

IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU
15/2021
CIV/APN/463/2020**

C OF A (CIV) NO.:

In the matter between:

MAHLOMOLA MOSES MANYOKOLE

APPELLANT

AND

THE PRIME MINISTER

1ST

RESPONDENT

THE MINISTER OF JUSTICE AND LAW

2ND

RESPONDENT

THE CHIEF JUSTICE

3RD

RESPONDENT

THE ATTORNEY GENERAL

4TH

RESPONDENT

**TRIBUNAL OF THE REMOVAL OF THE
DIRECTOR GENERAL ON CORRUPTION AND**

ECONOMIC OFFENCES

5TH

RESPONDENT

JUSTICE TEBHOHO MOILOA

6TH

RESPONDENT

JUSTICE SEMAPO PEETE

7TH

RESPONDENT

JUSTICE POLO BANYANE

8TH

RESPONDENT

CORAM: K.E. MOSITO P
P.T. DAMASEB AJA
P. MUSONDA AJA

HEARD: 14 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

The DG of the DCEO sought declaratory relief and reviewing, correcting and or setting aside of a decision to establish a tribunal in terms of s 4 of Act 5 of 1999 (as amended) on the ground he was not afforded pre-decision hearing; including his suspension pending the outcome of the tribunal's proceedings. DG also attacked legal notice establishing tribunal on ground that its terms of reference vague. Absence of audi being common cause and the suspension having occurred whilst matter was sub judice, the High Court held that DG ought to have been afforded audi but that its absence was not unfair in view of the wide publicity arising from the litigation instituted by the DG and that the tribunal was proper forum to clear his name. High Court also held that legal notice creating tribunal not void because particulars of what is to be investigated not stated therein as those particulars apparent from show-cause letter to DG. Relief seeking to set aside establishment of tribunal therefore dismissed. High Court also holding that suspension of DG whilst issue sub judice a usurpation of judicial function and therefore set it aside.

Held on appeal that High Court correctly concluded that terms of reference for tribunal not vague. Once high court found audi was denied the proper inquiry ought to have been if the discretionary remedies sought by DG were appropriate in the circumstances. Court holding that such remedies ought to have been denied the DG on facts of this case. Although suspension clearly unlawful, held that setting it aside not in public interest.

JUDGMENT

P.T. DAMASEB, AJA

Introduction

[1] This appeal is concerned with the lawfulness of the decision taken by the Prime Minister of Lesotho on the recommendation of the Minister of Justice and Law to establish a tribunal to investigate the fitness of the appellant ('Mr.. Manyokole') to hold office as Director-General ('D-G') of the Directorate on Corruption and Economic Offences ('DCEO'), and to suspend the D-G pending an investigation by a tribunal.

[2] The DCEO is established in terms of the Prevention of Corruption and Economic Offences Act 5 of 1999 as amended by Act 8 of 2006 ('the Corruption Act'). The D-G is appointed in terms of s 4 of the Corruption Act. Under the definitions section of the Corruption Act, the Minister responsible for the administration of that act is the 'Minister of Justice and Human Rights', the second respondent.

[3] In terms of s 4(4) of the Corruption Act, to be appointed D-G, a person must be an admitted legal practitioner or be in possession of such qualifications as the Minister of Justice and Law by notice published in the Gazette may prescribe.

[4] Subsection (5) of s 4 of the Corruption Act sets out the procedure for the removal of the D-G as follows:

'(5) If the Minister represents to the Prime Minister that the question of removing the Director-General under this section ought to be investigated, then-

(a) the prime Minister shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the Chief Justice from among persons who hold or have held high judicial office;

(b) the tribunal shall inquire into the matter and report on the facts thereof to the Prime Minister and recommend to him whether the Director-General ought to be removed under this section.

(6) If the question of removing the Director-General has been referred to a tribunal under this section, the Prime Minister, acting in accordance with the advice of the Minister, may suspend the Director-General from the exercise of the functions of his office and any such suspension may at any time be revoked by the Prime Minister, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the Prime Minister that the Director-General should not be removed.'

[5] On 29 December 2020, the Minister wrote a letter to Mr. Manyokole informing him that a tribunal had been established to investigate his fitness to hold office. The Minister invited Mr. Manyokole to make representations why he should not be suspended pending the outcome of the deliberations of the tribunal. He was given three days to make the representations if he chose to do so.

[6] Mr. Manyokole chose not to make any representations and on 31 December 2020 launched urgent proceedings in the High Court to, on interim basis, interdict the Minister from advising the Prime Minister to suspend him and, in the event that such advice had already been given, to interdict the Prime Minister from suspending him; in the alternative, if the Prime Minister had already acted on the advice and suspended him, that such suspension be held in 'abeyance, inoperative and ineffective.'

[7] The interim relief was sought pending adjudication of the 'substantive relief' seeking *declarators* and review, correcting and or setting aside of all the possible adverse decisions made by both the Minister and the Prime Minister.

[8] The High Court had then become seized of the matter and the parties appeared before court and were given directions as to the filing of the remaining pleadings. The legality of the Minister's letter inviting Mr. Manyokole to make representations had therefore become a live issue in the proceedings launched on 31 December 2020.

[9] It was whilst those proceedings were pending that on 7 January 2021 the Prime Minister wrote a letter to Mr. Manyokole in the following terms:

'2. I am in receipt of the advice of the MINISTER OF JUSTICE AND LAW recommending your suspension from duty following the establishment of a tribunal in terms of LEGAL NOTICE NO.139 OF 2020. I have thoroughly applied my mind to the recommendation and gave due consideration to the competing interests involved and found it prudent to act as I hereby do.

