution of Lesotho, an appeal shall lie to the Court of Appeal from any decision of the High Court on questions of interpretation of the Constitution under ***Section 128*** and any determination by the High Court, where access to the High Court is guaranteed by ***Section 17*** of the Constitution and final decision of the High Court under ***Section 22.***

[42] The Court of Appeal is the Highest Court in the land, meaning it has authority over all other Courts within the Kingdom. As there is no Court in the Kingdom with more authority than the Court of Appeal, a Court of Appeal ruling/judgment cannot be

[18] Ibid

overturned by any other court. What that means, is that no court in the Kingdom can fly over the head of the Court of Appeal.

[43] Adherence to judicial precedent is an inescapable and compelling judicial imperative for all judges. We said in ***Mofomobe*** (supra), that the High Court (Constitutional Court) should give good faith and credit to its decisions. The point we were making is that, the lower courts cannot have knee-jerk type of rejection of judgments of peers. For the judgments of the apex court, such non-following of precedent if inadvertent on a serious constitutional matter of this nature may amount to incompetency, if judgment is rejected with full knowledge of its existence, it is judicial misconduct. The lower court has no choice in the matter and any decision contrary to precedent shall be invalid. To allow the opposite would deeply wound judicial consistency, certainty, predictability and consequently judicial stability in the Kingdom. There are no compelling circumstances or reasons for us to revisit ***Mofomobe*** and ***Dr Mosito,*** decisions.

Locus Standi

[44] The concept of ***locus standi*** has recently bedevilled constitutional litigation in the Kingdom, that it is critical that the Apex court, for the sake of future guidance to lower courts explain the issue in a simpler manner. Putting the concept in historical context, the Constitutions of former British colonies of which **Lesotho, Kenya** and **Zambia** are among them were

bequeathed on these countries. These Constitutions were of British ancestry or genealogy. The Constitutions were designed in Whitehall in a legal environment that eschewed minimal judicial and citizen intrusion in government administration, save and except if an individual fundamental rights and freedoms are threatened or violated. These Constitutions constricted the right of individual suing on behalf of others.

[45] In the case of **Zambia,** Article 28, of the Constitution, which has the same effect as Section 22(1), of the Constitution of Lesotho, a detained person has to sue by himself, while in Lesotho, another person can sue on behalf of a detainee, which makes ***Section 22(1) of the Constitution of Lesotho,*** more progressive than the Zambian **Article 28(1).** The explanation is Zambia still retains the "Bill of Rights" bequeathed at independence, while Lesotho enacted a new constitution in 1993. The effort of the Legislature to enact a Bill of Rights, to expand the concept of ***locus standi*** and include social economic rights in Zambia was defeated in referendum in 2016.

[46] The point being made is that expanding ***locus standi*** is a legislative Act and not a judicial act, as the Court below was trying to do, otherwise the court will be legislating from the bench, which may undermine the legislative power of Parliament under **Section 70** of the Constitution.

[47] To buttress the point, the expansion or broadening of the concept of ***locus standi*** in former British colonies is a Legislative Act[19], is the Kenyan case. Five decades after independence, Kenya enacted a new constitution in 2010 and under Part ii- Procedure for Instituting Court Proceedings, in Protection of Rights and Fundamental Freedoms, the legislature expanded or broadened ***locus standi*** by enacting Sections 6 and 7 couched in these terms:

> **Friends of the Court**
> [49] The following procedure shall apply with respect to a friend of the court-
> a) The court may allow any person with expertise in a particular issue which is before the court as a friend of the court.
>
> b) Leave to appear as a friend of the court may be granted to any person on application orally or in writing.
>
> c) The court may on its own motion request a person with expertise to appear as a friend of the court in proceedings before it
>
> **Interested Party**
>
> 1) A person, with leave of the court, may make an oral written application to be joined or an interested party.
>
> 2) A court may on its own motion join any interested party to the proceedings before it.

[19] Constitution of Kenya Act 2010

[48] These provisions are laudable and have conferred on the court and citizens to intrude in the vindication of fundamental rights and freedoms on behalf of others. But even the Kenyan constitutional designers have not allowed a citizen litigant to litigate on behalf of others on matters falling outside the Bill of Rights, as the appellants in ***Mofomobe*****;** and Respondents in ***Dr Mosito's*** case have sought to do. To that extent, although the Constitution of Kenya can be said to be neo-liberal, the Courts cannot entertain the litigation in this appeal.

[49] The High Court or indeed this court can seek aid of International Instruments, decisions in circumstances where (i) Lesotho is a signatory to the Instrument or Convention; (ii) where Judges as "Princes of Reason" feel that there is a gap, that must be filled to do justice to the case (iii) where foreign decisions interpret similar provisions, as those contained in the statutes of the Kingdom or where the issue to be decided is unprecedented. Foreign Instruments, Conventions and judicial decisions should not supplant decisions of this Court, but supplement them.

