

**Constitutional Case No.3/07**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:-

**PHOLOANA ADAM LEKHOABA** 1<sup>ST</sup> APPLICANT  
**‘MALICHABA LEKHOABA (MOSHOESHOE)** 2<sup>ND</sup> APPLICANT

and

**DIRECTOR OF IMMIGRATION** 1<sup>ST</sup> RESPONDENT  
**MINISTER OF HOME AFFAIRS** 2<sup>ND</sup> RESPONDENT  
**COMMISSIONER OF POLICE** 3<sup>RD</sup> RESPONDENT  
**COMMISSIONER OF LABOUR** 4<sup>TH</sup> RESPONDENT  
**ATTORNEY GENERAL** 5<sup>TH</sup> RESPONDENT

**JUDGMENT**

**CORAM : S.N. PEETE, J.**  
**A.M. HLAJOANE, J.**  
**M. MAHASE, J.**

**DATES OF HEARING : 10<sup>th</sup> May 2007, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 20<sup>th</sup>  
June 2007.**

**DATE OF JUDGMENT: 26<sup>TH</sup> OCTOBER 2007**

**Peete J.:**

## **Introduction**

- [1] In the Lesotho of today, this unique case raises an important issue of a “*crisis of identity*” under the new democratic constitutional dispensation.
- [2] **Lesotho** is a democratic Kingdom, geographically situated, rather conspicuously, in the middle of the **Republic of South Africa**. Before its independence in 1966, Lesotho had been existing as a British Protectorate then called *Basutoland*. Economically and industrially Basutoland (now **Lesotho**) was and still is mostly dependent upon the neighbouring South Africa. Most Basotho men and women continue to seek employment in South Africa, only because of Lesotho’s underdeveloped economic sector. This is a reality.
- [3] As independent states of the SADC, obviously, the two countries are closely interdependent and the movement of peoples across the common borders has to be handled with vigilance and diplomacy. The Basotho citizens in South Africa are as alien in that country as South African citizens are aliens in Lesotho. *Dual citizenship* is mutually prohibited; permanent or temporary residence is allowed on application under each country’s Aliens Control laws.

[4] The Republic of South Africa<sup>1</sup>, more than any other SADC country today, faces an endemic constant problem of illegal immigrants who filter into the Republic to find employment in its industrial heartlands.

[5] **The Law**

Under our law, citizenship is an important issue of status both under the Constitution of Lesotho and under laws passed by Parliament. Citizenship once acquired by birth or descent becomes an inalienable right to which certain fundamental rights – political, social and economic – attach. A citizen of Lesotho enjoys certain political rights one of which is the right not be deported; a citizen of Lesotho also enjoys political rights e.g. to participate in the political affairs of Lesotho by voting or by standing for public office through democratic elections<sup>2</sup>. Aliens enjoy neither.

[6] **Constitutions of Lesotho** (*of 1966 and 1993*)

The Constitutions of Lesotho both of 1966<sup>3</sup> and of 1993<sup>4</sup> recognised and bestowed citizenship upon the peoples of Lesotho and this fundamental right may not be abridged by any Act of Parliament unless that right is renounced voluntarily or by operation of law.

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<sup>1</sup> Ironically during the apartheid era the illegal immigrants from the subcontinent fled to Lesotho for their refuge!

<sup>2</sup> Sections 20 of the Constitution.

<sup>3</sup> Chapter III

<sup>4</sup> Chapter IV

It is perhaps, due to its cardinal importance, necessary to cite herein the whole Chapter IV of the 1993 of the Constitution of Lesotho. It states:-

## CHAPTER IV

### CITIZENSHIP

- “37. *Every person who immediately before the coming into operation of this Constitution is a citizen of Lesotho under the Lesotho Citizenship Order 1971 shall, on the coming into operation of this Constitution and subject to any provision made in or under this Chapter, continue to be a citizen of Lesotho.***
38. (1) *Subject to the provisions of subsections (2) and (3), every person born in Lesotho after the coming into operation of this Constitution shall become a citizen of Lesotho.*
- (2) *Save as provided in subsection (3), a person shall not become a citizen of Lesotho by virtue of this section if at the time of his birth neither of his parents is a citizen of Lesotho, and-*
- (a) *one or both of his parents possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Lesotho; or*
- (b) *one or both of his parents is an enemy alien and the birth occurs in a place the under occupation by the enemy.*
- (3) *A person born in Lesotho on or after the coming into operation of this Constitution who is disqualified to become a citizen of Lesotho by virtue of subsection (2) of this section shall become*

*a citizen of Lesotho if he would otherwise become stateless”.*

39. *A person born outside Lesotho after the coming into operation of this Constitution shall become a citizen of Lesotho at the date of this birth, if at that date either of his parents is a citizen of Lesotho otherwise than by descent.*
40. (1) *Any woman who, immediately before the coming into operation of this Constitution, is or has been married to a person –*
- (a) *who continues to be a citizen of Lesotho by virtue of section 37 of this Constitution; or*
- (b) *who, having died before the coming into operation of this Constitution of this Constitution would, but for his death, have continued to be a citizen of Lesotho by virtue of that section,*

*shall be entitled, upon making application and upon taking the oath of allegiance, to be registered as a citizen of Lesotho.*

- (2) *Any woman who, after the coming into operation of this Constitution, marries a citizen of Lesotho shall be entitled upon making application and upon taking the oath of allegiance, to be registered as a citizen of Lesotho.*

### ***Dual Citizenship***

41. (1) ***Any person who, upon the attainment of the age of twenty-one years, is a citizen of Lesotho and also a citizen of some country other than Lesotho shall cease to be a citizen of Lesotho upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is a***

*citizen of Lesotho by descent, made and registered such declaration of his intentions concerning residence as may be prescribed by Parliament.*

42. (1) *Parliament may make provision for the acquisition of citizenship of Lesotho by person who are not eligible or who are no longer eligible to become citizens of Lesotho under the provisions of this Chapter.*
- (2) *Parliament may make provision for depriving of his citizenship of Lesotho any person other than a person who became or becomes-*
- (a) *a citizens of Lesotho by virtue of having been born in Lesotho; or*
- (b) *a citizen of Lesotho by descent,*
- unless he would thereby become stateless.*
- (3) *Parliament may make provision for the renunciation by any person of his citizenship of Lesotho.*

43. (1) *In this Chapter –*
- “alien” means a person who is not a citizen of Lesotho;*
- “prescribed” means prescribed by or under any Act of Parliament.*
- (2) *In this Chapter, references to a citizen by descent are references to a person who is a citizen of Lesotho by virtue of section 39 of this Constitution or of section 23 (2) or 26 of the Constitution of Lesotho of 1966 or of section 6 of the Lesotho Citizenship Order 1971.*

- (3) *For the purposes of this Chapter, a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the Government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country.*
- (4) *Any reference in this Chapter to the national status of the parent of a person at the time of that person's birth shall, in relation to a person born after the death of either parent be construed as a reference to the national status of that parent at that parent's death, and where that death occurred before the coming into operation of this Constitution, and the birth occurred after the coming into operation of this Constitution the national status that the parent would have had if he or she had died on the coming into operation of this Constitution shall be deemed to be his or her national status at the time of his or her death.”*  
**(our emphasis).**

[7] Since the year 1966, the Kingdom of Lesotho has adopted a democratic constitutional rule in which the Constitution affirms solemnly its supremacy and declares that:-

- “1. (1) *Lesotho shall be a sovereign democratic Kingdom.*
- (2) .....
2. *This 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 the inconsistency, be void.”*

- Under section 2 the supremacy of the Constitution has therefore been truly entrenched.<sup>5</sup> This is a new democratic legacy in Africa, in the Commonwealth in the United Nations and the world at large.
- [8] Under the Lesotho Constitution, basic/fundamental human rights are also protected<sup>6</sup> and entrenched; also entrenched<sup>7</sup> are sections dealing with citizenship under Chapter IV.
- [9] In our view, a *citizenship* is one of the most important personal assets and rights (after the “*right to life*”) which a national of any country can enjoy. The right of citizenship is indeed an “*umbilical cord*” which links a national to his or her fatherland. Both under international and municipal laws, the citizens (*incolae*) enjoy certain rights which the aliens (*peregrini*) do not enjoy e.g. the rights to vote and to participate in the affairs of government. Reciprocally, the citizens owe “*political allegiance*” to the “*majestas*” of the state.<sup>8</sup> Citizens cannot be rendered stateless or be deported<sup>9</sup>.
- [10] In 1966, the **Aliens Control Act No.16** of 1966 was passed<sup>10</sup> by the First Parliament of Lesotho. Its Preamble reads:-

**“To make provision for restricting and regulating the movement of aliens, into and out of Lesotho, for their sojourn therein and for related and connected matters”, and**

<sup>5</sup> This in fact replaces the “**Parliamentary Supremacy**” of the British model.

<sup>6</sup> Section 22 of the Constitution.

<sup>7</sup> Section 85 (3) (b) of the Constitution.

