KINGDOM OF LESOTHO

IN THE HIGH COURT OF LESOTHO
HELD AT MASERU

CONSTITUTIONAL CASE NO: 11/2013

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

27/11/2013
DATE

SIGNATURE

In the matter between:

THE PRESIDENT OF THE COURT OF APPEAL **(Justice Michael Mathealira Ramodibedi)**	Applicant
and	
THE PRIME MINISTER **(Dr Motsoahae Thomas Thabane)**	First Respondent
JUSTICE Z YACOOB N.O.	Second Respondent
JUSTICE Y MOKGORO N.O.	Third Respondent
JUSTICE M JOFFE N.O.	Fourth Respondent
ATTORNEY-GENERAL	Fifth Respondent

SUMMARY:

Judge President of the Court of Appeal as applicant seeking urgent interdict to stop process enquiring into his conduct – the King having appointed a Tribunal to initiate impeachment proceedings based on allegations of serious judicial misconduct made by the Government of Lesotho – Tribunal appointed in terms of provisions of section 125 of the Constitution of Lesotho – suspension from judicial duties – the principle of natural justice during representation made to King and ensuing appointment of Tribunal – nothing preventing applicant from asserting his rights fully at hearing of Tribunal in due course – not in the interests of neither administration of justice, nor the judiciary and public to grant interdict – application dismissed.

ORDER

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[1] The application is dismissed with costs.

[2] The costs shall include the costs of two counsel.

JUDGMENT

MOSHIDI, AJ:

INTRODUCTION

[1] This is an urgent application brought by Justice M M Ramodibedi who is the President of the Court of Appeal ("*the applicant*") against the respondents for the relief set out immediately below.

[2] In the notice of motion dated 9 September 2013, the relief sought was couched in the following terms:

> "2. *That 1st Respondent's representation to his Majesty that the question of removal of Applicant from office of President of the Court of Appeal ought to be investigated in terms of section 125(5) of the Constitution be reviewed and set aside and/or be declared null and void.*
>
> 3. *(i) 1st Respondent be restrained and/or interdicted from advising the King to suspend Applicant from the office of President of the Court of Appeal; pending the determination of this application.*
>
> *ALTERNATIVELY:*
>
> *(ii) The operation of applicant's suspension from the office of President of the Court of Appeal be stayed/suspended pending the determination of this application.*
>
> *ALTERNATIVELY:*
>
> *(iii) That His Majesty's decision to suspend Applicant from the exercise of the functions of the office of the President of the Court of Appeal be reviewed and set aside.*
>
> *4) His Majesty's decision to appoint a tribunal to enquire into Applicant's removal from office for misbehaviour and/or inability to perform the functions of his office be reviewed and set aside and/or be declared null and void.*
>
> *5) 2nd, and 3rd and 4th Respondents be restrained and interdicted from sitting in the tribunal referred to at (iv) above pending the determination of this application.*
>
> *6) 1st and 5th Respondents be directed to pay the costs of suit including costs occasioned by the employment of three counsel.*
>
> *7) Further and/or alternative relief.*

8) *That prayers 1, 3(i) and (5) operate with immediate effect as an interim interdict, pending the finalisation of the matter."*

[3] Dr Motsoahae Thomas Thabane, The Prime Minister of the Kingdom of Lesotho ("*the first respondent*") filed a notice to oppose the application as well an answering affidavit on behalf of all the respondents.

SOME COMMON CAUSE FACTS

[4] It is common cause that during May 2013 the applicant launched an application for certain interdictory relief, aimed mainly at preserving his position and status as President of the Court of Appeal, against the first respondent the Minister for Justice and Correctional Services the Minister of Law and Constitutional Affairs the Principal Secretary – Minister of Justice the Registrar of the High Court the Commissioner of Police and the Attorney General. The application ("*the first application*"), was strenuously opposed by the Minister for Justice and Correctional Services ("*the Hon M M Monyake*"), who filed an answering affidavit on behalf of all the respondents. I mention the latter answering affidavit merely for its limited relevance in the instant application as discussed later in this judgment. The first application came before this Court, as presently constituted, on 22 July 2013. The first application was by agreement between the parties postponed *sine die* on certain conditions.

