

IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU
55/2022
0013/2022**

**C of A (CIV)
Const Case No.**

In the matter between: -

**ATTORNEY GENERAL
THE PRIME MINISTER
APPELLANTS**

**1ST APPELLANTS
2ND**

AND

KANANELO BOLOETSE

RESPONDENT

In consolidation:

IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU
No.0015/2022**

**C OF A (CIV) NO.55/2022
Const. Case**

In the matter between: -

**THE ATTORNEY GENERAL
THE PRIME MINISTER
AND
ADV. LINTLE TUKE**

**1ST APPELLANT
2ND APPELLANT

RESPONDENT**

DATE OF COURT ORDER:

19TH SEPTEMBER 2022

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

Date of Hearing: 19 September 2022
Order granted: 19 September 2022
Reasons for judgment: 11 November 2022

SUMMARY

Locus standi — party that approached the High Court for nullification of a state of emergency declared and the recall of a dissolved Parliament — such parties found to have had the necessary *locus standi* to mount the challenge —
Unconstitutionality of the state of emergency and recall of the Tenth Parliament — Consequences thereof.
Appeal dismissed with costs.

JUDGMENT

MOSITO P et CHINHENGO AJA:- Background

[1] On Monday, 19 September 2022, this Court dismissed, with costs, an expedited appeal brought by the appellants against the judgment of the High Court exercising constitutional jurisdiction. We indicated that we would provide reasons for the order on/or before the 11th day of November 2022. We also indicated that there are no reasons to alter the order of the

High Court. We now proceed to render the reasons for our decision.

Factual framework

[2] The present respondents filed two separate constitutional motions in the High Court. The High Court consolidated the two cases and consequently handed down a composite judgment on 12 September 2022.

[3] The cases sought to impugn the Prime Minister's declaration of a state of emergency and the resultant recall of Parliament by His Majesty, The King. The reliefs sought were the same save one seeking the nullification of any business Parliament may have concluded pending the outcome of the litigation as Parliament continued with its business despite the ongoing judicial proceedings.

Issues for determination by the Court

[3] The narrow questions we are required to determine are as follows:

- (a) Whether the respondents had *locus standi* to institute the proceedings in the court *a quo*.
- (b) Whether the declaration of the state of emergency by the Prime Minister was contrary to the Constitution.
- (c) Whether the recall of the dissolved Parliament was constitutional.

The law

[4] It is apposite to proceed to summarise the relevant provisions of the Constitution for the purposes of this appeal. Section 1 of the Constitution provides that Lesotho shall be a sovereign democratic kingdom. Section 2 provides that the

Constitution is the supreme law of Lesotho, and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void. Section 154 provides that “law” includes: (i) any instrument having the force of law made in exercise of a power conferred by a law; and (ii) the customary law of Lesotho and any other unwritten rule of law, and “lawful” and “lawfully” shall be construed accordingly. Thus, the Constitution is the supreme law of Lesotho. The Constitution has placed on an independent, neutral and impartial judiciary the duty to construe and apply the Constitution and statutes, and protect guaranteed fundamental rights and freedoms, where necessary.¹ It is not a responsibility which the courts may shirk or attempt to shift to Parliament.

[5] Chapter II of the Constitution provides for the protection of fundamental human rights and freedoms. Amongst these rights is the right to participate in government. This right embodies a person’s inalienable right to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote or to stand for election at periodic elections under the Constitution, under a system of universal and equal suffrage and secret ballot; as well as, to have access, on general terms of equality, to public service.

[6] The Constitution goes further to provide for the enforcement of protective provisions. Section 22(1) provides that “[i]f any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him ...then,

¹ Roodal v. The State (Trinidad and Tobago) [2005] AC 328 at para 34.

without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

[6] Section 23(1) provides that, in time of war or other public emergency threatening the nation’s life, the Prime Minister may declare that a state of emergency exists for the purposes of Chapter II. This means that the section 23 state of emergency can only be declared to protect fundamental human rights and freedoms and no other.

[7] Section 84 (2) provides that if, after a dissolution of Parliament and before the holding of a general election of members of the National Assembly, the King is advised by the Council of State that, owing to a state of war or a state of emergency in Lesotho, it is necessary to recall Parliament, the King shall recall the Parliament that has been dissolved and that Parliament shall be deemed to be the Parliament for the time being (and the members of the dissolved Parliament shall be deemed to be the members of the recalled Parliament), but the general election of members of the National Assembly shall proceed and the recalled Parliament shall, if not sooner dissolved, stand dissolved on the day immediately preceding the day fixed for such general election or, if more than one such day, the first of such days.

[8] The Constitution goes further to set out the principal institutions of the State which reflect its democratic character. Chapter VIII deals with the executive authority of Lesotho. It provides that the executive authority of Lesotho is vested in the King and, subject to the provisions of the Constitution, shall be exercised by him through officers or authorities of the

Government of Lesotho. Section 87 deals with the Prime Minister, who is appointed by the King acting in accordance with the advice of the Council of State.

[9] Chapter VI deals with Parliament. Section 54 provides that a Parliament shall consist of the King, a Senate and a National Assembly. The National Assembly is composed of one hundred and twenty elected members. The Senate is composed of the twentytwo Principal Chiefs and eleven other Senators nominated by the King acting in accordance with the advice of the Council of State.

[10] Section 85(1) provides that, subject to its provisions, Parliament may alter the Constitution. On the wording of section 85 (3)(a), a bill to alter any of the following provisions of the Constitution, namely: section 85, sections 1(1) and 2, Chapter II except sections 18(4) and 24(3), sections 44 to 48 inclusive, 50(1) to (3), 52, 86, 91 (1) to (4), 92, 95, 103, 104, 107, 108, 118(1) and (2), 119(1) to (3), 120(1), (2), (4), and (5), 121, 123(1), (3), (4), 125, 128, 129, 132, 133 and sections 154 and 155 in their application to any of the provisions mentioned in this paragraph; shall not be submitted to the King for his assent unless the bill, not less than two nor more than six months after its passage by Parliament, has, in such manner as may be prescribed by or under an Act of Parliament, been submitted to the vote of the electors qualified to vote in the election of the members of the National Assembly, and the majority of the electors voting have approved the bill. This is a requirement for a referendum.