3. Acting pursuant to the provisions of SECTION 4 (6) of PREVENTION OF CORRUPTION AND ECONOMIC OFFENCES ACT NO. 5 OF 1999 (As amended) - I am suspending you with full pay and benefits forthwith.'

[10] When the pleadings closed, the matter was argued before Mokhesi J on 14 January 2021 and judgment handed down on 18 February 2021. In a fully reasoned judgment the learned judge made the following order:

'(a) The application is dismissed with costs, which costs must exclude costs for the 5th to 8th respondents.'

[11] The parties were not *ad idem* about the court's decision on the status of the suspension of Mr. Manyokole in view of the rather terse order referenced above. The Minister and the Prime Minister therefore brought an application before Mokhesi J for 'variation' of the court's judgment and order on the issue of suspension. Mr. Manyokole opposed that application.

[12] The backdrop is that the Minister had advised the Prime Minister to suspend Mr. Manyokole after the latter had launched court proceedings challenging the Minister's show-cause letter. During the course of his clarification judgment handed down on 22 February 2021, Mokhesi J described the Minister's action as 'naked usurpation' of the judicial function and concluded that it was null and void.

[13] In his clarification judgment, Mokhesi J wrote that he had '*laboured under a misapprehension*' that the order he granted dismissing the '*substantive relief*' would be '*read with declaration of nullity*' of the suspension. According to the learned judge, Mr. Manyokole remained '*unsuspended*'. He therefore issued a new, if more comprehensive, order as follows:

(a) The interim reliefs are dismissed.

(b) Suspension of the applicant is declared null and void ab initio.

(c) The final reliefs (excluding prayer 2 .10 of the Notice of Motion are dismissed with costs, which costs shall exclude the costs of the 5th to 8th respondents'.

[14] Prayer 2.10 asked for an order reviewing, correcting and setting aside any decision made by the Prime Minister to suspend Mr. Manyokole on the advice of the Minister.

[15] Mr. Manyokole appeals against the refusal of the balance of the substantial relief while the Minister and the Prime Minister

cross-appeal the High Court's order that the suspension was void *ab initio*.

The trigger for the litigation

[16] Before I set out the allegations made on affidavit by the parties, it will be conducive to clarity if I set out the trigger for the litigation initiated by Mr. Manyokole.

[17] On 10 December 2020 the Minister wrote a letter to Mr. Manyokole informing him that he is:

'contemplating to advise the Prime Minister acting pursuant to the provisions of Section 4(5) of the [Corruption Act], to establish a tribunal to probe your fitness to hold office. Pending the contemplated action on my part, I invite you ...to show-cause why I may not recommend your suspension from office pending the contemplated advise in terms of the law...'

[18] The Minister pointed out in this show-cause letter that his action was actuated by *'a trail of issues ... which hinge on the concern that [Mr. Manyokole] did not manage the affairs of the [DCEO] well with the requisite diligence and professional aptitude'*.

[19] The Minister went on to detail those 'issues':

- (a) Failing or neglecting to develop and implement sound management systems for the DCEO to maximize its efficiency in breach of regulation 4(1)(c);
- (b) *'Endeavouring'* to *'unilaterally'* withdraw criminal charges against a former Minister of Finance without the concurrence of the Director of Public prosecutions ('DPP'); alternatively conducting the case incompetently with the risk that there could be unsuccessful prosecution;
- (c) In a specific criminal case, whose particulars are stated, and involving bribery allegations against two private citizens and three public officers, he was directed to prosecute all the individuals involved but declined to prosecute the public officers and *'selectively'* prosecuted only the private citizens;
- (d) In another criminal case whose particulars are provided, he *'mishandled'* the conduct of the case resulting in a permanent stay of prosecution being granted in favour of the accused;
- (e) In yet another criminal case whose particulars are stated, his *'professional ineptitude or calculated undermining or frustration'* of the prosecution led to the *accused being acquitted'*;

- (f) Since assuming office, he has not reported any '*comprehensive plan and or program to execute*' the DECO's '*core mandate of prosecuting the classified crimes*' in both subordinate and superior courts;
- (g) On his watch, there are no completed criminal cases, a situation attributable to his '*gross professional ineptitude and or negligence*';
- (h) Serious allegations were made against him in the Public Accounts Committee that by '*omission or commission*' he frustrated the conduct of criminal investigations against persons associated with him;
- (i) There is a pending criminal case in which he is accused of obstruction of justice.

[20] Aggrieved by the letter's content, Mr. Manyokole launched an urgent application seeking interim interdictory relief together with substantive declaratory and review relief against the decision-making underpinning the show-cause letter. That was under case CIV/APN/451/2020.

[21] Apparently conceding the illegality of the decision requiring Mr. Manyokole to show-cause, the Minister withdrew the show-cause letter. The litigation was therefore not pursued although CIV/APN/451/2020 remains pending in the High Court.

[22] The significance of the litigation under CIV/APN/451/2020 is that, aimed as it was at challenging the since aborted show-cause letter, it brought into the public domain the allegations relied on by the Minister to initiate the establishment of a tribunal to investigate Mr. Manyokole's fitness to hold office.

[23] In the show-cause letter of 29 December 2020, the Minister informed Mr. Manyokole that a tribunal had been established in terms of Legal Notice No. 139 of 2020. It is common cause that the establishment of the tribunal was preceded by a recommendation by the Minister to the Prime Minister in which he repeated the alleged incidents of misconduct on Mr. Manyokole's part referenced in the aborted 10 December 2020 show-cause letter.