<sup>8</sup> Only citizens can commit the crime of high treason. (**Rex v Mofelehetsi Moerane** – 1974-75 LLR 212)

<sup>9</sup> Under certain conditions aliens can be deported. (**Lawrence Matime v Rex** – 1972-73 LLR 49, 136,189)

<sup>10</sup> 30<sup>th</sup> September 1966.



*“Alien” means .....a person who is not a citizen of Lesotho”.*

[11] In 1967, the First Lesotho Parliament also passed the **Lesotho Citizenship Act No.17 of 1967**<sup>11</sup>. Its Preamble read:-

*“To make provision, to the extent permitted or required by the Constitution, the acquisition, deprivation and renunciation of citizenship of Lesotho; to specify, in relation to persons by what date those persons shall have done what is required by the constitution in relation to dual citizenship and to make provision for related and connected matters.”*

[12] Whereas the 1966 Constitution of Lesotho<sup>12</sup> continued to recognize the citizenship of all those persons who were hitherto citizens of Basutoland by birth and by descent, provisions was also made for citizenship by registration and by naturalization. But more importantly, the Constitutions of Lesotho 1966 and of 1993 outlaw **“dual citizenship”**<sup>13</sup> and provide that any person who wishes to be registered or naturalised as a citizen of Lesotho must be willing to renounce any other nationality or citizenship that he or she may have.

[13] Under the present Lesotho law, a person who is a citizen of Lesotho may lose that citizenship by a voluntary renunciation or (Form I) by deprivation of citizenship (by registration or naturalization) under sections of the Lesotho Citizenship Act 1971<sup>14</sup> or involuntarily by

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<sup>11</sup> Repealed by Lesotho Citizenship Order Act No.16 of 1971 – whose preamble reads-

**“To make provision for citizenship of Lesotho, for the acquisition, deprivation and renunciation of citizenship and for related and connected matters.”**

<sup>12</sup> Section 23 (1) read **“Every person, who having been born in Basutoland, is on the 3<sup>rd</sup> October 1966 a citizen of the United Kingdom and Colonies shall become a citizen of Lesotho on 4<sup>th</sup> October 1966.”**

<sup>13</sup> This can be defined by a contemporaneous holding of citizenships of two or more countries.

<sup>14</sup> Sections 22 and 23 of the Lesotho Citizenship Act No.16 of 1971 and Constitution, Section 41 and 42.

reason of the provisions of section 41 of the 1993 Constitution and section 8 (1) of the Lesotho Citizenship Act 1971.

- [14] Whereas it is common knowledge that Lesotho has gone through certain unhappy political and constitutional crises since 1970, most laws continued to operate, especially and more relevantly, the **Aliens Control Act 1966** and the **Lesotho Citizenship Act 1971**.

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- [15] In their founding papers, the Applicants' **Notice of Motion** reads:-

*"Sirs,*

***TAKE NOTICE THAT*** *the applicant intends to make an application to this court for an order:-*

- (a) Giving directions as to time and procedure to be followed in order to dispose of this matter expeditiously.*
- (b) Declaring that 1<sup>st</sup> applicant herein to be a citizen of Lesotho and not subject to all the impediments and restrictions residence in Lesotho as are imposed on the alien.*
- (c) Declaring the Minister of Home Affairs Order of deportation of the 1<sup>st</sup> applicant from Lesotho as unlawful, null and void.*

**ALTERNATIVELY**

- (a) *Declaring 1<sup>st</sup> applicant's deportation from Lesotho unlawful for being in contravention of sections 7 (1) and 11 (1) of the constitution due to the fact of 1<sup>st</sup> applicant's marriage to a Lesotho citizen.*
- (b) *Directing the Minister of Home Affairs or his agents to facilitate 1<sup>st</sup> applicant's permanent residence with his wife in Lesotho by issuing him with the necessary permit<sup>15</sup>.*
- (c) *Costs of this application.*
- (d) *Further and/or alternative relief.*

**And** that the accompanying affidavit of applicant will be used in support thereof.”

- [16] In his founding affidavit, the first applicant **PHOLOANA ADAM LEKHOABA** alleges that:-

*“To the best of my knowledge and belief I was born at Ha Foso in the district of Berea Lesotho on the 30<sup>th</sup> August 1970. My sources of this knowledge are my parents Matšelisio Lekhoaba (born Lesenyeho) and Motsitsi Lekhoaba. Both my parents have passed away”.* (**Our underline**)

- [17] The applicant has attached the affidavits of one ‘Mapoloko Amelia Poqa and of one Chieftainess ‘Manapo Majara in support of his contention that he was born in Lesotho.

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<sup>15</sup> This alternative prayer (b) was abandoned later in the hearing of these proceedings.

[18] Also attached are photocopies of his South African Identity Document (ID) No.7008305311082 issued in October 1987 and of his South African passport No.403517310 dated 28<sup>th</sup> February 1997 (now expired).

[19] It is common cause that in his ID and in his South African passport, the 1<sup>st</sup> Applicant has a nationality (*citizenship*) of the Republic of South Africa, and it is recorded therein that he was born at Senekal in the Republic of South Africa.

[20] He continues in his founding affidavit to state that -

*“when I attained age of awareness I found myself living in Senekal Orange Free State with my parents. My brother Fusi had all along remained in Lesotho.”*

[21] He continues to state that since 2005, he had been living peacefully in Lesotho as a pastor of the Apostolic Faith Mission of South Africa and was then also working as a radio presenter/journalist for the Harvest FM Radio which is registered to broadcast in Lesotho.

[22] He also alleges that on the 3<sup>rd</sup> March 2007 in Maseru married the 2<sup>nd</sup> Applicant, a lady who is a citizen of Lesotho.

[23] The 1<sup>st</sup> Applicant had since 2005 periodically been granted temporary permits for his sojourn in Lesotho from time to time.

- [24] He informs the court that his tranquil sojourn was disturbed after the February 2007 General Elections in Lesotho after he, the first Applicant, participated in certain Harvest Radio broadcasts allowing “*people to express themselves over the election results*”. It seems, according to applicant, certain of his comments over his Harvest Radio displeased certain officials of the ruling party.
- [25] He narrates certain events that took place between the applicant on one hand and the Honourable Minister of Tourism who is also the Deputy Secretary General of the ruling Lesotho Congress for Democracy LCD; he also attaches a letter from the latter addressed to Harvest Radio complaining about a programme conducted by 1<sup>st</sup> Applicant on Harvest Radio on the 22<sup>nd</sup> January 2007. First applicant alleges that it was being complained that his statements over the Harvest radio were causing political instability in the country.
- [26] He says soon after this correspondence, officials from Labour Department arrived at Harvest Radio Studios to “*investigate alien people*” working at the station who were causing instability.
- [27] He continues to state that he was later summoned to the Police Headquarters where he was asked by the *Assistant Commissioner Mhlagaza* to produce proof that he, the first applicant was a Lesotho citizen.

*“I told him that I took myself to be a Lesotho citizen because I was born in Lesotho and that my status as such could not change*

*simply because I found myself living in South Africa when I was young and even obtained South African citizenship documents”.*

[28] He says because of what he labeled police persecution, he later escaped and went back to the Republic of South Africa only to return on the 2<sup>nd</sup> March 2007 for his wedding to his new bride. He says the wedding ceremony between himself and his wife – the 2<sup>nd</sup> Applicant – a Lesotho citizen – took place on the 3<sup>rd</sup> March 2007 in Maseru.

[29] He continues to state that it was during the wedding festivities that he received a cellular phone message from someone describing himself as member of Interpol ordering him to cancel the wedding reception and to return back to his home in South Africa forthwith.

[30] He says he however left Lesotho on the 3<sup>rd</sup> March 2007 only to return to the Kingdom on the 24<sup>th</sup> March 2007. It was then that, he says his wife the 2<sup>nd</sup> Applicant showed him the “**Deportation Order.**”

[31] The Deportation Order reads:-

**“THE ALIENS CONTROL ACT NO.16 OF 1966  
THE ALIENS CONTROL ACT (COMMONWEALTH AND  
THE REPUBLIC OF IRELAND AND PROCLAMATION 1972  
DEPORTATION ORDER**

**TO: COMPOL (CID) MASERU.....**

**WHEREAS I, ARCHIBALD LESAO LEHOHLA, MINISTER OF  
HOME AFFAIRS AND PUBLIC SAFETY AND PARLIAMENTARY  
AFFAIRS, AM OF OPINION THAT THE PRESENCE OF**

***PHOLOANA ADAM LEKHOABA* IN THE KINGDOM OF LESOTHO IS UNLAWFUL AND I AM FURTHER OF OPINION THAT HIS DEPORTATION IS NECESSARY IN THE INTEREST OF LESOTHO.**

**IN THE EXERCISE OF POWER VESTED IN ME BY PARAGRAPH 3 OF LEGAL NOTICE NO.18 OF 1972 OF THE AFORESAID PROCLAMATION ORDER THAT THE SAID *PHOLOANA ADAM LEKHOABA* BE DEPORTED TO HIS COUNTRY OF ORIGIN. NAMELY: REPUBLIC OF SOUTH AFRICA.**

**YOU ARE HEREBY AUTHORISED AND REQUIRED TO CAUSE THE SAME PERSON TO BE REMOVED FROM LESOTHO UNDER PROPER ESCORT. I FURTHER ORDER THAT IN TERMS OF THE POWERS CONFERRED UPON ME INTERMS OF SECTION 25 (3) OF ALIENS CONTROL ACT THAT THE SAID *PHOLOANA ADAM LEKHOABA* .....**

**BE ARRESTED AND DETAINED IN CENTRAL PRISON MASERU WHILE AWAITING HIS DEPORTATION FROM THE KINGDOM OF LESOTHO.**

**AT MASERU DATED 12<sup>th</sup> DAY OF March....,2007**

**Signed \_\_\_\_\_  
MINISTER OF HOME AFFAIRS AND PUBLIC SAFETY AND  
PARLIAMENTARY AFFAIRS**

[32] He says he again left Lesotho because he saw that the Deportation Order effectively invalidated his entry and his temporary residence permit recently issued to him on the 24<sup>th</sup> March 2007.

