CIV/APN/149/2010

IN THE HIGH COURT OF LESOTHO

In the matter between:

THE LAW SOCIETY OF LESOTHO	**Applicant**
And	
THE CHIEF JUSTICE	**1st Respondent**
THE REGISTRAR	**2nd Respondent**
THE DEPUTY REGISTRAR	**3rd Respondent**
THE MINISTRY OF JUSTICE	**4th Respondent**
THE JUDICIAL SERVICE COMMISSION	**5th Respondent**
THE ATTORNEY GENERAL	**6th Respondent**

JUDGEMENT

Coram : Hon. Monapathi J

Date of hearing : 15th August, 2011

Date of Decision : 29th September, 2011

Date of Judgment : 13th March, 2012

1. I have already made a decision in this matter on the 29th September 2011.

2. On the 30th June 2009, the Chief Justice issued ***High Court (Amendment) Rules*** which amended ***Rules*** 5, 6, 7, 9, 27 and 36 and inserted a new ***Rule 61*** (the 2009 Rules). The amendment

provided broadly, for uncontested matters to be heard by a Registrar instead of a Judge. There was no dispute that later, following the said amendment of the rules, the Registrar presided over uncontested motion rolls and matters that are objectively of a judicial nature.

3. On the 9th March 2010 the Law Society convened a meeting to consider disquite about the legality and constitutional propriety of the Registrar's role in enrolling and presiding over motions arrest *suspectus de fuga* and hearing divorce matters. It was said they were thereby wrongly exercising adjudicative functions. It was decided to urgently challenge these new rules. On the 1st March 2010 the Law Society brought the present application on urgent basis for the following relief:

a) The purported granting of adjudicative authority and or judicial powers on the Second and Third Respondents by the First Respondent shall not be declared null and void and of no force and effect;

b) The High Court (Amendment(Rules 2009 pursuant to which the First Respondent purports to substitute Registrar for Judge in respect of adjudicative functions to hear and determine matters or cases mentioned thereunder shall not be

declared inoperative inasmuch as they are *ultra vires* under section 131 (a) of the Constitution read with section 5 of the ***High Court Act No. 5 of 1978***;

c) First Respondent shall not be declared to have no authority to delegate judicial powers and adjudicative functions to the Second and Third Respondents;

d) Second Respondent and her assistants and deputies shall not be restrained and interdicted from exercising any judicial powers and adjudicative functions against litigants contrary to section 12 (1) and (8) and section 118 (2) of the Constitution;

e) Any allocation of work by the First Respondent to the Second Respondent together with her deputies and assistants and their performance in terms of the High Court amendment Rules 2009 shall not be stayed pending the outcome of the present application;

f) First Respondent shall not be granted further and or alternative relief;

g) Applicant shall not be granted further and/or alternative relief.

And

That prayers 1 and 2 (e) operate with immediate effect as interim relief pending the outcome hereof."

I was urged by Respondents to note that Rule 27 save for section (13) thereof, which is inserted by the 2009 amendment rule was not in issue in these proceedings. That no prayer was sought in that regard.

4. As the Applicant's submitted, the declaratory order was in relation to which they complained, they explained as "purported delegation of judicial powers" by the Honourable the Chief Justice to the Registrar in terms of the said High Court (Amendment) Rules 2009. The Registrar and her Assistants are appointed by the ***Judicial Service Commission.*** Section 5 of the ***High Court Act 1978*** provides for their attachment to the High Court. It was not argued that they are not "judicial officers".

5. The 2009 Rules are also attacked by the Applicant on the basis that they are *ultra-vires* the power of the Chief Justice under section 131 (a) of the ***Constitution*** read with section 16 of the ***High Court Act no. 5 of 1978***. The said section 131 (a) reads as follows:

> "the Chief Justice may make rules <u>for regulating the practice and procedure of the High Court</u>." (my emphasis)

And the said section 16 reads, in full, as follows"

> "16 The Chief Justice may make rules of court for any one or more of the following purposes-
>
> a) For <u>regulating and prescribing the procedure (including the method of pleading) and the practice</u> to be followed in the court in all causes or matters whatever;
>
> b) For regulating and prescribing the procedure on appeals (other than criminal appeals) from any court or person to the court;
>
> c) For prescribing the forms to be used in connection with any cause or matter before the court;
>
> d) For prescribing the fees and percentages to be taken in the court; the fees of advocates and the costs of attorneys; the costs of proceedings in the court; and the taxation and recovery of the same;
>
> e) For regulating the expenses of parties and witnesses, their amount and the method and time of payment thereof." (my emphasis).