[24] It is also common cause that at no stage was Mr. Manyokole afforded an opportunity to make representations before the establishment of the tribunal: Either before the Minister advised the Prime Minister to establish it or before the Prime Minister established the tribunal. The only time Mr. Manyokole was asked to make representations was to give reasons why he should not be suspended pending the outcome of the investigation by the tribunal.

[25] Besides listing the names of the chairperson and members of the tribunal all of whom were designated by the Chief Justice as required by the Corruption Act, Legal Notice No. 139 of 2021 in part reads:

'Terms of reference

2. *The terms of reference of the tribunal are –*

- (a) *To investigate and determine the questions of removing the Director-General of the Directorate on Corruption and Economic Offences Advocate Mahlomola Manyokole; and*
- (b) *Make recommendations to the Prime Minister as to whether or not Advocate Mahlomola Manyokole ought to be removed, from office.'*

[26] The 6th respondent, a retired judge of the High Court, was nominated by the Chief Justice as chairperson of the tribunal. The Chief Justice also designated Justices Semapo Peete (7th respondent) and Polo Banyane (8th respondent). In other words, as required by the Corruption Act the tribunal comprises jurists all of whom are designated by the Chief Justice.

The Pleadings

Mr. Manyokole's affidavit

[27] It is now common cause that when the Minister recommended to the Prime Minister the establishment of the tribunal and when the latter decided to establish the tribunal, Mr. Manyokole was not afforded a pre-decision hearing. That is the one predicate for Mr. Manyokole seeking relief in the 31 December 2020 litigation. The other ground is that the presence thereon of Justice Moiloa and or its vagueness rendered the Legal Notice No. 139 illegal and void *ab initio*.

[28] Therefore, under the heading '*substantive relief*', Mr. Manyokole sought orders **declaring** as illegal, irregular and void: (i) Legal Notice No. 139 of 2020, (ii) the actual establishment of the tribunal, (iii) the show-cause letter by the Minister dated 29 December 2020, (iv) any suspension of Mr. Manyokole.

[29] The notice of motion sought the **review and setting aside** of the following: The establishment of the tribunal in terms of Legal Notice 139; the decision of the Chief Justice to select Justice Teboho Moiloa as member and chairperson of the tribunal; the Minister's show-cause letter of 29 December 2020 to Mr. Manyokole why he should not advise the Prime Minister to suspend him; any decision taken by the Prime Minister to suspend the D-G 'notwithstanding service and institution of these proceedings'.

[30] In his founding affidavit Mr. Manyokole does not specifically deal with the alleged incidents of misconduct cited by the Minister as far back as 10 December 2020 and repeated in the show-cause letter of 29 December 2020 and which prompted him to approach court for relief under CIV/APN/451/2020.

[31] Mr. Manyokole contends himself by stating that the matters complained about by the Minister and which at the time directed his attention to the reason for the establishment of the tribunal, are either '*matters within the management or administrative purview of DCEO*' or '*are matters of discipline or conduct*'. It is

not suggested by the DG under oath that they are false or trumped-up.

[32] Rather, in his founding affidavit Mr. Manyokole makes the case that:

- (a) the show-cause letter of 29 December 2020 is irregular and unlawful because he had not been afforded an opportunity to make representations and because it was activated by ulterior motives on the part of the Minister;
- (b) the establishment of the tribunal is irregular and unlawful because (i) its chairperson is conflicted, (ii) its purported terms of reference are vague and overbroad.

[33] As for (b) above, Mr. Manyokole's main objection on affidavit can be stated briefly. He contends that the terms of reference are not sufficiently clear to inform him just what he is going to face at the tribunal. It does not say whether and how he is infirm of body or mind or what the misbehaviour is that calls for investigation. The result is that the tribunal is left to investigate anything imaginable – to his prejudice.

[34] Mr. Manyokole also impugns the decision-making of the Minister and the Prime Minister on the common cause ground that he was not afforded a pre-decision hearing. He maintains that he was denied a hearing on his '*incapacity or commission of misconduct*' before the establishment of the tribunal or before

the Minister made an '*adverse representation*' to the Prime Minister. This he alleges:

'[W]as gravely contrary to and an invasion of my entrenched right to fair hearing, fundamental justice and the duty of [the Minister and the Prime Minister] to act fairly towards me.'

[35] Mr. Manyokole maintains that the establishment of the tribunal '*deleteriously*' '*invaded*' his right to '*reputation and dignity*' and that the Minister and the Prime Minister acted *mala fide* in establishing the Tribunal.

[36] As for the Minister invoking his powers under s 4(5) of the Corruption Act, Mr. Manyokole's foundational contention is that '*objectively*' there does not exist '*conditions and factors or circumstances which lead to the reasonable inference that the D-G of the DCEO is unable ... to exercise the functions of his office or has committed some gross misbehaviour*'. He asserts that the Minister may only proceed under s 4(5) when he has '*reasonable inference*' of incapacity or misbehavior and that '*the Minister must form the opinion that the circumstances of incapacity and/or gross misbehaviour justify the removal of the D-G ...from office*'.

[37] As an overarching theme, Mr. Manyokole accuses the Minister and the Prime Minister of being actuated by malice in initiating the statutory power under s 4 of the Corruption Act. He makes it plain under oath that the Minister and the Prime

Minister are pursuing personal interests in invoking the statutory power created for the removal of the D-G.

