LESOTHO

# IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU**

**C OF A (CIV) NO. 49/2020**

In the matter between:

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| **DIRECTOR OF PUBLIC PROSECUTIONS** | **1ST APPELLANT** |
| **COMMISSIONER OF LCS** | **2ND APPELLANT** |
| **ATTORNEY GENERAL** | **3RD APPELLANT** |

and

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| **PITSO RAMOEPANA & 28 OTHERS** | **1ST RESPONDENT** |
| **REGISTRAR OF THE HIGH COURT** | **2ND RESPONDENT** |
| **JUDICIAL SERVICE COMMISSION** | **3RD RESPONDENT** |
| **JUSTICE CHARLES HUNGWE** | **4TH RESPONDENT** |
| **JUSTICE ONKEMETSE TSHOSA** | **5TH RESPONDENT** |

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

**HEARD:** 12 APRIL 2021

**DELIVERED:** 14 MAY 2021

## Summary

*The Respondents, twenty nine of them, applicants in court a quo, sought "interim" and final relief relating to the delivery to court of electronic records in criminal proceedings in which they are defendants and medical records of six of them; conditions in prison where they are currently lodged; stay of prosecution in several criminal cases in which they are accused of serious offences, including murder and attempted murder; the handling by and conduct of presiding judges in the criminal trials; discovery of agreement in term of which the presiding judges were recruited; invitation to court a quo to declare presiding judges unfit to hold office, and direction to Judicial Service Commission to recommend to His Majesty the King that process for removing presiding judges be put in motion;*

*Appellants raising lack of jurisdiction on part of the court to hear and determine issues in application on the basis that same issues were disposed of in prior proceedings in High Court and Court of Appeal or are matters properly for trial court to deal with; alternatively court a quo should have declined to assume jurisdiction;*

*At hearing in court a quo, respondents abandoning reliefs amounting to collateral challenge to on-going criminal trials thereby effectively remaining with challenge to prison conditions and treatment of them as inmates, challenge to fitness to hold office of presiding judges and challenge to agreement on basis of which they were appointed;*

*Court a quo avoiding issue of jurisdiction and proceeding to issue interlocutory orders relating to production of medical records, electronic records of on-going criminal trials for purposes of dealing with remaining issues;*

*Held: court a quo should have addressed issue of jurisdiction upfront; had no jurisdiction or should have declined to assume jurisdiction as case may be;*

*Appeal accordingly upheld.*

**THE COURT**:-

## JUDGMENT

**Introduction**

[1] Mr Pitso Ramoepana and twenty eight others ("respondents") are members of the security services of Lesotho. They are in prison custody pending trial on several counts of murder and attempted murder. They were arrested for these offences in the second half of 2017. On or about 5 October 2020, they commenced motion proceedings in the High Court seeking certain "interim" and final reliefs against the Director of Public Prosecutions ("DPP"), Commissioner of Lesotho Correctional Services, the Attorney General ("appellants") and five others. They obtained an interlocutory order from that court in terms of which –

(a) the Registrar of the High Court, the 2nd respondent in those proceedings, was ordered to avail to the court (i) five transcribed electronic records of criminal proceedings, specified by date of the proceedings concerned, relating to the following cases in which the respondents are charged with the offences mentioned in the preceding paragraph - CRI/T/0001/2018, CRI/T/0002/2018, CRI/T/0003/2018, CRI/T/0004/2018, CRI/T/0010/2018 and, (ii) a "document constituting the agreement between the executive arm of Government, the Judicial Service Commission, the Director of Public Prosecutions, the

Southern African Development Community and the European Union detailing the proposed manner in which the [respondents'] criminal trials were to be conducted";

(b) the 3rd respondent, Commissioner of Lesotho Correctional Services, was ordered to avail to the court, within 7 days, copies of medical booklets and medical records of the first five respondents and "a copy of the medical booklet of Maribe Nathane;"

(c) the respondents were granted leave to file supplementary affidavits as they deemed necessary upon the documents in paragraphs (a) and (b) being availed to the court.

[2] The "interim" order granted by the court prompted the appellants to note this appeal and file grounds of appeal on 14 December 2020. The reasons for noting the appeal will become apparent later on in this judgment.

[3] We will refer to the twenty-nine accused persons as the respondents and to the agreement referred to in para 1(a) as "the Agreement." The other respondents - Registrar of the High Court, Acting Chief Justice (4th respondent)[1], Judicial Service Commission ("JSC"), Justice Charles Hungwe and Justice Onkemetse Tshosa - are not actively involved in this appeal. They

[1] Para 2.4 of founding affidavit.

were cited, we venture to say, merely because they are interested in the outcome of this appeal. They did not file any papers in the High Court or in this appeal.

**Condonation of late filing of heads of argument**

[4] The respondents did not file their heads of argument on time in terms of the rules. They applied for condonation of the non-compliance.[2] The 1st respondent deposed to the affidavit in support of the application in circumstances where the legal practitioner acting for the respondents would have been expected to do so. The averments in explanation of the non-compliance is very general in nature and hardly satisfactory. It is basically that the respondents were regularly in court and therefore the heads of argument could not be filed on time. In our view, it is the legal practitioner who should have deposed to the affidavit in support of the condonation application. It is such legal practitioner who files heads of argument after all and is in a better position to give an explanation as to why the heads of argument were not filed in time. Be that as it may, we granted the application because the appellants did not oppose it.

**What triggered the appeal**

[5] In addition to the interlocutory order granted by the court, the respondents also sought an interim order that criminal proceedings against them in CRI/T/0001/2018,

[2] See notice of motion filed on 6 April 2021.

CRI/T/0002/2018, CRI/T/0003/2018, CRI/T/0004/2018, CRI/T/0010/2018 ("the criminal cases") be stayed pending the determination of the application.

[6] The final reliefs that the respondents sought in the motion proceedings were orders declaring that the denial to the respondents of nutritious food in prison custody violates their right to health and constitutes torture and inhuman treatment; that the denial to them of nutritious food as directed by their doctors violates their right to freedom from inhuman treatment, and that their living conditions in prison are not conducive to "the highest possible attainable standard for [their] physical and mental health".

[7] Against the two judges presiding at their trials, Hungwe AJ and Tshosa AJ, they sought the following final reliefs:

> "15. Declaring that the conduct of the 6th respondent [Hungwe AJ] in CRI/T/0004/2018 directing that the indictment be read to accused and that accused plead to it despite the objections that there has not been full discovery of the docket and defence has not been served with the indictment that was read to the accused is indicative of unfitness to hold office;
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> 16. Declaring that the conduct of the 6th respondent of-
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> (i) not allowing the defence sufficient time to prepare for trial;

(ii) directing that the trial proceeds in the absence of counsel for Thabo Ts'ukulu in circumstances where he was forced by law not to be before court;

(iii) recording and reading from the court file that on 22 June, 2020, counsel for the Crown objected to the application for discovery of the investigation diary by saying that the defence is not entitled to it whilst no such submissions were ever made before the court on that day;

(iv) directing that when he ordered, on 20 June, 2020, that the investigating diary be made available the court meant that it be availed to the prosecution by the police when the application put before him was that the investigation diary be availed to the defence by the prosecution;

(v) accusing counsel for accused No 1, on the 18th September, 2020, of dishonesty when counsel referred the court to the relevant portion of the record of 22 June, 2020, and making submissions on behalf of his client;

(vi) directing, on 22 June, 2020, that the investigation officer be present when accused No 1 was to collect documents material to his defence from his home when no one asked the court to order for the presence of the investigating officer when the accused was to collect and give to his lawyers documents that were material to his defence;

in CRI/T/0010/2018 is indicative of unfitness to hold office.

