IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.10/2020

CONST CASE NO. 17/2019

HELD AT MASERU

In the matter between:

'MAMPHO MOLISE	**1ST APPELLANT**
SETLOBOKO MOJAKI	**2ND APPELLANT**
'MANKOPANE MAPHASA	**3RD APPELLANT**
AND	
BASOTHO CONGRESS PARTY (BCP)	**1ST RESPONDENT**
NATIONAL EXECUTIVE COMMITTEE OF THE BASOTHO CONGRESS PARTY (BCP)	**2ND RESPONDENT**
TŠOEU THULO MAHLAKENG	**3RD RESPONDENT**
T.MAHLAKENG & CO ATTORNEYS	**4TH RESPONDENT**
THE LAW SOCIETY OF LESOTHO	**5TH RESPONDENT**
THE COMMISSIONER OF POLICE	**6TH RESPONDENT**
THE OFFICER COMMANDING MASERU CENTRAL POLICE AND ANY DISTRICT	**7TH RESPONDENT**

THE ATTORNEY GENERAL **8TH RESPONDENT**

CORAM: DR K E MOSITO P

DR P MOSUNDA AJA

DR. J. VAN der WESTHUIZEN AJA

HEARD: 16 OCTOBER 2020

DELIVERED: 30 OCTOBER 2020

SUMMARY

Civil Practice –*Proceedings of the High Court to be in open court - Proclaimed necessity for publicity should be observed - failure to hold the whole of the proceedings in public amounts to such a disregard of the forms of justice as to lead to substantial and grave injustice.*

JUDGEMENT

DR K E MOSITO P

INTRODUCTION

[1] The Appellants approached the High Court on an urgent basis for declaratory, mandamus and interdictory reliefs. The High Court was

approached in its constitutional jurisdiction. In their Notice of Motion, the Appellants (as applicants) moved the High Court for review and the setting aside of their dismissal as unconstitutional. They also asked that the National Executive Committee be directed to convene a Special Conference of the party. They also asked the court to order the Lesotho Mounted Police Service to attend the said Special Conference in order to maintain law and order thereat. Other interdictory reliefs were largely concerned with the internal running of the party.

[2] On the 12th day of February, 2020, the High Court dismissed the application on the basis that it was a matter best suited for the High Court exercising its ordinary jurisdiction. Dissatisfied with the said decision, the Appellants approached this Court on appeal. The issue being one as to whether the High Court was correct in dismissing the application for lack of jurisdiction and not on the basis of some constitutional basis, the matter was placed before a panel of three judges of this Court.

[3] At the commencement of these proceedings, this Court enquired from the parties whether, bearing in mind that the matter had served before three judges in the court *a quo*, and that, apparently, the issue was one as to jurisdiction, this Court was not competent to dispose of the jurisdiction issue. The parties gave their concurrence that the matter could, quite ably be disposed of by a panel of three judges of

this Court. It was on that unanimous basis that this Court proceeded to deal with the matter before us.

THE PARTIES

[4] It is common cause that, at all material times leading to the institution of these proceedings, the Appellants have been members of the Basotho Congress Party (BCP). The first respondent is a duly registered political party in terms of the laws of the Kingdom of Lesotho. The second respondents is an organ of the first respondent which, took the decisions which the applicants took on review. The third respondent is the Leader of the Party. The 4th respondent is a firm of attorneys owned by the 3rd respondent. The 5th respondent is a body corporate and a professional body of the Lesotho legal fraternity established in terms of the ***Law Society Act,1983***. It is not clear why it was made a party in these proceedings.

[5] The 6th to the 8th respondents are state functionaries cited herein because Appellants sought to have them attend its Special Conference to help maintain peace and order at their requested Special Conference.

[6] The founding affidavit on behalf of the applicants is deposed to by the first Appellants as the first applicant and former secretary for the Mechachane Constituency in Butha-Buthe district.

THE FACTUAL MATRIX

[7] On 16 October 2020, the appeal was placed before this Court for consideration. The Appellants' position was that they are appealing against the High Court's decision to decline jurisdiction to entertain their application which had been brought before the High Court exercising constitutional jurisdiction. During the hearing of the appeal, the Respondents' Counsel brought to the attention of this Court that there were two inconsistent orders of the Court a quo filed of record. The one order had been issued on the 18th day of March, 2020 while the other had been issued on the 19th day of March, 2020. The order of the 18th did not reflect that the application had been dismissed for lack of jurisdiction of the court a quo, while the order of the 19th reflected that the application had been dismissed for lack of jurisdiction. The question then became one as to which of the two orders was the correct one.