[38] Mr. Manyokole states that he has *'secret information and intelligence'* that some people who are the subject of corruption-related investigations by the DCEO under his stewardship and *'busking (sic) in the comfort of ... nefarious criminality ... have suggested to the Government that all means must be adopted and employed to ensure my removal from the office of the DCEO.'*

[39] According to Mr. Manyokole, the Minister's 10 December 2020 show-cause letter ('the first show-cause letter') was in pursuit of that stratagem. He avers that after the withdrawal of the first show-cause letter, he *'received intelligence ... that [the Prime Minister and the Minister] are bent towards ensuring that I am removed from the office of the Director General ... and are making all preparations and strategies to ensure that that goal is achieved.'*

[40] Mr. Manyokole states that he *'believed the informers since even in their first occasion of the [Minister] seeking to suspend me from office, the information that they laid before me came to pass as a reality. I had no reason to doubt them this second time too.'* He further alleges that the Prime Minister and the Minister harbour a grudge against him because he declined their entreaties to reinstate the DCEO chief investigator (Mr. Thibeli) whom he had suspended for being implicated in money-

laundering. This information, he says, he received from *'some persons I need not disclose.'*

[41] Mr. Manyokole alleges further that he *'received reliable information from my intelligence ... that Mr. Thibeli has been earmarked by the [Prime Minister and the Minister] to succeed or replace me ... once I have been removed or at least to act as the Director General upon my suspension.'* He adds: *'Mr. Thibeli is a darling of [the Prime Minister and the Minister].'*

[42] Mr. Manyokole goes on to make other allegations against the Prime Minister and the Minister: that they in one form or another either interfered with his work or sought to influence him to discontinue corruption-related allegations against certain individuals. He also specifically accused the Minister of once requesting him to prosecute on corruption charges a minister from a minority party in the coalition government led by the Prime Minister.

[43] It is further alleged that the chairperson of the tribunal, Justice Moiloa is the subject of corruption and money-laundering investigations by the DCEO under his auspices and that the judge's selection as chairperson is therefore irrational. In that connection, Mr. Manyokole alleges that the judge, as former chairperson of Standard Bank, facilitated a corrupt purchase of Standard Bank's house by its erstwhile managing director, Mr. Mpho Vumbukani.

[44] Mr. Manyokole further alleges that the DCEO under his auspices is investigating several corruption and money-laundering allegations against the Prime Minister.

[45] It is the above history of his interface with the Minister and the Prime Minister which, according to Mr. Manyokole, is *'the reason why in [their] eyes and other crusaders of corruption (whose cases I have not narrated herein to avoid burdening the record ...) are the real reason why I have lost favour with the [Prime Minister and the Minister].'*

[46] He adds:

'... according to them I should be suspended and then removed from office ... and thus pave the way to be replaced by Mr. Thibeli so as to allow the DCEO fight the political and other battles of those at the receiving end of the investigators net of the DCEO. The establishment of the Tribunal ... is a simple non-impregnable façade behind which the real intention is clearly to remove me as an obstacle in the pursuit of corrupt agenda and objectives.'

Answering affidavits

[47] As I will demonstrate in due course, this case is not about whether the DG was given a fair hearing before the establishment of the tribunal. Both the admitted and common cause facts show that he was not. The case is more about whether he was entitled to the discretionary relief he sought

consequent upon that unlawful conduct. It is therefore unnecessary to rehash the averments made by the Minister and the Prime Minister as decision makers in opposition to the facts alleged by Mr. Manyokole asserting that he was not given a fair hearing.

[48] I will confine the summary of the answering affidavits to those allegations which have a bearing on whether or not Mr. Manyokole was entitled to the relief he sought in his 31 December 2020 litigation.

[49] Both the Prime Minister and the Minister filed affidavits in opposition to the application. Extensive confirmatory affidavits were also filed, most notably by senior officials working for the DCEO and junior to Mr. Manyokole. These officials make common cause with the Prime Minister and the Minister in confirming the allegations being made by the two members of the Executive against their superior.

[50] The Prime Minister and the Minister deny that they acted *mala fide* in the discharge of their powers to initiate the tribunal process against the DG in terms of the Corruption Act.

[51] The Prime Minister prefaced his answer as follows:

'From the relevant media platforms [being print and radio broadcasts including broad social media] ...it became abundantly clear that this

litigation created a sensational perception in the public domain to the effect that I am corruptly acting in collusion with various unspecified Cabinet Ministers and unspecified Government Bureaucrats to maliciously remove the[DG].'

[52] Mr. Manyokole's reply to that is that:

'The narrative the [Prime Minister] seeks to employ has been paraded by the media, including social media platform'.

It is conceded therefore that the allegations made by Mr. Manyokole in his 31 December 2020 litigation has been widely published and commented on by the media and the public in terms adverse to the Government.

[53] Remarkably, the DG denies in reply that he *'alleged anywhere that the [Minister and the Prime Minister] are crusaders of corruption.'* That he did so I have already shown in the analysis of his founding affidavit at para [45] above.

[54] Both the Prime Minister and the Minister express concern about the manner in which Mr. Manyokole implicates other persons not party to the litigation and who had no knowledge of alleged active corruption investigations against them by the DCEO.

[55] Specifically, the Prime Minister expressed shock at the suggestion that he was the subject of a criminal investigation relating to events which allegedly occurred concerning the Victoria Hotel 16 years ago when he was the Principal Secretary of Finance. According to the Prime Minister, he was never questioned in connection with the matter or warned as a suspect.

