

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) No.  
32/2021  
CIV/APN/130/2020  
CIV/APN/134/2020  
CIV/APN/135/2020  
CIV/APN/136/2020**

In the matter between

<b>COMMISSIONER OF POLICE APPELLANT</b>	<b>1<sup>ST</sup></b>
<b>STAFF OFFICER TO COMMISSIONER OF POLICE APPELLANT</b>	<b>2<sup>ND</sup></b>
<b>LMPS HUMAN RESOURCES OFFICER APPELLANT</b>	<b>3<sup>RD</sup></b>
<b>SENIOR OFFICERS IN CIV/APN/130/2020 APPELLANT</b>	<b>4<sup>TH</sup></b>
<b>DR 'MOPA TS'IU IN CIV/APN/134/2020 APPELLANT</b>	<b>5<sup>TH</sup></b>
<b>JUNIOR OFFICERS IN CIV/APN/135/2020 SENIOR OFFICERS IN CIV/APN/136/2020 APPELLANT</b>	<b>6<sup>TH</sup> APPELLANT 7<sup>TH</sup></b>

and

<b>LESOTHO POLICE STAFF ASSOCIATION RESPONDENT</b>	<b>1<sup>ST</sup></b>
<b>MINISTER OF POLICE RESPONDENT</b>	<b>2<sup>ND</sup></b>
<b>ATTORNEY GENERAL RESPONDENT</b>	<b>3<sup>RD</sup></b>
<b>MOHATO LEROTHOLI &amp; 22 OTHERS</b>	

**IN CIV/APN/136/2020  
RESPONDENT**

**4<sup>TH</sup>**

**CORAM:** K E MOSITO P  
M N CHINHENGO AJA  
J VAN DER WESTHUIZEN AJA

**HEARD:** 19 APRIL 2022

**DELIVERED:** 13 MAY 2020

### **Summary**

*Police Association and some police officers suing Commissioner of Police in no less than four related applications for promoting certain police officers to senior ranks allegedly on his own without involvement of Police Appointments and Promotions Board, as well as suing the promoted officers, to set aside promotions as unlawful and contrary to law;*

*After initially filing notices of intention to oppose, Attorney General withdrawing such notices believing defendants had no case;*

*Presiding Judge consolidating the cases and at hearing raising mero motu the lack of standing of private legal practitioner engaged by Commissioner of Police and promoted officers after withdrawal of Attorney General and after hearing argument thereon finding such practitioner not entitled to represent them under the aegis of Attorney General's office but not deciding whether such representation in defendants' individual capacity not permissible in the circumstances;*

*Having found against representation by private legal practitioner, presiding Judge proceeding to determine merits of applications without hearing the parties;*

*On appeal Held - presiding judge not having decided whether or not representation by private legal practitioner was altogether not permissible on the facts of the case,*

*declining to decide the issue and leaving it to the High Court to do so on remittal of the cases;*

*Held further that presiding judge fell into error in determining merits without hearing the parties, and accordingly judgments and orders of High Court set aside and cases remitted to be heard and determined by another Judge, subject to him or her giving directions to ensure any outstanding pleadings are filed and litigation proceeds in the ordinary way.*

## **JUDGMENT**

### **CHINHENGO AJA**

#### **Introduction**

[1] The High Court (Makara J) heard four applications together after consolidating them - Case Numbers CIV/APN/130/2020 CIV/APN/134/2020 IV/APN/135/2020 and CIV/APN/136/2020. It however handed down two separate judgments, one covering the first three matters and another the last matter. The judgments are substantially the same especially on the issues that have to be determined in this appeal. It suffices for all purposes to focus only on the first judgment.

[2] The applications before the High Court are referred to herein with reference to their numbers as "130/2020", "134/2020", "135/2020" and "136/2020". These applications were review applications to set aside the promotions of police officers mentioned in each of them. At the time when the judge

considered and disposed of these applications, all the necessary affidavits had apparently been filed except in 136/2020, in which the applicants had not filed answering affidavits.

[3] The court's orders under appeal are reproduced by the Registrar as follows:

In 130/2020 (dated 17 June 2021):

"1. The forty-four (44) promotions announced on the 22<sup>nd</sup> day of April 2020 concerning 4<sup>th</sup> to 47<sup>th</sup> respondents are hereby reviewed, corrected and/or set aside as they are in law in violation of provisions of section 8(1) and (2) of the Lesotho Mounted Police Service Act No 7 of 1998 and Regulation 7 of the Lesotho Mounted Police (Administration) Regulations No. 202 of 2003.