Judicial Independence

[50] Judicial Independence is at two levels, institutional and personal independence. The institution may be independent, but Judges may be timid. Judicial independence means decisional or determinational independence within the Law i.e. being faithfully wedded to the Constitution, the Statutes thereunder, and judicial Precedent and not outside it, if so, then that is "Judicial Overreach."

[51] In an erudite Judgment in the Transvaal in 1979 in ***S v Adams***[20] Kings J stated:

> *"An Act of Parliament creates Law but not necessarily equity. As a Judge in a Court of Law, I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a Court of equity I would have come to the assistance of the appellant. Unfortunately and on an intellectually honest approach, I am compelled to conclude that the appeal must fail, that is, I have to apply the strict letter of the Law"*

[52] In Para. 5 of the Judgment we have stated earlier that in Para 22 of the High Court Judgment, the High Court admits that the Constitution does not make specific provision for broad standing or public interest standing, but go on to read into Section 22 (1) the concept of direct and substantial interest. With the greatest respect this was "Judicial Legislation" not "Judicial Interpretation."

[53] The Court ***a quo*** made five fatal mistakes

i) Not faithfully interpreting Section 22(1) as they admit in Para 22;

ii) Not following the ***Mofomobe*** Precedent set by the full Bench of this Court;

iii) By using a private law decision to interpret a public law litigation with different scrutiny level in terms of ***locus standi*** and substantive scrutiny;

[20] 1979 (4) SA 793 (T), P801

iv) Creating what they thought was equity for the respondents; and

v) Being oblivious that there was the Law Society to which the respondents belonged which is a creature of statute with a broad mandate and administered by a democratically elected executive. You therefore, had parallel applications, in the same type of Litigation. The Lower court may say the Law Society as not before them, but it was a notorious fact they were earlier before the High Court in the same type of Litigation, which proceedings they ought to have taken cognizance of.

[54] We have noted with disapproval insinuations in the Court below that the executive had a hand in selecting Judges to preside in the ***Dr. Mosito*** appeal. In my view whoever would have sat would have been bound by this Court's decision in ***Mofomobe*** that is the case that settled the issue of ***locus standi*** in this Country. The Bench was constituted by **Farlam AP, Majara CJ, Louw, Musonda and Chihnengo AJJJA.** This court made it clear in the ***Dr. Mosito*** Judgment in Para. 30, that the Court was bound by ***Mofomobe,*** had there been industrious research such unfortunate comments would not have been made. ***Mofomobe*** settled the Law on ***locus standi*** and not ***Dr. Mosito*** matter. This Court has been consistent. A Judge's loyalty is to the Law and the Constitution and nothing else. A Judge should not be influenced by extra-legal, statements, conduct or considerations, he or she should be impervious to those issues.

[55] The difficulty the court *a quo* had is failure to distinguish the levels of judicial scrutiny under the Bills of Rights, which is called

"Juridical Constitutionalism (Judicial enforcement of human rights). Here we call the scrutiny, "**anxious scrutiny"** see **Lord Bridge's Judgement** in ***R v Secretary for Home Department ex parte Buddeyay***[21] The matter before them was not a human rights issue, but executive accountability litigation and the level of scrutiny is called the **"light touch**" review, which demands that only perversity or absurdity amounting to bad faith or misconduct of an extreme kind will satisfy the threshold of unreasonableness or the public official taking leave of his/her senses ***Nottinghamshire County v Secretary of the Environment, Transport and the Regions***[22] The litigation in the court *a quo* fell in the "**light touch"** review category. Even the construing of ***locus standi*** is stricter in **"light touch"** review. We acidly note that the case of ***United Watch Diamonds Co. (Pty) Ltd and Others v Disa Hotels Ltd and Another*** (supra), was a case in private law, to use it to interpret the constitution, which is public law is a tragic mistake. In any event, the case in the headnote says we quote:

> *"Sub-tenant has no direct legal interest in proceeding in which the tenant's confirmed right of occupation is in issue, however, much the termination of the right may affect him commercially and financially. That sub-tenants of a company in provisional liquidation have no* ***locus standi*** *to apply for an order setting aside an order of court authorizing the provisional liquidator to cancel the company's lease of the premises upon which they are carrying on their business."*

[21] 1987 AC 514 HCUK
[22] 1986 1 AC 240 HLUK

[56] The case on which the decision of the Court ***a quo*** was anchored deals with private contractual obligations and has no relevance to judicial review of executive action or the constitutional validity or invalidity of executive action which are a public law matters.

