IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.: 57/2019**

In the matter between:

MATSOSO NTSIHLELE & 127 OTHERS **APPELLANTS**

AND

INDEPENDENT ELECTORAL COMMISSION **1ST RESPONDENT**
MINISTRY OF PUBLIC SERVICE **2ND RESPONDENT**
MINISTRY OF FINANCE **3RD RESPONDENT**
CLERK OF NATIONAL ASSEMBLY **4TH RESPONDENT**
COMMISIONER OF POLICE **5TH RESPONDENT**
ATTORNEY GENERAL **6TH RESPONDENT**

CORAM: DR. KEM MOSITO P
PT DAMASEB AJA
DR. J VAN DER WESTHUIZEN AJA

HEARD: 24 OCTOBER 2019
DELIVERED: 1 NOVEMBER 2019

SUMMARY

Appeal – High Court exercising its constitutional jurisdiction – Dispute from employees of Independent Electoral Commission (IEC), concerning revised organisational structure which benefited them – Court a quo approached in order to seek redress on the basis that their constitutional rights were infringed because of departure from structure which benefited them. Court a quo holding that such not a constitutional matter and ought to have been brought under alternative for a, e.g under the Labour Code Order 24 of 1992. Point in limine upheld that the High Court should decline jurisdiction in terms of the proviso to s 22 of the Constitution.

On appeal – Appellants challenging a High Court refusal to accept jurisdiction over their dispute on the ground that they had adequate redress under alternative procedures - Court of Appeal holding that although IEC is not part of the Executive (Government); its employees, once assigned to the IEC, are not part of the public service to which the Public Service Act 1 of 2005 applies. However, IEC is a 'public' body susceptible to the court's judicial review power and as such falls under protective embrace of labour legislation. Appeal court confirming that court below came to the correct result in holding that the appellants had alternative recourse under the Labour Code Order instead of approaching the High Court exercising its constitutional jurisdiction.

JUDGMENT

P T Damaseb AJA:

[1] This is an appeal against a judgment and order of the High Court exercising its constitutional jurisdiction.[1] The appellants are employees of the Independent Electoral Commission (IEC) created by the Constitution of Lesotho (the Constitution). In January 2019, they launched urgent proceedings on notice against several respondents, including the IEC, because of a dispute that arose between them and the IEC. That application was heard by the High

[1] Contrary to popular belief, in Lesotho there is no Constitutional Court properly so-called. But in the wake of the promulgation by the Chief Justice of the Constitutional Litigation Rules, issues involving the enforcement of constitutional rights guaranteed under ss 4-21 of the Constitution of Lesotho must be ventilated in terms of those rules: *The Chief Justice and Others v The Law Society of Lesotho* Civ. No. : 59/2011 delivered 27 April 2012; *Korokoro Constituency Committee and 2 Others v Executive Committee: All Basotho Convention and 6 Others* Civ. No.: 04 of 2019 delivered 28 January 2019, paras [63]-[57].

Court (Makara, Sakoane and Moahloli JJ) on 9 May 2019 and a judgment unfavourable to the appellants handed down in August 2019.

[2] The appellants appealed against the judgment on 23 August 2019. On 4 September 2019, they sought leave from this court, by way of notice of motion, for an expedited hearing of the appeal during the current (October) session. The application was granted and we heard the appeal on 24 October 2019.

[3] The question we have to answer on appeal is whether about 126 employees of the IEC were entitled to approach the High Court exercising its constitutional jurisdiction, in order to seek redress on the basis that their constitutional rights were infringed. The employees are aggrieved by the manner in which the IEC has gone about implementing the restructuring proposals affecting them made by a consultant engaged by the IEC.

[4] The essence of the appellants' grievance is that their employer commissioned a study by a consultant, Dr Zabala, to design a new organisational structure for the IEC administrative staff. After consultation with all stakeholders, including the appellants, Dr Zabala produced a report recommending a new organisational structure accompanied by revised benefits for the positions created. Those proposals affected the appellants' positions in the IEC. They maintain that their employer (in the person of the former Director of Elections) approved that structure

and it therefore had to be implemented as they acquired property rights from it.