[11] The proviso to the above provision states that if the bill does not alter any of the provisions mentioned in paragraph (a)

and is supported at the final voting in each House of Parliament by the votes of no less than two-thirds of all the members of that House, it shall not be necessary to submit the bill to the vote of the electors. This means that if the bill alters any of the provisions mentioned in paragraph (a), even if it is supported at the final voting in each House of Parliament by the votes of no less than two-thirds of all the members of that House, it must be submitted to the vote of the electors.

Consideration of the merits of the appeal

[12] In order to seek redress for a violation of fundamental rights and freedoms, a litigant must first have *locus standi* to bring a claim. The adjudication over *locus standi* is a central function of the High Court. A key consideration during adjudication by the High Court is how claims related to fundamental rights and freedoms are conceptualised and the availability of / for the judicial review of decisions taken by the executive and legislative branches of government in these areas.

[13] The first ground of appeal before us is whether the court *a quo* erroneously concluded that the respondents herein (as applicants in the court *a quo*) had *locus standi in judicio* to institute the two consolidated applications. In determining whether a person has *locus standi* in a matter, a court must assume that the allegations made by that person in the case are true or correct. Therefore, to answer this ground of appeal, we consider it apposite to first turn to the pleadings.

[14] In paragraph 1 of his founding affidavit, Mr Boloetsi avers that he is a male Mosotho adult. He goes on to aver in paragraph 13 of his founding affidavit that he is bringing the

application in his own interest as a Mosotho because the declared state of emergency directly impacts on his constitutional rights. He avers further that the Constitution protects his right to participate in government (section 20 of the Constitution) [which is allegedly being violated in this case].

[14] In the past, this Court has held that in cases of allegations of violation or likely contravention of section 20 (1) (a) of the Constitution, the aggrieved person is given the right to go direct to the court.² The litigant's right to bring an application, and therefore his standing to do so in this regard, is circumscribed by Section 22 (1).³

[15] Chapter II of the Constitution contains provisions on the protection of fundamental human rights and freedoms. Section 20

of the Constitution provides that: [e]very citizen of Lesotho shall enjoy the right- [a], to take part in the conduct of public affairs, directly or through freely chosen representatives; [b], to vote or to stand for election at periodic elections under the Constitution under a system of universal and equal suffrage and secret ballot;

[c], to have access, on general terms of equality, to public service. [16] Since the Prime Minister may declare that a state of emergency exists for the purposes of Chapter II, it is clear that inelegance in

drafting apart, the case being alleged by Mr Boloetsi is that his right to participate in government (section 20 of the

² Mofomobe and Another v Minister of Finance and Another, Phoofolo KC and Another v the Right Hon Prime Minister C of A (CIV) 29/2017.

³ Ibid.

Constitution) was likely to be contravened in relation to him. These averments established his *locus standi* under the Constitution.

[17] In paragraph 14 of his founding affidavit, Mr Boloetsi avers that the insistence on the common law rule whereby standing requires a direct and substantial interest is myopic, out of sync with public law litigation and inconsistent with the protection of the rule of law and legality within a constitutional State, thereby undermining the supremacy of the Constitution. In paragraph 15, he avers that this common law rule excludes members of the public from participating in government through judicial intervention since they must prove that they have a direct and substantial interest in the subject matter of the litigation. In my view, this complaint is a result of a conflation of principles governing constitutional law *locus standi* and common law principles on *locus standi* and was ill-conceived.

[18] Under our common law, *locus standi* denotes either the capacity of a party to litigate or that the litigant has a legally enforceable right or interest, enforceable by him or her. A litigant must plead and prove that he or she has a direct and substantial interest in the subject matter and the outcome of the suit. *Locus standi* is a procedural construct which is usually raised and considered before entering upon the merits of a case. Once *locus standi* is successfully raised against a litigant, it usually puts a matter to rest.

[19] In a catena of decisions, this Court has had to consider the issue of *locus standi*.⁴ The Constitution's text does not make reference to the common law standing requirements, and nowhere does it require that a person should have a "direct and substantial interest" in the subject of the litigation in order to have standing. In those cases, *locus standi* was almost invariably pleaded and particularised either on private law rights (private law *locus standi*) or administrative law rights (public law *locus standi*). As Cameron JA once put it, legal standing means 'the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted'⁵. It, therefore, means the right of the applicant to assert a claim.⁶ The requirements of the constitutional law *locus standi* under section 22(1) of the Constitution, are conceptually distinct from those required by the common law.

[20] Section 22(1) of the Constitution provides that "[i]f any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to

4 In *Lesotho Human Rights Alert Group v. The Minister of Justice and Human Rights; the Director of Prisons and the Attorney-General* C. of A. (Civ) No. 27/94 at 8 -9, this Court dismissed an appeal because the appellant had no *locus standi* under the Constitution to institute the proceedings attempting to champion the interests of some inmates. In *Mofomobe and Another v Minister of Finance and Another, Phoofolo KC and Another v the Right Hon Prime Minister*, C of A (CIV) 29/2017, this Court rejected the first appellant's *locus standi* for lack of a direct and substantial interest in relying on the Constitution. In *Dr Kananelo Mosito and 6 others v Qhalehang Letsika and 3 others*, C of A (CIV) 9/2018, this Court set aside the judgment of the High Court in which the High Court had held that the respondents had *locus standi* to challenge the appointment of the appellant as President of the Court of Appeal. The Court set aside the said judgment *inter alia* because the applicants lacked *locus standi* within the context of section 22 (1) of the Constitution of Lesotho 1993. In *Justice Maseshophe Hlajoane and 4 Others v Letsika and 2 Others* (C of A (CIV) 66/18), this Court set aside the judgment of the High Court, *inter alia*, on the basis that the applicants lacked *locus standi* within the context of section 22 (1) of the Constitution of Lesotho 1993. In *Lesotho Human Rights Alert Group v. Minister of Justice and Others* (supra) at 99.

