

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CIV) NO 40/2018
CIV/APN/150/2018**

In the matter between:

THE SPEAKER OF THE NATIONAL ASSEMBLY	1ST APPELLANT
THE CLERK TO THE NATIONAL ASSEMBLY	2ND APPELLANT
THE PUBLIC ACCOUNTS COMMITTEE	3RD APPELLANT
MINISTER OF PARLIAMENTARY AFFAIRS	4TH APPELLANT
ATTORNEY GENERAL	5TH APPELLANT

and

HLAHLOBO MORURI	1ST RESPONDENT
‘MATIEHO MATIEA	2ND RESPONDENT
MOROESI G TAU THABANE	3RD RESPONDENT

CORAM: DR K E MOSITO P
P T DAMASEB AJA
DR P MUSONDA AJA
M H CHINHENGO AJA
DR J VAN DER WESTHUIZEN AJA

SUMMARY

The Public Accounts Committee of the National Assembly has an important oversight function regarding the finances of organs of state. Thus they are empowered to investigate concerns of the Auditor General about the office of the Master of the High Court. They do not have the power though to pursue individual complaints about specific estates that are being handled by executors appointed by the Master. For these Proclamation 19 of 1935 provide recourse to the High Court. A court of law may generally not interrupt Parliamentary proceedings, especially with regard to Parliament's function to legislate, but may order a Parliamentary Committee not to exceed its legal mandate.

JUDGMENT

VAN DER WESTHUIZEN AJA

Introduction

[1] Challenges that require ongoing critical reflection keep a democracy alive. This matter poses important questions about the separation of powers in the Kingdom of Lesotho.

[2] The Speaker of the National Assembly, the clerk of the National Assembly and the Assembly's Public Accounts Committee (PAC) (together with two other appellants) appeal against a judgment of the High Court concerning the authority of the PAC to investigate aspects of the work of the Master of the High Court (the Master). The first and second respondents are officials in the Master's office, who approached the High Court in their personal capacity. The third respondent is an attorney, appointed as an executor by and functioning under the supervision of the Master.

[3] By agreement of the legal representatives of the parties and because of the restrictions caused by Covid 19, this matter was decided on the written submissions of the parties.

Factual background

[4] In addition to its mandate to legislate, the National Assembly of Parliament has important oversight functions. These it exercises by way of committees. The PAC is established by the Standing Orders of the National Assembly of Lesotho (the Standing Orders). The Standing Orders derive their force from the Parliamentary Powers and Privileges Act 8 of 1994. Standing Order 97(5) tasks the PAC with “consider(ing) the financial statements and accounts of all government ministries and departments, executive organs of state, courts, authorities and commissions established by the Constitution and each of the two Houses of Parliament; ... any audit reports issued on the financial statements, accounts or reports referred to the Committee by the House, the Speaker, or these Standing Orders”. The PAC “may report on any of the financial statements, accounts, or reports ...; or initiate any investigation in its area of competence”.

[5] Based on reports of the Auditor General for three financial years, from 2013 to 2017, the PAC, through its secretary, directed the Ministry of Justice to submit written responses to queries in the reports, inter alia related to the Guardian Fund under the control of the Master’s office. The Auditor General expressed concern about possible financial mismanagement and referred to a number of specific cases, without mentioning names.

[6] The Ministry, including the Judiciary and Master, duly submitted these. Subsequently the PAC invited the Ministry to appear before it to respond orally to the queries in the Auditor General’s reports.

[7] The PAC also received a complaint by Ms Mpho Mapetla about the handling of the estate of her late father, Mr Mapetla. She was a beneficiary; and attorney Tau-Tabane (the third respondent) the executor of the estate. According to the affidavit of one of the respondents, Ms Mapetla's complaint was unknown to them.

[8] On 16 April 2018 the Master was questioned. Questions were asked about the Mapetla estate. The meeting was postponed for 21 days, to enable the Master and her staff to obtain further information and prepare properly. Before the time period expired, the respondents applied to the High Court, on the basis of urgency, to interdict the PAC from continuing with the enquiry. The respondents were of the view that the PAC had no authority to investigate the handling of private estates by executors appointed by the Master.

High Court

[9] The High Court granted the relief sought. In an *ex tempore* judgment Monapathi J rejected preliminary points, such as the submission that the respondents lacked locus standi to apply to that Court for the relief. He found that the PAC had no power to investigate the accounts of estates in the office of the Master. These are not "public accounts". The Master of the High Court is part of the judiciary.