[57] We are therefore clearly minded that, the appeal was not moot, the Court below was bound by precedent. The law on ***locus standi*** in this Country does not permit any constitutional litigation outside Section 22(1) of the Constitution. In this case the respondent had no sufficient interest to pursue litigation pursuant to Section 125 of the Constitution.

COSTS

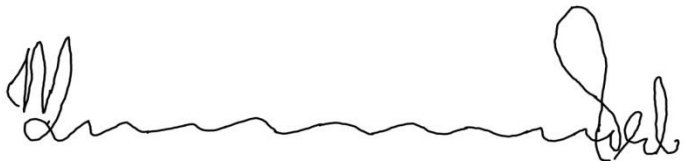
[58] The Court ***a quo*** awarded costs against the appellants, which order we set aside. In substitution thereof we made no order as to costs. We had in mind the principle set out in ***Biowatch Trust v Registrar, Genetic Resources and others***[23] that litigants who lose constitutional challenges against government should not be mulcted with costs, unless it is shown that they were frivolous and vexatious. The Respondents having been successful in the Court ***a quo*** in a similar matter, they might have been laboring under the misapprehension that their action was on firm ground. They were not therefore vexatious and frivolous litigants.

[23] 2009 (6) SA 232 (CC) Para 21 – 23

CONCLUSION

[59] The Judgment in the Court ***a quo*** and consequential orders are set aside and in substitution thereof we made the following orders:

> "1. The appeal succeeds with no order as to costs of the appeal.
>
> 2. The decision of the court *a quo* is set aside and replaced with the following – "The application is dismissed with no order as to costs."



DR. P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

S. N. PEETE
JUSTICE OF APPEAL

I agree

_____

M. MOKHESI
ACTING JUSTICE OF APPEAL

CHINHENGO AJA:

[60] I have read the reasons for judgment prepared by my brother Musonda AJA. I agreed with the order that we made and signed on 7 November 2018, but I would like to provide my own reasons for agreeing with it.. In particular I do not think that it is necessary to contend with all the issues that he canvassed in light of the mootness adverted to by the respondents. I have decided to simply set out reasons that I think suffice for purposes of the order we made.

[61] This is an appeal from a judgment delivered by the High Court sitting as a Constitutional Court, in which, in essence, (a) the court set aside the appointment of Justice Hlajoane as acting President of the Court of Appeal for being in violation of s 118(2) as read with s 12(1) and (8) of the Constitution; (b) declared unconstitutional the removal of Justice Mokgoro as acting President of the Court of Appeal for violating s 125 of the Constitution, and (c) ordered costs against the appellants.

[62] At the end of the hearing of the appeal we made the following order –

"1. The appeal succeeds with no order as to costs of the appeal.

2. The decision of the court *a quo* is set aside and replaced with the following –

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

[63] We said we would give our reasons later and the majority has subscribed to the reasons prepared by Musonda AJA. These, however, would be my reasons.

[64] The respondents successfully challenged the appointment of Justice Hlajoane as acting President of the Court of Appeal in the court *a quo*. The date when the matter was heard and the date of delivery of judgment are not indicated in the judgment but we were informed that the Acting Chief Justice delivered the judgment on 30 November 2018. By that time this Court had delivered its decision in *Dr. Mosito and others v Letsika and others*[24], which, to a large extent, laid to rest the main issues raised by the respondents and contested by the appellants in the court below in the matter now on appeal. By 30 November 2018 Dr Mosito had been appointed as substantive President of the Court of Appeal. Neither Justice Mokgoro nor Justice Hlajoane could, in the circumstances, be called upon to act as President of the Court of Appeal.

[24] C of A (CIV) 9/2018

[65] The respondents did not appear at the hearing of the appeal. They had indicated to the Registrar and to the respondents' counsel, and in that way to the Court, their standpoint that in view of the appointment of the President of the Court of Appeal, there was no point pursuing the appeal as the matter had become moot. Accordingly only appellants' counsel appeared to argue the appeal.

[66] Appellant's counsel submitted that there were only two issues for determination by this Court: whether or not the matter was moot or academic, and if not, whether the grounds of appeal raised are legally sound. I agree with his submission that these are the issues for decision by us. If we found that the matter was moot, then that would be the end of the matter on the substantive issues of the appeal and there would be no need to deal with the other issues. In any event there was no substantive opposition of the appeal by the respondents.

[67] I deal first with the question whether the matter is moot or not. The appellants relied on ***The Post (Pty) Ltd and Others v Africa Media Holdings (Pty) Ltd and Others***[2] in which Cleaver AJA said

> *"[4] As the period of restraint has by now expired, all that remains is the question of costs. Since the appellants were, through no fault of their own, not able to have their appeal heard before the restraint period expired, I consider it only right and proper that they be afforded an opportunity to challenge the orders made against them by means of their appeal. Counsel for the parties were also in agreement that this should happen."*

[68] In so relying on *The Post* case, the appellants' counsel went on to give the learned Judge's statement above a much wider meaning, which, in my view, is not merited going by what he said. Appellants' counsel submitted that because the issue of costs should be determined by this Court then for that reason the matter is not moot. And that this is what Cleaver AJA determined. I do not agree.