6. The attack by the Law Society against the purportedly delegated judicial powers and exercise of "adjudicative" functions of the Registrars was on the basis that such exercise of the powers and performance of adjudicative functions was contrary to litigants'

constitutional rights under chapter 11 of the ***Constitution*** [section 12 (1) and (8)] read with section 119 of the constitution. Those sections read as follows:

> "12. {1} if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." (my emphasis). and
>
> {8} Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing with reasonable time." (my emphasis).

7. As a background the Law Society would argue that: The High Court has power under section 119 of the Constitution to review, correct and set aside the exercise of public power by any public functions. Such powers were subject to the jurisdiction of the High Court including the undisputed rule making powers of the Chief Justice: "as such jurisdiction and powers as may be conferred on it by this constitution or by or under any other law." The deep

meaning, the fundamental premises and the bottom line being that the High Court and the Chief Justice can only go as far as it is permitted by any law or the ***Constitution***. In this case the Law Society argued that it is the ***Constitution*** read with the ***High Court Act 1978***.

8. The Law Society's challenge can briefly be summarized as an attack against the said exercise of the powers by the Chief Justice as to its basis or source, as being *ultra vires* the ***High Court Act*** as aforesaid and as being illegal and an uncostitutional of conferment of judicial powers on Registrars contrary to section 118 of the ***Constitution*** which is specific in saying; of 118 (1); that:

> "the judicial power shall be vested in the courts of Lesotho which shall consists of a Court of Appeal, A High Court, Subordinate Courts and Court Martial such tribunals exercising a judicial function as may be established by Parliament."

The point was accordingly being made that the said section 118 tells us who can exercise judicial powers according to law. Or rather that the laws that Parliament can bring about prescribe the parameters of those powers to those courts and tribunals and only those shall have "judicial powers". To the extend that the Registrar and Assistant Registrars are not mentioned this seems to be a complete answer to the quiz that they cannot exercise judicial

power. The question will perforce be whether Registrar and Assistant Registrars can be "empowered or vested" with powers through the rules of court to exercise judicial functions as the broader question has been shown already.

9. In argument, the Law Society proposed further that as a matter of high constitutional law principle and in terms of our ***Constitution*** the High Court has, under section 2, the power to declare any law or conduct which is inconsistent with the constitution invalid. In other words it is not only whether the challenge is constitutional it can also safely be whether there is an illegality. The jurisdiction that the court has is distinct and separate from section 22 (jurisdiction in respect of redress for human rights violation) under (chapter II Bill of Rights) of the ***Constitution***. The court was referred in that regard to ***Islamic Unity Convention Independent Broadcasting Authority and Others 2002 (5) BCLR (CC)*** at 437 para 8 to 439 para 14, The ***Legal System of Lesotho*** ; SM Poulter, Virginia/Mitchie; at pages 271-353. This means, according to the argument, that it is on two bases that the High Court would have jurisdiction and the present challenge is certainly one of them.

10. Furthermore, the present challenge can safely be that an authority has exercised its own "rule-making" powers wrongly and

it ought to be reviewed. Properly speaking judicial review of public power is and has always been an inherent constitutional function of superior courts whether in civil review or criminal review. As the Law Society submitted most logically therefore whenever a court is called to review exercise of public power "such a request is an invocation of constitutional jurisdiction". In simple terms the court is exercising a jurisdiction that it lawfully has. I was referred in that regard to ***Pharmaceutical Manufacturers*** of SA: in Re: ***Ex parte Application of President of RSA*** 2000 (3) BCLR (CC) pages 256-261 (Principles thereof summarized at page 257 B-D). For avoidance of doubt the section 119 (1) is quite precise in providing for unlimited original jurisdiction of the High Court

> "to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any other law." (my emphasis).

11. The said jurisdiction of the High Court as invested to it by the ***Constitution*** as aforesaid is to be read with the section s 7 and 8 of the ***Constitution*** (powers of review and powers on appeal) for completeness.