[33] First applicant submits in his founding affidavit that he cannot be deported because he is a citizen of Lesotho and that the Deportation

Order signed by the Honourable Minister of Home Affairs (2<sup>nd</sup> Respondent) “*is invalid by virtue of the fact that I was not given a hearing in the matter by the 2<sup>nd</sup> respondent*” (para 12.1).

[34] At his paragraph 13 says he “*cannot be deprived of citizenship of Lesotho and any law depriving of citizenship, under those circumstance is not applicable to him to that extend.*”

[35] At Para 13.1 he declares-

*“Furthermore I attained the citizenship of South Africa not out of choice but because I found myself living in South Africa with my parents who were Lesotho citizens. At the time I was only 17 years old and not 21 years. I never intended to renounce my citizenship of Lesotho after I attained the age of 21 years. I kept the citizenship of South Africa out of necessity because I have certain economic and financial ties with South Africa. In terms of the Law in South Africa I can keep those ties such as my investment only if I maintain the citizenship of South Africa or the status of a permanent resident these like most Lesotho citizens that I know of do even up to today. I have always regarded Lesotho as my home as it is in this country where I was born.”* (our underline)

[36] He continues to allege that:-

*“I am married to a Lesotho citizen who has a perfect right to remain in Lesotho unless she takes the citizenship of another country voluntarily. I also state that my marriage to a Lesotho citizen was not one of convenience so that I could remain in Lesotho. By being deported from Lesotho merely because I am not a citizen here, as appears, I am being deprived of the right to live together for life with my wife and to afford her and she to me, cohabitation, loyalty mutual assistance and support and all other*



*duties and rights that flow from a marital relationship. I have asked my attorney to develop this aspect more fully .....to say that the deprivation of the right mentioned above is a contravention of section 11 of the Constitution”.*

[37] He alleges further that the “**interests of Lesotho**” as pleaded in the Deportation Order is a decision misconceived and arbitrary because it was founded on party political grounds that have nothing to do with the security and stability of the State and that the decision to deport him is “*an abuse of power and not in the interests of State security but in the interests of a political party which is in government.*”

[38] The Second Applicant has also made an affidavit materially supporting the 1<sup>st</sup> Applicants’ averments.

[39] The Respondents having filed their notice of intention of oppose, attached thereto affidavits of the 1<sup>st</sup> Respondent and of the Honourable Minister of Tourism (also Deputy Secretary General of the Lesotho Congress for Democracy) who had however not been cited as a respondent in the notice of motion though she was mentioned in the 1<sup>st</sup> applicant’s allegations of confrontation.

[40] **First Respondent’s Answer**

As the Director of Immigration Department, a department which falls under the portfolio of the 2<sup>nd</sup> respondent, **Ms Matšelis Ramathe** states in her opposing affidavit para 3.4.1 –

*“I deny that the Defendant (sic) was/born in Lesotho. Although I do not have personal knowledge of where First Applicant was born, the documents which he himself has attached to this application being annexure “Pl2” “Pl3” and Pl4” clearly state he was born in South Africa and for the attestation of which he should have declared ..... that to the best of his knowledge and belief, he was born in South Africa and that even if it was his parents who attested they would have declared that he was born in South Africa”.*

[41] The first respondent alleges that whereas the first applicant had been able to obtain a 30-day temporary permit, the first applicant had no residence permit and that he was also not entitled to take up employment in Lesotho even as a “volunteer” (with or without pay).

[42] More importantly, first respondent continue to state that:-

*“.....it was not the radio programme which resulted in the deportation order being issued. The deportation order was issued because the applicant was unlawfully residing and working in Lesotho.”*

[43] The first respondent then issuably contends a legal stand and states

*“.....even if the applicant was born in Lesotho, once he acquires the citizenship of another country, (in this case South Africa) he is required to renounce his citizenship (of South Africa) upon*

*attainment of 21 years or he forfeits his Lesotho citizenship when he reaches the age of 26 years.”*

- [44] She further contends that as a matter of law “*a non-citizen does not become a citizen of Lesotho because he has married a female Lesotho citizen*”.
- [45] To the applicant’s allegations raised in the founding affidavit that it is not interests of Lesotho but “*interests of a political party which is in power*” (Para 14...) that are involved, she notably does not respond to these serious allegations and merely contends herself by stating that the first applicant’s stay (being an alien) was unlawful having no residence or work permit and hence was liable to be deported.
- [46] Before going into the real merits of this case, it should be noted that in issuing the Deportation Order on the 12<sup>th</sup> day of March 2007 the Honourable Minister of Home Affairs (2<sup>nd</sup> respondent) was exercising his statutory powers vested in him under the **Aliens Control Act No.16 of 1966** as amended and under paragraph 3 of the Legal Notice No.18 of 1972 had formed “*an opinion that the presence of **PHOLOANA ADAM LEKHOABA** in the Kingdom of Lesotho is unlawful and that he is further of opinion that his deportation was necessary in the interests of Lesotho*”.
- [47] The 2<sup>nd</sup> respondent has however elected not to respond to the seemingly scrupulous attack on the *bona fides* of his motive in issuing the deportation order. The First Applicant alleges that interests of

Lesotho were not affected by his continued presence in Lesotho and that “*the decision to deport me is an abuse of power, not in the interest of state security, but in the interests of a political party which is in government*”.

[48] This very serious allegation that has not be responded to or controverted especially by the second respondent who is the repository of power under the **Aliens Control and Lesotho Citizenship Acts**.

[49] It is a trite principle in application proceedings that bare denials are prejudicial to a litigant’s case and that the respondent must always respond issuably to the allegations made by the other party in his affidavit – failure to do so may cause the court to accept the to take applicant’s allegations as correct<sup>16</sup>. That the second respondent did not depose to an affidavit was a serious flaw in the respondents’ case. However, not much revolves on this because the deportation order is not being challenged on a ground such as improper motive or *mala fides* but mainly upon the alternative grounds that the order is unlawful for being in contravention of sections 7 (1) and 11 (1) of the Constitution of Lesotho due to the fact of applicant’s marriage to a Lesotho citizen. This ground is a cry far from that of improper motive or *mala fides*. In our view prayers (c) and alternative prayer (a) must be read conjunctively in order to have meaning. Moreso in the main

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<sup>16</sup> Erasmus B1-44 states if the respondent’s affidavit in reply to the applicant’s fails to admit or deny or confess and avoid, allegations in applicant’s affidavit, the court will, for the purposes of the application, accept the applicant’s allegations as correct. (**Moosa v Knox** 1949 (3) 81 327 N; **United Methodist Church of South Africa vs Sokufundamala** – 1989 (4) SA 1055; **Ebrahim** – 1992 (2) SA 151. The respondent must eschew indignant argument and expostulation in his answering affidavit.

prayer the deportation order is being challenged on the principal ground that, being a Lesotho citizen, the first applicant cannot be deported.

- [50] It is also important to note that in her opposing affidavit, Director of Immigration does not respond to the allegations under paragraph 13 of the founding affidavit. In fact she states:-

*“I did not complain to Home Affairs about the Applicant’s (Harvest’s) programme and certainly did not ask that a Deportation Order be issued.”*

*4.3 Save for what has been set out above, I deny the remainder of the allegations as set out herein.*

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- [51] Matters of birth are usually matters of hearsay where there is no evidence of the parents of the litigant. In the absence of a birth certificate, passports and other ID’s, if genuine, are usually taken as *prima facie* evidence of what is contained in them. Such certificates do no more than shift a duty to adduce evidence but the *onus* remains upon the party who has to prove the fact which the certificate contains – **S v Veldthuisen** – 1982 (3) SA 413.