5 *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg and Another* 2009 (1) SA 317 (SCA) ([2008] ZASCA 104) para 19.

6 *Smyth and Others v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA) para 54.

be contravened in relation to him..., then, without prejudice to any other action

with respect to the same matter which is lawfully available, that person ... may apply to the High Court for redress.” Thus, the jurisdiction conferred by section 22(1) is derived from or based on an allegation of actual or prospective contravention of a fundamental right or freedom.⁷ The mere allegation of such contravention is sufficient to engender constitutional jurisdiction in the High Court to hear and determine the application in which the allegation is made.⁸

[21] A word of caution! The right to apply to the High Court under section 22(1) of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an essential safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.⁹

[22] We now turn to the second respondent’s case. In paragraph 4 of his founding affidavit, Mr Lintle Tuke (an advocate of this Court) avers that he has a constitutional legal standing to bring the application because this is a rule of law review, which is provided for under the Constitution. When the Prime Minister decided to declare a state of emergency under section 23 (1) of the Constitution, he exercised a public power which was subject to a rule of law review. In the same vein, this allegation by Mr Tuke was made in identical circumstances as

7 Permanent Secretary v. de Freitas (1995) 49 WIR 70 at 74 and 75, per Sir Vincent Floissac CJ.

8 Ibid.

9 Kemrajh Harrikissoon v. Attorney-General (1979) 31 WIR 348 at 349, per Lord Diplock.

those of Mr Boloetse. We find that he also had *locus standi* under section 22(1) of the Constitution.

[23] Section 2 of the Constitution provides that the Constitution of Lesotho is the supreme law of Lesotho, and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void. Does this confer *locus standi* on every person in Lesotho, without more, to institute proceedings in court against any authority for non-compliance with the Constitution? The concept of the rule-of-law review has its origin in English law. The grounds recognised by the English courts for interference in decisions subject to the rule-of-law review are substantially similar to the ones recognised by our courts as justification for a rule-of-law review. To call it a rule of law review is merely an appellation because the principles underlying such a review are the same as any other review.

[24] In our view, the requirement that government should observe the law must be a constitutional priority which the courts should recognise. We cannot imagine any principled reason for nonobservance of the Constitution. While the standing principle poses important questions about the meaning of the rule of law, the Constitution, statute law and common law coalesce into one legal system.¹⁰ The Constitution has a direct effect on statute law and common law as well as an indirect radiating influence on both.¹¹ There is, however, no textual basis for the extension or broadening of the concept of *locus standi* in Lesotho's Constitution as it presently stands. As this Court stated in *Hlajoane's case (supra)*, the expansion or

¹⁰ Roodal v. The State (Trinidad and Tobago) [2005] AC 328 at para 8.

¹¹ Ibid.

broadening of the concept of *locus standi* in former British colonies is a legislative act.¹²

[25] It is evident from the preceding discussions that these two respondents (applicants in the court *a quo*) have the right to participate in government as they have alleged. They, therefore, had *locus standi* to bring the applications in the court *a quo*.

Declaration of state of emergency

[26] The respondents' main argument rests on *locus standi* to the extent that their legal representatives dealt with this one issue only in their main heads of argument. In this regard, they stated"-

"We therefore emphasise and perhaps underscore the point of *locus standi* as argued in the preceding paragraphs. This appeal on this point alone must be upheld, and the applications of each of the respondents be dismissed."

[27] It would seem the appellants' legal representatives had second thoughts about the adequacy of their written submissions which focused on *locus standi* only. They decided to deal with the merits of the appeal and address the issue of the declaration of the state of emergency in supplementary submissions filed of record on 18 September 2022. Therein they make submissions concerning sections 23 and 84(2) of the Constitution, both on declaration of a state of emergency. They

12 Justice Maseshophe Hlajoane and 4 Others v Letsika and 2 Others (C of A (CIV) 66/18) Para [47].

contend that the court *a quo* failed to interrogate the meaning and scope of or define a state of emergency “when the case of the respondents was simply that there was no state of emergency but a political failure by the legislature and the executive arm of government.”¹³ They state that they “loathe to rely

on foreign authorities because of the peculiar circumstances that triggered the litigation in issue”, and refer to the remarks of Kriegler J in *Bernstein v Bester*¹⁴ where he said:

“... I wish to discourage the frequent – and I suspect, often facile – resort to foreign authorities. Far too often, one sees citation by Counsel of, for instance, an American judgment in support of a proposition relating to our Constitution without any attempt to explain why it is said to be in point.

A comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's Constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision.”

[28] Not only were counsel themselves relying on a foreign authority, but they exposed themselves to the very criticism in Kriegler J's remarks. The main point in his remarks is that it is pointless to refer to foreign authorities without explaining their relevance to the issues at hand. He says it would be folly not to

¹³ Paras 1.2 and 1.3 of supplementary heads of argument

¹⁴ 1996 (2) SA 751 (CC) at para133

ascertain how another jurisdiction has dealt with an issue in *pari materia* to the one before this court where the provision under consideration is modelled on a provision in that other jurisdiction. There is, therefore, nothing wrong with relying on foreign authorities, as did the court *a quo*, if those authorities are relevant and assist in interpreting a provision under consideration by a court.

[29] The starting point in considering the propriety of the declaration of a state of emergency is the order of the High Court on that issue. It is that order upon which the other orders, consequential in nature, are dependant in the sense that without nullifying the declaration of emergency, there would have been no basis for finding that the notice recalling the 10th Parliament was *ultra vires* his Majesty's powers and that the recalled Parliament had no constitutional authority to debate and pass the Bills. The High Court order, as a whole, reads –

- “1. The Declaration of the State of Emergency by the Prime Minister is declared null and void for failing to meet the threshold in section 23(1).
2. The Recall of the Tenth Parliament Notice 2022, in terms of which the dissolved Parliament is recalled to pass the two Bills, is *ultra vires* the power of his Majesty.
3. The recalled Parliament has no constitutional authority to debate and pass the two Bills.”