12. Perhaps it is wise to further state as a background these unquestioned aspect as follows:

a) "section 119 (2) of the constitution provides that judges of the High Court are Chief Justice and such number of other judges ("puisne judges") as may be prescribed by Parliament;

b) Furthermore, section 120 (1) and (2) provides that appointment of the Chief Justice and puisne judges is by King acting on the advice of the Prime Minister and Judicial Service Commission respectively;

c) Furthermore still section 122 directs that: before entering into his duties of office, the Chief Justice and a puisne judge shall take and subscribe such oath for the due execution of his office as may be prescribed by Parliament. Accordingly Parliament has prescribed for the judicial oath of office for High Court Judges in section 4 of ***Oaths Order No 39* of 1972.**

13. Besides the issue of jurisdiction, there is wide web of the controlling laws which most fortunately revolve around the following issues that fell for determination and thus arose for arguments which were the following; Firstly, whether the Chief

Justice in administration of the High Court this delegated power to make unless for "practice and procedure" entitled him to confer upon the Registrar and her Assistants the court's jurisdiction and performance of its adjudicative" functions Secondly, whether the puisne judges can share with Registrars the exercise of the jurisdiction of the court and exercise of its powers. And thirdly, the nature and/or contradistinction between the puisne judges' adjudicative powers and the Registrars administrative functions.

14. In my view it became immediately apparent that between before counsel's argument and against the background of the laws touching on the issues, the issues could not lend themselves to any simple treatment. That is why every argument seemed to be bulging at the seams. I suppose it was because of the overall sensitive nature of the dispute. It was mostly about interpretation of the law.

15. Having touched on references to the ***constitution***, the ***High Court Act 1978*** and the oath of Judges it is now convenient to look deeper into the meaning of judicial power as used in section 118 of the constitution all of which it was sought to demonstrate that the words had a relationship or congruence. Judicial power should be defined purposefully with reference to the jurisdiction of the High Court under section 22 and section 119 (1) read with section 2 of the ***High Court Act No. 5 of 1978*** and the

appropriate if not correct legal definition. Counsel referred to legal definition by ***Black's Law Dictionary,*** 1990, Sixth edition, at page 849 and ***The Irish Constitution***, J Kelly, Second Edition (Dublin) 1984 "Jurist" at pages 212-213 and 218.

16. Counsel submitted that the court would be urged, consequently that, constitutionally speaking, it is only the Chief Justice and puisne Judges who can exercise judicial power in the High Court on the pre-condition that all must have been appointed by the King and must have subscribed to the oath of office as laid down in the ***Oaths Order 1972*** which is not obtainable in the circumstances of the Registrar and Assistant Registrars.

17. Counsel felt, perhaps correctly, that the oath of office was mandatory in all professions and as the author ***Basu*** articulated in relation to a similar constitutional requirements in India.

> "This article (read section 122 is perhaps mandatory in the sense that a person cannot be said to have asked office as a judge of the High Court until and unless he has subscribed the oath of affirmation a required in this article."

See ***Basu's Commentary on the Constitution of India*** (1990) 6th edition. Vol. II at page 254-255.

18. Counsel argued, in extension, that when Registrars are compared and contrasted with Judges, the Registrars are not appointed by the King and are not puisne Judges and cannot exercise judicial powers that belongs to the High Court.

19. Secondly, the Law Society saw it as being significant that, as they contended the Chief Justice has created a *sui generis* oath of office the Registrars in terms of the impugned ***High Court (Amendment) Rules, 2010 (Legal Notice No. 36 of 2010***). The said oath of office prescribes for an oath as follows:

> "I …. do hereby saw as that I will in my capacity as Registrar/Deputy Registrar/Assistant Registrar admit justice to all persons alike without fear, favour or prejudice and in accordance with the laws and the High Court Rules 1980 as amended from time to time. So help me God. Signed in my presence and sworn before me Chief Justice Maseru this ….. of …….. two thousand and……."

The pertinent question has accordingly been as to where the Chief Justice, who has not appointed the Registrar, would get such power from. Indeed the Registrars are not his appointees but are appointed by the Judicial Service Commission under section 133 (3) of the constitution.

20. The Law Society argued further that inasmuch as the Registrars are appointed by the Judicial Service Commission, if there was any oath which is required to be taken, it would have to be created by the appointing authority, if there be such a statutory requirement. Simply put, it is the law establishing the Judicial Service Commission which would be competent to indicate or prescribe such administration of oath.

21. Basically and at the other angle is that Registrars are not appointees of the High Court, but are attached to that court in its section 5 of the ***High Court Act*** whereupon as submitted they perform administrative functions not judicial functions.