[5] It is also common cause that subsequent to the postponement of the first application, the first respondent invoked the provisions of section 125 of the Constitution of Lesotho ("*the Constitution*"), and made certain representations to the King of Lesotho ("*the King*"), initiating the process of removing the applicant from office. The representations were made to the King on 23 July 2013. As a consequence, on 16 August 2013 the King appointed a tribunal which is yet to enquire into the question of the removal of the applicant from office. This was in compliance with the provisions of sec 125(4) to (7) of the Constitution. The appointment of the Tribunal was duly gazetted[1].

[6] The relevant subsections of sec 125 of the Constitution, which deal with the procedure that ought to be followed in the removal of a judge from office and the requirements therefor, are subsections (4) to (7). These provide as follows:

> "*(4) An appointed judge shall be removed from office by the King if the question of his removal has been referred to a tribunal appointed under subsection (5) and the tribunal has advised the King that the appointed judge ought to be removed from office for inability as aforesaid or for misbehaviour.*
>
> *(5) If the Prime Minister or, in the case of a Justice of Appeal, the President represents to the King that the question of removing an appointed judge under this section ought to be investigated, then –*
>
> *(a) The King shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected in accordance with the provisions of subsection (6) from among persons who hold or have held high judicial office;*

(b) The tribunal shall enquire into the matter and report on the facts thereof to the King and advice the King whether the appointed judge ought to be removed from office under this section for inability as aforesaid or for misbehaviour.

(6) When the question of removing the President is to be investigated, the members of the tribunal shall be selected by the Prime Minister and, when the question of removing a Justice of Appeal is to be investigated, the members of the tribunal shall be selected by the President.

(7) If the question of removing an appointed judge from office has been referred to a tribunal under subsection (5), the King, acting in accordance with the advice of the Prime Minister in the case of the President and in accordance with the advice of the President in the case of a Justice of Appeal, may suspend the appointed judge from the exercise of the functions of his office and any such suspension may at any time be revoked by the King, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal advises the King that the appointed judge should not be removed from office."

THE PROVISIONS OF URGENT APPLICATIONS

[7] In regard to urgent applications, Rule 8(22) of the High Court Rules of Lesotho provides as follows:

"(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure as the court or judge may deem fit.

(b) In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in a hearing in due course if the periods presented by this Rule were followed." (underlining added)

Rule 8(22)(c) makes provision for urgent applications to be accompanied by a certificate by an advocate or attorney which confirms that he/she has given consideration to the facts of the matter and that there is a *bona fide* belief that the matter deserves urgent adjudication.

[8] The applicant contends that the present application is urgent. He also attached to the founding affidavit a certificate by Adv Mpho Maema who certified that the matter is urgent. The certificate is dated 9 September 2013. The reasons for urgency as alleged in paragraph 7 of the founding affidavit are briefly that, the impeachment proceedings which have been instituted in violation of applicant's rights and the independence of the judiciary, are imminent; that the applicant's dignity has been seriously impaired and continues to be so impaired on a daily basis; that the applicant has established a clear right for the relief sought; that he has no alternative remedy; that he would not be afforded substantial relief in the hearing in due course; and that therefore the balance of convenience favours the applicant's case. On the other hand, the respondents in the answering papers contend, and for a number of reasons, that the application is not urgent at all and ought to be declined on this basis only.

[9] I must at the outset, and quite apart from the merits, observe that the respondents' contentions that there is no urgency in the present application, are not without merit. At best for the applicant, the credible evidence as discussed immediately below show that he inexplicably delayed in launching the instant application, and therefore created his own urgency.

[10] As stated earlier in this judgment, in the first application (case number CC5/2013), the first respondent served and filed an answering affidavit[2] in opposition to the applicant's relief. It is rather significant that in that answering affidavit the applicant was informed pertinently that the Government of Lesotho was proceeding to institute impeachment proceedings against him. In addition, the applicant was told simultaneously that a tribunal will in due course be appointed in accordance with the provisions of sec 125(4) to (6) of the Constitution to enquire into and report on whether the applicant ought to be removed from judicial office[3]. The respondents in the first application sought, in the alternative, the dismissal of the first application, and the stay of the proceedings pending the outcome of the impeachment proceedings. The first application, as alluded to above, was postponed *sine die* by agreement of the parties.