[30] The respondents' applications were filed as urgent applications. They were heard on 24 August 2022. The

judgment and court order were handed down on 12 September 2022, some thirteen days after Parliament had convened between 24 and 29 August 2022 and had already passed the two Bills. The court order, therefore, not only declared that the declaration of a state of emergency by the Prime Minister was null and void, but it also set aside as *ultra vires* the exercise of power by His Majesty to recall Parliament and the passing of the two Bills by Parliament.

[31] The High Court decision is as unprecedented as it is extremely important in this jurisdiction. In the heads of argument, the appellants' Counsel describes the case as "not an ordinary one but a milestone moment in which the dynamics of the separation of powers are at play ... a classic one in which the power of the executive and legislative branch of government are tested against those of the judicial arm of government." They make the point that they will demonstrate in their submissions that the High Court decision "was an open act of judicial overreach on the part of the judicial arm of government" "and "make an assessment whether this was not one such scenario where the High Court ought to have deferred to the other arms of government instead of substituting its views on the issues that have to do with the recalling of parliament and consequent declaration of emergency." ¹⁵

[32] Counsel extensively refers to the American case of *Marbury v Madison*¹⁶, and submit that all three arms of government are subject to the Constitution and that, as much as there are dangers of violation of the Constitution by the

¹⁵ See para 1.2 and 1.3 of appellants' main heads of argument.

¹⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

legislature or the executive, the same can happen if the judicial arm runs unchecked over its role as interpreter of laws and the Constitution. Having highlighted this in the main submissions as an extremely important aspect of the case, Counsel makes no further submissions in support thereof but restricts themselves to *locus standi* until they filed the supplementary submissions.

[33] Three of the four grounds of appeal relate to the declaration of state of emergency. They are -

“2. The court erred and misdirected itself in interrogating the merits that informed the declaration of emergency. The findings of the court *a quo* attracted judicial overreach and consequent violation of the sacrosanct separation of powers doctrine.

3. The court *a quo* erred and misdirected itself in concluding that it had jurisdiction to interrogate and or probe polycentric issues that informed the recall of Parliament.

4. The court erred and misdirected itself by failing to weigh public interest dynamics as against the alleged breaches of the Constitution.”

[34] In the supplementary heads of argument¹⁶ appell'nts' counsel accurately identify the basis of the respondents' case, it being that there was no state of emergency that justified the recall of Parliament. Having so identified the respondents' case, they submit that courts should not 'attribute to

16 Para 1.9

themselves superior wisdom in matters entrusted to other branches of government, especially in a matter such as this, where the public interest or public policy are implicated. In this regard, they refer to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Another*¹⁷ and *Tšepe v Independent Electoral Commission and Others*.¹⁸ In *Bato Star* the following remarks of the House of Lords¹⁹ appear:

"... the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. However, it does not mean that their

allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principle upon which decision-making powers are allocated are principles of law.

The Courts are the independent branch of government, and the Legislature and Executive are, directly and indirectly, respectively, the elected branches of government. Independence makes the Courts more suited to deciding some questions, and being elected makes the Legislature or Executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. When a court decides that a decision is within the proper competence of the Legislature or Executive, it is not showing deference. It is deciding the law."

[35] In *Tšepe*, which was concerned with administrative review, the court said“

17 2004 (4) SA 490 (CC)

18 LAC (2005-2006) 169 at 186G-187F

19 In R (on the application of Pro-Life alliance) v British Broadcasting Corporation [2003] ALL ER 977 (HL)

"In treating the administrative agencies with appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so, a Court should be careful not to attribute superior wisdom to matters entrusted to other branches of government. A Court should thus give due weight to the findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which the Court should give weight to these considerations will depend upon the character of the decision itself and on the identity of the decisionmaker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts.

Often the power will identify a goal to be achieved but will not dictate which route should be followed to achieve that goal. In such circumstances, a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is not one which will not result in the achievement of the goal or which is not reasonably supported on the facts or not reasonable in light of the reasons given for it, a Court may not review that decision. A Court should not rubberstamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

[36] The remarks of the courts in the immediately cited cases provide invaluable guidance.

[37] The three grounds of appeal, properly understood, call into question the right of the court to inquire into the factual or policy foundations of the declaration of emergency; the court's competence or power to probe issues that several centres of

power control, in this case, the Executive and the Legislature (what Counsel describe as polycentric issues), and faults the court for having failed to balance the public interest served by the declaration of emergency, the recall of Parliament and the passing into law of the two Bills against "the alleged breaches of the Constitution." There is an implicit acknowledgement in the last of the three grounds of appeal that whilst there may have been a breach of the Constitution, that breach should be of no consequence considering the public interest involved. The short answer to this is that where a breach of the Constitution has been proven, a matter which we must decide in this case, the consequences are, without more, that the breach cannot be condoned for any reason. Section 2 of the Constitution provides tha"-

"The Constitution is the supreme law of Lesotho, and if any other law is inconsistent with this Constitution, that other law shall, to the extent of its inconsistency, be v"id."

[38] The High Court determined that the emergency declaration was null and void for failing to meet the Constitution's threshold in section 23(1). Section 23 of the Constitution provides:

"23. Declaration of emergency

- (1) In times of war or other public emergency which threatens the life of the nation, the Prime Minister may, acting in accordance with advice of the Council of State, by proclamation which shall be published in the Gazette, declare that a state of emergency exists for the purpose of this Chapter.

Every declaration of emergency shall lapse after the expiration of fourteen days, commencing with the day on which it was made, unless it has, in the meantime, been approved by a resolution of each House of Parliament

(2) nt.