22. By the same reasoning as above, the Chief Justice has delegated power of making rules for "practice and procedure" in the High court or elsewhere as legally empowered. That is different and separate from creating oaths where he should not and cannot do, let alone delegate functions and administration of justice to persons to or to people who have not been invested with judicial powers because they are not judicial officers specifically or otherwise take judicial work. The other pithy question will perhaps be whether the Chief Justice can distribute cases to the Registrar

and Assistant Registrars. The Chief Justice's powers are circumscribed as follows:

23. These powers ought not to derogate from the powers that the Chief Justice rightly has to make rules under section 131 (9) of the ***Constitution*** lead with section 16 of the ***High Court Act*** which are confined to regulating the practice and procedure before the High Court, with the necessary limitations that they should not contradict or override the provisions of the ***constitution***, Acts of Parliament or the common law. I was referred in that regard to ***Superior Courts Practice,*** Frasmus HJ (1994) B1-5, and ***Basu (****supra****) at 34-35 Leerhhordt v Monoko HCTLR (H/C) 1926- (255) Achimaly v Rich 1918 TPD 387, at 389.***

24. The learned author ***Basu*** articulates the words "practice and procedure" to say, they thus:

> "devote the word procedure by which a legal right is enforced as distinguished from the law or defines the right. The words are of a wide amplitude and empower the supreme court to regulate not only its own proceedings but also the conduct of all persons appearing before the court, in and out of the court, in so far as such conduct has a bearing or their professional relations and ethics."

25. Again it must be emphasized that the Registrars and their assistants being the appointees of the Judicial Service Commission, attached to the High court are neither judges no intermediate subordinate judicial officers as they have not even taken the oath or affirmation that magistrates take in terms of section 5 of the ***Oaths Order 1972***.

26. As said before one of the questions will be whether the Chief Justice can distribute cases to the Registrar and her Assistants. The main question being of course whether the Chief Justice can empower the Registrar and Assistant Registrars to do judicial work. The understanding is that section 12 of the High Court Act 1978 makes it mandatory for the Chief Justice to "regulate" and " distribute" the businesses of the High Court. And all actions and proceedings before the High Court shall be determined by a single judge unless the Chief Justice otherwise directs. The dictionary definition of the two words make the meaning clearer thus: According to ***Blacks Law Dictionary (1990) 6th Edition***. Regulate to fix establish control to adjust by rule method, or established mode, to direct by rules restriction to subject to the governing principles. Distribute: to deal or divide out a proportion or in shares.

26.1 The overall meaning as submitted would therefore be that as defined above the Chief Justice has to fix control or

adjust the business in the court and to deal or divide it in proportion or in shares, between "himself and the puise Judges". As in other jurisdictions such regulation and distribution of court business should be such that the Chief Justice and each puise Judge is allocated an action or proceedings to hear and determine alone unless the Chief Justice directs the Judges to sit as a panel sometimes including himself as some sensitive or high profile cases will indicate or deserve.

26.2 A comparison was sought with South African legislation, to wit section 13 (1) of the ***Supreme Courts Act No. 59*** about which the learned author Erasmus (supra) has commented as follows at A1-16:

> "This court shall be constituted before a single judge. This subsection makes it clear that ordinarily a single judge may sit as a court of first instance in civil matters, thus resolving previous doubts on the subject. A single judge cannot be deprived of the jurisdiction conferred upon him by this sub-section by a rule of practice to the effect for example that particular matter should come before a full court."

26.3 The words "all actions and proceedings" as used in the

above section are terms of art and defined in the ***Black's Law Dictionary*** such as to allow no doubt that it is about decisions "by judges" in actions and proceedings. Applicants accordingly submitted that there would be nothing to suggest any legal basis for distribution of actions and legal proceedings to be heard or determined by Registrar or his or her Assistants. This is not to deny that Registrar and his or her Assistants have vast administrative powers such taxation of costs and so forth.

26.4 The language used in the enabling sections 118 (22), 119 (1) of the ***constitution*** read with section 12 of the ***High Court Act*** all speak of the Chief Justice and puise judges, being the sole repositories of judicial power as stipulated in the ***constitution*** and the ***Act*** and a defined in text books and dictionaries. Then the next question will be: apart from distribution of work can be Chief Justice delegates judicial functions to the Registrar and Assistants?