Questions

[10] The following questions have to be addressed:

- (a) Did the respondents have locus standi to bring the application?
- (b) Should condonation be granted for the late filing of the appeal?
- (c) Does the PAC have the authority to investigate the Master's handling of private estates?

(d) Did the High Court have jurisdiction to interfere with a parliamentary process, namely the proceedings of the PAC, before the conclusion thereof?

Locus standi

[11] The appellants submit that the respondents had no locus standi to approach the High Court in their personal capacities but still on behalf of the Master's office. Furthermore, they did not object to being called to the PAC to face questions and approached the Court only shortly before the 21 days lapsed.

[12] This argument is highly technical and not persuasive. As individuals in the Master's office and the executor of an estate, appointed by the Master, they have a direct and substantial interest in the case.

Condonation

[13] The ex tempore judgment by Monapathi J was delivered on 17 May 2019. Only on 8 May 2020 – seven days before the May session of this Court commenced - an application for condonation for the very late noting of the appeal was filed. This left very little time to respond.

[14] The explanation for the inordinate delay is not satisfactory. It is set out in a purported affidavit by Crown Attorney Mr Mafefoane Moshoeshoe that does not meet the legal requirements for a proper affidavit. The attorney was at fault.

[15] The application for condonation is not opposed though. This is a factor to be taken into account, together with the unreasonableness of the delay, the lack of a proper explanation and the prospects of success of the appeal.

[16] The last-mentioned are dealt with below. However, the question in this case is not merely whether the appeal is likely to succeed. The issues to be decided are of deep significance for the functioning of democracy in Lesotho, in particular with regard to the role and power of Parliament.

[17] The Appellants' conduct is unacceptable. As often stated before, condonation is not merely for the asking. Rules setting time limits do not exist for the sake of formality, but in order to ensure fairness to all parties and to enable a court to arrive at a well-considered just decision. Confident as we are that the last-mentioned has happened in this case and that the respondents did not suffer significant prejudice, condonation should be granted. The conduct of the appellants' attorney warrants disapproval. Thus the appellants must pay the costs of the condonation application, if any, even should the appeal be decided in their favour.

The authority of the PAC

[19] The appellants argue that the PAC is empowered to consider the financial affairs of all government organs. The office of the Master is a public one and thus subject to consideration by the PAC. Its finances are audited by the Auditor General, whose reports the PAC received, with some queries. Once financial affairs appear in the Auditor General's reports, they fall within the scope of the PAC's mandate.

[20] They furthermore rely on the definition of "public money" in section 2 of the Public Financial Management and Accountability Act 12 of 2011,

namely “any money, bank deposit, negotiable instrument, or other investment or earnings – (a) in the custody or under control of Government ...; or (b) ... or of any person acting for or on behalf of Government ... or their agency; or (c) held by Government in trust for, or otherwise for the benefit of a person other than Government.” The appellants add that section 2 of the Audit Act 12 Of 1973 similarly defines “public moneys” and argue that funds in deceased estates are funds held in trust for the benefit of other persons.

[21] The respondents point out that the Audit Act of 1973 has been repealed by the Audit Act 6 of 2016. They argue that the appellants mischaracterise their cause of action. They accept that the PAC is mandated to look into the finances of organs of state like the Master’s office, but submit that the PAC does not have the mandate in law to probe issues regarding the administration of specific estates. Complaints like the one by Ms Mpho Mapetla should not be brought to the PAC, but are governed by the Administration of Estates Proclamation 19 of 1935 (the Proclamation).

[22] Ex tempore and curt as its judgment is, the High Court correctly decided in favour of the respondents. Of course the PAC has to oversee the finances of government ministries and departments, as well as of executive organs of state, as determined by Standing Order 97(5), referred to in paragraph 3 above. Even the finances of courts fall within this scope. Thus the Ministry of Justice, including the Registrar of the High Court and the Master, responded to the PAC’s request to answer questions emanating from the Auditor General’s reports.

[23] Investigation of the handling of particular estates for which executors have been appointed is something different though. The legislature provided recourse for concerns of interested parties like beneficiaries. Section 109 of the Proclamation states that “(e)very appointment by the Master of an executor, ... and every order or decision by the Master ... is subject to appeal

to or review by the Court ... at the instance of any person aggrieved thereby". The judicial route is the appropriate one to follow. This, the legislature determined. The National Assembly may amend or repeal the (very old) Proclamation but has not done so. The Court should not be bypassed by the PAC entertaining complaints of individuals against the conduct of the Master of the High Court or its executors regarding specific estates.