A declaration of emergency may at any time be revoked by the Prime Minister acting in accordance with the advice of the Council of State by proclamation, which shall be published in the Gazette

(3) e.

A declaration of emergency that has been approved by resolution of each House of Parliament in pursuance of subsection (2) shall, subject to the provisions of subsection (3), remain in force so long as those resolutions remain in force and no longer

(4) r.

A resolution of either House of Parliament passed for the purpose of this section shall remain in force for six months or such shorter period as may be specified therein

(5) n:

Provided that any such resolution may be extended from time to time by a further such resolution, each extension not exceeding six months from the date of the resolution effecting the extension.

(6) Where the resolutions of the two Houses of Parliament made under subsections (2) and (5) differ, the resolution of the National Assembly shall prevail.

(7) Any provision of this section that a declaration of emergency shall lapse or cease to be in force at any particular time is without prejudice to the making of a further such declaration, whether before or after that time.

The King may summon the two Houses of Parliament to meet for the purpose of this section notwithstanding that Parliament then stands dissolved, and the persons who were members of either House immediately before the dissolution shall be deemed, still to be members of that House, but subject to the provisions of sections 61(4) and 63(4) of this Constitution, neither House shall, when summoned by virtue of this subsection, transact any business other than debating and voting upon resolutions for the purposes of this section

(8) n.”

[39] A declaration of a state of emergency for the purpose of Chapter II of the Constitution [on Protection of Fundamental Human Rights and Freedoms] is intended to enable the government to curtail fundamental human rights and freedoms of the people enshrined by sections 6 (on the right to personal liberty), section 18 (on freedom from discrimination), and section 19 (on the right to equality before the law and the equal protection of the law) during a state of war or a state of emergency and to take measures that, in terms of section 22(1) of the Constitution, are necessary in a practical sense in a democratic society for dealing with the situation that exists in the country during that period. [40] In terms of section 23(1), the Prime Minister, on the advice of the Council of State, is empowered to proclaim the existence of a state of emergency for the purposes of Chapter II. Such declaration lapses after 14 days unless it has, in the meantime, been approved by resolution of each House of Parliament, in which case the state of emergency shall remain in force for as long as the resolutions remain in force. Subsection (8) is important. It prescribes that His Majesty may summon the two Houses of Parliament for purposes of section 23 even if Parliament has

been dissolved. When either House is summoned by virtue of section 23 it may not transact any business except that of debating and voting upon resolutions for the purposes of the section.

[41] Acting in terms of section 23(1), the Prime Minister proclaimed a state of emergency in the country from 16 to 29 August 2022, a period of 14 days. That proclamation did not, on its own, necessarily require parliamentary approval or any resolution of either House to that effect, nor did it require Parliament to meet at all. However, once the Prime Minister has declared a state of emergency, the King can, as he is empowered to do by section 23(8), summon the two Houses to meet for the purposes of section 23, notwithstanding that Parliament then stands dissolved. Once summoned, neither House can transact any business other than approve or disapprove by resolution the declaration of emergency. So, if the King had acted in terms of section 23, the only business of Parliament would have been to debate and vote upon resolutions for the purposes of that section.

[42] It is appropriate to again clarify the purposes of a declaration of a state of emergency in terms of section 23 of the Constitution. That section confines those purposes to the abridgement of fundamental human rights and freedoms under Chapter II of the Constitution.

[43] Before the Prime Minister proclaimed that a state of emergency existed, the Tenth Parliament had been dissolved for about one month by operation of law in terms of section 83(2) of the Constitution: its five-year tenure had

expired. The King recalled Parliament on the advice of the Council of State in terms of section 84(2) of the Constitution and not in terms of section 23.

[44]Section 84(2) provides:

"If after the dissolution of Parliament and before the holding of a general election of members of the National Assembly, the King is advised by the Council of State that, owing to a state of war or a state of emergency in Lesotho, it is necessary to recall Parliament, the King shall recall the Parliament that has been dissolved and that Parliament shall be deemed to be the Parliament for the time being (and the members of the dissolved Parliament shall be deemed to be the members of the recalled Parliament), but the general election of members of the National Assembly shall proceed and the recalled Parliament shall, if not sooner dissolved, stand dissolved on the day immediately preceding the day fixed for such general election or, if more than one day, the first of such days."

[45]The recall of Parliament in terms of section 84(2) is dependent upon either a state of war or a state of emergency in Lesotho and on the Council of State advising the King to recall Parliament owing to that situation. The Parliament so recalled shall remain as the Parliament until the day before a general election is held. At the time that the King exercised his authority on 23 August 2022 to recall Parliament, as is mandatory for him to do when advised to that effect by the Council of State, a state of emergency was in existence in Lesotho by reason of the Prime Minister's proclamation on 16 August 2022. The King

acted in accordance with the advice of the Council of State. In these circumstances, in our view, the King could not be faulted on any basis for recalling Parliament. He did not have a discretion in the matter, unlike under section 23(8), in terms of which he exercises a discretion and is not required to summon Parliament on the advice of anyone. That is why if he summons Parliament in terms of section 23(8), the la'ter's business is singularly to debate and vote upon resolutions for purposes of that section. In our view, the summoning of Parliament under section 23 may be because the King entertains doubt as to the propriety of the declaration of a state of emergency and summons Parliament only for the purposes of debating and passing resolutions in that regard.

[46]The distinction between summoning Parliament under section 23(8) and recalling it under section 84(2) must be borne in mind in interpreting the two provisions. Summoning under section 23(8) is for a specified purpose, in this case, to debate and pass resolutions on the declaration of a state of emergency, in other words, to approve or disapprove of the declaration. A recall of Parliament under section 84(2) is a procedure involving an extraordinary sitting of Parliament outside the time when that Parliament would usually sit. When so recalled, Parliament can transact any business. The mere fact that it has been recalled has no effect on its order of business. Therefore, when the King recalled Parliament in terms of section 84(2), it was entitled to transact any business as

was properly placed before it, including passing legislation subject to its rules.