2. Costs of suit are awarded to the applicant."

In 134/2020 (dated 17 June 2021):

"1. The appointment of 5<sup>th</sup> respondent by the 1st respondent is hereby reviewed, corrected and/or set aside as it is in law in violation of Police Service Act 1998 and of Lesotho Mounted Police Service (Administration) Regulations 2003 as amended.

2. Costs of suit are awarded to applicant.”

In 135/2020 (dated 17 June 2021):

“1. The promotions announced on the 22<sup>nd</sup> and 23<sup>rd</sup> day of April 2020 concerning 4<sup>th</sup> to 130<sup>th</sup> respondents are hereby reviewed, corrected and/or set aside as they are in law in violation of Regulation 7 of Lesotho Mounted Police Service (Administration) Regulations No.202 of 2003.

2. Costs of suit are awarded to the applicant.”

In 136/2020:

“That the promotions of the respondents to the respective ranks of Senior Inspector, Superintendent, Senior Superintendent, Assistant Commissioner of Police, Senior Assistant Commissioner of Police, are reviewed, corrected and set aside” and the process leading to the promotions should be stated afresh.

[4] The full judgment of the Court in consolidated cases 130/2020, 134/2020 and 135/2020, which was a reconstruction of an earlier draft of the judgment that had been lost because of a “ransom virus that the information experts both within and outside the Judiciary acknowledged was impossible to resolve”<sup>1</sup>,

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<sup>1</sup> Para 5 of judgment

contains an order on a preliminary issue raised in relation to all the applications as to the authority of the appellants counsel, *Adv. Maqakachane*, a legal practitioner in private practice, to represent them. In terms of that order, the court determined that –

“1. The counsel concerned [*Adv. Maqakachane*] lacks legal credentials to represent the AG and/or the 1<sup>st</sup> respondent [Commissioner of Police] in this matter.

2. The counsel further lacks credentials to represent the AG together with the 4<sup>th</sup> to the 47<sup>th</sup> respondents [promoted officers] since that is not legally allowed.

3. The letter authored by the AG upon which the counsel relies for his proposition that it authorised him to represent the 1<sup>st</sup> respondent, is not interpreted as giving him that mandate.

4. The counsel is, in the context of this case, found to be conflicted by virtue of his own account that he represents the office of the 1<sup>st</sup> respondent at the behest of the 1<sup>st</sup> respondent and that he simultaneously stands for the 4<sup>th</sup> to the 47<sup>th</sup> respondents in their private capacities.

5. There is no order as to costs in the circumstances, it is patently clear that it was not the Government

that had opposed the present proceedings through the AG.”<sup>2</sup>

[5] The court’s orders appearing at the end of the long judgment (consisting of 98 paragraphs) covering 130/2020, 134/2020 and 135/2020 differs from that reproduced by the Registrar, especially in respect of the costs order. It reads:

“1. The promotions of the respondents to the respective ranks of Senior Inspector, Superintendent, Senior Superintendent, Assistant Commissioner of Police, Senior Assistant Commissioner of Police, are reviewed, corrected, and set aside.”

2. The promotions process of the Lesotho Mounted Police in respect of senior ranks of Senior Inspector, Superintendent, Senior Superintendent, Assistant Commissioner of Police, Senior Assistant Commissioner of Police be started afresh in accordance with the law.

3. The promotions of the Lesotho Mounted Police Service to all senior ranks in the class of junior ranks are reviewed, corrected, and set aside.

4. The promotions process to all senior ranks in the class of junior ranks, should be started afresh and be administered in accordance with the law.

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<sup>2</sup> This order appears at para 41 of the judgment

5. There is no order as to costs in the circumstance, it is patently clear that it was not the Government that had opposed the present proceedings through the Attorney General.”

[6] The apparent differences in the orders produced by the Registrar and those in the written judgment must be resolved in favour of adopting those in the judgment as the correct orders of the court. This means that the appeal against the order of costs reflected in the Registrar’s orders falls away.

[7] It is common cause that the judge considered the merits of the applications in the judgment dealing the preliminary point relating to *Adv. Maqakachane* without having heard argument from any of the parties. The judge went to great lengths to justify his decision to do so. The present appeal is against his judgments and orders in all the four matters. At the commencement of the hearing we granted, with the consent of the parties, an application by the appellants for condonation of the late filing of the record of appeal, without making an order of costs.