[24] This does not mean that the task of the Auditor General and the PAC is not immensely important. Naturally, in view of the oversight function of the PAC, it should be able to investigate concerns about irregular spending, mismanagement, or corruption in the office of the Master and elsewhere in the state machinery. It is indeed entitled to do so even with regard to the finances of the judiciary. Such concerns may well result from a multitude of specific individual complaints, which may be looked into as examples of systemic malpractice. This, however, differs from using a hearing by the PAC to probe into the handling of a private estate, based on an individual complaint. The High Court has a role to play. If, for example, decisions of the Master are overturned by several High Court judgments, the PAC may well take a hard look at the office. But it may not usurp the power of the Court.

[25] It must also be added that the Master's office and its officials should not be allowed to avoid having to respond to queries. Corruption and similar malpractices in this office in various countries have caused considerable financial loss and chaos.

[26] The appellants' reliance on the above-mentioned statutory definitions of "public money" does not seem to take their case any further. The question at hand is about the authority of the PAC and the scope of its mandate, not the meaning of "public money", a concept that is not mentioned in Standing Order 97(5). It is also not about the duties and powers of the Auditor General. The wide description of the PAC's mandate by Standing Order 97(5) cannot

override the specific statutory provision for grievances about the handling of estates by executors in the Proclamation. The fact that the Auditor General may audit and the PAC may investigate the financial affairs of the High Court, for example, does not mean that they may probe into the court's consideration of specific dispute between parties in litigation before it, because the case involves finances.

[27] The PAC overreached.

Jurisdiction

[28] The appellants submit that the High Court had no jurisdiction to interfere in proceedings of Parliament, like the enquiry of the PAC, before their completion. In doing so, they rely on statements about the function of Parliament to legislate, its constitutional power to regulate its own procedure and the doctrine of the separation of powers in the jurisprudence of Lesotho and South Africa.

[29] The case law the appellants rely on does not support their case. In *Development for Peace and Another v Speaker of the National Assembly and Others* (Const Case 5 of 2016, unreported) Peete J specifically referred to the power of Parliament "to make laws" and "to make rules for the orderly conduct of its own proceedings". In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paragraphs 36 and 37 Ngcobo J mentioned Parliament's very special role in a constitutional democracy as "the principal legislative organ of state". "With due regard to that role, it must be free to carry out its functions without interference".

[30] There are many reasons why a court should not be able to terminate a legislative process before it has culminated in the passing of a bill. The very

idea of Parliament is to formulate law through debate. Neither a political party nor any individual ought to be able to stop the debate in its tracks by way of a court order because of disagreement on the direction of that debate. After the bill has been passed, other steps follow before it becomes law. At an appropriate time, the legislation may be challenged in court. In paragraph 69 Ngcobo J states that “as a general matter, where the flaw in the law-making process will result in the ... law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process ... to have the resulting law declared invalid”.

[31] In the present case the National Assembly was not busy legislating. One of its committees, the PAC, was exercising its oversight role. And, in any event, as quoted by counsel for the appellants, Ngcobo J mentioned exceptions in the same paragraph “when immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law”, as well as “where an aggrieved person cannot be afforded substantial relief once the process is completed”.

[31] Parliament and its committees are not above the Constitution and the law. They have to stay within the scope of their legal mandate. Who else than a court should an aggrieved party approach to interdict a committee from intruding into legally forbidden territory, like private matters?

[32] If the Parliamentary Justice Portfolio Committee receives complaints about how the police or prosecution handles a highly publicised murder and decides to start its own criminal trial, orders the arrest of an accused and summonses witnesses, those affected may surely ask a court for an order to stop the process before a guilty verdict is reached and a sentence imposed. And, if a Parliamentary Committee violates its own rules by refusing to allow members to speak on a sensitive piece of legislation in the making, those with a substantial and direct interest must be able to approach a court to protect the rule of law before the completion of the process.

[33] In my view the High Court did have jurisdiction to entertain the application by the respondents and did not unduly interfere in the proceedings of the PAC.

Order

In view of the above, the following is ordered:

- (a) The appellants' failure to note the appeal timeously is condoned.
- (b) The appeal is dismissed with costs, including costs - if any - of the unopposed condonation application.

DR J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



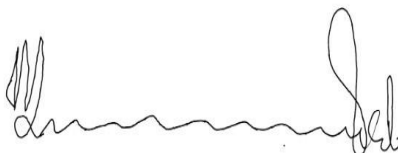
DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



P T DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:



M H CHINHENGO
ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS: ADV M MOSHOESHOE
ATTORNEY GENERAL LAW OFFICE

FOR THE RESPONDENTS: MR RASEKOAI AND MG MAKARA
PHOOFOLO ASSOCIATES INC