[8] Both learned Counsel then explained before us as to what had actually transpired before the court a quo resulting in the one or other of the said orders. The net effect of the explanations was that these orders were made in Chambers. However, the learned Counsel differed on some material respects as to what had actually happened. We then directed both Counsel to file affidavits explaining what happened before the court a quo. Both Counsel duly complied. We

are grateful to the learned Counsel for their affidavits now filed of record.

[9] In his affidavit deposed to on 19 October 2020, Advocate Fusi N. Sehapi for the Appellants, deposes that, on the 12thday of February 2020, he and his learned friend Mr T Mahlakeng, appeared in Chambers in the Court a quo. He deposes in effect that the Counsel were called into Judges' Chambers. He took three of his clients along with him into the Chambers of Mahase ACJ, so that they could be his witnesses for the many others who could not go in. While in Chambers, he was "grilled" [by which I understand him to mean he was strenuously questioned] by the judges on the reliefs sought in the notice of motion. He deposes that his expectation was that the matter would be heard in open court and that he was to be given a fair opportunity to prepare and file heads of argument.

[10] Advocate Sehapi has also attached a court minute of what transpired in Chamber three before Mahase ACJ, Nomncongco J and Makara J. The minute reveals *inter alia*:

> "Court: per Makara J. 'The reliefs sought could have been dealt with by the High Court. No order as to costs.'
>
> Per Nomncongco J. 'The Court declines to exercise its constitutional jurisdiction in terms of section 22 of the Constitution.'
>
> Court:- Application does not fall to be dealt with by the Constitutional Court. We decline to exercise our constitutional jurisdiction in relation to this application. No order as to costs.

My Bro. Makara J to write Judgment
M.Mahase A.C.J."

[11] Mr. T Mahlakeng who appeared for the respondents before us and in the court *a quo*, also deposed to an affidavit on the 20th of October 2020. The affidavit was on the happenings of that eventful day. He deposes that on the 12th day of February, 2020, he appeared before a panel of Judges in Constitutional Case 2019 together with Advocate Sehapi for the present Appellants. He confirms that they attended in Chambers and three of Advocate Sehapi's clients we allowed to attend. The Assistant Registrar or Judge's Clerk called the matter. The Honourable Judges then brought to the attention of Advocate Sehapi that all the reliefs or prayers in his notice of motion were matters justiciable before the High Court exercising its ordinary jurisdiction. The Honourable Judges went further to ask Advocate Sehapi to weigh the inconvenience bring the matter in the constitutional court before a panel of three judges when the matter could easily and conveniently be dealt with before a single judge in the High Court exercising its ordinary jurisdiction.

[12] He further deposes that *"[w]e were then excused to leave the Honourable Judges to consider the matter. After a few minutes we were called back into Chambers where the panel dismissed the matter with no order as to costs and one member of the panel opining that they were declining jurisdiction."*

[13] It is therefore common cause on the facts that, the proceedings of the High Court of the 12th day of February, 2020 were not carried on and orders thereof pronounced and declared in open Court. I shall revert to this issue later.

ISSUES ON THE APPEAL

[14] In light of the above facts, the crisp issue for consideration by this Court is whether, regard being had to the provisions of section 13 of the High Court Act, the proceedings of the 12th day of February, 2020, were or were not carried on and orders thereof pronounced and declared in open Court. Depending on the answer to the question, whether the said proceedings and orders were or were not a nullity.

THE LAW

[15] Section 13 of the High Court Act provides that, save where otherwise provided in this Act, the pleadings and proceedings of the High Court shall be carried on and the sentences, decrees, judgments and orders thereof pronounced and declared in open Court and not otherwise: Provided however that at any time during a trial a Judge may, if he thinks fit, order the Court to be cleared or that any person or class of persons shall leave the Court.