### **Grounds of appeal and relief sought**

[8] The main ground of appeal for consideration is, in my opinion, that the judge erred in granting judgments and orders without hearing the appellants on the merits. The other



grounds are that he erred in granting the judgments and orders without first determining an interlocutory application by some members of the 1<sup>st</sup> respondent filed on 10 July 2020 seeking a stay of execution of orders in 130/2020 and 135/2020 and declaratory relief, pending the final determination of that interlocutory application; that he erred in granting the orders premised on the determination that *Adv. Maqakachane* had no legal authority to represent the appellants and that the applications before him were not opposed, and finally, he erred in making an adverse order of costs against the appellants.

[9] Additional grounds of appeal, ten of them, were filed on 24 June 2021. No issues were raised by the respondents in regard to the filing. In the additional grounds, the appellants further contend that the judge erred in the following respects-

- (a) granting the applications in reliance on a Savingram from the 3<sup>rd</sup> respondent (the Attorney General) dated 7 May 2020 and an earlier letter from the 1<sup>st</sup> appellant, both of which were not part of the evidence or the record before the court;
- (b) incorrectly interpreting the Savingram;
- (c) finding that the averments by the appellants in the answering affidavits “depended for [their] authenticity and validity upon the question of who qualified to represent them in the litigation thereby conflating

matters of evidence and the issue of legal representation”;

- (d) finding, not only that the private legal practitioner was not entitled to represent the 1<sup>st</sup> appellant, but the other appellants also;
- (e) deciding the applications when answering affidavits had not been filed in one of the consolidated matters, 136/2020;
- (f) holding that he had the discretion to dispense with a hearing of arguments on the merits and to proceed on the assumption of the correctness of parties’ version without hearing them;
- (g) deciding 136/2020 “separately on the basis that there were no answering affidavits filed, while substantially the same issues and questions of law arose in [the other matters]”; and
- (h) holding that the legal practitioner of the appellants claimed that his entitlement to represent them derived from the Savingram from the Attorney General.

[10] The relief sought by the appellants in this appeal is an order setting aside the orders of the High Court and remitting

the four matters to the High Court to be heard by a different judge. Part of the relief is for ancillary orders-

- (a) authorizing and directing respondents to file answering affidavits in 136/2020, if any, and replying affidavits in all the four matters, if any; and
- (b) authorizing appellants to be represented by a legal practitioner in private practice of their own choice.

[11] In my view the real issue before this Court is simply whether the learned judge was correct in deciding the matters before it on the merits without hearing the parties thereon. If he was wrong on that issue, then all the matters must be remitted to the High Court to be disposed of in the ordinary course of litigation. That will also make it, strictly speaking, unnecessary for this Court to decide the propriety of *Adv. Maqakachane* to represent the appellants. The appellants will then have to be represented by whomever they choose, including *Adv. Maqakachane*, provided they do not implicate the Attorney General in that representation.

## **Background**

[12] The presiding judge set out the facts of the cases before him very well and made the same task quite easy for this Court. I quote the relevant portions of the judgment in relation to the facts:

“[6] A foundation of a charge that the impugned promotions is simply that the 1<sup>st</sup> respondent had, in making them, acted contrary to the legislatively provided procedures and even against the substantive law provisions on same. The applicant has motivated its case with reference to the specific developments that demonstrate the procedural improprieties and the corresponding violations of the applicable statutory provisions. To substantiate the charge, it has in its founding affidavit, illustrated how these transgressions were committed. In summarized terms these have been presented thus:

1. On or around the 22<sup>nd</sup> April 2020, the 1<sup>st</sup> respondent published a memorandum through which he announced the promotions of the individually cited 44 senior officers herein, without any prior or current advertisement of the vacant positions for the [eligible] candidates to apply for being considered for the appointments to those offices.

2. The failure to publish the vacant positions of the senior officers violated the fairness, accountability and the transparency which constitute the key pillars of a just and fair administrative right under a constitutional democratic governance which is envisaged

under Regulation 7 of the Lesotho Mounted Police Service (LMPS).

3. Some of the senior police officers had, contrary to Regulation 7, skipped the next ranks. These are the 15<sup>th</sup> to the 17<sup>th</sup> respondents, 25<sup>th</sup>, 45<sup>th</sup>, 46<sup>th</sup> and 47<sup>th</sup> respectively. In this respect, some have skipped two ranks.

4. There was *ex facie* memo announcing the promotions of the concerned senior officers, no reference made to section 8(1) and (2) of the Lesotho Mounted Police Service Act and the authority that elevated them to the senior positions in the Service.

5. At the material time the promotions were made to the senior ranks, there was no Promotions Board to consider the elevation of the police to the senior offices in the Service, which is impliedly acknowledged in the memo addressed by the 1<sup>st</sup> respondent to the Police Authority dated the 18<sup>th</sup> March 2020 requesting it to establish the Board.