26.5 It was not disputed that the general rule and principle was that in the ordinary courts of law cases for resolution are acted upon by judges personally. This principle applies to special functions and tribunals, or public bodies exercising quasi-judicial functions. Where there is

need or requirement for delegation or where permitted, it has to be expressed unambiguously in the enabling statutory instruments to that effect. The court was referred to Baxter (1984) ***Administrative Law*** (Juta) at page 434, 437 – 441, De Smith, Lord Woolf Jowe LLC (1999) ***Principles of Judicial Review*** (London – Sweet and Maxwell) at pages 225-226, ***Hospital Association of South Africa (PTY LDT) v Minister of Health 2010 (10) BCCR 1047 (GNP***), paras [68]-[71] 3.1 That principle is articulated most admirably by the learned author L Baxter in legal 434,439-340 by saying:

> " Where a prove is conferred upon an offence or statutory body it is intended that the power should be exercised by that office or body and no one else. The recipient or the power has preferably chosen for a purpose for accountability, expertise seniority or advantaged position in exercising the power, should be allowed the power to be exercised by someone who was not chosen he will have abdicated his own power and he will not have complied with the legislation. The courts will recognize neither his chosen substitute nor any person who has usurped his position (434).

And he continued:

> "When the person has a significant discretionary component requiring skilled and careful decision making

> and probably even decision of policy. It is unlikely that it is delegable. The power is usually classified as quasi-judicial or legislature depending on the circumstances, and having acquired one of those labels. It is stamped as non-delegable. " (My emphasis).

By way of repetition it was not disputed that the judicial power is conferred upon the courts in terms of section 118 of the **constitution**. It was common cause that the power of the Chief Justice is in terms of section 12 of the **High Court Act 1978** "to distribute all action proceedings for hearing and determinated by a single judge unless the Chief Justice directs otherwise."

27.Mindful of the attitude of the Applicants who contend that the Registrar is not a judicial officer, the Respondents have sought to differ and contend that: Firstly the judicial power is not solely vested in the Judges in terms of the constitution. And secondly, the words "unless the Chief Justice otherwise directs" in the **Act** on power the delegation and distribution of actions and proceedings for hearing and determination by the Registrar and Assistant Registrars. On the contrary Applicant submitted that the Respondents contention has to be rejected. That it should be accepted that judicial power is vested with judges and judicial officer's in the courts and only in the courts in terms of the constitution. That according to them it would be idle in this day and hour to argue that there are other organs of the state or tribunals

who can purport to have a share in the excuse of such power." That is why they argued further, had the drafter of the constitution envisaged such a sharing of judicial power they could have easily added to the section 118(1) of the constitution Registrar and Assistant Registrars to the list of those officials who shall be vested with judicial power. In my view, Lawyers have not struggled to give definition to the word vested hence it is defined in ***BLACK'S LAW DICTIONARY*** as:

> "Fixed, accrued, settled, absolute, complete. Having the character of absolute ownership not contingial not subjected to be attended by a condition."

Indeed nothing could be more comprehensive. Applicant has accordingly submitted that courts are "vested" to be repository of judicial power. This according to them poses an almost impossible hurdle to who else can be repository of those powers. It cannot be the Registrar or her Assistants however forcefully this is put forward. This seems correct in my opinion.

28.A search for an interpretation that would suggest that there is another context in which other tribunals other than courts be depositories of judicial has power to touch on whether what it is in the **High Court Act** that can constitute such indication. It may not end with the suggestion that the **High Court Act** provided that in distributing the work of the High it is to judges "unless the Chief

Justice directs otherwise" is no great assistance to the Respondents as the Applicant submitted, where the provisions of section 2(2) are to be understood.

28.1 Firstly, the language in section 2(2) has to give way to the constitution in the event of any inconsistency. Applicant submitted that there was no inconsistency that arose from the use of those words. The way I saw, it did not appear to be that this could be challenged by the Respondents and it was not.

28.2 Secondly, those words allowed for no other reasonable interpretation except to harp back to conclusion that it is undoubtedly an indication that the court's decision can be put in the hands of one or more judges e.g. a panel to jointly hear a case. Thus, had the legislature wanted to include Registrar and her Assistants in the list of those to whom the business of the Court can be distributed, parliament would have easily said so, in the normal way of providing in statutory instruments. It would have provided in a way similar to the way it has provided to office of Judge that is laying down mode of appointment. See section 3 of ***High Court ACT***. Significantly it provides for office of Registrar and Assistants who "shall be attached to the High Court, see section 5. Counsel then said and argued the proper meaning of "attach" was to be found in the definition of ***BLACK'S LAW DICTIONARY*** as:

> "A term describing physical union of two otherwise indifferent structures or objects or the relations between the two parts of a single structure, <u>each having its own functions</u>" (my emphasis)

Counsel further contended that the Court would be persuaded that in that context or scheme of the office of the Registrar could only have been created and attached to the High Court to serve its own functions different from that of the Judge. I also felt that if the contrary intention had existed it should have been well specified and indeed in an unambiguous manner.