[56] The Minister makes a critical observation about the disclosures made on affidavit by Mr. Manyokole in the present proceedings when he says:

'[T]here are private citizens (curiously branded as suspects by the DG) who are glaringly prejudiced by the apparent maladministration of the DCEO and whose purported investigations form the subject of publication even before they are charged or interviewed for that matter. The publication of information that the retired judge is a 'suspect' even before he could be charged and even before the decision to prosecute was made by the [DPP] says a lot about the management of the affairs of DCEO [by the DG].'

[57] Although he never asserted in his founding affidavit that the Prime Minister, Justice Moiloa or indeed all the others he named as being the subject of active DCEO investigations were aware of the investigations, in reply Mr. Manyokole claims that the Prime Minister and the judge were aware that they were being investigated.

[58] These being motion proceedings we have to accept the version of the Prime Minister and the Minister. It follows that the judge and people not cited as parties in the present proceedings but alleged to be the subject of corruption investigations only so became aware in the course of these proceedings.

[59] The Prime Minister states that *'the explosive remarks made in the affidavit of the DG threaten the stability of the Government of the Kingdom of Lesotho.'* That assertion is to be seen against the backdrop of the common cause fact relied on by the Prime Minister that his is a coalition government which includes one of the politicians whose prosecution the Minister is accused by Mr. Manyokole of instigating.

[60] The assertion is not to be taken lightly. It is made on the back of allegations by Mr. Manyokole that he is being briefed by individuals in the intelligence service about a plot by the Minister and the Prime Minister to get rid of him. As the Prime Minister understandably laments, as head of the Government the nation's intelligence service is answerable to him and not to the DG. That divided loyalties of an intelligence service has the potential to destabilise a country which is already plagued by political instability is a moot proposition.

[61] The Prime Minister also states under oath that he was informed by an employee of the DCEO (Mr. Tsotang Likotsi) that Mr. Manyokole was part of a plot to unseat him as Prime Minister

by causing him to be prosecuted for corruption in relation to the Victoria Hotel affair. That assertion was confirmed by Mr. Tsofeng Likotsi who is DCEO's Principal Investigator.

[62] Mr. Likotsi stated in a confirmatory affidavit that he was the official responsible for investigating the Victoria Hotel affair and that he found no evidence implicating the Prime Minister but that the DG does not agree and wants the Prime Minister prosecuted at all costs so as to destabilise the government that he leads. (The important thing is not so much the truth of these allegations but the fact that they are being made).

[63] It is apparent from Mr. Likotsi's affidavit that there is animosity between him and the DG and that he is the source of information to the Government about the alleged plot to unseat the Prime Minister.

[64] The Minister refutes Mr. Manyokole's allegations that he (a) pressured the DG to cause the prosecution of two politicians and (b) pressured the DG to investigate corruption allegations against the registrar of the HC. In the latter respect, he stated that as the minister responsible for the DCEO he received complaints from aggrieved Judiciary employees and passed those on to the DG who in turn reported back to him in writing that nothing untoward could be attributed to the registrar and that he accepted the view expressed by the DG.

[65] As regards the alleged pressure to have other politicians prosecuted, the Prime Minister and the Minister state that the suggestion is absurd because the DG has no such power as it vests in the DPP.¹

[66] The Minister also refutes the allegation that he sought to influence the DG not to pursue corruption investigations against a named company (Lesotho Stone Enterprises) because the Minister's unnamed nephew is employed there.

[67] In respect of Mr. Thibeli, the Prime Minister states that the suggestion that Thibeli was being earmarked to replace Mr. Manyokole as DG is absurd because that person is not an admitted legal practitioner as required by the Corruption Act.

[68] The Minister points out that although the DCEO is autonomous from government, he is answerable to the legislature for the work of that body. It is in that capacity he receives information from and about the DCEO and asks for progress on its activities. The purpose is not to interfere he says but to hold them accountable. Section 52 of the Corruption Act requires the DG to submit a report on the activities of the DCEO to the Minister but Mr. Manyokole has failed to do so.

The High Court's approach

¹ That much is clear from s 43 of the Corruption Act.

[69] When the dispute became ripe for adjudication, Mokhesi J had before him three separate issues: the *in limine* objection raised by the government to the application relating to misjoinder; the interim relief sought by the appellant against the suspension and establishment of the tribunal, and the substantive relief relating to whether or not the establishment of the tribunal should be declared unlawful and therefore be reviewed and set aside because he was not allowed to make representations; whether or not Justice Moiloa's presence on the tribunal made it void; whether the manner of the establishment of the tribunal threatens the independence of the anti-corruption agency; whether the legal notice is defective.

[70] Mokhesi J came to the following main conclusions on the above issues: The DCEO was improperly joined as it had no direct interest in the subject matter of the dispute. The interim relief failed in its entirety. The Minister acted unlawfully in recommending Mr. Manyokole's suspension as DG while that issue was *sub judice*.

[71] There was failure of *audi* before the Minister recommended the establishment of the tribunal to the Prime Minister. The suspension of Mr. Manyokole as DG while the matter was *sub judice* amounted to a usurpation of the judicial function and rendered it null and void.

[72] The issues canvassed in the second recommendation to the Prime Minister, barring one, are the same as those mentioned in

the aborted show-cause letter. Those allegations were brought into the public domain when the appellant went to court and they received wide publication.

[73] The fact of the publication is a factor to be placed in the scale in determining whether the appellant was treated unfairly. The establishment of the tribunal affords the appellant the opportunity to clear his name.