6. Most disturbingly, is the averment that these promotions were made notwithstanding there

was a pending case before the retired Peete J in which the promotions of some of the senior officers involved in the present case were challenged. The case referred to is *Lesotho Police Staff Association v Commissioner of Police and 9 Others*<sup>3</sup>."

[13] It is common cause that initially the Attorney general (AG) who is cited as the 49<sup>th</sup> respondent filed his notice of intention to oppose the reviews in the three matters. However, shortly thereafter, the latter withdrew his opposition upon the specific reasoning that the charges against the impugned promotions were legally indefensible and that it would be unethical to resist the applications. This was subsequently confirmed by Adv. L Moshoeshoe of the AG chambers who featured before the court after being ordered by it to ascertain their position over the matter. He however advised the court that the AG has, out of embarrassment, written a letter to the 1<sup>st</sup> respondent telling him that he could secure the services of a private legal practitioner to represent him in the consolidated matters. In the course of the deliberations, he handed over to the court the concerned correspondence.

[14] The final position maintained by the AG in the cases under consideration and its resultant actions, triggered the court to invite the counsel involved to address it on the legal standing of Adv. Maqakachane to represent the 1<sup>st</sup> respondent and the promoted police officers individually. The counsel respectively

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<sup>3</sup> CIV/APN/19/2018

addressed the question. It must be highlighted that at that time the parties had already filed their papers and, resultantly the pleadings were closed. In the meanwhile, the court had fully read the papers placed before it and was postured to revisit them again and again for the purpose of considering the way forward.

[15] Thus after counsel had addressed the court, it retired to contemplate on the representations they had made on the issue of the *locus standi* of the practitioner who featured for the 1<sup>st</sup> respondent. In the process, it transpired to it that its determination over that preliminary legal question could have a direct bearing on the merits of the case. It then emerged further that the papers filed for the parties were closed and that they comprehensively presented the case for each party. In the same vein, it cautioned itself that it is seized with the paper founded and driven proceedings and that the scenario left it with the alternative avenue to consider the merits with the possibility to make a final determination thereon.

[16] The court was elementarily inspired by the preliminary developments to consider deciding the merits of the case on the basis of the papers and to dispense with the address of the counsel for the parties. The developments are the AG had withdrawn his opposition of the applications and withdrawn the representation of his office in the matters. The measures were reinforced by the denunciations that the promotions initiated

by the 1<sup>st</sup> respondent that occasioned the application were illegal to the extent of being legally and morally indefensible.”

[17] Having set out the facts as shown above, the judge considered the preliminary point about *Adv. Maqakachane's* alleged lack of standing to represent the appellants and the justification of his decision to deal with the merits in the absence of any representations or submissions from the parties

### **Exclusion of counsel and deciding merits without hearing parties**

[18] The judge justified his decision to deal with matters before him without receiving submissions, oral or written, from the parties or their legal representatives. His reasoning is interesting and fairly novel. He states that after deciding the preliminary issue he revisited the papers and was satisfied that the pleadings were closed, and each party's case was clear. Additionally, the matter was to be decided on a question of law as to whether or not the promotions were done in terms of the applicable law. He was satisfied that the ruling on *Adv. Maqakachane's* right to represent the appellants had profound consequences on the merits of the cases. He says:

“[44] The court after making the interlocutory ruling on the considered *locus standi*, revisited the papers before it to determine the way forward. This was inspired by the fact that the pleadings were already



closed, and the conspectus of the case presented by each side were clearly placed into perspective. In the process it transpired that the application was predominantly founded upon the question of law on the lawfulness or otherwise of the promotions that formed its subject matter.

[45] The court further discovered that the ruling that counsel did not have the locus has profound consequences on the merits of the case. ***In this respect, it found that the effect of the questioned representation should be considered right from the moment he received the instructions from the 1<sup>st</sup> respondent and the promoted officers and transcend into the stage where they deposed to their affidavits in accordance with his advice. His appearance before the court on their behalf was recognised as the culmination of the stated preceding developments. Thus, the representation by a counsel should not be restricted to the appearance before the court but be perceived as consisting of several transactions executed by the lawyer.***

[46] ***After the rejection of the locus of the counsel, it followed that in the circumstances of this case, the advice he gave to the 1<sup>st</sup>***

***respondent and the affidavits drawn on that basis should naturally fall apart.*** This place the respondents in a position no better than their counterparts in CIV/APN/136/2020 where there were no answering affidavits filed and, consequently, this *inter alia* led to the granting of prayers in the application by default. In any event, counsel never, from the onset, qualified to feature for the 1<sup>st</sup> respondent in his official capacity or to do so at the behest of the AG and simultaneously for the promoted officers in their private status without any pleaded [case] on how this would be in the public interest.”