[5] The appellants' dissatisfaction stems from the fact that, according to them, instead of implementing the new structure and promoting and remunerating them according to it, the incumbent Director of Elections has materially altered the Zabala structure. The new Director, the employees allege, is unlawfully and in breach of several of their constitutional rights, implementing a structure different from Zabala's with different benefits which have the effect of diminishing their entitlements.

[6] As far as it is relevant to the appeal, the appellants sought the following relief against the IEC:

> *' 2.1 The respondent is interdicted, prohibited and retrained from:*
>
> *2.1.1 Proceeding with the implementation of the "new organisational structure' formulated by the management task team of 1st respondent; and*
>
> *2.1.2 Proceeding with the implementation of the "new organisational structure" formulated by the management task team of 1st respondent and or appointing any person to the created positions envisaged in the new structure pending finalisation hereof;*
>
> *2.1.3 Taking any steps in relation to the performance of any activity pursuant to the "new organisational structure" pending finalisation thereof;*
>
> *2.1.4 An order directing the 1st respondent to dispatch the documents incidental and connected with the "new*

organisational structure" to this Honourable court seven days after the service of this order;

2.1.5 *An order directing the 1st respondent to appoint the auditor to audit Independent Electoral Commission for the monies allocated to it from 2013 to 2017/2018 financial year after parliament was dissolved on 6th March 2017;*

3. It be declared that the positions contemplated in the '' new structure" be declared null and void and of no legal force to the extent of discriminating against the applicants contrary to sections 18,19 and 26 of the constitution.

4. An order reviewing and setting aside the decision of the 1st respondent to formulate the "new structure" in issue without the consent, inputs and or participation of applicants as irregular and of no legal effect.

5. An order declaring the invalidity of the decision of the 1st respondent stalling the implementation of the structure executed by Dr Griffiths Zabala to the extent of taking away the benefits of applicants contrary to section 17(1) of the constitution.

6. A declaratory order that the applicants are entitled to the benefits and salaries commensurate to their appointments to positions authorised in the structure by Dr Zabala." (Emphasis supplied).

[7] The application was opposed by the IEC and all the other respondents. The respondents' *in limine* objection to the appellants' application is couched as follows:

" *[t]he present matter has improperly been brought before this honourable court as it is essentially a labour dispute and should have been referred*

to tribunals that exercise exclusive jurisdiction over labour disputes and in the alternative in above. . .

. . .

[A]t best for the applicants, the present dispute is an application for the review of an administrative action or decision; and as such should not have been brought before this. . . court. It is not a matter that falls to be decided on the basis of any substantive constitutional issue.

. . .

Applicants. . . have effective remedies through resort to labour dispute settlement mechanisms and or administrative review; and this court will not seek to resolve the present dispute on the basis of constitutional principles as the matter is capable of proper resolution through ordinary labour disputes procedures or administrative review procedures."

[8] That objection, the court below opined, was *'in essence that the substantive prayers …though couched as if they are constitutional, are in truth reliefs which can be sought and pursued in another for a, under the ordinary laws and/or procedures* (sic). '

Court a quo's approach

[9] The High Court interpreted the IEC employee's case as being predicated on the employer's alleged infringement of their rights protected under ss 17[2], 18[3] and 26[4] of the Constitution. On the basis of the *in limine* objection taken by the respondents, the court *a quo* (Moahloli J writing for the court) characterised the issue it had to decide in the following terms:

[2] Freedom from arbitrary seizure of property.
[3] Freedom from discrimination.
[4] Equality and justice.

"[22] In my view the initial issue for determination is whether this is a proper case for the application of the principle of jurisdiction and adjudicative subsidiarity as clearly enunciated in the proviso to section 22 of the Constitution."