[74] The representations to the Prime Minister by the Minister set the ambit for the tribunal and that it cannot go on a frolic of its own to investigate anything imaginable and as it pleases. In other words, the terms of reference are limited by the particularised allegations made by the Minister to the Prime Minister. That conclusion remains unchallenged by way of cross-appeal and is binding on the Government, including on the tribunal which was cited in the proceedings and actively participated in opposing the appellant's relief.

[75] The challenge to Moiloa J's presence on the tribunal is premature as that issue ought properly to be raised before the tribunal through a recusal application. The upshot therefore is that the court a quo held that the legal notice is not void.

The appeal

Main appeal

[76] In the notice of appeal, Mr. Manyokole advances 12 separate grounds of appeal. It is not necessary to repeat them all. They boil down to the following basic propositions: The High Court misdirected itself in not reviewing and setting aside (a) the Minister's decision to recommend to the Prime Minister the establishment of the tribunal and (b) the Prime Minister's decision to establish the tribunal in circumstances where', it is said:

- (a) there were no 'objective facts that constituted jurisdictional facts' for the minister to make 'adverse representations' to the Prime Minister;
- (b) the appellant was not given an opportunity to make representations both before the minister's recommendation to the Prime Minister and before the Prime Minister established the tribunal;
- (c) the failure to allow the appellant an opportunity to make representations violated his fair hearing rights, reputation, dignity and self-worth, and amounted to unfair treatment;
- (d) the establishment of the tribunal was 'illegal, irregular, null and void' (i) because the legal notice creating it 'was vague' and open-ended such as to authorise the investigation of even matters outside 'the prescriptive terms' of s 4 of the Corruption Act; (ii) violated the principles of legality, intelligibility and certainty and (iii) it

was 'inconsistent with s 4' for its failure to specify 'the grounds and circumstances for the investigation to form the essential and necessary part of the question to be referred to the tribunal.

Cross-appeal

[77] The Minister and the Prime Minister impugn the High Court's conclusion that the suspension of the D-G was void *ab initio*. Secondly, the cross-appellants complain that the High Court misdirected itself in not imposing a punitive costs order on attorney and client scale against Mr. Manyokole on account of his '*inelegant and intemperate language in the papers*'.

Disposal

[78] The grounds of appeal set out above have considerably narrowed the issues that require decision on appeal. Although advanced with great gusto *a quo*, the proposition by Mr. Manyokole that the appointment of Justice Moiloa vitiates Legal Notice No. 139 is no longer being pursued. The High Court's conclusion that the DCEO was mis-joined is not being impugned either.

[79] Similarly, the Minister and the Prime Minister do not challenge the legal conclusion by Mokhesi J that the D-G was unlawfully denied a pre-decision hearing before the establishment of the tribunal. That is significant because in the

answering papers the Minister and the DG had maintained that Mr. Manyokole was not entitled to such a hearing as it was within the employer's prerogative to institute disciplinary proceedings against an employee without seeking his or her consent.

[80] What remains for decision therefore are the following: The validity of Legal Notice 139; whether the court *a quo* was correct in holding that although denied pre-hearing *audi* the D-G was not treated unfairly; whether the learned judge *a quo* correctly set aside the suspension of Mr. Manyokole, and whether Mr. Manyokole should have been mulcted in punitive costs.

Validity of the legal notice

[81] The High Court's *ratio* for validating the impugned Legal Notice No. 139 is that it is a mistake to read its terms in isolation of the Minister's letter of recommendation to the Prime Minister for establishing it. As I understand Mokhesi J's reasoning, the incidents cited by the Minister in both his 29 December 2020 show-cause letter and the recommendation to the Prime Minister for establishing the tribunal, form the grounds on which the investigation into the D-G's fitness to hold office is to be anchored.

[82] That finding remains unchallenged on appeal and is binding on both the Minister, the Prime Minister and the tribunal. The tribunal was cited in the proceedings *a quo* and actively participated therein represented by counsel, Adv. C.J. Leputhing.

Mr. Manyokole will be perfectly entitled therefore to challenge any investigation which goes beyond what the Minister particularised in justifying the establishment of the tribunal. That is the clear implication of the unchallenged conclusion reached by Mokhesi J on the matter.

[83] Contrary to Mr. Manyokole's suggestion to the contrary, the particularized incidents of alleged misbehaviour, if true, clearly fall within the contemplation of s 4(3) of the Corruption Act. It is inconceivable that being the subject of a criminal prosecution, for example, cannot fall within the ambit of s 4(3) of the Corruption Act.

[84] I am satisfied that the challenge to Legal Notice 139 of 2020 was correctly rejected by the High Court.

The denial of pre-hearing

[85] As I already mentioned, the Prime Minister and the Minister do not challenge the finding that they were in law obliged to afford Mr. Manyokole a hearing before the establishment of the tribunal. Because the High Court took the view that Mr. Manyokole was not treated unfairly although denied *audi*, Mr. Manyokole feels aggrieved that the establishment of the tribunal was not reviewed and set aside. That is the kernel of Mr. Manyokole's grievance on appeal. The issue, therefore, as I see it is one of remedy.

[86] Both *declaration* and *review* are discretionary remedies. Thus, even if a case is made out that a public functionary acted unlawfully, the court must still exercise its discretion whether or not to grant the relief sought.