28.3 Applicants argued further about the words "otherwise directs" in the ***High Court Act***. Counsel said that another indication that the words refer to the court's business as being: …. To "judges or more judges" and not Registrar or her Assistants was that it was stated significantly and emphatically so. That is why the word "shall" appears twice in section 12 of the Act. That word as accepted by lawyers "connotes" a mandatory provision as opposed to directory or permissive provision. It is being concluded therefore that, that word cannot be used to deprive judge of their powers conferred upon them by section 119(1) of the ***constitution*** and the ***High Court Act***. See section 2 The Judges jurisdiction as they are empowered by the last mentioned laws is to hear both opposed or unopposed matter. I agreed with respect.

28.4 As alluded to before "as directed otherwise" is relied upon by the Chief Justice as basis for the challenged rules as having been justified in:

> "Order" to free judge of the High court from having to hear matters in which those different between rival litigants, so that Judges have more time to hear many matters that are indeed disputed. And the aim was (and is) to do without in anyway compromising the rights of applicants who seek relief in unopposed matter or those of their legislature."

The issue has been whether the Chief Justice has such powers.

28.5 The Respondents attitude to Chief Justice's aim and objective as in above quotation is that it was not disputed in reply in which emphasis was laid on the fact that adjudicating authorities have to be established if done properly, by act of parliament. And furthermore, as an answer, that any need to devote more attention to contested matters can be advance by appointment of acting Judges for proper adjudication of the merits. Respondents submitted that the value of using the Registrar and her Assistants is so compelling unless something more than the Applicant's strict approach was shown.

28.6 Respondents argued further to say other than that strict approach Applicant had advocated Applicant had demonstrated neither prejudice to litigants nor any breach of the right to fair hearing. Litigants instead stood to gain by reason of additional hands to their disputes. In addition the decisions of Registrar in the present instances were essentially administrative in nature and were given as an uncontested matters or orders much by consent of the parties or secured by default of appearance. If Registrars were prevented from assisting in such matter the losers would be the litigants in uncontested matters will be litigants whose rights to fair hearing will resultantly be undermined by the delaying in having them unresolved.

28.7 Applicant as has been intimated previously it is that the 2009 **Rules** should be dealing in operative in as much as they are ultra vires under section 131(a) of the constitution read with section 5 of the **HIGH COURT ACT.** Respondent submitted that since the Applicant's case was pillared to section 2(a)(b) and (c) and (d) which dealt with the exercise of adjudicative authority or of judicial powers the Applicant's interpretation of what adjudicative powers meant they would follow the interpretation of the word adjudicative. That is that, since the Registrar and her assistants are not expected to deal with disputed matters it cannot be said they have adjudicative powers. It is because courts necessarily deal with situation where there are rival litigants.

29. The Applicants further submitted in reply that firstly that Courts are not created to deal only with matters in which there rival litigants. If so the ***High Court Act*** could not have been drafted in order to:

> "to inquire into determine any existing, future contingent rights or obligations notwithstanding that such person cannot claim any consequential relief." See section 2 (1) (b) of ***High Court Act.***

29.1 Secondly, Judges deal with all matters without distinction whether they are opposed or not.

29.2 Thirdly, as long as a justiable dispute is established it has never meant a less heavier obligation on the part of a judge where a matter was not opposed. Incidentally one would speak always of a need even in that case for a judge to exercise his discretion. See also section 12 (1) and 12(8) of the *constitution*. It was the Judges responsibility in every case would be similarly heavy. This remains so when dealing with unopposed bails, unopposed matters divorce default judgments and when judges are called to determine the granting or refusal of an order for security. An order for arrest *suspectus de fuga* is an even more serious matter.

29.3 Fourthly, as said before, where there is need to have a further pair of hands the Chief Justice has the best solution that is to appoint acting Judges not the easy solution of burdening the Registrar and her Assistants. However, heavy the yoke judges are obliged to hear cases and determine actions and proceedings lodged in the ***High Court***. See section 3 (1) of the Act. This serves to protect litigants by way of getting them in the "fool proof hands of judicial officers away from incursion of the executive and ad hoc tribunal.