[10] The High Court was alive to the principle that where a claimant alleges a breach of a constitutionally protected right and establishes a *prima facie* breach thereof, the burden of justification is cast on the party responsible for the act or conduct causing grievance. It noted that the procedure for enforcing a constitutionally protected right finds expression in s 22 of the Constitution which states (and note the proviso thereto):

" 22. Enforcement of protective provisions

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

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.''

[11] The court went on to state that it was '*entitled to refuse to accept constitutional jurisdiction where it is satisfied that the applicant is able to obtain adequate redress under another law (or procedure)*".

[12] To support that proposition, the High Court relied on the judgement of this court in *Sole v Cullinan NO and Others.*[5] In that case, referring to the enforcement powers the High Court enjoys in terms of s 22 of the Constitution, Gauntlett JA said the following[6]:

"*The Constitution of Lesotho…specifically authorises the use of the particular constitutional remedy for which s 22 provides. Notwithstanding this, the proviso to s 22(2) expressly accords the High Court the discretion to decline to exercise its powers in this regard if satisfied that "adequate means of redress for the contravention alleged "are available. In my view, they undoubtedly were so available in the present case…In these circumstances, and given the inherent undesirability involved in the duplication of proceedings, the incurrence*

[5] LAC (2000-2004) 572.
[6] Id at 594E-I, para [38].

> *of unnecessary costs (both for litigants and the State) and the use of scarce judicial resources, it is not at all clear why the court a quo in this matter did not at least consider the exercise of its power in terms of s 22(2). It is important that in any future invocation of s 22, the High Court should give careful consideration to its powers under that provision."*

[13] Against that backdrop, the High Court went on to analyse the appellants' constitutional causes of action by reference to their specific prayers. The court distilled the following causes of action from the appellants' affidavit. The first it identified is the claim that the IEC was avoiding implementing the Zabala recommendations and instead implementing a 'new structure' and in that way infringing the appellants' rights protected by ss 18, 19 and 26 of the Constitution. In other words, that according to the appellants, they were being denied a fair hearing (guaranteed both under the Constitution and the common law) before the IEC implements the 'new structure'. The next cause of action is the non-implementation of the Zabala structure and the consequent failure to remunerate them accordingly – thus depriving them their property right to 'salary and appurtenances' contrary to s 17(1) of the Constitution.

[14] The High Court reasoned that for it to come to the assistance of the appellants there must be some feature of the case which indicates that the alternative means of legal redress available to them would not be adequate. An example it drew from comparative jurisprudence is where, for example, there was an arbitrary use of State power. The court also called in aid the dictum of the Privy

Council in *Attorney General for Trinidad and Tobago v Ramanoop*[7] to the effect that *'where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course.'*

[15] Having considered the appellants' causes of action, the court was satisfied that it was essentially a labour matter which could be dealt with 'adequately under the country's labour laws'. It said at para [24]:

> *"In terms of our Labour Code Act, breach of contracts of employment, underpayment or non-payment of monies due to employees, unfair labour practices, unfair dismissals for operational requirements, discrimination, as well as disputes of interests may be referred to the various fora established by the Code for resolution by conciliation, arbitration or adjudication. The Code also gives the labour Appeal Court jurisdiction to hear and determine all reviews of any administrative action taken in the performance of any function in terms of the Code and any other labour law."*

[16] As for the claim that because they were employed by the IEC, which is an institution independent from the Executive, they fell outside the purview of the Labour Code the court said at para [25]:

> *"This argument holds no traction because applicants do not fall under any category of employees to whom the Code does not apply [viz, public officers and members of the Lesotho Defence Force, Lesotho Mounted*

[7] [2006] I AC 328. The enforcement clause in Trinidad and Tobago's Constitution has a provision similar to Lesotho's s 22 proviso.