**[emphasis added]**

[19] The reasoning of the judge, which he does not support with authority, is clearly to the effect that *Adv. Maqakachane* had no right to represent the appellants, and by some parity of reasoning, that the affidavits he may have drawn up for the appellants are *ipso facto* of no validity and, that being the case the matters could be disposed of as if they were not defended. This understanding is shared by counsel for the 1<sup>st</sup> respondent who submits:<sup>4</sup>

“The Honourable Court held that the failure of the counsel to establish credentials to represent the applicants renders the legal advice he gave them, opposition he filed, pleadings he made, to be null and

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<sup>4</sup> Para 1.10 of 1st respondent heads of argument

void. It nullified all incidental applications brought by the same counsel on their behalf.”

[20] Whilst the judge may have been correct that Adv. Maqakachane had no right to represent the appellants in their official capacities of Commissioner of Police in the one case, and as serving members of the police service in the other cases, there remains something to be said about the Attorney Generals Savingram and its correct interpretation; about the right of the promoted officers, acting in their personal capacities as litigants in a matter in which they are sued individually, to represent themselves or to be represented by a legal practitioner of their choice; and in the nullity of appellants’ affidavits merely because they were prepared by *Adv. Maqakachane*.

[21] In a seemingly contradictory approach, the judge says the following in the next paragraph:

[47] Interestingly, when the court traversed the papers filed by both sides, it got the impression that they respectively comprehensively, systematically, adequately, and simplistically with admirable power of articulation captured their competing cases. The same applies to the manner in which they supported their analysis and submissions with reference to the applicable laws to provide guidance to the court. Thereafter it concluded that the founding affidavit

and its augmentation through the replying affidavit sufficiently constituted the evidence and pleadings placed before the court by the applicant. On the other hand, it conversely recognized that the answering affidavits presented by the respondents project a similar picture.”

[22] The next point the judge makes in support of his approach is that, because in application proceedings a party stands and falls by its affidavits, the pleadings having been closed in this case,

“... it found no need to be addressed on the same since the court did not visualize any unique discourse over the matter ..., it found no element of exceptionality in the facts that occasioned the litigation, the issues involved, and the relevant laws save for the possibility of self-creation of unnecessary sophistication by the counsel to technically derail the course of justice.”<sup>5</sup>

[23] The judge cites *Mohale Tunnel Contractors v Lesotho Security (Pty) Ltd*<sup>6</sup> as one of the many authorities supporting the principle that in application proceedings a party stands or falls by his affidavits. He also refers to *Southern Lesotho Construction (Pty) Ltd v MM Construction (Pty) Ltd*<sup>7</sup> and *Tanki Thamae v District Agricultural Officer and Others*.<sup>8</sup> Indeed, this

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<sup>5</sup> Para [49] of judgment

<sup>6</sup> CIV/APN/490/99 [2000] LSHC 98 (02 February 2000)

<sup>7</sup> CIV/APN/347/2004

<sup>8</sup> VIV/APN/317/2012 [2013] LHSC 62

statement has been made in many decided cases but it is understood to be restricted to the averments of fact in the affidavits . He relies on *Monyako v Lesotho Tourist Board and Others*<sup>9</sup> and *'Mako Mohale v 'Mako Mohale*<sup>10</sup> to justify going into the merits without hearing the parties.

[24] The facts of *'Mako Mohale*, which the judge outlines in his judgment are not, contrary to what he says, like those in present case in any material sense. In that case the issue raised was the *locus standi* of the litigant and not the litigant's legal practitioner. That being the situation there was no defendant in that matter and entering judgment as if the matter was undefended, was perhaps correct.

[25] In dealing with the merits of the case, the judge considered the case made by the respondents on the one hand and that made by the appellants on the other as contained in their affidavits.

[26] On the respondents' side it is broadly that they were discriminated against in the process leading to the promotion of their counterparts; denied the opportunity to apply for the vacant positions; promotions to senior ranks were made contrary s 8 of the Police Service Act and regulation 7, which respectively, empowers the Police Appointments and Promotions Board to sit and consider promotions and provide for transparency and accountability of the promotion process,

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<sup>9</sup> (LAC/A/11/2002) [2007] LSLAC 3

<sup>10</sup> CIV/A/08/2015

including advertisement of vacancies, which was not done; the promotions were made arbitrarily and unilaterally by the 1<sup>st</sup> respondent; the promotions were made notwithstanding the fact that there was litigation concerning earlier promotions of other senior officers; the promotions were generally unreasonably made; and the 1<sup>st</sup> respondent failed to produce a record of proceedings of the Police Appointment and Promotions Board despite an order of court requiring him to do so.