[69] Cora Hoexter, in ***Administrative Law in South Africa (Juta, 2007)*** *at pp. 520 – 521,* referred to in the majority judgment, defines mootness as follows:

> *"Mootness is another doctrine associated with American constitutional jurisprudence. It relates to whether a decision 'presents an existing or a live controversy; which is a necessary ingredient if the courts wish to avoid 'giving advisory opinions on abstract propositions of law.' If there is no live controversy, the matter is moot in the sense that the decision of the court will make no difference."*

[70] In ***Tefo Hashatsi v Prime Minister and Others,***[25] this Court said:

> *[15] When the matter was argued in this court counsel for the fifth respondent, Mrs 'Mamphanya Mahao, the widow of the late Brigadier Mahao, contended that the relief sought by the appellant would no longer have a practical effect and that the whole case is moot. In this regard reliance was placed on* ***Premier, Provinsie Mpumalanga en 'n Ander v Groblersdalse Stadsroad*** *1998 (2) SA 1136 (SCA) at 1141 D-F. That case is not directly of assistance because it is based on section 21A of South African Supreme Court Act 59 of 1959, which has no counterpart in Lesotho. The test for mootness which should in my view be applied in Lesotho is that stated by Viscount Simon LC* ***in Sun Life Assurance Co of Canada v Jervis*** *[1994] 1 All ER 469 (HL) at 471 A-B, which was quoted with approval by* ***Plewman JA*** *in* ***Coin Security Group v SA National Union for Security Officers*** *2001 (2) SA 872 (SCA) at 875 C-E. That test is whether there exists between the parties to an appeal a*

[25] C of A (CIV) 5/2006

matter 'in actual controversy which [the Court] undertakes to decide as a living issue.'

[71] The test for mootness stated above, relates, in my view, to the substantive issue or issues in dispute between the parties. In this case the issue in dispute was essentially the appointment of Justice Hlajoane as acting president of the Court of Appeal. The position in which she was to act has been filled. It is no longer of any moment whichever way Court decides: there is no longer any live issue in controversy between the parties. It cannot be gainsaid that "the decision of the court will make no difference" or that there is no matter *"in actual controversy which [the Court] undertakes to decide as a living issue."* To my mind therefore the question of costs can be handled quite separately from the substantive issues and should not impact on the question of mootness. A proper reading of *The Post* supports this conclusion. What may create confusion is the necessity, in determining the issue of costs, to regard to the relative merits of each party's case. I would, as stated by Cleaver AJA in *The Post,* consider the issue of costs as a separate matter to be decided even if the matter is moot. I therefore would have found that this matter is now moot and that it was not necessary to deal with the other grounds of appeal.

[72] The appellants contended that important constitutional issues arise in this appeal, such as the correct interpretation of s 124(4) and (5) of the Constitution in relation to an acting position. That may be so but in my opinion that should not constrain this Court to deal with

the issue simply for the purpose of setting out the correct position at law, when no practical purpose will be served by any decision the court reaches. There is always danger in a court to seeking to give an interpretation to a constitutional provision where no live issue is being decided. It is preferable to interpret constitutional provisions in relation to live issues.

[73] The majority judgment deals with the question of *locus standi* of the respondent. That question was settled in *Dr Mosito*'s case following the decision in ***Mofomobe and Another v Minister of Finance and Another; Phoofolo KC and Another v the Right Hon Prime Minister***. There is no point addressing that issue again.

[74] Coming now to the issue of costs, the principle to be followed is clearly set out in the lead judgment. I agree that the principle we adopted as set out in ***Biowatch Trust v Registrar, Genetic Resources and others***[26], which has been followed in this and other jurisdictions, is applicable. As ably stated by Musonda AJA in the majority judgment, it is that litigants who lose constitutional challenges against Government should not be mulcted with costs, unless it is shown that the challenges were frivolous and vexatious. That principle also applies in appropriate cases, such as this one, where the Government loses. The learned Justice of Appeal thus

[26] 2009 (6) SA 232 (CC) Para 21 – 23

correctly reasoned that the appellants should not have been ordered to pay the costs.

[75] These would be my reasons for the order we made after hearing this appeal on 7 December 2018.

_____

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree 

_____

N. MTSHIYA A.J.A
ACTING JUSTICE OF APPEAL

For the Appellants: Attorney Rasekoai

For the Respondents: Non-appearance