> *Police and other disciplined force]. It is fallacious to claim that merely because they are employed by an institution whose independence is guaranteed by the Constitution, then disputes concerning their employment fall under the High Court's constitutional jurisdiction."*

[17] The court concluded that the appellants' causes of action have remedies under the Labour Code. Moahloli J concluded as follows:

> *"[30] I am …satisfied that applicants have not successfully shown any special feature which indicates that the means of legal redress otherwise available would not be adequate …*
>
> *For these reasons the court declines to exercise its powers under section 22(1) and (2) of the Constitution as it is satisfied that adequate means of redress for the constitutional infringements alleged are and have been available to the applicants under other law.*"

[18] The court *a quo* accordingly upheld the respondents' objection *in limine* and dismissed the application.

The Appeal

[19] The appellants impugn the judgment and order of the High Court. The core of the complaint is that the High Court erred in declining jurisdiction on the ground that they had adequate redress under alternative procedures. As I understand their case, they maintain that the proviso to s 22 found no application.

[20] The respondents support the judgment and order of the High Court.

Discussion

[21] It is clear from its judgment that the High Court came to the conclusion that it was not the appropriate forum for the ventilation by the appellants of their grievance against the IEC. I need to point out immediately that in my understanding of the High Court's reasoning, it does not necessarily say that the appellants do not have valid constitutional complaints. What is said is that those complaints can be raised in alternative fora.

[21] It becomes necessary therefore to consider if the appellants had viable alternative remedies.

[22] Mr Leputhing accepted during argument that if we are satisfied that the appellants had alternative recourse under the Labour Code, the appeal ought to be dismissed. I will therefore consider if indeed the appellants could have sought redress for their grievances under the Labour Code.

Recourse under the Labour Code

[23] Labour-related disputes in Lesotho fall under the purview of the Labour Code Order 24 of 1992 (the Labour Code[8]), unless specifically excluded in the circumstances that I will show below.

[8] As amended in particular by the following amendments to the Labour Code order 1992: 9 of 1997and 3 of 2000.

[24] Section 15(1) of the 1992 Order entitles a party to a dispute relating to rights or liabilities of a party under a contract of employment, to report the matter to a labour officer who may take steps to effect a settlement between the parties. In terms of s 15(2) the labour officer to whom the dispute is reported may at the request of any party to the contract, refer the matter to the Labour Court.

[25] Section 16 vests a very significant power in a labour officer in relation to court proceedings. It states:

> *"For the purpose of enforcing or administering the provisions of the Code a labour officer may-*
> *(a) …*
> *(b) institute and carry on civil proceedings on behalf of any employee, or the employee's family or representative, against any employer in respect of any matter or thing or cause of action arising in connection with the employment of such employee or the termination of such employment."*

The Conciliation and Arbitration machinery

[26] Section 46B (1)-(4) of the Labour Code Order establishes a Directorate of Dispute Prevention and Resolution (the Directorate), headed by the 'Director'. Under subsection (5) of s46B, the Directorate's functions are, inter alia: to attempt to prevent and resolve trade disputes[9] through conciliation; to resolve trade disputes through arbitration; to advise employers, employers'

[9] A 'trade dispute' is defined in the Labour Code Order as "any dispute or difference between employers or their organisations and employees or their organisations". (My emphasis).

organisations, employees and trade unions on the prevention and resolution of trade disputes. Sub-section (6) (a) empowers the Directorate to appoint a conciliator in the Directorate or a part-time conciliator to conciliate a dispute referred to it.

[27] Section 226(1) (a) of the Labour Code Order grants the Labour Court exclusive jurisdiction to resolve disputes relating to an unfair labour practice.

[28] In turn, s 226 (2) (b)(ii) states that a 'dispute of right' relating to a breach of a contract of employment shall be resolved by arbitration. In terms of sub-sec (3) thereof, such a dispute may also be referred to the Labour Court by the Director if he or she is of the opinion that the dispute may also concern matters that fall within the jurisdiction of the Labour Court.

[29] Section 227 sets out the procedure by which a dispute of right is to be referred to the Directorate. That procedure includes both conciliation, and if the latter is unsuccessful, arbitration[10]. In terms of sub-sec (8), where an arbitrator has been appointed in terms of sub-sec (4) and a party to the dispute fails to attend either the conciliation preceding the arbitration or the arbitration itself, the arbitrator may either dismiss the referral or grant an award by default.