[87] As Baxter² writes:

‘With the exception of the interdict de libero homine exhibendo (which is available as of right), the common-law remedies of interdict, mandamus, and review to set aside or correct, are discretionary: they may be withheld by the court even if the substantive grounds for the grant of the remedy have been made out. In addition, declaratory orders are specifically stated by the Supreme Court Act³ to be discretionary. The discretion is a judicial one, in the sense that the court will carefully weigh all the surrounding circumstances, exercising a wide but principled discretion’.

[88] The South African Supreme Court of Appeal correctly reiterated the principle as follows in *Oudekraal Estates (Pty) Ltd v City Council of Cape Town and Others*⁴:

² Baxter, L .1984. Administrative Law at p.712.

³ Lesotho’s equivalent is s 2(1)(b) of the High Court Act 5 of 1978 which states: The High Court for Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have –

(a)...

(b) in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination...’

⁴ 2004(6) SA 222(SCA) at para [36]. This approach was confirmed by Scott JA, in *Chairperson, Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* 2008 (2) SA 638 (SCA) ([2005] 4 All SA 487) para 28 quoting Brand JA’s remarks in *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302(SCA) para [46] that “there is a public interest element in the finality of administrative decisions and the exercise of administrative functions”. To this, Scott JA added, “considerations of pragmatism and practicality”.’

'[A] court that is tasked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever and administrative act is invalid'.

[89] Mokhesi J held that Mr. Manyokole was unlawfully denied *audi* but, on the facts, concluded that he was not treated unfairly. Counsel for Mr. Manyokole criticizes that approach. He submits

that the court *a quo* placed more emphasis on the reputation issue rather than the dignity of the D-G. With respect, I do not quite understand what difference practically that would make.

[90] Besides, counsel also submitted - and not without justification - that the finding that failure to grant *audi* was unlawful but did not amount to unfairness seemed a contradiction in terms. Even if that approach is a misdirection, not much turns on it in the view I take of the issue based on the function of judicial review in our legal system. Under our system of judicial review, a finding of unlawfulness of administrative action does not automatically result in review and setting aside. The court retains a wide discretion in the matter.

[91] Once it found that *audi* was unlawfully denied, the High Court should at that stage have framed the issue as one of

'appropriate remedy' - regard being had to the fact that Mr. Manyokole came to court seeking discretionary remedies: *declarators*, review and or setting aside.

[92] The proper inquiry that Mokhesi J should have engaged in in view of the unchallenged conclusion that *audi* was improperly denied was whether review and setting aside was an appropriate remedy.

[93] I will therefore proceed from the premise that the court *a quo* had in reality exercised a discretion not to grant the review and setting aside sought.

[94] When one has regard to the facts overall there are weighty considerations why the discretionary remedies sought by Mr. Manyokole ought not to have been granted. I will proceed to set out those considerations.

Unsubstantiated serious allegations by the D-G

[95] The majority of the imputations on the characters of the Minister and the Prime Minister are based on inadmissible hearsay evidence as summarised in paras [38] to [41] of this judgement. For example, Mr. Manyokole states that (a) the Minister and the Prime Minister confided in others that he should be removed, (b) that a replacement has already been found and that his belief is based on *'intelligence'* which he is not at liberty to disclose.

[96] Although the Prime Minister in his answering papers does not challenge the admissibility of those allegations, the Minister did so. Even if they did not, it is an issue that a court can raise, and the High Court ought to have raised, *mero motu*: For admissibility of evidence is a matter of law and not of discretion.⁵ The fact that Mr. Manyokole says they are from intelligence sources make the hearsay allegations no less inadmissible.

[97] Although inadmissible, the allegations have been made on affidavit in court proceedings and described by the Prime Minister in his answering affidavit as having the potential to undermine the national security of Lesotho.

The relief would not address Mr. Manyokole's core grievance

[98] The affidavits paint a very shocking picture of the toxic atmosphere that has arisen between Mr. Manyokole and some of the most senior members of the Executive. Very serious allegations of corruption which are largely unsubstantiated have been levelled against the two functionaries statutorily mandated to initiate the process to investigate the conduct of a D-G.

[99] Mr. Manyokole in unambiguous terms makes clear on affidavit that the initiation of the investigation process into his fitness to hold office is driven by ulterior motives: To silence him

⁵ *Korokoro Constituency Committee v Executive Working Committee- All Basotho Convention* (C of A (Civ) 04/2019[2019] LSCA 22 (28 January 2019) para [58].

from pursuing corruption investigations against the Prime Minister, the Minister and or people associated with them.

[100] These allegations are sufficiently serious to undermine the social contract between the governed and those that govern so as to erode legitimacy in the entire governance edifice. The allegations of corruption and wrongdoing are not only directed at the executive arm of government but also at a judge designated by the Chief Justice.

[101] Mr. Manyokole states under oath that the Minister and the Prime Minister have already made up their minds to remove him from office and that the show-cause letter is only a ruse. If the process were to start *de novo*, it is hard to imagine how it can proceed in an orderly fashion. The review relief would therefore not be in the public interest.

[102] It seems to me otiose in the circumstances to, by granting the relief sought, expect an orderly process to be put in motion to invoke the machinery for investigating the D-G in terms of the Corruption Act.

The broader public interest

[103] The reasons which were advanced in the second show-cause letter were materially the same as those contained in the first show-cause letter - save for one allegation that Mr. Manyokole also be probed for using against the Minister and the

Prime Minister *'gratuitous and intemperate language in the affidavits filed of record.'*

[104] Although as is common cause, the allegations motivating the Minister's decision to invoke s 4(5) of the Corruption Act are materially the same in both the first and second show-cause letters, remarkably Mr. Manyokole does not engage with them.