[47] A state of war or a state of emergency that requires action under either section 23 or section 84 must be empirically in existence. That situation does not exist merely by reason of the Prime Minister's declaration or the Council of State's advice to that effect without a factual foundation. Where the factual foundation of a state of emergency is solid, that is when the statement in *Tšepe* (supra) finds application: a court would have to give due weight to the findings of fact and policy decisions made by those with special expertise and experience in the field. However, the court shall not shy away from reviewing a decision which is not reasonably supported by the facts or not reasonable in light of the reasons given for it. Moreover, this, in our view, is the main issue for consideration in this appeal.

[48] We emphasise that the Prime Minister is not required to declare a state of emergency: he *may*, and should he, he can only do so on the advice of or with the approval of the Council of State. The fall-out from the emergency declaration, if any, or as found by the High Court, can only lie on the laps of the Prime Minister and the Council of State's laps, not the King's.

[49] On the part of the Council of State, once it had advised the Prime Minister about the propriety of declaring an emergency, it could not have acted otherwise when calls were made for Parliament to be recalled in terms of section 84.

[50]The main reason for the declaration of an emergency is to be found in the Prime Minister's proclamation. He states therein“

"I, Moeketsi Majoro,

Prime Minister of Lesotho, pursuant to section 23(1) of the Constitution of Lesotho,1993 and acting in accordance with the advice of the Council of State and recognising that failure to pass the bills constitutes a public emergency, by proclamation, declare the state of emergence to exist in Lesotho from 16th to 29th August 2022.”

[51]The preambular part of the proclamation gives some background to the reason for the declaration of a state of emergence. The reason, however, is only one - the failure by Parliament to pass the Eleventh Amendment to the Constitution Bill, 2022 and the National Assembly Electoral Amendment Bill, 2022. Parliament had failed, on account of a lapse of time, to pass the two Bills, so it was proclaimed.

[52]The question to be answered in the first place is, what is the purpose of a declaration of emergence in terms of section 23 of the Constitution and was that purpose served by the declaration? As we have already stated, the purpose of such a declaration is to enable the Government to derogate, to the prejudice of the citizenry, from the rights and freedoms enshrined in Chapter II of the Constitution and, of course, to deal with the exigencies arising from the situation. There is no indication that any rights and freedoms of the people were abridged or derogated from

during the fourteen days of the purported emergency. The declaration was, therefore, not made for the purposes of Chapter II but for some other purpose. To that extent, the declaration was ill-founded and not in accordance with the Constitution. The purpose for which the Prime Minister proclaimed a declaration of a state of emergency falls outside the purposes for which such declaration may be made under section 23. On this score alone, the declaration does not meet the threshold in the Constitution.

[53] In fairness to the appellants, we examine the antecedent reasons for the declaration of emergency. They are the following assertions -

- 53.1 the current political climate in the country poses a substantial threat, risk and danger to national stability and prosperity;
- 53.2 the country has endured political instability, injustice and discord since 1966 and the situation is continuing and aggravating;
- 53.3 the factors undermining stability, justice and peace have been identified as unchecked politicisation of the public service and security agencies, loopholes in the Constitution, formation of coalition governments, unregulated floor crossing in Parliament and inadequate regulation of political parties;
- 53.4 it is acknowledged that the country heavily relies on international partners for financial and investment support, and some of that support is linked to national reforms which have been undertaken to bring about lasting political stability, justice and peace through the two bills whose failure to pass means the continuation of the ills identified;

- 53.5 imminent sanctions impact negatively on and result in loss of financial and investment support;
- 53.6 grave post-election killings and other inhuman attacks are caused by political factionalism;
- 53.7 the current legal framework is inadequate to deal with post-election political instability;
- 53.8 the failure due to a shortage of time to pass the two Bills, which are necessary measures to counter and prevent socio-economic, security and political damage caused by instability, has created conditions of extreme peril to the safety of persons and property;
- 53.9 it is possible that the undesirable situation may escalate and further threaten the peace, safety, and stability of the nation; and
- 53.10 the failure to pass the two Bills on its own constitutes a public emergency

[54]The question that immediately arises is what evidence the government adduced in support of the above apparently bald assertions of fact. For that, we look at the affidavits of the Prime Minister in response to the respondents' averments that-

- 54.1 the dissolution of Parliament by operation of law casts a shadow over the national reforms, which are a "brainchild of the SADC intervention in Lesotho in '016";
- 54.2 the declaration of a state of emergency was debated to recall Parliament "to cure what may only be seen as a political failure and not an emergency";
- 54.3 "the declaration is expansive, lacks sufficient particularity, vague and opinionated and therefore subject to abuse and inconsistent with section 23(1) of the Constitution of Lesotho;"

- 54.4 the Constitution envisages as an emergency an event of a calamity, which must be present, actual, imminent and exceptional;
- 54.5 the present situation is neither calamitous nor imminent, and the articulation of it by the Prime Minister is no more than a political opinion;
- 54.6 there is no threat to the citizenry's life, and hardly anything surprising about the Lesotho political situation is cited as the cause for the declaration of a state of emergency.