17. Declaring that the conduct of the 7th respondent [Tshosa AJ] in CRI/T/0003/2018 of:

(i) on 14 August, 2020, his Lordship denied the defence counsel an opportunity to address the court on preliminary issues before reading the indictment;

(ii) on 14 August, 2020, his Lordship directed that the indictment be read to the accused persons despite objections to that: 1. Defence put it on record that they were unable to consult clients due to Covid-19 lockdown restrictions, 2. Sebilo Sebilo's lawyer was not before the court and the court had accepted the explanation proffered for his absence;

(iii) on 14 August, 2020, the court directed that it is not ready to deal with any other issues other than that that the accused should be read the indictment and plead;

(iv) on 14 August, 2020, the Crown made it clear that its witness are not before the court due to Covid-19 restrictions but the court directed that the accused be read the indictment and plead and the proceedings be postponed to a future date;

(v) on 21 September, 2020, the court gave a ruling on a purported recusal application without hearing evidence;

(vi) on 21 September, 2020, the court after being informed that Khauhelo Makoae (Accused 2) had been certified to be mentally unstable, directed the trial to be set down for hearing notwithstanding;

is indicative of unfitness to hold office."

[8] Further, the respondents also sought, as final relief, the following -

(a) a declaratory order that their right to a fair trial within a reasonable time has been violated;

(b) that the Agreement is in violation of their right to a fair trial;

(c) a permanent stay of the criminal proceedings against them, alternatively, that their legal practitioners be given "the electronic record of proceedings [in the criminal cases] on a weekly basis or at such intervals as determined by the court";

(d) an order admitting them to bail pending the finalisation of their cases; and

(e) an order directing the Judicial Service Commission to advise His Majesty the King to appoint a tribunal to enquire into the fitness to hold office as justices of the High Court of Lesotho of the two judges presiding at their trials.

**Grounds of appeal**

[9] The grounds of appeal, it will be evident, do not directly focus on the interlocutory order issued by the court but on an issue which is of concern to the appellants arising from the application as a whole and which, in an indirect way, impacts on the interlocutory order. This is so because, although the court merely issued final orders in relation to the medical records and the electronically transcribed records, the appellants contend that the court erred –

> "[a] with regard to the basis and context within which it allowed interim orders in a constitutional motion launched as a collateral challenge to the validity of the proceedings in on-going criminal trials CRI/T/0004/2018, CRI/T/0008/2018 and CRI/T/0010/2018, which are serving before Acting Judges Hungwe and Tshosa of the High Court of Lesotho;
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> [b] in ordering the dispatch of the transcribed records of proceedings in respect of the above mentioned criminal trials to it in a veiled attempt to review them, pass value judgment on their performance and take a decision on the fitness of Acting judges to hold office;
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> [c] in assuming jurisdiction over a matter of the agreement between the executive arm of government, the Judicial Service Commission and SADC over the appointment of Acting Judges, which this Court had upheld in the matter of *Tseliso Mokhosi & 15 others v Justice Charles Hungwe & 4 others* C of A (CIV) No 38/2019;

[d] in failing to pronounce itself on the kind of powers it claimed to exercise in interfering with the criminal trials currently serving before their colleagues of the same High Court contrary to the decision in *Mahase v Kh'ubeka & others* [2005-2006] LAC 426;

[e] in rejecting the standpoint of the Crown that in view of the decision in *Tseliso Mokhosi* above, it must be found that the case is moot, which is then the end of the matter on the substantive issues in respect of the mandate of Executive under section 118(3) of the Constitution on the recruitment of the Acting Judges before whom the criminal trials in issue are serving;

[f] in speculating that a decision in *Motsieloa Leutsoa & another v Director of Public Prosecutions & 4 others* CC: 10/2019 on how issues of nutrition of inmates must be dealt with is wrong because accused persons [Mr Ramoepane & 28 Others] in the mentioned trials cannot be made to stand trial on empty stomachs, thus misconceiving the nature and extent of the practical effect of the judgment;

[g] in view of its attitude towards the judgment in *Motsieloa Leutsoa* above ... under-appreciating principles of constitutionalism, rule of law, precedents, *functus officio* and *res judicata* to the extent of displaying lack of judicial comity;

[h] in misdirecting itself by improperly exercising its discretion by avoiding a consideration of the objection to jurisdiction, which would have rendered every other objection to jurisdiction irrelevant, including their claimed capacity to probe alleged judicial dishonesty of Acting Judges of parallel jurisdiction to them;

[i] in being persuaded to believe that it had jurisdiction to conduct an investigation into the complaints of accused persons about the Acting Judges because there are no administrative arrangements and procedures through which their complaints can be channelled to the Judicial Service Commission in such a way as is reasonably necessary for the due administration of justice except through the route adopted in the Notice of Motion by prayer 22;

[j] in concluding that the litigation in issue has nothing to do with the progress of the criminal trials in issue which it ruled must proceed side by side with the investigation of the fitness of the judges seized with the trials to hold office, including their alleged misbehaviour and bias which had already been dealt with in *Motsamai Fako & 2 others v Director of Public Prosecutions & 2 others* C of A (CRI) No 3/2020;

[j] in rejecting the persuasive value of the approach which was adopted by the Supreme Court of New South Wales in the case of *Pradeep Deva v University of Western Sydney* (228) NSWCA 137 which was cited to it in opposition of allowing Respondents to forum shop through the use of review of the decision of the Judicial Service Commission to recruit Acting Judges because it is untenable in that there is no real question of law to be determined after directing the Registrar of the High Court to avail the agreement envisaged in prayer 9 of the Notice of Motion;

[k] in materially misdirecting itself by "rejecting the standpoint of the Crown to the effect that it is no longer of any moment whichever way a court decides on divergent views and dissenting opinions offered by the parties on pre-trial procedures because they in any

event have been settled in in the case of *Ramoepane v Director of Public Prosecutions* C of A No 33/18; and

[l] in rejecting the standpoint of the Crown that this litigation is intended to be a conduit pipe by which complaints of the lawyers representing the accused persons are passed on to the Judicial Service Commission after losing on all the cases cited above in terms of which all remedies had been exhausted by accused. The same lawyers represented the same clients, hence a strategy to place the Judges in a particularly vulnerable position both for the present and the future if suspicions of the kind referred to in the affidavits are raised without foundation."

[10] Ordinarily, an appellant is aggrieved by an order of court and appeals against it. That is what the respondents would have us hold in this case, and they assert as much.[3] The thirteen or so grounds of appeal setting out the several respects in which the appellants contend that the court erred, make it apparent that the appellants are not directly aggrieved by the "interim" order as such, but by something much more fundamental. They are aggrieved by the fact that the court entertained the application when it should not have done so "on account of lack of jurisdiction". Whilst the respondents submitted that the appeal is against the "interim order" only, that can only be so if no regard is had to the tenor and substance of the grounds of appeal. It seems to us that the granting of the "interim order" served as a trigger for the appellants to yet again challenge the issue of jurisdiction on appeal, which they had raised in their answering affidavit and

[3] See para 1 of respondents' heads of argument where it is stated: "The appeal is against the interim order of the court a quo, sitting as a Constitutional Court."

which the court, on all appearances, seems to have disregarded when it granted the interlocutory order. In ground of appeal (h) above the appellants state that the court avoided consideration of jurisdiction. That seems to us to be a correct observation. And in the absence of reasons for judgment and the fact that the issue was raised in the answering affidavit, we can only accept what the appellants say in this regard.