[27] On the appellants' side the defence was broadly that the respondents were prohibited from litigating on promotions by sections 66 and 67 of the Police Service Act and the requirement that any grievance relating to promotions should be addressed to the relevant authorities through the Police Negotiating Council; the litigation by the respondents runs counter to clauses 4 and 5 of the 1<sup>st</sup> respondent's constitution on the aims of the organization and scope of its mandate; the promoted officers were already in the new posts and receiving salaries and benefits commensurate therewith; the respondents' case is one of *quo warranto* generally available only to the Attorney General and, in exceptional cases, to the promoted officers concerned; the respondents, in particular the 1<sup>st</sup> respondent "has no legal interest in the matter [and] ..is just [a] meddlesome interloper in the management, administrative and police aspects in the terms and conditions of service of its members;"<sup>11</sup> 1<sup>st</sup> respondent had no authority to conduct the litigation in the absence of a resolution by its Executive

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<sup>11</sup> Para [60] of judgment

Committee passed with the requisite quorum; there was non-joinder of the Police Appointments and Promotions Board; there was reasonable justification proffered by the 1<sup>st</sup> appellant that challenges on the ground forced him to make the promotions, namely, the Covid 19 pandemic, shortage of officers across all ranks which compromised efficiency and effectiveness, the lack of cooperation from the Minister of Police who frustrated the establishment of the Police Authority and obstructed execution of that body's mandate.

[28] In the two preceding paragraphs, I have outlined the respective contentions of the parties only to highlight the fact that these were real and important issues on which the parties should have been heard. The intention in so highlighting the issues is not to decide them. That is for the High Court to do upon giving the parties the opportunity to argue their respective cases.

[29] I must emphasise that the appellants are parties to proceedings instituted by the respondents challenging the right of the 1<sup>st</sup> appellant to act in the manner he did and seeking to reverse the promotion of no less than 175 police officers to senior ranks. Both the 1<sup>st</sup> appellant and the promoted officers have a right to present their cases at a hearing. Where the Attorney General has declined to represent them, it is clear at least in relation to the promoted officers, that they have every right to defend themselves in the proceedings and vindicate, if they can, the propriety of their promotion. This is so even if, as

correctly observed by the learned judge *a quo*, their fortunes are largely dependent on the propriety of the action of the 1<sup>st</sup> respondent.

[30] It is, however, less clear whether the 1st appellant can, despite the opinion of the Attorney General and the Minister of Police that he acted unlawfully, defend his decision on his own in the circumstances of this case and without the involvement of the Attorney General. It is not necessary to decide this point because it is one properly for the judge hearing the case in the High Court to determine at first instance. It is doubtful that the law is that in every case in which the Attorney General has declined to defend a public official, that official may not defend himself in respect of any action taken by him in his official capacity and in performance of his official duty. It may well be that when a court of law interrogates the issues it may find that the Attorney General was wrong in declining or refusing to defend the public official concerned.

[31] In deciding the right of parties sued in any action to be heard in their defence, I find the judgment of the High Court quite illuminating. Under the subheading "*The Human Rights Dimension in the Matters*"<sup>12</sup> the judge sets out the imperatives in matters of this kind. Not much more can be added to what he says:

“[94]This court has a constitutionally ordained vertical obligation to protect and advance *human*

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<sup>12</sup> Paras 92 to 95 of judgment



*dignity, freedom and equality* as key values and characteristics in a constitutional democracy. The instant proceedings represent one of the typical scenarios in which the court must be alive to its stated constitutional imperative. This is sanctioned by the fact that the genesis of this litigation is basically a protestation over the violations of procedural rights of the members of the applicant who lament that the Commissioner of Police perpetually discriminates against them when making promotions. To illustrate their grievances, they complain that they are adversely treated differently from their colleagues with whom they are similarly situated as citizens and policemen of various ranks.

[93] Towards the end, it must be recorded that all members of the Association [1<sup>st</sup> respondent], every citizen or alien including public service employees of any stature and members of the disciplined establishments have a right to *a lawful, reasonable and procedurally fair administrative action* in their deals with Government structures and systems. This is resonated in the constitutional *right to fair hearing and the observance of the right to be heard*. Actually, these are endowments which are inherent in man just by virtue of being human. It could be perceived as inhuman and a violation of the human dignity of a member of the Applicant who suddenly sees a junior

officer promoted over him/her without a clear justification for that. This would be bound to generate disgruntlement, low working morale and instability within the service.