[55]The response by the Prime Minister is that the Constitution does not contain a definition of the state of emergency. An emergency is usually unforeseen. It should be left to the executive authority to decide what situation amounts to an emergency. The term should be understood to accommodate a wide range of crises such as the one faced by Lesotho in this instance, undoubtedly, "a product of many challenges that the country faced since independence in 1966." As such, the declaration of emergency was aimed at preserving democracy and safeguarding national stability and prosperity. The background reasons for the declaration in the proclamation are enough to fall within the description of a state of emergency, which serves a legitimate governmental purpose. The respondents sought only to invite the judiciary to unduly interfere with the powers of the executive arm of government. The decision to declare a state of emergency is an executive decision and falls outside the scope of judicial review, absent allegations of illegality. [56] The Prime Minister sets out the history of national reforms from 2014 and says that successive

governments in 2015 and 2017 pledged to reform the public service, Parliament, Constitution, judiciary, and security systems of the country following a report on the necessity of reforms by an envoy of the Commonwealth Secretary-General. The National Reforms Dialogue Act, 2018 (No.6 of 2018) established a forum whose objectives were to promote long-term national stability, unity, and reconciliation; to create professional, functional, and effective institutions for the management of public affairs, service delivery and development, building a national consensus, implementing of necessary constitutional changes, promoting stakeholder consensus on the reforms and long-term national unity and consensus. A National Reforms Authority Act (Act No.4 of 2019) was passed with a tenure of one year. The authority could not complete its mandate within the tenure period, thereby compelling an extension of its life to April 2022. In the end, it was dissolved by Notice in the Gazette. By this time, the Executive was satisfied that the two Bills were ready for consideration by Parliament. When that process commenced, the tenure of the Tenth Parliament expired before the two Bills could be passed into law. Therefore, the recalling of Parliament was necessary to avoid the reform process being derailed by the failure to pass the Bills. The failure to pass the Bills cast aspersions on the Prime Minister and Parliament's commitment to performing their functions. The Government has a duty to honour its commitment to international partners who sponsored the

reform process to pass the two Bills during the life of the Tenth Parliament.

[57] In considering the process of declaring a state of emergency, the High Court made two observations with which we do not agree.

The first observation is this:

“Thus, the Prime Minister and His Majesty do not act out of their own personal wishes, whims, opinions, and *ipse dixit dehors* (outside) information, material and facts grounding the advice. They are obliged by the Constitution to follow the advice of the Council of State. Nowhere does the Constitution enjoin the Council of State to consult or obtain the concurrence of the Prime Minister and His Majesty before it submits advice. Once the advice is given, they have to accept it and act accordingly by the Prime Minister issuing the declaration of emergency and His Majesty recalling Parliament.”²¹

[58] The correct position in relation to the initiation of the process for declaring a state of emergency is that the Prime Minister is not obliged to declare a state of emergency by any authority. It is he who *may* declare a state of emergency, but in doing so, he must act in accordance with the advice of the Council of State. Section 23(1) uses the permissive word “may” and obliges him, once he decides to declare a state of emergency, to obtain the approval of the Council of State. Without such approval, he cannot. The initiative is that of the Prime Minister, but it must be approved by the Council of State. The Council of State cannot, of its own volition, compel the Prime Minister

to declare a state of emergency against his will or judgment.

[59]The second observation relates to the remarks that -

"If at the time the Prime Minister declares a state of emergency parliament stands dissolved, His Majesty can recall Parliament to meet to transact only the business of debating and voting upon resolutions to approve the declaration of the state of emergency. A harmonious interpretation of sections 23(8) and 84(2) is that the mandate of a recalled Parliament is only to debate and pass resolutions approving the Declaration and not to exercise section 78 powers to make laws. The procedure for debating the Declaration is by motion to approve moved by a Minister in both Houses."²²

²¹ Para 46 of the High Court judgment ²²

Para 48 of the High Court judgment.

[60] We have already observed that section 84(2) is dependent on the existence of a state of emergency declared by the Prime Minister on the advice of the Council of State whether or not such declaration has been debated and voted upon by Parliament. Where such a state of emergency has been declared after the dissolution of Parliament, the Council of State may advise the King to recall Parliament. Once so advised, the King has no discretion in the matter. He must recall Parliament. The recalled Parliament subsists until the day before the date of election of members of the National

Assembly at a general election. That recalled Parliament is not limited in the scope or nature of its business or activities. It may pass laws. A harmonious interpretation of sections 23 and 84 of the Constitution is that if an emergency has been declared for the purposes of Chapter II, and whether or not Parliament has been summoned under section 23(8) or has debated and passed resolutions on the declaration or not, that Parliament may be recalled under section 84(2) and will be the Parliament for the time being until the day before the next general election. The summoned Parliament is for a limited purpose - debating and passing resolutions on the declaration of emergency. The recalled Parliament remains the Parliament until the day before the next general election, and it is at large to consider such business as may be brought before it and may pass laws.

[61] The real issue in this appeal is not whether section 23 and 84 of the Constitution were complied with. On the face of it, they were.

As stated by the High Court in paragraph [50] of the judgment, the

issue is whether the decision to declare a state of emergency was justified on the basis proffered by the Prime Minister with the advice of the Council of State. In the words of the High Court - was a failure to pass the two Bills a public emergency as envisaged by section 23 of the Constitution? Did the situation threaten the life of the nation?

[62] The court *a quo* had regard to the International Covenant on Civil and Political Rights, 1966, ratified by Lesotho and proceeded to say:-

"[51] Article 4(1) of that Covenant has principles promulgated to define the meaning of 'threat to the life of the nation'. These are the Siracusa Principles; under the heading '*Public Emergency which Threatens the Life of the Nation*', it is said:

'39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called the derogation measures) only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

(a) affects the whole of the population and either the whole or part of the territory of the state, and

(b) threatens the physical integrity of the population, the political independence or territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the nation's life cannot justify derogations under Article 4.

...

54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or

imminent danger and may not be imposed merely because of an apprehension of potential danger.'

52. Importantly, the principles make it abundantly clear that a 'Proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation to determine to what extent, if any, it poses a threat to the life of the na'ion'. In this sense, therefore, the requirement of good faith based objective assessment opens the door of judicial review of the determination of the existence of a state of emerge"cy."

[63] The High Court referred to several other authorities on the meaning of a public emergency - the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*; the decision of the House of Lords in *A v. Secretary of State for the Home Department*²⁰ and the appeal decision of the European Court of Human Rights in the same case cited as *A and Others v United Kingdom*.²⁴ These cases and others cited therein make the point that a declaration of a state of emergency may be justified where the life of the nation is threatened and the phrase 'threatening the life of the na'ion' contempla"es "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is compo"ed." The

situation may be imminent. So, while the court must accord a large margin of appreciation to States in their assessment of the question whether the situation with which they are faced

²⁰ [2004] UKHL 56 (16 December 2004).