[16] The virtues of openness were discussed by the Supreme Court of Canada in ***A.G. Nova Scotia v. MacIntyre*** which quoted the eighteenth-century philosopher Jeremy Bentham as saying:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.[1]

[17] As noted by the Supreme Court of Canada in ***Vancouver Sun (Re),*** the open court principle enhances the public's confidence in the justice system:

> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law". Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.[2]

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[1] R. v. C.B.C. et al., 2013 ONCJ 164 (CanLII). CanLii.org. Para. 13. Retrieved 23 October 2020.

[2] Vancouver Sun (Re), [2004] 2 SCR 332, 2004 SCC 43". www.canlii.org. Paragraph 24: Supreme Court of Canada. Retrieved 23 October 2020.

[18] The open court principle has long been recognized as a cornerstone of the common law.[3] As noted in its 1913 decision in ***Scott v. Scott***,[4] the House of Lords noted that the right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity". Viscount Haldane L.C., noted that "Justice is not a cloistered virtue". In the 1936 decision of ***Ambard v. Attorney-General for Trinidad and Tobago***, Lord Atkin noted, "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity."[5] In is in acknowledgement of this publicity principle that, nowadays, even allow videotaping of court sessions without obtaining the specific permission of the judge, within the limitations established by law.[6] It is the foregoing principles in my view that underpin section 13 of our High Court Act.

CONSIDERATION OF THE GROUNDS OF APPEAL

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[3] A.B. v. Bragg Communications Inc., [2012] 2 SCR 567, 2012 SCC 46. Paragraph 11: Supreme Court of Canada. September 27, 2012. Retrieved 23 October 2020.
[4] Vancouver Sun (Re), [2004] 2 SCR 332, 2004 SCC 43. www.canlii.org. Paragraph 24: Supreme Court of Canada. Retrieved 23 October 2020.
[5] Vancouver Sun (Re), [2004] 2 SCR 332, 2004 SCC 43". www.canlii.org. Paragraph 24: Supreme Court of Canada. Retrieved 23 October 2020.
[6] That said however, as was pointed out in Centre for Child Law and Others v Media 24 Limited and Others 2020 (4) SA 319 (CC) at para 103:
… one would need to know in advance that a particular media house or media group is intending to publish one's details. Beyond this, the litigation to prevent publication may inadvertently expose one to publicity or media attention. A just and fair response should rather place this burden on the media houses and groups.

[19] Some eighty years ago, the issue with which we are presently seized, first arose in our jurisdiction.[7] In **Mahlikilili Dhalamini and others v. The King**, [8] on 8th April 1940, three appellants were convicted in the High Court of Swaziland by Huggard C.J. of the murder of one Nkalane Vilakazi, and were sentenced to death. On appeal to the Judicial Committee of the Privy Council, their Lordships, on 20th May 1942, intimated that they would recommend that the conviction be set aside and would give their reasons at a later date. This they now proceed to do.

[20] By the ***Swaziland High Court Proclamation, 1938,*** there was established the High Court of Swaziland. Mahlikilili Dhlamini and others were charged before the High Court of Swaziland. Section 10(1) of ***Swaziland High Court Proclamation, 1938*** provided that, the pleadings and proceedings of the High Court shall be carried on and the sentences, decrees, judgments and orders thereof pronounced and declared in open Court and not otherwise: Provided

[7] The reason for this statement is that, decisions of the Privy Council of the 1940s constitute unquestionable judicial authority for this Court. This is because, from 1889 up to 1938 the High Court was the Resident Commissioner's Court. In the Authority Under Foreign Tribunal Evidence Act Order in Council of 2nd August, 1910 the Resident Commissioner's Court was recognized as a Supreme Court of Basutoland. Consequently the Resident Commissioner was made a Judge within the meaning of the Foreign Tribunals Act of 1856. The High Court came into being by the High Court Proclamation 57 of 1938. Section 12 of that High Court Proclamation of 1938 substituted the High Court for the Resident Commissioner's Court wherever it appeared. Appeals from the High Court in terms of the amended Order in Council of 13th October, 1910 were to be to Privy Council. A Court of Appeal for the High Commissioned Territories was later established with the same judges of the then Basutoland, Bechuanaland and Swaziland.
[8] *Privy Council Appeal No. 38 of 1941 Appellants: Mahlikilili Dhlamini and others | 20-05-1942*

however that at any time during a trial a Judge may, if he thinks fit, order the Court to be cleared or that any person or class of persons shall leave the Court.