[30] Disputes which are referred to conciliation as a precursor to adjudication by the Labour Court as contemplated by sub-sec (5)

[10] See sub-sec (7).

may, in terms of sub-sec (9), be brought on application to the Labour Court by a party to the dispute.

[31] An important feature of the Labour Code Order is that a person whose dispute falls within the purview of the Act can approach the Labour Court for urgent relief, including interim relief pending the resolution of a dispute by arbitration.[11]

Conciliation

[32] Conciliation is governed by s 228B and under that section conciliation may include (a) mediating the dispute, (b) conducting a fact-finding exercise, and (c) making a recommendation to the parties which may be in the form of an 'advisory arbitration award'.

Arbitration

[33] Arbitration is conducted in terms of s 228C. Its purpose is to deal with the substantial merits of the dispute fairly and quickly and with minimum legal formalities. Evidence may be led at the arbitration. In terms of s 228D, the arbitrator may make any appropriate award which may include: a declarator; compensation or damages. An arbitration award must be given within 30 days of the arbitration.[12] In terms of s 228E(5), such an award is final and binding and shall be enforceable as if it was an order of the labour

[11] Labour Code Order 1992, s 228.
[12] Section 228E (3).

Court. Arbitration awards are subject to review by the Labour Court of Appeal by virtue of s 228F of the Labour Code order.

[34] Having set out the dispute resolution machinery under the Labour Code order I proceed to consider if it availed the appellants.

[35] Section 2 of the Labour Code Order states (under the heading "Scope of Application"):

> *"(1) The Code shall apply to any employment in the private sector and to any employment by or under the Government, or by or under any public authority, save as provided in subsection (2). Unless otherwise specified in the Code, it shall also apply to apprentices.*
>
> *(2) The Code shall not apply to*[13]*-*
> *(a) any person (other than a person employed in a civil capacity) who is a member of –*
> *(i) the Royal Lesotho Defence Force;*
> *(ii) the Royal Lesotho Mounted Police;*
> *(iii) or any other disciplined force within the meaning of Chapter II of the Lesotho Independence Order of 1996;*
> *(b) such category or class of public officer, such public authority or employee thereof as the Minister may by order specify and to the extent therein specified.*
> *(3) No exemption shall be made by the Minister under subsection (2) (b) which is incompatible with any international labour Convention which has entered into force for the Kingdom of Lesotho."*

[13] Labour Code (Amendment) Act 9 of 1997 amends the 1992 Labour Code Order in s 2(2) by inserting after sub-para (iii) the 'National Security Service and Lesotho prison Service.

[36] The first question that arises is whether the IEC falls under "Government" or "public authority" in order for its employees to come under subsection (1) and therefore make the Labour Code applicable to the present dispute?

Is IEC part of Government?

[37] The 1992 Labour Code Order does not define "Government". The Constitution establishes three arms of the state: Parliament[14], the Executive[15] and the Judiciary.[16] The reference in s 2(1) of the Labour Code Order is therefore to the Executive as contemplated in the Constitution.[17] But is the IEC part of the Executive? It seems not if one has regard to, first, s 66A of the Constitution which states:

> ***"Powers, duties and functions of Electoral Commission***
>
> *66A (1) The Electoral Commission shall have the following functions –*
>
> *(a) To ensure that elections to the National Assembly and local authorities are held regularly and that every election or referendum held is free and fair;*

[14] Constitution, Chapter VI.
[15] Constitution, Chapter VIII. This Chapter creates to following institutions and they do not include the IEC: Ministers of Government (s 87); Cabinet (s 88); assistant ministers (s 93); Council of State (s 95); Principal Secretaries (s 96); Government Secretary (s 97); Attorney General (s 98); Director of Public prosecutions (s 99); Chiefs (s 103); College of Chiefs (s 104); National Planning Board (s 105) and Local Authorities (s 106). Under s 88 the Prime Minster appoints ministers and assigns them portfolios under s 98. The IEC does not fall under a Ministry created under ss 88 and 89.
[16] Constitution, Chapter XI.
[17] That comports with s 3 (1) of the Interpretation Act 19 of 1997 which states that "Government" means the Government of Lesotho.