[105] The allegations are very specific. The manner in which he had allegedly misconducted himself is stated by reference to specific cases and incidents, including that he is an accused in a criminal case involving obstruction of justice. He is also alleged to have been brought before the Public Accounts Committee on allegations that he frustrated the conduct of criminal investigations against associates. Mr. Manyokole made no reference whatsoever in his founding affidavit to the pending criminal case which was disclosed by the Minister in the affidavit filed in the proceedings seeking the court's clarification of its earlier judgment of 18 February 2021. The allegations are both specific and serious considering that they are made against the person statutorily charged to stamp out corruption.

[106] Against the backdrop of the serious allegations and counter-allegations made by the parties on affidavit, it is important that the statutory process under the Corruption Act is commenced and completed with all deliberate haste, in the public interest. That forum will afford both parties, especially Mr.

Manyokole who feels he could not make certain disclosures on affidavit, to present all the evidence to support the allegations.

[107] It bears repeating that of the 'issues' listed by the Minister to justify the establishment of the tribunal is that Mr. Manyokole frustrated or obstructed prosecution of a former minister of finance for corruption, that he in one case selectively pursued the prosecution of only private individuals and left out public officials, and that he is facing a criminal prosecution. These allegations were on public record when Mr. Manyokole approached court, yet he chose not to engage with them at all.

[108] The net result is that Mr. Manyokole made the choice not to engage with what are very serious allegations and to state for the public record that they are baseless and could not possibly justify the Minister invoking the statutory power under s 4(5) of the Corruption Act.

[109] For all of the above considerations, Mr. Manyokole ought to have been and was properly denied the declaratory and review relief he sought to nullify the establishment of the tribunal to inquire into his fitness to hold office.

The suspension

[110] The court *a quo* came to the correct conclusion that the suspension was unlawful. But that is not the end of the matter. It was required to consider if setting it aside was the appropriate remedy in the circumstances. Mokhesi J took the

view that nothing prevents the Minister from recommending the suspension again. The question is to what end?

[111] In the toxic atmosphere that has developed between the D-G and the Government that seems a moot exercise which will not achieve any practical result; and considering the negative perception that it most likely already created in the public mind it would not engender public confidence in the process.

[112] Mr. Manyokole states in stentorian terms that the Government led by the Prime Minister is determined to get rid of him. Litigation is thus inevitable if any show-cause letter is issued or if any suspension results therefrom. Common sense suggests that because of his perception of persecution it is improbable he will accept being suspended in response to any show cause letter.

[113] In any event, Mr. Manyokole already made clear in his founding affidavit that it is not necessary to suspend him pending the outcome of the tribunal's deliberations. The public spat between the Executive and the D-G will therefore continue unabated and cause great damage to the Kingdom's orderly governance. This matter should proceed to finality with deliberate haste so that the true facts are established in an open and transparent manner.

[114] I am fortified in this view by two further critical considerations. The first is that Mr. Manyokole has been placed

on full pay for the duration of the suspension. That certainly ameliorates the impact of the suspension. Secondly, the tribunal is made up of independent judges, both retired and in office, who will bring an objective and impartial mind to bear on the matter and ensure that Mr. Manyokole is afforded every facility and opportunity to state his case for the public record.

[115] For all the above reasons I conclude that it was not an appropriate remedy to set aside the suspension of Mr. Manyokole and therefore the cross- appeal should succeed. I will revert to this matter when I come to consider costs.

Cross-appeal

[116] The only issue remaining in the cross-appeal is whether Mr. Manyokole should have been mulcted with a punitive costs order for the manner in which he made imputations on the characters of the Minister and the Prime Minister and others who are not cited in the proceedings. That cross-appeal is opposed on the ground that, being an appeal against a costs order, it required leave.

[117] The objection has no merit because the cross-appeal also attacks the order declaring the suspension void – a conclusion which they were entitled to appeal against as of right in terms of s 16(1)(a) of the Court of Appeal Act 10 of 1978. In terms of s 16(1)(b) of the Court of Appeal Act 1978, leave would be required if the only order appealed against is one of costs. That is not the case here.

[118] It will be recalled that the court *a quo* ordered costs against Mr. Manyokole on the ordinary scale, excluding in respect of 5th to 8th appellants. For all of the reasons that I have set out above, this certainly is case where the serious unsubstantiated allegations made by Mr. Manyokole against the Prime Minister and the Minister based largely on hearsay would have attracted a punitive costs order such as was sought against him *a quo*.

[119] On the other hand, the Prime Minister and the Minister's conduct in suspending Mr. Manyokole while the matter was *sub judice* equally calls for censure. It must be made clear that the Government has an obligation to respect the independence of the courts and not to render the courts' decisions *brutum fulmen*. The rule of law requires no less.

[120] The court's disapproval of the unlawful conduct on the Government's part will be marked by denying the Minister and the Prime Minister the punitive costs order they would otherwise be entitled to on account of Mr. Manyokole's reprehensible conduct in the course of the litigation.

Costs of appeal

[121] The Prime Minister and the Minister have achieved substantial success in the appeal and are entitled to the costs of the appeal.

Order

[122] The order I propose is that the main appeal is dismissed and the cross-appeal succeeds in part. The order of the High Court is therefore substituted by the following order:

- (a) *'The application is dismissed with costs, excluding the costs of 5th to 8th respondents'.*
- (b) The Minister and the Prime Minister are awarded costs in the appeal against the D-G.



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree



KE MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



P MUSONDA
ACTING JUSTICE OF APPEAL

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