[94] The right of the members of the 1<sup>st</sup> respondent to *a lawful, reasonable and procedurally fair administrative action* in their deals with Government, in particular the Commissioner of Police, is definitely readable into our Constitution. This is traceable from the fact that this right necessitates good governance which is in the main, characterized by transparency and accountability. It is in recognition of these realities that South Africa enacted the Promotion of Administrative Justice Act.

[95] The significance of the ideals stated in the preceding paragraph were sufficiently affirmed in *Mthembu Mahanyele v Mail & Guardian Ltd & Another*<sup>13</sup> in these words:

‘All spheres of government and all organs of State must provide effective, transparent, accountable and a coherent government for the Republic as a whole.’

[[96] |The Court on an *obiter dictum* note, fears that there could have been extra ordinary circumstances

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<sup>13</sup> 2004 ZASLA 67

which compelled the 1<sup>st</sup> respondent to effectively deviate from the law by resorting to policy based expediency when considering the promotions. He has in all fairness to some extent, sought to take the court into confidence about the exigency situation that compelled him to do so. This may have seemingly been authored by the extra-ordinary circumstances created by some third force in the background.”

[32] From the last quoted paragraph of the judgment, it is apparent that the judge entertained some sympathy for the 1<sup>st</sup> appellant deriving from an understanding that circumstances may have forced him to act in the way he did, a matter that he sought to justify in his affidavit but on which the judge did not give him the opportunity to argue so as to persuade the court to his point of view. The “**right to a fair hearing and the observance of the right to be heard**” which the judge so ably articulates at quoted paragraph [93] of his judgment, should be extended to everyone, as he says. This right was denied to the appellants by the court. It must be afforded to them.

### **Discussion, Submissions and Conclusion**

[33] Submissions of counsel for 1<sup>st</sup> and 4<sup>th</sup> respondents *Adv. Mohanoe* and *Adv. Molise* supported the decision of the judge

on excluding *Adv. Maqakachane* from representing the appellants and deciding the merits without hearing the parties. They relied for that on the authorities referred to by the learned judge. It is significant that *Adv. Mohanoe* casts more light on what happened. He says:

“The Attorney General withdrew the Notices of Intention to oppose the applications and the Commissioner of Police, Senior Officers, Dr Ts’iu and Junior Officers instructed **Clark Poopa** (who in turn instructed *Adv. Maqakachane*) who filed notices to oppose 130, 134, 135, and 136 applications, respectively. They then filed and delivered their answering affidavits, respectively.”

[34] The significance of this exposition of what happened lies in the fact, which I understand to be *Adv. Maqakachane*’s contention, that after the Attorney General withdrew the notices of intention to oppose, fresh notices were filed by private legal practitioners, *Adv. Maqakachane* and attorney Clark Poopa, on the instructions of the 1<sup>st</sup> respondent and his co-appellants. Reading the judgment of the court I am unable to find that the learned judge decided the issue whether in circumstances where the Attorney General declines to represent or defend a public official, that public official cannot take up the cudgels and defend his action albeit performed by him in his official capacity and by extension of reasoning, at his own expense.

[35] What I understand the learned judge to have decided is that where the Attorney General declines to represent or defend a public official for any reason whatsoever, a private legal practitioner cannot be engaged to defend such public officer under the aegis of the Attorney General and/or at expense of the public purse. The narrow issue I have identified not having been decided by the High Court, it is thus not before this Court for decision. Argument by counsel on all sides focussed on the consequences of the Attorney General declining to represent a public official, the result of which, they contend, is that a private legal practitioner cannot be engaged purporting to be acting for a public official with the blessings of the Attorney General.

[36] It seems to me therefore that the learned judge may have been correct that a private legal practitioner may not represent a public official without the Attorney General's consent or blessing. His decision, however, did not answer the factual situation and difficulty created by the instruction of the appellants to *Adv. Maqakachane* and attorney Clark Poopa. If the concern was the issue of costs, as it seems to be even going by the Ugandan authority cited in the judgment and by *Adv. Mohanoe - Gordon Sentib & Others v IGGS*<sup>14</sup> - that would be a separate matter. It is not inconceivable that a public official who defends himself in a matter the Attorney General has refused to represent him may win that suit, and thereafter return to the Attorney General for reimbursement of his costs.