(b) To organize, conduct and supervise, in an impartial and independent manner, elections to the National Assembly and referenda under the provisions of this constitution and any other law;

(c) To delimit the boundaries of constituencies in accordance with the provisions of this Constitution and any other law;

(d) To supervise and control the registration of electors;

(e) To compile a general register of electors and constituency registers of electors for the several constituencies and to maintain such register or registers up to date;

(f) To promote knowledge of sound democratic electoral processes;

(g) To register political parties;

(h) To ascertain, publish and declare the results of elections and referenda;

(i) To adjudicate complaints of alleged irregularities in any aspect of the electoral or referendum process at any stage other than in an election petition; and

(j) To perform such other functions as may be prescribed by or under any law enacted by Parliament.

(2) For the purposes of subsection (1), the Minister responsible for the Public Service shall, when so requested by the Electoral Commission, make available to the Commission any public officer of any authority of the Government for the purposes of the discharge of its functions; and the appointment, exercise of disciplinary control or removal of any such

public officer in relation to the performance of his electoral functions shall be vested in the Commission."

[36] The National Assembly Electoral Act 14 of 2011(NAEA) makes it clear that employees of the IEC are under its direct control and not under the aegis of the Executive. Section 149(1) of NAEA is worthy of quotation in that regard. It provides:

"Existing staff and transitional arrangement

149 (1) Subject to subsection (2), a person who, immediately before the coming into operation of this Act, was employed in the Public Service and serving under the Commission, shall be regarded as an employee of the Commission with all benefits already acquired or accumulated.

(1) A person who intends to remain with the Public Service shall notify the Commission within a period of 6 months of the coming into operation of this Act for redeployment into the Public Service, in consultation with the Ministry of Public Service.

(2) Pension, gratuity and other benefits of –

(a) Existing staff of the Commission shall continue to be governed by the Pensions Proclamation 1964 or the Public Officers Defined Contribution Pension Fund Act, 2008 whichever is applicable;

(b) Members of staff of the Commission appointed after the coming into operation of this Act and who join the Commission 10 years or more prior to attaining the prescribed retirement age in the Public Service shall be governed by the Public Officers Defined Contribution Pension Fund Act, 2008." (My underlining for emphasis).

[37] The above provisions make clear in my view that the IEC is independent from the Executive contemplated in the Constitution and, therefore, not part of 'Government' in terms of s 2(1) of the Labour Code. Its employees, once assigned to the IEC, are therefore not part of the public service to which the Public Service Act 1 of 2005 applies.[18]

[38] Since the IEC is not "Government" in terms of s 2(1) of the Labour Code, I proceed to consider if it is a "public authority." A 'public authority', in the definitions section "includes a department of government or subdivision thereof, a local authority and a Chief."

[39] In my considered view, the definitions clause is not exhaustive of what a "public authority" constitutes; it only adds to what would be ordinarily included under the concept. The Namibian Supreme Court has held that where in a definitions clause 'includes' is used (as opposed to 'means') it 'expands', it is 'extensive'. It indicates that the defined word or expression bears its ordinary meaning and also a meaning which the word or expression does not ordinarily mean.[19]

[40] The IEC is a body created under the Constitution and it exercises public power. In that sense, it is a public body or institution as opposed to a private one. A body exercising public

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[18] Section 30 (as amended) states that 'the Labour Code Order 1992 shall not apply to public officers, except in relation to appeals to the labour Court in pursuance of section 20 of this Act.'