[11] It is not in dispute that on 22 August 2013 the first respondent addressed a letter, i.e. annexure "E" to the present answering affidavit to the applicant. In this letter, the applicant was informed about the appointment of the Tribunal by the King which is to enquire into the applicant's removal from office for misbehaviour and/or the inability to perform the functions of his office. The letter also detailed at least eight grounds of alleged misconduct on the part of the applicant. What is of relevance for present purposes, is that the letter states that the date and venue of the Tribunal's sittings as well as the procedures to be followed are to be determined in due course.

[12] On the same date, the first respondent addressed a further letter, i.e. annexure "F" to the applicant. In annexure "F" the applicant was invited to make written representations on or before 4 September 2013 as to why he should not be suspended from office pending the outcome of the impeachment proceedings against him. In annexure "F" the first respondent also made it plain that:

> *"I am considering whether to advise the King to suspend you from the exercise of the functions of your office in terms of section 125(7) of the Constitution. In the event that I decide to advise the King to suspend you from the exercise of the functions of your office, I would advise that suspension take place with you retaining your current salary benefits."*

[13] It is not in contention that the applicant neither responded to the contents of both annexures "E" and "F", nor did he make representations on the issue of his proposed suspension. Instead, the applicant thereafter waited for some fifteen days to elapse until he brought the present application on an urgent basis on 7 September 2013. In his replying affidavit attested to on 24 September 2013, the applicant elected not to deal with the contents of the letters quoted above. In regard to the respondents' contentions that the instant application is not urgent the applicant, in his replying affidavit[4], merely alleges that:

> *"There is no merit in the contention for the dismissal of the application on the lack of urgency, as it would not be a proper order. The proper course for this Honourable Court would be to hear the matter on urgent basis – more particularly now that the pleadings are closed with the filing of this affidavit."*[5]

SOME APPLICABLE LEGAL PRINCIPLES

[14] I deal with some applicable legal principles based on the above background. It is by now generally trite procedure that urgent applications must be brought without undue delay, and without the abuse of court process. Where there was undue delay, such delay ought to be explained satisfactorily by the applicant seeking relief on urgent basis.

[15] In the Republic of South Africa, the counterpart of Rule 8(22) of the Lesotho High Court Rules, is Rule 6(12) of the Uniform Rules of Court, which deals with urgent applications. In *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another t/a Makin's Furniture Manufacturers*[6], Coetzee J said:

> "*Undoubtedly the most abused Rule in this Division is Rule 6(12) which reads as follows:*
>
> > *'(12)(a) In urgent application the court or the judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure which shall as far as practicable be in terms of these rules to it seems meet.*
> >
> > *(b) In every affidavit or petition filed in support of the application under para (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.*'" (underlining added)

Later on in the judgment, Coetzee J went on to say:

> "*Mere lip service to the requirements of Rule 6(12)(b) will not do an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.*"[7]

[16] In *Commander of the Lesotho Defence Force and Another v Matela* [1999] LsHC 150, the issue was whether the High Court was incorrect in granting the respondent a permanent interdict restraining the appellants from continuing to allegedly defame the respondent. The application was brought *ex parte* and on urgent basis on 15 December 1998 and set down for 16 December 1998. In upholding the appeal the Court of Appeal, emphasised that:

> *"Orders should only be granted without notice where this is rigorously justified (where, for instance, there is extreme urgency or the need to prevent the order from being frustrated where any prior notice could have that effect."*

In regard to urgency, the Court, through Gauntlett JA, said:

> *"It is also not enough that counsel merely certifies urgency. Certificates of urgency must shortly state the grounds for urgency. Again a failure to do so may well lend to a dismissal of applications and special costs orders in appropriate circumstances."*