[11] We note that the appellants describe the court order as an interim order when in actual fact there is nothing interim about it. If the medical and transcribed records are availed to the court, there will be no other final order to be made in that regard. If the position were to be that an interim order was in fact granted, then the respondents obtained final relief on proof merely of a *prima facie* case. The order, however, does not itself indicate that it is interim. We assume that in making the order, the judges of the High Court satisfied themselves that the respondents had established their case on a balance of probabilities so as to become entitled to the order that they obtained, which is final in substance. As a matter of fact, the order granted is merely interlocutory in the sense that it was made before the criminal cases were completed. There is a subtle difference, depending on the nature of the case, between an interim order and an interlocutory order. Generally, in application proceedings an interim order serves to preserve the *status quo,* or to grant temporary relief pending the finalisation of the application, whereas an interlocutory order is any order that is made during the course of proceedings. To use the words "interim" and

"interlocutory" inter-changeably in relation to the order granted in this case is liable to cause some confusion that may have an unintended outcome. Had the court granted a stay of proceedings pending the finalisation of the application that was before it, such order would have been an interim order proper. The order granted by the High Court in this case is an interlocutory order and it is final in respect of the issues it covers. Although it is final in that sense, it is still interlocutory because it is not definitive of the rights of the parties and does not dispose of at least a substantial portion of the relief claimed in the main application. See *First National Bank of Lesotho v Lugy's Manufacturing (Pty) Ltd*[4] citing with approval *Zweni v Minister of Law and Order.*[5]

**Thrust of respondents' application in High Court and purpose of seeking interlocutory orders**

[12] It is readily recognisable that the thrust of the respondents' application in the High Court was three fold. The respondents sought, essentially and most importantly, the removal of the two judges from presiding in the criminal cases. Secondly, and less impactful to their circumstances, they sought better treatment in prison than that accorded to other prisoners in respect of food, health care and general prison conditions. Thirdly, before they abandoned the prayers as we set out below, they sought a permanent stay of the criminal proceedings against them or admission to bail. It will be apparent, from a reading of the

[4] C of A (CIV) No. 51/2019.
[5] 1993 (1) SA 523 (AD) at 535-536.

respondents' affidavits that the main reason for requiring discovery of medical reports and the records of proceedings was to establish the veracity of their allegations against the respondents, in particular the presiding judges.[6]

**Appellants' opposition of application in the High Court**

[13] The appellants opposed all the reliefs sought by the respondents. In light of the grounds of appeal and our view that the issue of jurisdiction raised therein is critical, we will not outline in detail or otherwise address the position of the appellants in relation to the substantive issues serve to the extent to which they

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[6] See, for example following paragraphs:

Para 8.5(c)(ii) of founding affidavit:

> "The learned judge then went on to accuse counsel of being dishonesty when interpreting its pronouncement on the issue of the diary; once [the Registrar]avails the transcribed record of 22 June, 2020, in CRI/T/0010/2018 to this Honourable Court, the court will see for itself that when the learned judge ordered that the investigation diary be availed to the defence, the defence were wrongly accused of dishonesty."

And paragraph 8.2:

> "We verily believe that the record of proceedings in our cases will clearly show that the delay in the prosecution of our cases is occasioned by the endless amendments to the indictments and service of additional statements every now and then and then contrary to the assertions that the Crown has been making all along that our cases are ripe for trial....".

Para 10.2 of replying affidavit:

> " Deponent seems to have misunderstood our request for the production of the records; we are not seeking the review of the decisions of the trial court, we are simply asking that they be availed to vindicate our allegations against the conduct of the presiding judges and the manner in which our trials are being handled."

Para 20 of replying affidavit:

> "... We are not concerned about the view of deponent on the presiding judges, the issue is whether what we allege about the presiding judges is true or not; this is the reason why we asked for the transcription of the relevant record of proceedings so that the court can see for itself the manner in which our cases are being handled and the conduct of the presiding judges. ...".

are relevant to the issue of jurisdiction. Those issues would properly be for the High Court to deal with but for the objection to jurisdiction. The respondents confined themselves in this appeal to dealing with the appeal against the interlocutory order, which they perceived to be the only issue on appeal. They at least acknowledged that the appellants opposed the application for the reason that it constitutes "a collateral challenge to the respective criminal trials". However the respondent maintained that, in their opinion, the challenge was of no significance after they abandoned all the prayers that would have made the application a collateral challenge to the criminal proceedings.[7]

**Absence of reasons for interlocutory order**

[14] The High Court, which sat as a Constitutional Court, did not give reasons for the interlocutory order that it made. The neglect or failure to give reasons has become a perennial problem that litigants face with some judges of that court. It does not appear to be possible to arrest this trend or tendency unless the Chief Justice takes a firm stance against it. Deliberations of this Court are severely hamstrung by that neglect, nay refusal, of the judges. It is disconcerting that in this case the judges did not see it fit to give reasons for their decision.

[15] It must however be said again and again that judges have a public duty to give reasons for decisions that they make, especially where those decisions are taken on appeal. Without reasons it is

[7] Para 6(f) of respondents' heads of argument.

not possible for this Court to know why the court made the order it did. In matters of immense national importance, such as these criminal cases, it is absolutely essential, not only for the credibility of the High Court, but also the justice system as a whole, that reasons be given. It now appears as if it is sheer defiance of this Court's supplications that impel judges not to give reasons for their judgments.

[16] The duty to give reasons derives from the public law proposition that decision-makers must act fairly, rationally and for proper law purposes. To discharge this duty, it is necessary to fully record the actual reasons for a decision, disclose findings on material questions of fact and the reasoning process leading to the conclusions reached. Thus, the statement of reasons must explain the path of reasoning by which the court arrived at the opinion it formed on the question referred to it. The statement of reasons must explain in sufficient detail to enable this Court, on appeal, to see whether or not the opinion does not involve an error of law. If the statement of reasons fails to meet this standard, we think that that failure itself may amount to an error of law on the face of the record upon which appropriate relief may conceivably be sought and granted in order to remove the legal effect of the opinion. Thus, issues that are vital to a judicial officer's conclusion should be identified and the manner in which he resolved them explained. This need not involve a lengthy judgment but requires the judicial officer to place on record those matters which were critical to his decision. Although it is difficult to argue that a decision should be overturned because of an absence of reasons, in our view, there

will be occasions when, on a very restricted approach, an application to overturn a decision on the basis of absence or inadequacy of reasons, may be made if a litigant is able to satisfy a court that he or she is unable to understand why the judicial officer reached a decision adverse to him or her. An appellate court should always be placed in a position in which it can properly assess the correctness of the decision - whether it is patently unreasonable, that is to say, it is openly, clearly, and obviously unreasonable or that there is no evidence that can rationally support it, or that the decision was made arbitrarily or in bad faith, due to an improper purpose or whether mostly irrelevant factors were considered or the court failed to take into account things that the law requires must be taken into account. The consequences of neglect or refusal to give reasons are there for all to see in this appeal.

[17] The respondents contended in the heads of argument that the court *a quo* later gave its reasons for granting the interlocutory order when it dismissed the appellants' application for leave to appeal. The court *a quo* indeed explained somewhat why it made the order but that did not absolve it from giving reasons specific to the interlocutory order. In any event such reasons would amount to no more than *obiter dicta* in the judgment on leave to appeal.