- [52] In these proceedings, the *onus* rested throughout on the applicant to prove in fact that (a) he was in fact born in Lesotho on the 30<sup>th</sup> August 1970 (whether at Ha Foso or Thaba-Tseka is not material). He must

discharge this *onus* on a balance of probabilities in all proved circumstances. – **Kelleher** – 1983 (1) SA 71 at 75. In our view the important points to consider in this inquiry are the following:

- (a) *was the applicant born in Senekal in South Africa whilst his parents were citizens of Lesotho? or*
- (b) *was the applicant born in Thaba-Tseka of the said parents?*
- (c) *is the explanation by applicant regarding Senekal as place of birth inherently plausible or reliable?*
- (d) *is there credible evidence – despite inconsistencies in applicant’s version – that his parents were citizens of Lesotho who resided in Thaba-Tseka?*

[53] Over these issues there is a material dispute of fact. Having read through the Referee’s Report (attached to this Judgment), it can be safely inferred that applicant’s parents were born and lived in Lesotho and thus were citizens of Lesotho; this fact, though not formally admitted by respondents, cannot be denied and must be regarded as admitted – **Plascon – Evans Paints** – 1984 (3) SA 623 at 634 A – 635 B per **Corbett JA**.

In our view even if the first applicant had been called for cross examination under Rule 8 (14) of the High Court Rules 1980 his evidence regarding his birth would never change from being the hearsay it was; nor could he testify with certainty and credibility about the time and place of birth of his parents.

[54] The determination of the nationality and citizenship of applicant's parents was indeed a paramount issue that transcended the whole proceedings if, at all, the principal question of applicant's true identity and citizenship would be resolved and this could not be achieved on papers as they stood.

[55] In the exercise thereof of its discretion under Rule 19 of the *Constitutional Litigation Rules (Legal Notice no.194) 2000* [and the Court is indebted to **Mr Molyneaux** for his assistance] the Court, with the consent of the parties, referred for inquiry and report to a Referee this matter of place of birth of applicant's parents for local investigation. This Rule 19 reads:-

***“19. The Court may, with the consent of parties, refer for inquiry and report to a referee***

- (a) any matter that requires extensive examination of documents or scientific, technical or local investigation which in its opinion cannot conveniently be conducted by it.***
- (b) .....***
- (c) any other matter arising in the proceedings”.***

For the purposes of completeness of this judgment, the Report submitted by **Mr Sesioana** – a Referee mutually selected by both counsel and appointed by this Court – will be attached *ipsissima verba* to this judgment.

[56] What may be gleaned from the sworn statements of the eight people in this Report is that the first applicant was allegedly born in Lesotho in 1970 and that he maintained contact with the Lekhoaba family in Lesotho (*Vide – Fusi Lekhoaba and Masilo Lekhoaba*) and that the applicant's father had even been allocated an arable field and had a residential house at Ha Moqekela in Thaba-Tseka and that one Tsibela Lekhoaba testified to the effect that Motsitsi Lekhoaba only fled the country during the 1970 political disturbances.

[57] From these statements it is safe to infer, in the absence of evidence to the contrary<sup>17</sup>, that the first applicant's father was a Lesotho citizen and that the first applicant was born in all probability at Thaba-Tseka and not at Ha Foso Maqhaka or in Senekal, in the Republic of South Africa. Any allegation that he was born elsewhere would be based on hearsay and would not be reliable. Courts of law have recognized that people of the same kin are usually well acquainted with matters concerning their family relationships and are unlikely to have a reason to tell lies – See **Hoffman and Zeffertt – South African Law of Evidence (1983) 3<sup>rd</sup> Ed, p.127 (on pedigree)**<sup>18</sup>.

[58] It was not suggested that the several people, some related and some not related to the first applicant, knew in fact that there were proceedings *sub judice* or knew the purpose for which their knowledge was being sought; nor, if they knew, they could fabricate –

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<sup>17</sup> **Lawrence Matime v Rex** - 1971-73 LLR 189 (C.A) at 192-193 per **Schreiner P.**

<sup>18</sup> Admissibility of pedigree evidence given *ante litem motam* (before commencement of a law suit/dispute) is so because the declarant was not aware of an impending controversy or litigator (**Shedden v A.G** – (1860) 3 LT 592 or because there is no temptation to exceed or fall short of truth (**Whitelocke v Baker** – (1807) 33 ER 385 at 386 per **Lord Eldon**; The **Berkeley Peerage** case (1811) 171 ER 128.



with a feloniously mischievous conspiracy and so in unison. We therefore find no cogent reason to doubt what these Basotho people told the Referee *Mr Sesioana* – the Referee whose genuine comment on these people’s credibility is also fair in the circumstances.

[59] The only reasonable inference that this Court should reach is that the applicant was born in Lesotho at Thaba-Tseka in 1970 of parents who were Basotho nationals or citizens. The allegation by the applicant in paragraph 9 of his founding affidavit that he was born at Ha Foso – having accepted the sworn testimony of people who know first hand the applicant his origins and place of birth – is by all accounts factually unreliable being a result of hearsay and is analogous to that of a witness giving evidence as of his own age<sup>19</sup>. We find that the first applicant was a Lesotho Citizen by birth.

[60] That however is not the end of the story. Under our law, the place of birth of an individual does not conclusively determine his citizenship. The citizenship of his parents especially his father at the time of birth is also very important. There is no allegation on record that Motsitsi Lekhoaba was a citizen of South Africa – but there is evidence that he was a national of Lesotho who fled Lesotho around 1970. From his youth the first applicant took Senekal as the place of his birth and filled in this information when he applied for an identification document and for the now expired South African passport.

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<sup>19</sup> *Lawrence Matime vs Rex* – 1971-73 LLR 189 at 192

[61] Even assuming that he was born in Senekal in 1970 that does not *per se* render him a citizen of South Africa, if there is credible or reliable evidence that his parents were at the time citizens of Lesotho who were then residing in Senekal in South Africa.

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### **What is the citizenship of first applicant to-day?**

[62] **Mr Phoofolo's** ingenious argument on this important issue by all means requires this Court to give a full and clear interpretation and construction to sections 41 and 42 of the 1993 Constitution of Lesotho. All what in effect the important sections do is: (a) to protect the citizenship of those Lesotho citizens who are citizens by virtue of having been born in Lesotho or are citizens of Lesotho by descent against any deprivation of that citizenship because such right is their birthright upon which no Parliamentary instrument can encroach; (b) but also to provide that such a citizen of Lesotho can forfeit this birthright if by a voluntary (conscious) choice or election, he or she has also acquired citizenship of some country other than Lesotho and has failed five years after having attained the age of twenty-one years, to renounce his citizenship of that country in terms of *section 8* of the **Lesotho Citizenship Order No.16 of 1971**. Section 3 of the Order thereof reads:-

#### ***“CITIZENSHIP RIGHTS***

**3. *Subject to the provisions of section 8, every person who immediately before the coming into operation of this order***

*was a citizen of Lesotho by virtue of the provisions of the Lesotho Independence Order 1966, shall continue to be a citizen of Lesotho unless he ceases to be a citizen in terms of this order or any other law.*

4. ....
5. (1) *Subject to the provisions of subsection (2), every person born in Lesotho after the 3<sup>rd</sup> day of October 1966 shall be a citizen of Lesotho with effect from the date of his birth.*
- (2) *A person born in Lesotho after the 3<sup>rd</sup> October 1966 shall not become a citizen of Lesotho by virtue of this section,*
- (a) *if at the time of his birth,*
- (i) *neither of his parents is a citizen of Lesotho;*
- (ii) *his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Lesotho; or*
- (iii) *his father is an enemy alien and the birth occurs in a place under occupation by the enemy.*
- (b) *unless he would thereby become stateless”*

[63] Under the 1966 Constitution of Lesotho, **dual citizenship** was also proscribed under section 28 which read:-

***“Dual citizenship***

28. – (1) *Any person who, upon the attainment of the age of*

*twenty-one years, is a citizen of Lesotho and also a citizen of some country other than Lesotho shall cease to be a citizen of Lesotho upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is a citizen of Lesotho by virtue of section 23 (2) or section 26 of this Constitution, made and registered such declaration of his intentions concerning residence as may be prescribed by Parliament.*

(2) *Any person who –*

*(a) has attained the age of twenty-one years before 4<sup>th</sup> October 1966; and*

*(b) becomes a citizen of Lesotho on that day by virtue of section 23 of this Constitution; and*

*(c) is immediately after that day also a citizen of some country other than Lesotho*

*shall cease to be a citizen of Lesotho upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is citizen of Lesotho by virtue of section 23 (2) of this Constitution, made and registered such declaration of his intentions concerning residence as may be prescribed. (Our emphasis)*

(3) *A citizen of Lesotho shall cease to be such a citizen if –*

*(a) having attained the age of twenty-one years, he acquires the citizenship of some country other than Lesotho by voluntary act (other than marriage); or*

*(b) having attained the age of twenty-one years, he otherwise acquires the citizenship of some country other than Lesotho and has not, by the specified*

*date, renounced his citizenship of that has not, by the specified date, renounced his citizenship of that other country, taken the oath of allegiance and made and registered such declaration of his intentions concerning residence as may be prescribed. (our emphasis)*

- (4) A woman who –
- (a) *becomes a citizen of Lesotho by registration under the provisions of section 24 or section 27 of this Constitution; and*
  - (b) *is immediately after the day upon which she becomes a citizen of Lesotho also a citizen of some other country.*

*shall cease to be a citizen of Lesotho upon the specified date unless she has renounced the citizenship of that other country, taken the oath of allegiance, and made and registered such declaration of her intentions residence as may be prescribed.*