30. In the premises I concluded that that distinction between disputed matters and non-disputed matters did not lessen the responsibility that judges have in relation to those. Accordingly it (even if it is unintended) it is of the serious infusion by the Chief Justice into judicial powers or power to adjudicate of the Judges.

31. Respondents counsel submitted that the Applicant's interpretation of the **rules** was based on misconceived of the word adjudicate as said before. It sought support from dictionary definitions as follows:

ADJUDICATE 1 intransitive, act as judge in competition, court tribunal decide judicially regarding (a claim etc).

CONCISE OXFORD DICTIONARY 9th edition p 17.

ADJUDICATE 1 to decide(an issue) judicially, pass or sit in judgement.

COLLINS ENGLISH DICTIONARY

Adjudicate 1 to hear and settle(a case) by judicial procedure.

2 to pronounce judicially, adjudge… to act as a judge

READERS UNIVERSAL DICTIONARY P29.

I therefore concluded that, most demonstrably, the above English language dictionaries did not assist the Respondents' interpretation in anyway but otherwise indicated the contrary meaning that is aligned to Applicant's interpretation. Then I will say that the Registrar and her Assistants were being irregularly vested with judicial powers to adjudicates dispute by the HIGH COURT 1909 Rules which was a wrong exercise of the power to make rules by the Chief Justice as I now conclude.

32. The matter is a challenge, as said before, to rules making power of the Chief Justice. This touches on the concepts of not only constitutionality but legality, the doctrine separation of powers, delegated legislative powers to make regulations and rules and finally legality and *doctrine* of *ultra-vires.*

33. In making Rules made ***High Court Act*** the Chief Justice exercised delegated legislative power presumably for good administration of the Courts. This was not an exercise of judicial powers but creative or constitutive act (vesting of powers), by the Chief Justice under section 16 of the ***High Court Act.*** I have accordingly agreed with the Applicant that the act of investiture of judicial powers whether quasi-judicial or administrative is not envisaged under the said section 16. That investiture like appointment of officers is a solem and serious legal act that vests in those officers powers and functions that have serious legal consequences and in this case very serious legal consequences.

34. Whereas the good intention of the Chief Justice could be presumed, unfortunately the investiture of the Registrars immediately brought about a situation where the Chief Justice acted *ultra vires* as I found.

35. The stark question has always been what could have been the solution? If this is in order for Registrar to lawfully exercise any power in any form that must be provided by a law passed speedingly by Parliament preferably after consulting all stakeholders. It is because Courts should not legislate under the old age doctrine of separation of powers. That is the constitutional function of Parliament neither should the executive or the

legislature interfere with the exercise of judicial power without an enabling act of Parliament. A good example is where under the ***FEDERAL COURT OF AUSTRALIA ACT 1976*** the court or a judge may direct that a Registrar exercise certain judicial powers of the Court. It is because the exercise of those power is not non-consequential but affects directly or indirectly the rights, freedoms and interests of the individual.

36. Indeed officers are appointed by the Judicial Service Commission some of those are magistrates and Registrars but the scope of magistrates who exercise judicial powers are defined in an Act of Parliament. So should the functions of Registrars.

37. I agree, for emphasis, that another solution to the backlog problem has always been appointment of Acting Judges. This is to avoid a situation where the ***High Court Rule*** 2009 seek to create a situation where a Principal Secretary of state is vested with powers without an authority Act of Parliament. Nor can delegate their ministerial powers to the Principal Secretary regardless of the noble motives and intentions.

38. The ***High Court Rule 2009*** as alluded are also subject to attack from another angle. Under the doctrine of legality the

exercise of judicial powers must be in accordance with the law under the constitution. This is an aspect of the Rule of law. Any resolution which has adverse effect on the rights freedom and interests of the citizen must be determined according to law and not otherwise. Finally since 1993 the ***constitution*** is the supreme law in Lesotho, every public law or act or decision must pass the constitutional muster. Constitutionalism implies constitutionality or exercise of executive legislative and judicial power and authority.

39. It was clear that the application ought to succeed under prayers which are allowed with costs.

T. E. MONAPATHI
JUDGE

For Applicant : Adv. S. Sakoane
For Respondent : Adv. H. Viljoen
Judgment noted by Adv. S. E. Pule