[18] We were informed by respondents' counsel that the respondents abandoned some of the reliefs. The appellants did not disclose that fact, if fact it be. We were informed by counsel for the appellants that he made sustained submissions on the issue as to

whether or not the court had jurisdiction to entertain the application, with counsel for the respondents refuting that assertion. In this regard the latter states –

> "... the decision [of the High Court] did not turn on the question of Jurisdiction as being sought to be suggested by the grounds of appeal of the appellants. The issue of jurisdiction was never raised in the court a quo."[8]

[19] The above are but only two examples of important issues in this appeal on which written reasons would have enlightened us. We are left to glean from the later judgment dismissing the appellants' application for leave to appeal and from submissions by counsel to try and understand what actually transpired in court and what prompted the judges to make the order now challenged on appeal. It is not therefore surprising that the appellants cast some aspersion on the High Court in the second ground of appeal where they state that the order to produce the electronic transcribed record is a "veiled attempt to review them, pass value judgment on their [acting judges] performance and take a decision on the fitness of Acting judges to hold office." Such criticism of the court can easily be avoided by giving of reasons for decision.

**Abandonment of certain reliefs**

[20] The respondents' legal practitioner informed this Court that when the matter was heard in the High Court, the respondents

[8] Para 7 of respondents' heads of argument.

abandoned certain of the relief that they initially sought, namely, a stay of criminal proceedings as prayed in paragraphs 1 and 21, a declaration that their right to a fair trial within a reasonable time had been violated as prayed in paragraph 18 and an order admitting the respondents to bail in terms of section 6(5) of the Constitution as prayed in paragraph 19. The abandonment is not apparent on the record. We however have no reason not to accept counsel's assertion in this regard, despite that the appellants did not confirm that indeed the said prayers were abandoned. What remained of the respondent's claims are prayers mostly concerned or associated with the intention to have the presiding judges removed from office. The abandonment and what remained thereafter is clarified by respondents' counsel where, in his heads of argument, he says:

> "On 11 December 2020, the Respondents moved the application for the interim orders; at the commencement of those proceedings Respondents informed the court a quo that they have abandoned reliefs in the interim and main which have the effect of interfering with the progress of the criminal [proceeding's] prayers; as pointed out by the court a quo, in its judgment in the appeal in Cons. Case no. 17/2020 referred to at paragraph 4 above, what remained are prayers for:
>
> (a) *A declaratory that the act of denying the applicants access to nutritious food violates their right to health.*
>
> (b) *A declarator that rulings made (sic) our Brothers Tshosa AJ and Hungwe AJ in criminal matters*

*involving these applicants are indicative of their unfitness to hold office.*

(c) *A declarator that 'the agreement entered into between the Executive arm of Government, the Judicial Service Commission, the Director of Public Prosecutions, the Southern African Development Community and the European Union detailing the manner in which the applicants' case will be conducted violates the applicants' right to a fair trial and is therefore unconstitutional."* [9]

[21] If *Motsieloa Leutsoa* and *Tseliso Mokhosi* disposed of the issues in paragraphs (a) and (c) above, respectively, as alleged by the appellants, then what remains, according to the respondents' itemization above, is only the prayer for the declaration that the presiding judges are unfit for office. This confirms our assessment of the application in the High Court to have been designed to pursue the removal of the presiding judges yet again.

**Complaints by respondents**

[22] It is apposite to set out the respondents' complaints in the proceedings in the court below. They complain about every conceivable issue connected with their trials. A quick count of the complaints shows that they come to about fifteen in number. They complain about –

[9] Para 6(b) of respondents' heads of argument.

(a) being denied bail when many other military and police officers who have been charged with similar offences have been admitted to bail;[10]

(b) improper joinder as an accused of 1st respondent in CRI/T/0002/2018;[11]

(c) the fact that their trials have been unfairly delayed from the time of their arrest in late 2017 and indictment in early 2018;[12]

(d) lack of candidness of "local judges" on the reason for many remand hearings when the real reason was simply that processes were on course to appoint foreign judges;[13]

(e) them or their lawyers not being consulted about the decision to rope in foreign judges to preside over the criminal cases, a decision they describe as forum shopping by "the executive and SADC", and about the fact that their trials are to be in terms of a project with time limits for the foreign judges to complete the trials, which process took more than a year to complete;[14]

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[10] Para 4.5 of founding affidavit.
[11] Para 4.6 of founding affidavit.
[12] Para 5 of founding affidavit.
[13] Para 5(a)(i) of founding affidavit.
[14] Para 5(a)(iii) and (b) of founding affidavit.

(f) denial 'on countless occasions' of the right to legal representation and access to their lawyers; interception of communication between them and their lawyers, and failure by appellants to respond to correspondence from their lawyers;[15]

(g) piecemeal service of witness statements and 'endless' amendments to the indictments when the cases were due to proceed thereby causing numerous postponements;[16]

(h) delay in discovery by the Crown of police dockets and investigation diaries and the furnishing of further particulars requested by them;[17]

(i) delay caused by the Crown's intention to join other persons as accused persons;[18]

(j) delay caused by failing court recording systems;[19]

(k) prison conditions and holding cells which are 'overcrowded, unhygienic and filthy'. They complain about denial of bail; disease among inmates; lack of constant medical assistance and medicines; denial of nutritious and sufficient food in prison and refusal to

[15] Para 5(c) of founding affidavit.
[16] Para 5(d)(i) of founding affidavit.
[17] Para 5(d)(iv) of founding affidavit.
[18] Para 5(d) of founding affidavit.
[19] Para 5(e) of founding affidavit.

have food delivered to them from their homes; denial of proper health care and of special food prescribed by doctors and Correctional Service medical personnel;[20]

(l) the trial courts refusing to deal with some of these complaints on the basis that they are of an administrative nature which should be addressed by the appropriate authorities;[21]

(m) the attitude of trial judges of showing "frustration and irritation whenever [their] lawyers address them" and of constantly indicating to them that a lot of time has been wasted by the respondents and their lawyers when the judges do not similarly show the same attitude when the Crown counsel addresses them nor do they put any blame on the Crown for delay in the progress of the trials when it is in fact the Crown that is responsible for all the delays; the presiding judges readily granting postponements at the instance of the Crown and refusing to entertain similar requests by the defence, and generally the conduct of the Judges tending to exhibit preferential treatment of Crown counsel;[22]

(n) specific instances where they allege the presiding judges misdirected themselves on procedural issues, including the handling by Tshosa AJ of an application for his

[20] Para 6 of founding affidavit.
[21] Para 7.4 of founding affidavit.
[22] Para 8 to 8.4 of founding affidavit.

recusal – all of which, they allege, indicate the judges' unfitness to hold office;[23]

[23] There are other instances referred to in the supporting affidavits wherein the respondents allege that the judges misconducted or are misconducting the criminal proceedings. The common thread through the respondents' affidavits is that the respondents' are dissatisfied with the manner in which the presiding judges have so far conducted the criminal proceedings and the decisions they have made on the issues raised during the criminal proceedings to date. Regarding the electronic records of the proceedings, they aver that it is their right to be given the record of the proceedings "during and after conclusion" of the trials. In this connection they wittingly or unwittingly disclose the purpose for requesting the electronic records of proceedings.[24]

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[23] Para 8.5 of founding affidavit.