> There seems, therefore, no reason for refusing to give to the sections in the Proclamation the meaning which the words clearly indicate. What then should be the result of a failure to comply with the Proclamation and to hold the whole of the proceedings in public? In this country the omission would be a fatal flaw entitling a convicted criminal to have the conviction set aside. An analogous case is that presented by cases where the Judge has either pronounced sentence or altered sentence in the absence of the accused, see (1933) 1933 A.C. 699: 102 L.J. P.C. 148: 149 L.T. 574: 50 T.L.R. 13, Lawrence v. The King, where a Judge in Nigeria had altered sentence both in the absence of the accused and when sitting in Chambers. Prima facie the failure to hold the whole of the proceedings in public must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals. There may no doubt be cases where the guilt of the accused is so apparent that in spite of the disregard of this essential need for publicity this Board would not consider it right to grant leave to appeal. But the present is not such a case: as a particular native custom formed an important consideration upon which it was essential that the proclaimed necessity for publicity should be observed. For these reasons, their Lordships came to the conclusion that they should recommend to His Majesty that the appeals should be allowed.

[21] According to the ***Mahlikilili Dhlamini and others v. The King*** case, the giving of the judicial opinions by the High Court judges is part of the proceedings of the High Court, which are to be carried on in open Court. The giving of the opinions must, therefore, under the

enactment take place in open Court. In that case the Crown in their case for the respondents contended that the maxim *"omnia proesumuntur rite acta"* applied, which apparently meant that even if the opinions ought to have been given in public it ought to be presumed that they were so given. Their Lordships were not content to rely on a presumption of this kind.

[22] It is, therefore, established that the opinions and/or orders of the three judges were given in Chambers, contrary to the provisions of the High Court Act as stated above. We are aware that a practice has evolved in this Country wherein it has become so ingrained in the practice of the High Court that, it is as is section 13 of the High Court no longer exists anymore. This Court cannot accept the continuation of this practice because it violates a legislative enactment. Nor can this Court accept a construction other than what it has indicated by reason of the fact as stated that the practice adopted in this case has been invariably observed in similar matters.

DISPOSITION

[23] As pointed out above, section 13 of the High Court Act provides that, proceedings of the High Court shall be carried on and the judgments and orders thereof pronounced and declared in open Court and not otherwise. The section is couched in peremptory terms. According to section 14 of the ***Interpretation Act,1977***, the word "shall" in the section is peremptory and mandatory. In ***Nqosa***

Mahao and Others v All Basotho Convention and One[9] Damaseb AJA (with whom Chinhengo and Mtshiya AJJA concurred), decried a refusal to deal with a matter in open court as an irregularity committed in the face of a clear provision (section 13 of the High Court Act). As appears also in ***Mahlikilili Dhlamini and others v. The King***, proceedings of the High Court carried on and the judgments and orders thereof pronounced and declared in otherwise than in open Court are a nullity. The case has to be remitted to the High Court to be dealt with according to law.

COSTS

[24] Having now disposed of the issues that were necessary to be dealt with in this appeal, all that remains is the issue of costs. The appellants have succeeded on appeal, not on the basis of the case they had pleaded, but on the basis of the illegality resulting from the court *a quo's* failure to comply with the legislative enactment. I would therefore make no order as to costs.

ORDER

[25] In light of the foregoing reasons:

(a) The appeal is upheld on the basis that the proceedings and orders in chambers were a nullity.

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[9] *Nqosa Mahao and Others v All Basotho Convention and One C of A (CIV) No. 46/2019 at para 25 on pp.24-25.*

(b) The decision of the High Court is set aside for failure to comply with the mandatory provisions of sec 13 of the High Court Act, 1978.

(c) The matter is remitted to the High Court to be dealt with according to law.

(d) There will be no order as to costs.

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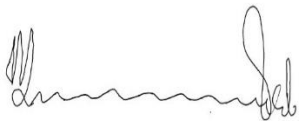
DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:



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DR P. MUSONDA

ACTING JUDGE OF APPEAL

I agree:

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DR. J. VAN der WESTHUIZEN

ACTING JUDGE OF APPEAL

FOR APPELLANTS: ADV. F. N. SEHAPI

FOR 1ST-4TH RESPONDENTS: MR. T. MAHLAKENG