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<sup>14</sup> CIV/A/6/2008 [2010] UGCC 5

[37] The foregoing points in the direction that the appellants should have been permitted to be represented by *Adv. Maqakachane* and attorney Clark Poopa subject to clarification that the Attorney General would not be responsible for any costs of suit. At the very least they should have been given the opportunity, acting in person, to persuade the court to their view of the litigation. In this connection it must be said that the learned judge's finding that the appellants' papers and affidavits were invalid by reason of *Adv. Maqakachane* advising in relation to them or preparing them is a fairly novel proposition. Documents and affidavits of the litigants are the litigant's documents and affidavits. The lawyer preparing them or advising about them is an agent of the litigant. To cast aspersions on the validity of the appellants' affidavits and adjudge them to be null and void, in the way that the learned judge did, is not in keeping with the generally accepted position that the affidavits and documents filed in any proceeding are those of the litigating parties and not their legal representatives.

[38] Coming now to the issue of deciding the merits without hearing the parties, *Adv. Maqakachane* submitted that s 12(8) of the Constitution provides for a fair hearing in the determination of civil rights and obligations. A denial to a party of the opportunity to address the court on the merits of the case does not meet or promote the standard set by s 12(8). In this regard, counsel cites seminal authority - *Vice-Chancellor of*

*the National University of Lesotho v Putsoa*<sup>15</sup>, which is to the following effect:

“In the first place - and counsel before us confirmed - that the hearing which preceded her judgment was confined in its ambit to the appellant’s *in limine* defences. In effect, there was a separation of issues: full argument was heard on the preliminary issues, and none on the merits. Yet the learned acting judge purported not merely to dismiss the *in limine* defences, but to deal with the merits too. She made a finding on these without hearing full argument, and issued an order dismissing the entire application, with costs.

[9] In the circumstances she had no entitlement to do so. If the learned judge did not wish to be confined in her ruling to the *in limine* points, she should have said so in terms to counsel, and given them a proper opportunity to address the merits. In similar circumstances, Corbett CJ said this:

‘It was undoubtedly procedurally incorrect for the trial judge to have thus telescoped the proceedings and this irregularity held potential prejudice [for the parties]’.

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<sup>15</sup> LAC(2000-2004) 458 para [8] - [11]. The following cases are also cited in this connection - *Ramaqele v Ramaqele* (C of A (CIV) 5/2012) [2012] LSCA 27 (27 April 2012) para [10] -[11]; *National independent Party (NIP) v Manyeli* C of A (CIV) No. 1of 2007; *Tumisang Ranthamane v Selogile Family Trust* C of A (CIV) No. 25 of 2020 (14 May 2021); *Abubaker v Letuka* LAC (2009 - 2010) 100, para [4] - [6]

(*Marsay v Dilley* 1992 (3) SA 944 (A) at 963D). As a consequence, the appeal in that matter was allowed and the matter remitted for hearing before another judge.

[10] What the court *a quo* did in this matter was not only in breach of basic procedural principles. It was also materially unfair. Not only at common law but as an entrenched right under the Constitution (s 12(8)), litigants are entitled to a fair hearing. In this case they were not given one in relation to the merits of the matter.

[11] On this basis alone the judgment and orders must be set aside.”

[39] The learned judge unfortunately fell into the same error as in *Putsoa*.

[40] In conclusion, the judgments and orders of the High Court in the consolidated cases should be set aside. For the avoidance of doubt, and for reasons stated in this judgment, this Court declines to make a determination on the representation of the appellants by a legal practitioner in private practice: that is entirely up to them. In light of the interconnectedness of the cases implicated in this appeal, it suffices to set aside the judgments and orders of the court *a*



*quo* because that court erred in determining the merits of the cases before it without hearing the parties, and to remit the matters to the High Court with a direction that the pleadings that are outstanding should be filed and that the cases be heard holistically in the normal course of litigation.

[41] Regarding costs it is my considered view that because this case involves police authorities and their officers, it is one in which it is not in the best interests of the Police Service to make an order of costs against either of the contending parties. The parties have to bear their own costs of appeal.

[42] Accordingly, it is ordered that-

1. The appeal succeeds and the judgments and order of the High Court in Case Numbers CIV/APN/130/2020, CIV/APN/134/2020, CIV/APN/135/2020 and CIV/APN/136/2020 are set aside. The cases are remitted to the High Court for hearing before another Judge.
2. The judge to whom these matters are allocated shall give directions in relation to the filing of any outstanding pleadings.
3. No order of costs of appeal is made; the parties shall bear their own costs.



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**MH CHINHENGO  
ACTING JUSTICE OF APPEAL**

I agree



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**K E MOSITO  
PRESIDENT OF THE COURT OF APPEAL**

I agree



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**J VAN DER WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANTS:** ADV T MAQAKACHANE  
**FOR 4<sup>TH</sup> RESPONDENT:** ADV M A MOLISE  
**1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS:** ADV N LESENYEHO and  
ADV T MOHANOE