[24] See following paragraphs:

> "8.2 We verily aver that the record of proceedings in our cases will clearly show that the delay in the prosecution of our cases is occasioned by the endless amendments to the indictments and service of additional statements every now and then contrary to the assertions that the Crown has been making all along that our cases are ripe for trial, three years after being charged and kept in custody, the Crown is still fishing for evidence and changing and chopping indictments.
>
> 10.1 In the light of the facts averred above as well as the supporting affidavits of my co-applicants, I verily aver that our right to a fair trial enshrined under section 12 of the constitution and the right to personal liberty as protected under section 6 of the Constitution have been violated through our continued detention in circumstances described above.
>
> 10.2 We accordingly ask in the main that this Honourable Court [High Court] permanently stays our trials and in the alternative, it should direct that we be released on bail so that we await trial in circumstances that are human and conducive to our physical wellbeing.
>
> 10.3. We also pray that this Honourable Court [High Court] directs the 4th respondent [JSC]to advise his Majesty to establish tribunals to investigate the fitness of the 6th respondent [Hungwe AJ] and the 7th respondent [Tshosa AJ] to continue holding office as Acting Judges of the High Court of Lesotho."

[24] The respondents' strong aversion to trial by the foreign judges is clear not only from the founding affidavit but it constitutes the theme of the supporting affidavits, especially that of Thabo Ts'ukulu in which he says:

> "The above narration of the manner in which our trials are being conducted and those addressed in Pitso Ramoepane's founding affidavit, clearly, go against the international standards preached in [annexure] PR1 which the Government used in support of its request to SADC and EU to have our cases presided over by foreign judges. We have been robbed of the good justice dispensed by Lesotho's own judges. Hence we seek the intervention of this Honourable Court.[25]"

[25] Respondent, Litekano Nyakane, is much more categoric:

> "I have lost all hope that I will receive a fair trial before Justices Tshosa and Hungwe."

[26] The "interim" order does not deal with or otherwise address the issue of the removal of the presiding Judges, or the prison conditions or the stay of prosecution. These are matters which the court *a quo* would have had to consider, as things stood, when the documents referred to in the order are availed to it. The grounds of appeal have, however, an indirect bearing on the interlocutory order in the sense that if the challenge to jurisdiction succeeds then the order will have to fall away.

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[25] Para 9 of Thabo Ts'ukulu supporting affidavit.

[27] It is intriguing that the respondents abandoned their prayers for a declaration that their right to a fair trial has been violated, for permanent stay of prosecution and alternatively for admission to bail. If anything the abandonment serves to show that the real focus of the application was for the High Court to review the handling of the criminal cases by the presiding judges and have them removed, hence the prayer for an order directing the JSC to advise His Majesty the King to set up tribunals to investigate the fitness of the judges to remain in office.

**Appellants' stance**

[28] The answering affidavit of the 1st appellant, the Director of Public Prosecutions ("DPP"), in general, urged the court *a quo* to decline jurisdiction on the basis that the matters raised in the application are either pending in the courts or have already been decided upon or finalised by the courts or for the reason that the application is an abuse of court process. The DPP sets out in detail the grounds of opposition to the application and highlights the enormity of the task involved in the criminal trials before Hungwe and Tshosa AJJ. She eloquently sketches the background to the criminal trials as follows –

> "1.6 In my viewpoint, the criminal trials of which the applicants (respondents in this appeal) have been charged alongside the former army commander are complex and require a lengthy duration to finalise to the extent that during their progress, the applicants must remain in custody because of the risk they pause to national security. It stands to reason that national

security is the responsibility of the executive government and courts of law should not attribute to themselves superior wisdom in matters entrusted to other branches of government. As already highlighted in the decision of *Ts'eliso Mokhosi & 15 others v Justice Charles Hungwe & 4 others* C of A (CIV) No 38/2019, the government of Lesotho reached an agreement with SADC that foreign judges be recruited for the "high profile" cases" in view of the toxic political climate and prevailing insecurity in the country. A finding has already been made by the Court of Appeal that the government of Lesotho, with the assistance of international community, identified the need to give special attention to the finalisation of the serious criminal prosecutions which were the product of violent events which posed an existential threat to the Kingdom.

1.7 As Director of Public Prosecutions, I am attaching more weight to the serious nature of the charges that the Applicants are facing and factors accentuated in the joint document by the EU, SADC, the government of Lesotho, the JSC and my office as justification to oppose their release on bail in that they have not proved exceptional circumstances in view of the delicately poised security situation in Lesotho. Some of their co-accused like Tumo Lekhooa and Molahlehi Letsoepa have already skipped the country to avoid criminal prosecution. This is common cause.

1.8 As will become apparent hereunder, the political disturbances of 2014 and thereafter created a national crisis which threatened the survival of state institutions. The applicants have been identified as some of the people responsible for the commission of the crimes instant, and the international community has offered assistance in the sense and to the degree

appropriate to facilitate the prosecution of their criminal trials fairly and impartially under our criminal justice system."

[29] The *Concept Note for New IcSP Action in ... [LESOTHO]17/10/18*, annexure "PR1" to the founding affidavit, to which respondents make extensive reference, casts further light on the enormity of the task before the learned presiding judges:

> "The Kingdom of Lesotho has had security and political challenges mainly arising from disturbances that occurred in August 2014 and which were related to changes in the commanders of the Lesotho Defence Force (LDF). Between February 2015 and June 2017, Lesotho has gone through two general elections and 2 changes of government. SADC has made a number of interventions since October 2014 in order to stabilise the political and security situation. These interventions include the appointment of the SADC Facilitator, deployments of the SADC Observation Mission to the Kingdom of Lesotho (SOMILES), The SADC Commission of Inquiry (the Phumaphi Commission), the SADC Oversight Committee of the Kingdom of Lesotho, the SADC Preventive Mission in the Kingdom of Lesotho (SAPMIL).
>
> The Phumaphi Commission inquiry findings are now part of a comprehensive SADC decision on Lesotho, and they include the need for the investigations and prosecution of all criminal matters related to specific members of the security services, particularly the LDF. However, the Lesotho judiciary is inundated with thousands of cases that are pending trial, the number of judges available to try these cases is limited, and there are widespread perceptions that the judges are not

> independent or impartial. These factors have also negatively impacted on the need for speedy resolution of cases involving high ranking former security personnel who were arrested and have been in prison pending trials. To this end, the Government of Lesotho approached SADC whose Member States agreed, at the level of the Summit, to second 5 experienced judges in order to assist with the resolution of these high-profile criminal cases.
>
> This proposal is a request on behalf of the Government of Lesotho, for the European Union to assist with emergency funding in order for the seconded judges from SADC MS to be engaged on an 18-month period to try and conclude at least 8 criminal cases involving about 35 accused persons. The SADC Secretariat will be responsible for the administration of the requested project funds on behalf of the Government of Lesotho."[26]

[30] There can be no doubt that the criminal trials are of significant national importance. In our view, it is absolutely necessary that the prosecution and the defence, as well as the presiding judges, must ensure that the trials are handled in such a manner as assures the general public that fairness and promptitude are being observed. The process must secure for the accused persons their right to a fair trial, which must be characterised by transparency and efficiency and at the same time afford the presiding judges a fair opportunity to carry out their sworn duty to administer justice without fear or favour, ill-will or affection and to deal with the cases before them as best they can.