- (5) *For the purposes of this of this section, where, under the law of a country other than Lesotho a person cannot renounce his citizenship of that other country, he need not make such renunciation but he may instead be required to make such declaration concerning that citizenship as may be prescribed.*
- (6) *In this section “the specified date” means, in respect of a person to whom subsection (1) or (2) or (3) (b) or (4), as the case may be, of this section refers, such date as may be specified in relation to that person by or under an Act of Parliament.” (Our emphasis)*

[64] As we have noted dual citizenship is proscribed under the 1993 Constitution of Lesotho section 42 (2) of the 1993 Constitution

however provides that Parliament may not under any circumstances make a provision whose effect would render any person (whether citizen by registration or naturalization) stateless. This is an immutable principle of law of nations which declares that every human being cannot be stateless has an inalienable right to be a national of his or her fatherland. Section 42<sup>20</sup> does not apply to persons who are citizens of Lesotho by birth or by descent, but this does not also mean that provision of section 41 of the Constitution does not apply to citizens of Lesotho by birth or decent who have acquired citizenship of some country other than Lesotho. In my view, a citizen of Lesotho by birth or by descent can make a conscious (well-considered) decision to relinquish his or her Lesotho citizenship and become a citizen of South Africa or of some other country. That is why it is necessary that after turning 21, some five years must pass for fuller and mature reflection to renounce – not the citizenship of Lesotho – but of the country other than Lesotho.

[65] Before the cessation of Lesotho citizenship under section 41 of the 1993 Constitution can occur, the following must be shown:-

- (a) the person must be an adult citizen of Lesotho.
- (b) who has attained the age of twenty-one years; and
- (c) who has voluntarily acquired citizenship of some country other than Lesotho – whether by naturalization or by registration;

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<sup>20</sup> Section 42 applies only to cases of acquisition, deprivation and renunciation under Acts of Parliament and not to citizens by birth or by descent.

- (d) and five years have expired since acquiring the citizenship of that other country; and
- (e) he has not renounced his citizenship of that country before the expiry of those five years.

[66] It is imperative – and this does not depend upon one’s choice – that if a citizen of Lesotho (by birth or by decent) wishes to continue being a citizen of Lesotho but also is a citizen of yet some country other than Lesotho, he must renounce the citizenship of that other country within five years after becoming twenty one, otherwise he/she shall cease being a citizen of Lesotho. This is an operation of law and no matter of choice. In other words, a person cannot be a citizen of Lesotho and a citizen of another country contemporaneously after expiry of five years.

[67] The *rationale* behind the “*window-period*” of five years after attainment of majority is to give the Lesotho citizen concerned sufficient period of reflection for a mature decision that will affect his status as a citizen of Lesotho. It is no window-dressing by any means.

[68] Indeed in the case of **Mokoena**<sup>21</sup>, I doubt the correctness of my former Brother **Maqutu J.** when he stated -

*“Parliament in its wisdom decided that citizenship by birth or by descent should not be lightly lost. It seems a person with a home in Lesotho cannot be deemed to have lost his birthright by taking what is deemed another citizenship to get a job while his domicile remains in Lesotho. Only citizenship of Lesotho by naturalization*

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<sup>21</sup> CIV/APN/216/2005 (16<sup>th</sup> January 2007)

*or registration can be lost in terms of section of Lesotho Citizenship Order 1971 by Ministerial Act.” (My underline)*

[69] Whilst it is true that unlike other forms of citizenship such as by registration or by naturalization, citizenship by birth and by descent in Lesotho is protected in a special manner and should not be lightly lost, it is not correct to state that it can only be lost through renunciation!

The constitutional protection, in my view, is however not absolute or immutable. It is all a matter of choice and of law. No one can be compelled to continue to be a citizen of a country he wants to sever ties with!

[70] I would therefore beg to differ with greatest of respect with my former Brother **Maqutu J** when he requires that before a citizen by birth or descent can lose his citizenship he must be proved by to have renounced by voluntary act his Lesotho citizenship (see **Mokoena v Makarabo Mokoena & others** – CIV/APN/216/05).

It is not, in my view, the failure “*to renounce Lesotho citizenship*” but failure to “*renounce citizenship of some other country within five years*” after attaining majority that causes cessation of Lesotho citizenship. No voluntary (overt) act is required but only failure to renounce the other citizenship is sufficient.

[71] **Mokoena v Mokoena – C of A (CIV No.2 of 2007)**



I have read closely the recent decision of the Court of Appeal<sup>22</sup> of Lesotho (an appeal from **Maqutu J**'s judgment). I do not read its ratio *decidendi* to mean that Lesotho citizenship can only be lost through a formal act of renunciation under *section 22* of the Lesotho Citizenship Act 1971; to read it so makes *section 41* of the Constitution meaningless. In my view there are three ways in which Lesotho citizenship may be lost and these are

- (a) by operation of law (*ex lege*) under section 41 of the constitution  
or
- (b) by renunciation under section 22 of the Lesotho Citizenship Act;  
or
- (c) by deprivation under section 23 of the said Act.

[72] In the United States of America a US citizen who acquires citizenship of another country either by naturalization or by registration does not lose his or her US citizenship unless he or she renounces his or her US citizenship. The concept or phenomenon of “**dual citizenship**” prohibition is in my view predicated upon traditional notions of nationhood and sovereignty and upon attendant rights and obligations of the citizen; that is: You are a citizen of country X and cannot contemporaneously enjoy citizenship rights of country Y. Archaic as the concept may turn out to be in a global and cosmopolitan world of today, the concept has crystalised into a constitutional ethos in some countries.

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<sup>22</sup> C of A (CIV) No.2 of 2007 – dated 25 October 2007

[73] Above all, it is important to read the provisions of section 41 and of section 42 of the Constitution not disjunctively but conjunctively in order to avoid their own self-destruct.

In my view, any interpretation which would in effect perpetuate Lesotho citizenship contemporaneously with foreign citizenship beyond the five years after attainment of majority, would be inconsistent with the clear provisions of section 41 and indeed they would be rendered nugatory; and all sections of the Lesotho Citizenship Act 1971 must be read consistently with the sections 41 and 42 of the Constitution.

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[75] In **Maphisa v Lecheko** 1991-96 (1) LLR 571 **Mr Nathane** had submitted that there was no proof that the applicant and her husband had renounced their Lesotho citizenship when they purported to acquire citizenship of RSA. I agree with **Kheola J.** where he stated thus:-

*“I do not agree with that submission because section 8 (1) and (2) of the Citizenship Order 1971 does not require that when a citizen of Lesotho acquires a citizenship of another country he must formally renounce his Lesotho citizenship. By mere acquisition of the citizenship of another country he or she ceases to be a citizen of Lesotho. In order to facilitate their employment in RSA the applicant and her husband took a very*

*drastic step of acquiring the citizenship of that country. The consequences of that decision are very bitter.”* [See also **Thebe-Tšoeu vs Chief Magistrate** (CRI/APN/14/96)]

[76] For the purpose of this judgment, we should assume in first applicant's favour that when he turned twenty-one on the 30<sup>th</sup> August 1991, the first applicant was still a citizen of Lesotho; it is also clear that when first applicant turned twenty-six on the 30<sup>th</sup> August 1996, he – and he does not gainsay this – does not state that he formally renounced his South African citizenship which, upon his own admission, he had acquired in 1987, he also later acquired a full South African passport in 1997 (then twenty seven years old) describing him as a South African national/citizen. Ignorance of law in this regard comes not to his succour but to his detriment. Law is the law and ignorance of it is not excuse – *ignorantia legem non excusat*. The ground of ignorance of the law or of economic necessity do not come to his aid. The 1966 and 1993 Constitutions and the Lesotho Citizenship Act of 1971 both outlaw dual citizenship. The first applicant has never formally, at any time up to the present, renounced the South African citizenship which he had hitherto acquired.

[77] The only conclusion which this Court must, in the circumstances of this case, arrive at is that on the 30<sup>th</sup> August 1996, the first applicant ceased being a citizen of Lesotho for all intents and purposes. Consequently, when on the 12<sup>th</sup> March 2007, the second Respondent signed a Deportation Order, the first applicant was not a citizen of Lesotho; and hence – being an alien – he was liable to be deported.

**Validity of the Deportation order made in terms of *section 25* of the Aliens Control Act No.16 of 1966.**

[78] Section 25 of this Act reads:-

***“25. (1) Subject to the provisions of section thirty –eight and thirty-nine, the Minister may make an order that an alien whose presence within Lesotho is unlawful shall be expelled from and remain out of Lesotho either indefinitely or for a period to be specified in the Order.”***

[79] Validity of every deportation order must necessarily depend upon the following -

- (a) legal competence of the maker.
- (b) Jurisdictional facts – substantive and procedural.

No doubt the second respondent is the sole repository of power under both the Lesotho Citizenship and Aliens Control Acts as the Honourable Minister of Home Affairs in the Government of Lesotho. He was under the law competent to make the Order which he signed the Order (first applicants’ surname is twice misspelled) whether jurisdictional facts, existed in *casu* is a question of fact. For example was the first applicant an “*alien*” liable to be deported from Lesotho? Was he present in Lesotho on the 12<sup>th</sup> March 2007? These are questions of fact and of law.