[19] *Egerer and Others NO v Executrust (Pty) Ltd and Others* 2018 (1) NR 230 (SC) at 243D-E, para 42.

power has always been understood under the common law to be a 'public' body susceptible to the court's judicial review power.[20] A statute is presumed to not change the common law unnecessarily[21] and in my view s 2(1) of the Labour Code does not exclude the IEC from the definition of 'public authority' whose employees would fall under the Labour Code.

[41] Additionally, the inclusion in s 2 of the Labour Code of a *proviso* that the Minister's power to exclude protected employees from the reach of the Act should not deviate from international labour standards, is an important interpretive tool. That proviso is intended to ensure that the exclusion provision is not used to arbitrarily exclude working people from the protective embrace of labour legislation.

[42] Therefore, unless good reason exists to the contrary, the definitions section should be interpreted purposively so as to extend the protections offered by the Labour Code to as wide as a class of working people as possible. Section 15 of the Interpretation Act 19 of 1997 supports a purposive construction of s 2(1). It reads:

> *"Every enactment shall be deemed shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."*

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[20] Baxter, L. 1984. *Administrative Law*. Cape Town, Wetton and Johannesburg: Juta & Co. Ltd, at pp 99-100 for a discussion of the common law's approach to what constitutes a 'public authority'.

[21] *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A); *Grgin v Grgin* 1960 (1) SA 824(W) 827; *Joubert v Joubert* 1966 (3) SA 735(O) 736.

The object of the Labour Code is stated as:

> *"To make provision for the amendment, consolidation and codification of the laws relating to employment and matters incidental thereto".*

[43] A contrary interpretation will deny IEC employees important rights[22] which are not covered under the NAEA. That Act places the IEC employees outside the public service so that their appointment, conditions of service, discipline and dismissal procedures are determined by their employer, the IEC.[23] Apart from assigning those limited functions to the IEC, the NAEA does not deal with substantive labour rights such as are granted under the Labour Code.

Disposal

[44] The conclusion to which I come is the following. The court below came to the correct result in holding that the appellants had alternative recourse under the Labour Code instead of approaching the High Court exercising its constitutional jurisdiction. It was undesirable and unnecessary for the appellants to approach the High Court as they did and to seek constitutional relief in terms of s 22 of the Constitution; when they could have sought relief in terms of the Labour Code.

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[22] Part IV: Wage-fixing machinery; Part V: Contracts of employment, termination, dismissal, severance pay; Part VI: protection of wages; Part VII: health safety and welfare at work; Part VIII: Weekly rest, hours of work, holidays with pay, educational leave, sick leave: Part XIII: the right to unionise: Part XV: unfair labour practices; Part: XVIII: settlement of trade disputes; Part XIX: right to strike; etc.
[23] Act 14 of 2011, ss 144-146.

Costs

[45] Since the respondents have achieved success, the default position is that they should be awarded costs. In the court below no costs order was made against the appellants, presumably because that court accepted that they were raising constitutional complaints.

[46] It bears mention that the appellants' failure on appeal is because of a finding that they approached a wrong forum and not that they have no valid claims against their employer. The IEC is a very important institution in the political life of the Kingdom. Its proper functioning depends on the health of its relationship with its employees. There undoubtedly is a problem in the IEC that needs to be resolved for the institution to function properly and the employees ventilating the grievance through court has highlighted the need for a speedy resolution to the dispute, in the interest of democracy in Lesotho. Mulcting the employees with costs would in those circumstances not add to harmony but only accentuate the acrimony.

[47] Therefore, in the exercise of our discretion we would not order costs against the unsuccessful appellants but caution that any future pursuit of the matter other than through the alternative fora could well result in adverse cost orders.

Order

[48] In the result, the following order is made:

1. The appeal is dismissed'
2. There is no order as to costs.

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P T DAMASEB

ACTING JUSTICE OF APPEAL

I agree

_____

DR. K E MOSITO P

PRESIDENT OF THE COURT OF APPEAL

I agree

_____

DR. J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

Counsel for the Appellants: Adv C J Lephuthing

Counsel for the Respondents: Adv K Letuka