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[26] See annexure "PR1" under heading *Description of Proposed Programme: Programme Summary.*

**Application for leave to appeal**

[31] The respondents submitted, based on their contention that the appeal is in respect of the interlocutory order, that the appeal should be dismissed because no leave to appeal was sought as provided in s 16(1) of the Court of Appeal Act, 1978.[27] We do not wish to deal with the correctness or otherwise of the decision of the High Court which resulted in the dismissal of the appellants' application for leave to appeal, in particular the finding that leave to appeal can only be sought in the Court of Appeal and not in the High Court. That finding is not sound. It cannot be correct. It is however not before us for determination. The net effect of it however is that the appellants were refused leave. The question paused by the respondents is whether the appellants' failure to apply for leave before us is fatal to their appeal. That contention was based singularly on the argument that the appeal is against the interlocutory order and, as such, leave to appeal is necessary. That, no doubt, would be a correct understanding of the law were the appeal to be directly and solely against the interlocutory order.

[32] The appellants were not sure-footed in advancing argument whether or not leave to appeal is required. While the mainstay of their submissions was that the court *a quo* had no jurisdiction to

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[27] Section 16(1) provides that-

> "An appeal shall lie to the Court [Court of Appeal] –
>
> (a) from all final judgments of the High Court;
>
> (b) by leave of Court from an interlocutory order, an order made *ex parte* or an order as to costs only."

deal with the substantive reliefs sought in the application, they went on to argue that "the order compelling discovery is appealable to the Court of Appeal which has long dealt with the relevance of the documents and advanced reasons for holding that the appointment of their Lordships as constitutional."[28] For this proposition they referred to *Santam Ltd and Others v Segal.*[29] They submitted that because the issues are *res judicata*, that alone is a strong argument for leave to appeal to be granted by this Court.[30] They also submitted relying on *Khumalo and Others v Holomisa*[31] that the interlocutory orders are appealable in the interest of justice.[32] At the same time appellants' counsel contended throughout his heads of argument that the issue whether or not the court *a quo* had jurisdiction is decisive of the appealability of this matter.

[33] We incline towards this latter view and hold that the issue of jurisdiction is so fundamental to this case and that the appeal is properly before us. We therefore do not intend to detain ourselves with a consideration whether the interlocutory order is appealable on any of the grounds advance by the appellants. In light of the view we take of the matter, the contentions of the respondents on this issue cannot also be upheld. We have already shown that the grounds of appeal and the appellants' affidavits raise the issue of jurisdiction as the single most important issue which the court *a quo* should to have considered and decided upon, upfront. We

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[28] Para [19] of appellants' heads of argument.
[29] 2010 (2) SA 160 at 162E-164G.
[30] Paras [26] and [27] of appellants' heads of argument.
[31] 2002 (5) SA 401(CC).
[32] Para [34] of Appellants heads of argument.

accept the appellants' contention that the appeal is against the court *a quo*'s unarticulated decision that it had jurisdiction to entertain the matter or that there was no basis for it to decline assumption of jurisdiction.

**Whether the High Court may not make an interim order where it has no jurisdiction**

[34] Counsel for the respondent, at our invitation, filed supplementary heads of argument on the question whether the court *a quo* could determine interim reliefs before it could decide the issue of its jurisdiction to determine the main or final prayers. Counsel submitted that the court a *quo* could grant the interim prayers despite the objection to jurisdiction raised in respect of the main prayers. He referred to South African cases of *Airoadexpress (Pty) Ltd v Chairman, LRTB, Durban, and others* [33] *National Gambling Board v Premier, Kwazulu Natal & Others*[34] and *President of the Republic of South Africa v UDM*.[35] These cases are to the same effect that a court may grant interim relief in a matter in which it has no jurisdiction. This is exemplified by statements in *Airoadexpress* and *National Gambling Board*:

> "... this is based on the existence of a general power or put differently, an inherent jurisdiction to grant *pendente* relief to avoid injustice and hardship. An inherent power of this kind is a statutory power which should be jealously preserved and even extended where

[33] 1986 (2) SA 663(A).
[34] 2002 (2) SA 715 (CC).
[35] 2003 (1) SA 472 (CC).

> exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless as is the case here."[36]

And:

> "At common law a court's jurisdiction to entertain an application for interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has jurisdiction to decide the main dispute."[37]

[35] The South African cases were concerned with the grant of interim relief and they make two important points. First that a court that has no jurisdiction can grant interim relief in exceptional cases to avoid injustice and hardship and where a litigant would otherwise have no remedy. Second, that such court must have jurisdiction to preserve or restore the *status quo* and it does not matter that it has no jurisdiction to decide the main dispute.

[36] There was no argument before us on the applicability of these principles to the facts of the present case. No exceptional circumstances were identified nor was it shown that the court *a quo* had jurisdiction to grant the reliefs in its order. Additionally, the court order is an interlocutory one and not one granting interim relief as contemplated in the cited authorities. On the facts, it seems to us that the present matter is distinguishable from the

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[36] *Airoadexpress* at p. 676C-E.
[37] *National Gambling Board* at p 731A-B, para 49.

South African cases on the facts and the nature of the relief involved.

**Jurisdiction**

[37] We now move to consider whether or not the issue of jurisdiction was before the High Court, a point on which, as an issue of fact, the parties are in contention about. The appellants raised the issue of jurisdiction squarely in the answering affidavit deposed to by the DPP.[38] The court *a quo* should have considered

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[38] At para 1.3:

> "In the view of the version of events which I will categorise hereunder I respectfully submit that this Honourable court must decline jurisdiction in this matter. The matters arising in this application are either *sub judice* before other courts, have been finally dealt with in the final judgments or relate to abuse of process."

At para 1.15:

> "In the light of the view I hold regarding the outcome of this matter, I am prepared to assume that once the trial court have pronounced order in respect of the transcription of the records, this honourable court has itself no authority to correct, alter or supplement those orders. In fact, the trial courts seized with those criminal trials are the ones to take part in the production of their own records if there are disputes. I maintain that to allow the opposite would deeply wound judicial consistency, certainty and consequently judicial stability in the Kingdom ... from my objective standpoint of a reasonable and informed director of Public Prosecutions, this Honourable Court has no jurisdiction to grant the substantive prayers sought in this matter and there is also no justification in the papers for the alleged pre-trial" prejudices and concerns raised not to be dealt with by the courts seized with the criminal trials as presently constituted."

Para 1.18

> "As I have suggested, there are inherent dangers of this Honourable Court assuming jurisdiction in this matter. It is inappropriate and an abuse of process for the applicant to resort to this Honourable Court on the matters of alleged pre-trial prejudices which can be dealt with adequately and/or be properly addressed by recourse to the review powers of the High Court of Lesotho or where they can obtain adequate redress under any other law, in my view, given the inherent undesirability involved in the duplication of proceedings, the applicants have not indicated that the alternative means of legal redress available to them before the remanding court would not be adequate. It is against this backdrop that this Honourable Court must decline jurisdiction on the basis of section 22(1) and (2) of the Constitution."

Para 1.24:

> "I have applied my mind to the whole Prayer 16 of the notice of motion. My point of departure is that we are bound to respect and accept the procedural orders of his Lordship Hungwe in the management of criminal trials before him. I hasten to add that this honourable Court cannot be called upon to reconsider the soundness or otherwise of His Lordship's directives in the management of the cases proceeding and/or pending before him. The bottom line of my contention is that this Honourable

it and come to a decision thereon. In the absence of reasons for the interlocutory order it is in place for us to assume that either the judges did not consider the issue at all or they considered it and held the view that they had jurisdiction, hence they heard the matter and issued the interlocutory order. Either way the judges were wrong: they had to consider the issue as a preliminary matter as raised, which they did not do, or if they considered it, they wrongly decided that they had jurisdiction.