[80] It is not in dispute that when on the 12<sup>th</sup> March 2007 the second respondent ordered that the first applicant be deported from Lesotho in terms of section 25 of the Aliens Control Act 1966 his opinion was that such deportation was necessary in the interests of Lesotho<sup>23</sup>.

But it is also common cause that on the 3<sup>rd</sup> March 2007 the first applicant decamped and left Lesotho and when he returned on the 24<sup>th</sup> March 2007 he was presented with a deportation order by his wife, the second applicant. In other words, he was not physically present in Lesotho when the Deportation Order was made by the Second Respondent.

[81] The interpretation and application *section 25* of the Lesotho Citizenship Act 1971 came up for consideration by Lesotho Court of Appeal in **Florio v Minister of Interior** (1991-96 LLR Vol.I 200<sup>24</sup> and **Steyn JA** reasoned that

*“... the Act is intended to be applied to a person who is indeed present at the time the order is issued*

*... It is my view that any order issued under section 25 can only validly be issued in respect of an alien who, at the time of its issue, is present in Lesotho<sup>25</sup>”.*

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<sup>23</sup> Legal Notice No.18 of 1972 – section 3

<sup>24</sup> Also in 1990-94 LAC 446

<sup>25</sup> P.446 E-I

[82] In the face of this Court of Appeal decision, this Court cannot therefore hold as valid the Deportation Order made by the second Respondent on the 12<sup>th</sup> March 2007 whilst the first applicant was not present then and this Order is hereby declared null and is set aside.

[83] **Audi alteram partem**<sup>26</sup>

Applicant alternatively contends that the Deportation Order must be set aside as being *ultra vires* because the second Respondent failed to afford him an opportunity to be heard before he reached a decision to deport him; he also alleges that in fact, though the second Respondent states in the Order that he based his reason for so deporting him upon “*public interest*”, that this was not so but that the decision was grounded on “*party political interest*” and that this has not been issuably controverted by the second respondent. He alleges that his – first applicant’s – public utterances over the Harvest Radio concerning the propriety of election results and proportional division of seats were turned into the seeds of his own destruction thus precipitating his deportation.

[84] The case of **Otubanjo vs Director of Immigration – C of A (CIV) No.35/05** decided that an alien is not entitled to be given a hearing prior to his being deported. This distinguishes an alien not holding a residence permit from a citizen of Lesotho because a citizen of Lesotho cannot be deported from his or her country (fatherland) and cannot be refused entry into Lesotho; whatever his undesirability.

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<sup>26</sup> Let the other side be heard.

[85] Upon his papers sworn to by himself, the first applicant admits that on the 12<sup>th</sup> March 2007, he was physically not present in Lesotho – having left Lesotho on the 3<sup>rd</sup> March under alleged threats from Lesotho police. At the material time there was therefore, no valid residence permit in his favour. If how such a permit then existed, it could be contended arguably by the first applicant that before such permit could be revoked or cancelled, he ought to have been given a hearing because he had a “*legitimate expectation*” to enjoy a temporary residence in Lesotho for its duration. The applicant cannot thus claim legitimate expectation to have been given hearing before the deportation order was made because on the 12<sup>th</sup> March 2007, he was out of Lesotho and had no residence permit lawfully existing in his favour.

### **Renunciation**

[85] An important and also rather ingenious argument was made by **Mr Phoofolo** (relying on the case of **Mokoena** (*supra*) per **Maqutu J**) that citizenship by birth or descent is not to be “*lightly lost*” and that there must be a conscious election/decision on the part of a Lesotho citizen to retain or renounce Lesotho citizenship and or/to renounce or retain the foreign citizenship. On the 30<sup>th</sup> August 1996<sup>27</sup> a conscious decision in my view, that was to have been made by first applicant was not to retain or renounce his citizenship of Lesotho but a decision to formally renounce citizenship of South Africa and the procedure to

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<sup>27</sup> Applicant turned twenty-six on the 30<sup>th</sup> August 1996 and that was his “specified date” in terms of section 20 (1) (a) of the Lesotho Citizenship Order No.16 of 1971.

do this was to be governed not by the law of Lesotho but by law of South Africa so that his citizenship in that country could be cancelled<sup>28</sup>. Indeed as recently as 1997, applicant took a South African passport No. 403517310 dated 28 February 1997 in which his nationality is inscribed as South African. This was a voluntary act on his part and he continued using that passport until it expired.

[86] In my view the “*window period*” of five years after attainment of twenty-one is intended that a Lesotho citizen who contemporaneously still holds citizenship of another country must make a mature decision as an adult whether to cease being a citizen of Lesotho and to retain the other citizenship. There is no need or requirement under law to formally renounce Lesotho citizenship; its loss comes about *ex lege* (by operation of law).

[87] In brief, the postulations of the Lesotho law can be paraphrased thus:-

*‘If you are a citizenship of Lesotho by birth or by descent and having attained the age of twenty-one you consciously acquire citizenship of some other country and you fail to renounce that foreign citizenship after attaining the age of twenty six (five years after 21<sup>st</sup> birthday) you “shall cease being a citizen of Lesotho” ex lege (by operation of law). Such Lesotho citizenship can be regained if (a) you renounce the foreign citizenship and follow other steps and procedures to become once again a citizen of*

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<sup>28</sup> See section 9 South African Citizenship Act No.88 of 1995 which gives the Minister of Home Affairs powers to deprive a South African citizen of his or citizenship.



*Lesotho by registration (section 22 of the Lesotho Citizenship Act 1971)*<sup>29</sup>.

[88] In South Africa, there are three modes of loss of South African citizenship-

- (a) by automatic statutory operation,<sup>30</sup>
- (b) by renunciation,
- (c) by deprivation.

See **The Law of South Africa Lawsa** (2<sup>nd</sup> Ed) para 162-165 – See **Green v Minister of Interior** 1968 (2) SA 611 (I); 1968 (4) 321 (AD) where it was held that where a young citizen was influenced by his parents and by circumstance to adopt the citizenship of another country, the act was voluntary; there was no compulsion.

[89] In **Green v Minister of Interior** (*supra*) **Mr Green** was born in the Union of South Africa of parents then domiciled in the Union. As a minor, he accompanied his parents to the United States of America

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<sup>29</sup> **Lawrence Matime v Rex** - 1971-73 LLR 136 at 142

<sup>30</sup> Section 6 of the South African Citizenship Act No.88 of 1995 provides as follows:-

**“6 (1) Subject to the provisions of subsection (2) a South African citizen shall cease to be a South African citizen if (a) he or she, whilst not being a minor, by some voluntary and formal act, other than marriage, acquires citizenship of a country other than the Republic .....”**

In general South African does not outlaw dual citizenship but adopts a policy of toleration within certain restrictions to prevent abuse - see **Jonathan Klaaren - Post – Apartheid Citizenship in South Africa**. At present, provision is made in the amended South African Citizenship Act No.88 of 1995 for South African citizen to retain his or her South African citizenship when becoming citizen of another country. In the U.S.A. a US citizen who naturalises in another country cannot have his or her U.S. citizenship removed unless he or she expressly intends to lose it.

Perhaps on the subcontinent the SADC common citizenship in the near future shall be the only panacea.

and at the age of 25 he applied for and was granted certificate of USA citizenship in 1948. He returned to the Union in 1949 and had been living there ever since. When Green applied for an order declaring that he was a South African citizen, it was held that as the Green, albeit for good reason, had acted of his own free will, without compulsion, that such act had to be regarded as a voluntary act within the meaning of Act.

In Lesotho, dual citizenship leads to cessation of Lesotho citizenship by operation of the Constitution itself i.e. (section 41 thereof) and of the statute (*section 8* of the **Lesotho Citizenship Act 1971**); renunciation (*section 22*); deprivation *section 23*.

[90] Indeed certain hardships are likely to be faced by the many of Basotho people who while being erstwhile citizens of Lesotho by birth or by descent, presently for the best part of their lives live, work and reside in South Africa and have elected – for multitudinous reasons e.g. finding employment in South Africa or securing other amenities of life – to formally acquire citizenship in South Africa. The Constitution of Lesotho and Lesotho Citizenship Act solemnly declare that “*dual citizenship*” is not allowed – you either retain your Lesotho citizenship by renouncing the foreign citizenship or you cease being a Lesotho citizen *ex lege* 5 years after reaching the age of majority. That is the law as should be administered by the courts of law in Lesotho.

[91] The only remedy to this hardship can only be brought about through a constitutional/legislative amendment changing the relevant provisions in Chapter IV of the 1993 Constitution of Lesotho and in the Lesotho Citizenship Act of 1971.

[92] Whilst inevitable absurd results or undue hardships must always be avoided when interpreting the law, no benevolent interpretation should be allowed to supercede otherwise clear constitutional or statutory provisions which the courts of law must enforce.