²⁴ ECHR 301 (19 February 2009).

constitutes an actual or imminent emergency or, as in the present case, give great weight to the views of the Prime Minister and the Council of State, it must assess the exercise of judgment by those two organs of state and satisfy itself that the emergency is an occurrence that is sudden and unexpected. As stated by the House of Lords “

"115. ... Few would doubt that it is for the executive, with all the resources at its disposal, to judge whether the consequences of such events amount to an emergency of that kind. But imminent emergencies arouse fear, and, as has often been said, fear is democ'acy's worst enemy. So, it would be dangerous to ignore the context in which the judgment is to be exercised. Its exercise needs to be watched very carefully if it is a preliminary to invoking of emergency powers, especially if they involve actions which are incompatible with Convention rights.

116. ... it is nevertheless open to the judiciary to examine the nature of the situation that has been identified as constituting the emergency. ... it is the proper function of the judiciary to subject the government's reasoning on these matters in this case to very close analysis. One cannot say what the exigencies of the situation requires without having clearly in mind what it is that constitutes the emergency.”

[64] The situation in Lesotho was on all fronts, not sudden and unexpected. The national reforms exercise started way back in 2014. The situation was far from an exceptional crisis or emergency, which affected the whole population and threatened the commu'ity's organised life. The situation was

perfectly normal and regular. The nation was poised for general elections in about three months and the election of a new Parliament that would continue with the unfinished work of the dissolved Parliament. The alleged emergency was not actual or imminent, and even if it was either, the Prime minister, in his affidavit, did not show in what way it may have been so. More importantly, the emergency was declared for a short period of fourteen days, undermining the alleged existence of an emergency. The organised life of the nation was not threatened in any way. We do not doubt that the declaration of emergency not only did not exist and was not imminent but also that it was a disproportionate measure adopted to deal with the perceived dangers of a failure to pass the two Bills. The Constitution sufficiently addresses the measures for dealing with the failure to pass legislation by one Parliament. The Bills only have to await the election of a new Parliament and then be reintroduced in terms of the standing orders. Hence, we are in entire agreement with the High Court where, in its judgment, it says -

“[59] The applicable principle on review is the legality principle propounded by this Court [High Court] in the ABC case.²¹ It requires that the exercise of constitutional power and performance of duties be lawful to acquire legitimacy. 36oneonee of power must act in good faith and not misconstrue the power and its purpose. The purpose of the power to declare a state of emergency is to deal with a threat to the life of the nation. ... The question is whether the Prime

²¹ All Basotho Convention (ABC) and others v The Prime Minister and others, Constitutional Case No. 0006/2020 (17 April 2020).

Minister's declaration of emergency meets the constitutional threshold in section 23(1).

...

[64] The onus is on the Prime Minister and the Council of State to justify the validity of the Declaration on the basis of the constitutional threshold. The onus should be discharged not on the basis of subjective views, opinions, or perceptions but objectively with reference to objective conditions of a public emergency as defined in section 23(1). In other words, the existence of a public emergency is objectively justiciable.

....

[67] Notwithstanding the political crises and instabilities, this Nation has gone on with its life. Institutions may have been shaken but certainly not collapsed. It is, therefore, a long shot for the [appellants] to assert that the failure by Parliament to pass the two Bills constitutes a public emergency. There is no demonstrable actual or imminent danger to the life of this Nation posed by the failure of Parliament to pass the two Bills before its dissolution on 14 June. ... The [respondents] are right in their contention that Parliament was simply beaten to time. This could have been avoided if Parliament had prioritised the passing of the Bills over other legislative business."

[65] We accordingly endorse the decision of the High Court that the failure by Parliament to pass the two Bills does not constitute a public emergency contemplated by section 23(1) of the Constitution. We have also stated that the purpose for which the Prime Minister declared a state of emergency i.e., to

cure the failure of Parliament to pass certain legislation is not a purpose contemplated by section 23 of the Constitution.

[66] In light our view that the decision that the declaration of a state of emergency was constitutionally invalid and without legal foundation as found by the High Court, it is not necessary to address separately the issues whether the recall of Parliament by the King or the Bills passed by Parliament pursuant to the declaration of the emergency can stand. They obviously cannot stand where their foundation has been removed or is non-existent. It has been voided. In the words of Lord Denning in *MacFoy v United Africa Company Ltd (West Africa)*²² -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

[67] The short answer to the contestation over the recall of Parliament and the passing by Parliament of the two Bills is that they are both nullities. They were or are dependent on the constitutional validity of the declaration of a state of emergency. They die with it. The appellants' grounds of appeal challenging the decision of the court *a quo* on the declaration of emergence are without merit. The court was entitled to inquire into the justification for the declaration. In doing so it was, in the circumstances of this case, not guilty of judicial overreach or the violation of principles of the separation of powers. The public interest as articulated in the proclamation is

22 PC 27 November 1965.

far outweighed by the gravity of the failure to meet the standard or threshold set by the Constitution.

[67] In the result we propose that the appeal be dismissed with costs.

Disposition

[68] For the reasons given above, after reading the submissions of Counsel in the case and after giving careful consideration to their oral submissions, we were of the opinion that this appeal could not succeed. We therefore accordingly dismissed the appeal with costs.



K. E. MOSITO PRESIDENT OF THE COURT OF APPEAL

I agree:



**M H CHIHENGO
ACTING JUSTICE OF APPEAL**

I agree:



**P T DAMASEB
ACTING JUSTICE OF
APPEAL**

I agree:



**P MUSONDA ACTING
JUSTICE OF APPEAL**

I agree:



**VAN DER WESTHUIZEN
ACTING JUSTICE OF
APPEAL**

For Appellants: Mr M Rasekoai and Adv. C J Lephuthing

For Respondents: Adv L Tuke, Adv S Tšabeha, Adv M
Ramaili SC