[38] A court may, depending on the facts of a given matter, either have no jurisdiction at all or it may, in its discretion, decline to assume jurisdiction. There is a little of each of these possible approaches in this case.

[39] Before addressing the jurisdictional issue further, we wish to state that in our view, the issue of jurisdiction raised by the appellant renders it unnecessary to deal with all the other contentions of the appellants in opposition to the application. In fairness to them, however, it is necessary to record that the appellants dispute all the factual allegations and conclusions of law contained in the respondents' affidavits. In respect of the prayer that the appellants avail the record of proceedings the appellants aver that the trial court has made the necessary orders for the electronic records to be availed. In respect of the alleged interminable amendments of the indictments and continuous provision of witness statement, they aver that they have provided

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Court has no jurisdiction to hear this application that seeks to review the orders of their colleagues...."

all the witness statements and other documents requested by the appellants. They deal extensively with, and dispute the propriety of the prayers for stay of prosecution, violation of fair trial rights and the provision of reasonable conditions of living and health services in prison. On all these issues they contend that there are judgments of the High Court and the Court of Appeal that have finally determined the issues raised by the respondents. In this regard they point to the following decisions of the court- *Ts'eliso Mokhosi & 15 others v Justice Charles Hungwe*[39] (declaring that the Agreement is valid and subsisting as an instrument through which the government of Lesotho obtained international assistance for the speedy disposal of all or some of the criminal cases), *Motsieloa Leutsoa & Another v Director of Public Prosecutions & 4 Others*[40] (addressing the alleged overcrowding in detention cells, unhygienic conditions, scarcity of food and other necessities and dismissing the respondents claims and giving certain directions to relevant authorities); *Motsamai Fako v Director of Public Prosecutions*[41] (finally dismissing the bail applications); *Thabo Ts'ukulu v Director of Public Prosecutions*[42] (denying bail to the applicant therein after which he applied again and lost), and *Litekanyo Nyakane v Director of Public Prosecutions*[43] (dismissing an application to fund respondents' legal costs from public funds and directing that *pro deo* counsel be provided in the usual way).

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[39] C of A (CIV) No. 38/2019.
[40] CC/10/2019.
[41] CIV/APN/0261/2019.
[42] CRI/APN/043/2017.
[43] CIV/APN/305/2019.

[40] The main point that the appellants make in relation to the cases mentioned in the preceding paragraph is that the appellants' complaints made in those cases are re-hashed in the application giving rise to the present appeal in circumstances where the complaints have been disposed of by the courts in prior proceedings. For these reasons appellants contend that the court *a quo* either had no jurisdiction or it should have, at the very least, declined to assume jurisdiction.

[41] The issue of jurisdiction was raised from at least three angles: in relation to the appointment of the presiding judges and the propriety of the Agreement, issues that are *res judicata* as they were disposed of in *Ts'eliso Mokhosi*; in relation to the presiding judges' handling of on-going criminal cases, a matter not within the court's power to scrutinise; and in relation to complaints relating to prison conditions, issues that were laid to rest in *Motsieloa Leutsoa.* We examine these decisions in detail below.

[42] Jurisdiction is fundamental to all proceedings in a court of law. The choice of a proper court in which to proceed is an important element of jurisdiction as it requires the litigant to determine the court within whose competency the matter lies. If a matter is wrongly brought before a court, that court will, upon objection or *mero motu,* decline jurisdiction. And by jurisdiction in this context, we mean the power and competence of a court to hear and determine an issue brought before it.

[43] It is trite that the power and competence of any court is not unlimited. There will always be some limitation on the jurisdiction of every court imposed either by statute or by the common law. In every case therefore the court before which an objection to jurisdiction has been raised has an unshakeable duty to determine that objection first and pronounce itself on the limitations to jurisdiction upon which the objection is based. If a court has no jurisdiction to hear and determine a matter, that court simply cannot make any order in the matter other than an order declining jurisdiction and an order as to costs, as may be appropriate. Consequently, if we determine that the High Court sitting as a Constitutional Court did not have jurisdiction as contented by the appellants, it will not be necessary for us to consider any other issue in this appeal. A lack of jurisdiction is terminative of proceedings before any court or brings them to an end entirely.

[44] At common law a court does not have the power to set aside or vary an order of another court of equal jurisdiction.[44] The High Court sitting as a constitutional court has no jurisdiction to hear and determine issues that arise from on-going criminal trials before other judges of the High Court. The reason that the court ordered the production of electronic records in on-going criminal trials before their colleagues, Hungwe and Tshosa AJJ, was to interrogate the manner in which the latter are handling the trials before them with a view to declaring them unfit to hold the office

[44] Cilliers AC. Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4th ed p 42 and several cases referred to at note 69.

of judge or to direct the JSC to recommend to the King that they be removed as judges, as prayed by the respondents.

[45] In *Ts'eliso Mokhosi*, the issues for decision by a full bench of this Court are set out.[45] The judgment also sets out the reliefs sought by the respondents therein, namely, preventing the commencement of the trials pending the finalisation of the application; declaring as null and void the appointment of Hungwe AJ and any other foreign judges to preside over their trials; staying the trials *pendente lite*, and declaring as null and void the JSC's recommendation to the King and the Monarch's appointment of foreign judges at the initiative of the Government. This Court held that the appointment of Hungwe AJ and other foreign judges to hear the criminal cases was constitutional and that the respondents made "unproven allegations that members of the Executive initiated the appointment of foreign judges to ensure that they are convicted and sentenced." It held that "the government reached an agreement [the Agreement] with SADC that foreign judges be recruited because of the toxic political climate and prevailing insecurity in the country raised the prospect that

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[45] Para [3] and [6] of the judgment:

> "[3] The appellants ... sought declaratory and interdictory relief against the appointment of the first respondent [Hungwe AJ] and any other foreign judges to preside over criminal trials in the High Court in which they and others are accused with serious offences in the wake of the 2014 political disturbances that engulfed the Kingdom.
>
> [6]: The gravamen of their complaint is that a decision had been taken by the government of the day, in collaboration with the Southern African Development Community (SADC) and without the involvement of the Chief Justice and the JSC, that their trials will be conducted only by foreign judges to be appointed specifically for the purpose and that local judges will play no part in such trials. They maintain that in so doing the government breached the Constitution which guarantees them the right to be tried by an independent and impartial court."

the ends of justice might not be fully met by assigning those cases to local judges who are not only already carrying a heavy workload but are affected by the insecurity and turmoil that have afflicted the country." This Court thus found that the Agreement was properly entered into and implemented. Although the application before the High Court has a slightly different bend it is essentially concerned with the respondents' resistance to trial by foreign judges, when this Court found that to be completely in order.

[46] The respondents' challenge of the Agreement, which is the reason for seeking its production, is clearly an attempt to re-visit the issue disposed of by this Court. Sixteen of the present respondents were applicants in *Ts'eliso Mokhosi.* The fact that there are more applicants in the main matter now before the High Court cannot make any difference. The parties remain substantially the same and so also the issue for determination in so far as the Agreement is concerned. The court *a quo* had no jurisdiction to entertain a matter on an issue that has been finally disposed of by this Court. The issue is *res judicata* however it is raised, with or without a fine tilt.