[93] **Section 11 of the Constitution**

In the alternative Prayer (a) the first applicant alleges that the deportation order is invalid for being in contravention of his rights under the Constitution of Lesotho – Sections 7 (1) and 11 (1). They read in part:

“7. (1) *Freedom of movement*

*Every person shall be entitled to freedom of movement that is to say the right to move freely throughout Lesotho, right to reside in any part of Lesotho, the right to enter Lesotho, the right to leave Lesotho and immunity from expulsion from Lesotho.*

(2) .....

**Right to respect for private and family life**

“11. (1) *Every person shall be entitled to respect for his private and family life and his home.*”

[94] Ordinarily, a person is entitled to enjoy his right to private family life in the country where he resides lawfully<sup>31</sup>. In our view, an alien cannot claim – as “*any person*” – the rights under sections 7 and 11 of Constitution of Lesotho if he is not lawfully in Lesotho in as much as a Lesotho citizen cannot claim any freedom of movement or right to family life if he or she is not lawfully in South Africa! The right under section 11 is predicated upon certain recognized rights under the laws of Lesotho.

[95] It would achieve absurdities<sup>32</sup> if aliens would come into Lesotho and claim immunity from deportation or rights to temporary residence permits in Lesotho merely because their spouses or children are residing in Lesotho. For example, a Lesotho citizen cannot claim to be entitled (as of right) to reside in the United Kingdom where his wife or her husband happens to be a citizen or to be pursuing studies or other engagement. The purpose of Aliens Control Act 1971 would be frustrated if section 11 of the Constitution is given such an expansive and not a purposive construction.

[96] I am not convinced that the interpretation of section 11 of the Constitution should be so expansively extended to include aliens unlawfully in the country. On the other hand an alien who is lawfully

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<sup>31</sup> The English phrase it “*Every man’s home is his castle.*”

<sup>32</sup> Devenish – Interpretation of Statutes – **Juta** – 1996 – p.161, 177

in Lesotho is fully entitled to sections 7 and 11 rights and other freedoms under the Constitution except those under its section 20.

[97] We are not convinced that the line of reasoning<sup>33</sup> adopted in the Zimbabwean and South African decisions cited by **Mr Phoofolo** should be adopted and followed in Lesotho without disservice to the Constitution of Lesotho of 1993 and to the **Aliens Control Act of 1966**.

[98] If an alien wishes to sojourn and join his/her spouse who is a Lesotho citizen and resident of Lesotho, he or she must follow the statutory requirements under the *Aliens Control Act of 1967*, wherein clear administrative procedures or steps are to be followed<sup>34</sup>; in other words he or she cannot jump the local administrative steps and ask the Court to make a declaratory order that, because he/she is married to a Lesotho citizen, he must as of right be granted a residence permit or not to be deported. He/she however can approach to court after he has made an application to the relevant depository and has been arbitrarily refused permit to join his spouse *mala fides* or for an improper motive. Marriage to a female Lesotho citizen *per se* does not found a right – real or contingent – to reside in Lesotho in order to guarantee a right under sections 7 or 11 of the Constitution. Rights of aliens (as human beings or persons) under chapter II are limited and can be restricted under law.

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<sup>33</sup> The reasoning of which may in fact be attractive and progressive in the modern world. These are **Rattigan v Chief Immigration Officer** – 1995 (2) SA 182 at 190 (H) per **Gubbay C.J.**; **Dadoo and Others v Minister of Home Affairs** – 2000 (3) SA 936.

<sup>34</sup> Italians advise “...when in Rome...do as the Romans do...”

[97] For example, only citizens have political rights under section 20 of the Constitution. An alien cannot claim a right to participate in the political affairs of Lesotho. An alien (*as a person*) can enjoy human rights under Chapter II but subject such to any such laws of Lesotho existing at the time. We have not been asked to declare any provisions of the *Aliens Control Act of 1967* as being unconstitutional or been asked to declare the Deportation Order *ultra vires* the principal law.

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### **Conclusion**

[98] It is for the Executive and Legislative arms of government in Lesotho to give due regard to the legal and perhaps to the socio-economic facts raised in this judgment so that if there be a real need for a legislative change in order to remove undue hardships, this should be done with all expedition.

[99] Without overstepping the parameters of judicial modesty, it should *in passu* be noted that the proximity of the two countries and other social and economic ties between them, demand a close bilateral cooperation in any legislative or administrative endeavours to remedy whatever problems that relate to the citizenship of the Basotho people presently living in South Africa, fully conscious to the fact that since the notorious “**Basotho – Boer Wars**” of the 19<sup>th</sup> Century, many Basotho families then living in what is now South Africa were arbitrarily “*cordoned off*” into the then new Union of South Africa; and that

many Basotho men and women still leave Lesotho to seek and obtain employment and education in industries and institutions in South Africa and succeed only if they have some form of documentation, and that the Basotho men and women living in the Republic of South Africa still maintain very strong family links and connections with their kin and roots in Lesotho.

[100] **Order**

1. I would dismiss prayer (b) and grant prayer (c) of the notice of motion.
2. This being an important constitutional matter, I would make no order as to costs.

**S.N. PEETE**

**JUDGE**

For Applicants : **Mr E.H. Phoofolo**

For Respondents : **Mr Molyneaux**

**Hlajoane J.,**

**Mahase, J.**

[101] This case raises very important constitutional issues which may not affect the citizenship rights of the 1<sup>st</sup> Applicant only but also that of other Basotho people.

[102] We do share the sentiments of our brother Justice S.N. Peete as he has ably outlined the way the said rights of the Basotho people are or have been affected by the unique situation of our country which is an enclave of the Republic of South Africa.

[103] The first Applicant insists that he is a Lesotho citizen and has challenged the deportation order which has been issued against him by the second Respondent herein. He has clearly spelt out his reasons for challenging same. He has asked this Court amongst other things, to declare that order as unlawful, null and void.

[104] Whilst as a panel we agree that the first Applicant was born in Lesotho and that he was born of Basotho parents, we nonetheless are not in agreement with our senior brother Justice Peete on the interpretation of **sections 37, 41 and 42 of the Lesotho Constitution 1993.**



[105] We wish to observe that in terms of **section 37 of the Lesotho Constitution**, the first Applicant's Lesotho citizenship rights are guaranteed. Indeed such rights are guaranteed as would be seen from the provisions of that section.

[106] **Section 37** provides as follows:- (quote)

*“Every person who immediately before the coming into operation of this Constitution is a citizen of Lesotho under the **Lesotho Citizenship Order 1971** shall, on the coming into operation of this Constitution and subject to any provision made in or under this chapter, continue to be citizen of Lesotho.”*

[107] It is now a matter of common cause that the first Applicant was born in Lesotho at Ha Moqekela in the Thaba-Tseka district, and that he was born of both Basotho parents. Vide: report of the referee appointed by this Court with the consent of Counsel on both sides. This fact which has not been denied or challenged in anyway by the second Respondent whose deportation order is being challenged by the first Applicant herein.

[108] Indeed if read together with *obita dictum* of **Maqutu J** (as he then was) in **CIV/APN/216/2005 Mokoena v Mokoena and Others**, on the question of citizenship rights in Lesotho; the provisions of **section 37 of the Lesotho Constitution, Chapter IV** on citizenship, buttresses the point that in a situation such as the present, the Court must lead evidence as to the person's state of mind. We took the other alternative route and appointed a referee in terms of **Rule 19 of**

**Constitutional Litigation Rules** in order to establish the citizenship of the first Applicant and where he was born. This in turn would lead us in to establishing the first Applicant's state of mind.

[109] The first Applicant whose averments in his founding affidavit – paragraph 13.1 have not been challenged and or refuted in anyway by the second Respondent, has clearly stated the circumstances under which he involuntarily found himself in. To confirm his averments the referee's report has revealed how the first Applicant's parents had involuntarily left Lesotho during 1970.

[110] Our brother Justice Peete at page 9 of the judgment has correctly shown that the 1966 and the 1993 Constitutions outlaw dual citizenship and that any person who wishes to be registered or naturalized must be willing to renounce any other citizenship that he may have.

[111] **“Section 41** of the Constitution 1993 reads:-

1. “Any person who, upon the attainment of the age of twenty-one years, is a citizen of some country other than Lesotho shall cease to be a citizen of Lesotho upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is a citizen of Lesotho, by descent, made and registered such declaration of his intentions concerning residence as may be prescribed by Parliament.
2. A citizen of Lesotho shall cease to be such a citizen if –
  - (a) having attained the age of twenty-one years, he acquires the citizenship of some country other than Lesotho by voluntary act (other than marriage); or

- (b) having attained the age of twenty-one years, he otherwise acquires the citizenship of some country other than Lesotho and has not, by the specified date, renounced his citizenship of that other country, taken the oath of allegiance and made and registered such declaration of his intentions concerning residence as may be prescribed.
3. ....

#### **“Section 42**

1. Parliament may make provision for the acquisition of citizenship of Lesotho by persons who are not eligible or who are no longer eligible to become citizens of Lesotho under the provisions of this chapter.
2. Parliament may make provision for depriving of his citizenship of Lesotho any person other than a person who became or becomes
  - (a) a citizen of Lesotho by virtue of having been born in Lesotho or
  - (b) a citizen of Lesotho by descent,
 unless he would thereby become stateless.
3. Parliament may make provision for the renunciation by any person of his citizenship of Lesotho.

[112] First Applicant in his founding affidavit has stated thus:

*“when I attained the age of awareness I found myself living in Senekal Orange Free State with my parents, my brother Fusi had all along remained in Lesotho.”*

[113] It is clear from the first Applicant’s affidavit that it was not out of his choice that he found himself residing in the Republic of South Africa. The only inference which can be deduced from the first Applicant’s affidavit/statement, as well as from those of the interviewees interviewed by the Court appointed Referee is that the first Applicant

involuntarily left Lesotho to reside in the Republic of South Africa. Reasons for same have been alluded to below.

[114] We take judicial notice of the fact that many Basotho people were forced to flee from this country in 1970 due to the then unfavourable prevailing political climate. The referee's report revealed that first Applicant happened to be born during that same period and his parents were victims of that unfortunate event. When his parents so fled to South Africa in 1970, the first Applicant had no choice at all to remain behind or to make a decision as he was only some few months old.

[115] There are plethora of authorities dealing with the issue wherein a party to any litigation has decided not to respond to averments/allegations directed at him. See the case of **Theko v Commissioner of Police 1991-92 LLR & LB 239** where the Court of Appeal held amongst others that;

*“...as no attempt was made by the Respondents to reply or to challenge the correctness of the averments contained in the affidavit of Mr Maqutu, the issues must be resolved on the basis of the acceptance of his unchallenged evidence.”*

The second Respondent has in this case decided not to depose to any affidavit.

[116] **Section 41** above shows how a Lesotho citizen can cease to be such a citizen at subsection (2) thereof. The reading of that section can mean nothing more than say that, one has got to be of age, a major, in order for him to make a decision on citizenship. In our case the first Applicant was only 17 years when he obtained a South African Identity document which is not to be separated from his passport. He was obviously still a minor and therefore not the person envisaged under **ss 2 (a) of section 41 of the Constitution**. The first Applicant never chose to go and live in Senekal. We now know that the choice was not even that of his parents as they were forced by circumstances to flee this country.

[117] **Section 41 (2) (a)** demands that once a citizen of Lesotho has attained the age of twenty-one, he will cease to be one such citizen if by voluntary act (our underlining) he chooses to acquire citizenship of some other country other than Lesotho. We have already said that the first Applicant did not voluntarily choose to go and live in Senekal, he only found himself living there when he became of age. One's intentions here become relevant.

[118] We have also learned that when the first Applicant in 1997 obtained a South African Passport, he was 27 years old and therefore a major. Looking at **subsection 2 (b) of section 41** above, we learn as to when the citizenship of that other country is to be renounced, by a person who has attained age twenty-one. Obtaining a passport is a continuation of an identity document as we have been told by the first Applicant that information from the identity document is a key to

obtaining a passport. To show his intentions such citizen has to take efforts to registrar such declaration. This clearly shows that a Lesotho citizen by birth does not cease to be such a citizen automatically by operation of law, there are procedures to be followed. Being of age is not enough, he still has to formally renounce citizenship of that other country. Besides, the first Applicant was never issued with a certificate of naturalization by the Government of South Africa as was the case in Mokoena above.

[119] Now coming to **section 42 of the Constitution, subsection 2 (a) and (b)** thereof clearly indicate that Parliament may make provision for depriving of Lesotho citizenship, and goes further to say, “other than a person who became to becomes

- (a) a citizen of Lesotho by birth;
- (b) a citizen of Lesotho by descent.

[120] **Section 42 (2) (a) and (b)** has singled out Lesotho citizenship by birth and descent. A Lesotho citizen by birth has to make a voluntary renunciation and follow the procedures to have his intentions registered. It would therefore mean that the section was meant only for Lesotho citizenship by naturalization and by registration. The Legislature in its wisdom could not have passed laws which may seem to attempt to change that which no man has the power to change. A person has no choice as to where he wants to be born, and by which parents. If one is born of particular parents there can be no law that

can change that, unless such a person by voluntary act chooses otherwise.

[121] So that if one was born in Lesotho by Lesotho citizens who were forced by circumstances beyond their control to flee from their country to go and live somewhere else, it would be absurd to pass laws that would suggest that such a person had the requisite intention to renounce his original (Lesotho) citizenship.

[122] It would be an absurd interpretation of the law to give the meaning to **section 41 of the Constitution** as being contradicted by **section 42 of the Constitution**. A good law is that which is interpreted to be for the general good not one which could target certain individuals at some particular given times. The sections being under one chapter on citizenship, must be read to compliment each other and not mean or give opposite meanings.

[123] It is therefore apposite to mention that indeed **section 41** is not applicable to the case of the first Applicant. He had not as already shown above reached the age of majority when in 1970 his parents, who were Basotho, fled to South Africa due to political unrest of the time. The first Applicant was not in a position to decide on his own on whether or not to acquire citizenship of some other country other than Lesotho. The South African Identity documents were not obtained by his own voluntary choice.

[124] It cannot in all honesty be argued that at the time when he was only 17 years old, he manifested an unequivocal intention to renounce his Lesotho citizenship and the attendant rights. In view of his unchallenged allegations in his founding affidavit we are not persuaded that the first Applicant has ever intended to renounce his Lesotho citizenship which he has acquired by birth on the 30<sup>th</sup> August 1970.

[125] It is therefore not correct that first Applicant's country of origin is South Africa. We now know and are agreed as a panel that his place of birth is Lesotho, and that he was born in the Thaba-Tseka district of Basotho parents/citizens.

[126] **Section 22 of the Citizenship Order 1971**

This section deals with "*Renunciation by reasons of dual citizenship*". **Subsection (4)** thereof shows that "*the Minister may refuse to cause the registration of a declaration of renunciation of citizenship of Lesotho*", for reasons given. If therefore the Minister is given such powers, it means that a person can still under the law have dual citizenship.

[127] **Subsection 4 (b)** of the same section has given out reasons to be considered by the Minister in refusing renunciation. One such reason for refusal being when request for renunciation is made during a war in which Lesotho may be engaged. This qualification fits well the circumstances that led the first Applicant's parents to have left



Lesotho. We are not here deciding for the Minister but are merely stating what we believe is the position of the law and giving it the correct interpretation.

[128] The Court in **Mokoena v Mokoena** (*supra*) on the same issues of dual citizenship decided that in terms **section 22 of the Lesotho Citizenship Order 1971** a Lesotho citizenship cannot just be renounced, as Parliament in its wisdom decided citizenship by birth or descent should not be lightly lost. But that only citizenship of Lesotho by naturalization or registration can be lost in terms of **section 23 of the Lesotho Citizenship Order 1971** by Ministerial act.

[129] The position of the law on dual citizenship has been correctly stated in **Mokoena v Mokoena** (*supra*) as regards people who are Lesotho citizens by birth or descent. We have not been persuaded to decide otherwise even after the Court of Appeal decision on the matter in **Mokoena v Mokoena and Others C of A (CIV) No.2 of 2007**. The Court of Appeal did not discuss fully the two sections i.e. **sections 41 and 42 of the Constitution**. The first Applicant in terms of **section 41 of the Constitution** never voluntarily acquired the citizenship of South Africa. **Section 42 of the Constitution** has clearly singled out citizens by birth and descent as people not affected by provisions depriving people of Lesotho citizenship by operation of law. We could not even follow the case of **Green v Minister of Interior 1968 (4) SA 321** cited by our senior brother as that case left Green stateless which is not allowed under our law.

[130] **Sections 41 and 42 of the Constitution** have to be read and interpreted as supplementing each other but not contradicting each other. If one is taken to contradict the other, that would create absurdity.

[131] For the foregoing reasons therefore the Application on the main prayers (b) and (c) are granted and there is no order as to costs.

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**A.M. HLAJOANE**  
**JUDGE**

**I agree**

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**M. MAHASE**  
**JUDGE**

[131] This Court noted with great dismay and deep concern that during one of the court sittings, the Court enquired why the first applicant was not in attendance as agreed; his counsel **Mr Phoofolo** then rose and explained briefly that first applicant had informed him that he was afraid for his life – this despite police escort he was being afforded.

Lesotho is a free country in a free world and no unlawful threats or plots will be countenanced. If any sinister threats were – in fact- ever made to applicant by whomsoever while the matter was *sub-judice*, we take it (a) as clearly contemptuous to this Court and (b) as a despicable conduct which is prejudicial the applicant's clear right to be present during these proceedings. No one – and we stress no one – had the right or power or authority to threaten any person involved in these court proceedings. Such should never happen again in the courts of this Kingdom.

We lastly wish to thank **Mr Phoofolo** and **Mr Molyneaux** for their able and skilful handling of their clients' cases.

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**S.N. PEETE**  
**JUDGE**

**I agree**

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**A.M. HLAJOANE**  
**JUDGE**

**I agree**

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**M. MAHASE  
JUDGE**

For Applicants : **Mr Phoofolo**

For Respondents : **Mr Molyneaux**