[47] The second issue that we have identified in paragraph 34 as raising jurisdiction from another angle is essentially a matter of procedure. In *Director of Public Prosecutions & another v Mampai Lesupi & another*[46] this Court stated that a resort to the institution of a collateral constitutional application during the course of a criminal trial is to be strongly disapproved. It went further to hold

[46] (C of A (CRI) 7/2008) [2008] LSCA 20.

that the matters raised in the collateral application were to be dealt with at an appropriate stage of the trial and that there was no need to have interrupted the smooth functioning of the ordinary criminal procedures by means of a collateral constitutional application. It approved of the statement by Gauntlet JA in *Fath and Another v The Minister of Justice of the Kingdom of Lesotho*[47] where the learned judge said:

> "That is not to say that circumstances may not arise in which a challenge to the competence of a criminal court to hear a matter may permissibly be made outside the ambit of the Code. That resort must however be rigorously justified. As a minimum the resort would have to be shown to be necessary, because the Code offers no appropriate mechanism for the challenge or because some other compelling consideration warrants it."

[48] The present matter is not dissimilar from *Mampai Lesupi*'s case. The complaints raised by the respondents against the presiding judges in relation to the conduct of proceedings before them are procedural in nature and cannot be the subject of a collateral civil application to the same court, albeit before different judges, before the criminal trials are finalised. They are issues that can be raised on appeal should the respondents lodge it after the conclusion of the criminal trials in the High Court. The respondents have not, in our view, shown that the collateral application is necessary at this stage of the trials.

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[47] (15/2005) [2006] LSCA 10 (11 April 2006);

[49] In *Motsieloa Leutsoa,* two of the respondents sought from the High Court, among other reliefs, a declaration that "[their] rights under section 4(1)(g) as read with s 11(1) and (3) of the Constitution have been infringed by [DPP, Commissioner of Lesotho Correctional Services and the Ministry of Justice] through the prolonged delay in the prosecution of their case and inhuman treatment they are subjected to at the Maseru Central Correctional Institution". They also sought a declaration that their "rights in terms of section 8(1) as read with section 27(1) of the Constitution have been infringed by the [Commissioner of Lesotho Correctional Services and the Ministry of Justice] through inhuman conditions prevalent at Maseru Correctional Institution (Maximum Security Prison cells) consequently this amounting to exceptional circumstances for the purpose of bail application." The applicant in that case specifically complained about the denial of medical assistance and treatment, overcrowding, unhygienic conditions, scarcity of basic bedding and other necessities and scarcity of food supplies.[48] The court concluded that these complaints are to be addressed in terms of the "Prison Proclamation 1957 and the Rules (No. 28) made thereunder." It "ordered that the applicants may consider directing their claims pertaining to the inhabitable or poor conditions prevailing at Maseru Central Prison, with the trial court."

[50] The respondents' challenge to the propriety of Hungwe AJ dealing with the criminal cases was raised in *Motsamai Fako*'s case. Therein, three of the respondents appealed against the

[48] Para [6] and [7] of judgment.

refusal of the judge to recuse himself alleging that he "failed to understand properly their concerns about his conduct over a period, such as his alleged prior knowledge of the case and remarks made in chambers."[49] They had misgivings about the remarks he made in the reasons for refusing bail to the first appellant and his reasons for refusing to recuse himself. They alleged the possibility of bias on his part as a result of those decisions. This court dismissed the appeal holding that the appellants had "not succeeded in showing bias or facts that could result in a reasonable apprehension of bias as far as the criminal trial is concerned in the reasons of the High Court's dismissal of the first appellant's bail petition."[50]

[51] In *Pitso Ramapoena v Director of Public Prosecutions & Another* [51], the 1st respondent appealed against a decision of the High Court sitting as a constitutional court, dismissing his application for a declarator that the decision of the DPP to withhold witness statements and other contents of the docket relevant the prosecution's case in CRI/T/MSU/0711 until the date of trial was set, was in violation of his right to a fair trial. By the time the appeal was head the documents sought had been furnished and the matter was moot and the only remaining issue, so far as the appellant's counsel was concerned, was for the Court to "straighten the legal position as to whether the DPP was in law entitled to refuse to release the statements until after the accused had been indicted", which issue the Court construed as "simply

[49] *Motsamai Fako* judgment at para [13].
[50] *Motsamai Fako* judgment at para [27].
[51] C of A (CIV) 33/2018.

one of timing." The Court dismissed the appeal on the basis that no issue of legal importance arose in the appeal and that in any event the appellant's concerns could be addressed at a pre-trial planning conference in terms of rule 62 of the High Court Rules as amended in 2016.

[52] It is evident that the respondents' claims in the application before the High Court have either been litigated upon or are properly matters to be decided by the trial court. Had the High Court properly considered the issue of jurisdiction as placed before it, we have no doubt that it would have, at the very least, declined to assume jurisdiction in the matter and that would have been the end of the application. The fact that the several applications adjudicated upon by the courts were brought by one or other or all the respondents does not detract from the substance thereof. Most of them, as is the case with the matter in the present appeal, are in essence collateral challenges to on-going criminal trials. In the particular circumstances of the present matter, such collateral challenge should not be permitted.

[53] In regard to costs, the approach has always been that a costs order should not be made in a criminal cause. Although the application before the High Court is a civil one, it is concerned with matters connected with a criminal trial. A similar approach to costs as in criminal matters is appropriate. However, we wish to sound a warning that where collateral civil applications to on-going criminal trials are routinely made without sufficient justification,

this Court may be constrained in future to order that the losing party should pay the costs.

[54] In the result, we make the following order:

1. The appeal succeeds.

2. It is declared that the High Court, sitting as a constitutional court,

(a) had no jurisdiction to entertain issues that are properly before presiding judges and on which the judges have already decided in criminal trials - CRI/T/0001/2018, CRI/T/0002/2018, CRI/T/0003/2018, CRI/T/0004/2018, CRI/T/0010/2018 CRI/T/0001/2018, CRI/T/0002/2018, CRI/T/0003/2018, CRI/T/0004/2018, CRI/T/0010/2018; and

(b) had no jurisdiction to hear and determine issues resolved by the Court of Appeal and the High Court in *Ts'eliso Mokhosi & 15 others v Justice Charles Hungwe*, *Motsieloa Leutsoa & Another v Director of Public Prosecutions & 4 Others*, *Motsamai Fako v Director of Public Prosecutions*, *Thabo Ts'ukulu v Director of Public Prosecutions* and *Litekanyo Nyakane v Director of Public Prosecutions.*

(c) should have declined to assume jurisdiction in respect of all the issues raised by the respondents in the application before it.

3. The interlocutory order made by the High Court on 11 December 2020 falls away in consequence of paragraph 2 hereof and, for the avoidance of doubt, it is set aside.

4. There is no order as to costs.

**DR K E MOSITO**

**PRESIDENT OF THE COURT OF APPEAL**

I agree

**DR P MUSONDA**

**ACTING JUSTICE OF APPEAL**

I agree

**PT DAMASEB**

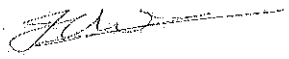
**ACTING JUSTICE OF APPEAL**

I agree

**MH CHINHENGO**

**ACTING JUSTICE OF APPEAL**

I agree



**DR VAN DER WESTHUIZEN**

**ACTING JUSTICE OF APPEAL**

| | |
|---|---|
| **FOR APPELLANT:** | ADVOCATE CJ LEPHUTHING |
| **FOR RESPONDENTS:** | ADVOCATE M E TEELE KC |
| | With ADVOCATE N MAFAESA |