[17] The case of *Basotho National Party and Another v Government of Lesotho and Others* 2005 (11) BCLR 1169 (LesH), is another example where the application was dismissed for lack of urgency and as amounting to an abuses of court process. There the applicants brought the application as a matter of urgency. The applicants, who later withdrew their applications, including the one under consideration, in essence sought various orders by way of relief. These included orders to the effect that the judiciary was not independent and free of government influence. The applicants contended

that they brought the application in order to ensure that their fundamental rights to full equality before the law and to a fair hearing by an independent and impartial tribunal of their disputes, be protected and given effect to. The applicants also alleged that they brought the urgent application as a way of dispensing with the requirement to exhaust all local remedies before approaching the Commonwealth Commission on Human Rights, and that the Government of Lesotho be ordered to give effect to the various international conventions listed in the notice of motion. In dismissing the application, the Court observed that the present Constitution of Lesotho came into operation as far back as 2 April 1993. The various international conventions specified by the applicants were in existence even long before then or long before the proceedings were instituted. In regard to urgency in particular, the Court held that:

> *"It is a notorious fact that the applicants have been litigating in these courts ever since. It is therefore a matter of astonishment that it has suddenly dawned with extreme urgency upon applicants that the courts of this Kingdom are not independent and not in accordance with international conventions. Even if there is a case to be made for the applicants, to suggest that it is urgent on these grounds is quite preposterous."*

APPLICATION OF LEGAL PRINCIPLES TO FACTS OF MATTER

[18] In the present matter, the history of the litigation between the parties, as well as the credible facts, clearly show that there is no urgency in the application. If there is any, it is self-evidently created by the applicant himself. He delayed without any reasonable explanation, to launch this application. He

knew full well of the respondents' intentions to initiate impeachment proceedings against him. This knowledge he acquired or must have reasonably acquired when he received the first respondent's answering affidavit in the first application served on him as far back as June 2013. He did nothing, and instead waited until he brought the present application in early September 2013.

[19] In addition, in the instant application, the contents of the founding affidavit, as well as the accompanying certificate of urgency, do not comply with the provisions of Rule 8(22) of the High Court Rules of Lesotho, quoted above. In other words, the applicant has failed to "*set forth in detail the circumstances which he avers render the application urgent*". See *Luna Meubelvervaardigers (Edms) Bpk (supra).* These requirements were re-emphasised in *Marumo and Others v National Executive Committee and Others* [2011] (LsHC) 92, where it was held that:

> *"Urgency is not a hat that one can put on or off at one's convenience. Urgency is a condition imposed upon a person by reasons or circumstances beyond his or her control ..."*

[20] The applicant has also further delayed inexplicably from 22 August 2013 to bring this application. On the latter date the applicant was pertinently informed of two significant developments in the litigation between the parties. In the first place, as stated earlier in this judgment, the applicant, not a layperson in litigation, was informed of the appointment of the Tribunal (consisting of Yacoob, Mokgoro and Joffe JJ), appointed by the King and the

details of the grounds for his removal from office that will be the subject-matter of the Tribunal's investigations, as evidenced in annexure "E". The appointment of the Tribunal had been duly gazetted. At the same time, the applicant was invited to make written representations as to why he should not be suspended from office pending the outcome of the impeachment proceedings against him. This, the applicant had to do on or before 4 September 2013. He chose to do nothing until 7 September 2013 when he brought the instant application. In the answering affidavit in the present application, the first respondent, as a gesture of good faith, expressed his preparedness to extend the period within which the applicant could make representations why he should not be suspended. The period was extended for a further period of five working days from the date of the answering affidavit. Significantly, the applicant does not deal with these matters in his papers. Indeed, the invitation to suspend and/or impeach a sitting judge is not a light matter. The allegations to be investigated against the applicant are of a serious nature. These include fraud and sexual harassment of female employees in Swaziland. See in this regard *Rees and Others v Crane* [1994] 1 All ER 833. The *de facto* position is that the applicant has since been suspended from office.

[21] The blatant tardiness of the applicant from 22 August 2013 is not only highly questionable, but also plainly remains unexplained. It is not a question of a delay caused by any attempt by the applicant to either settle the matter with the respondents or to seek some compliance from the respondents (*cf Transnet Ltd v Rubenstein*[8] and *Nelson Mandela Metropolitan Municipality*

and Others v Greyvenouw CC and Others[9] and *Mbayeka and Another v MEC for Welfare, Eastern Cape*[10]. Instead, it is the unexplained delay which shows self-created urgency resulting in circumstances for which the applicant alone must take responsibility as was held by Pickering J in *Dan Bolman and Another v African National Congress and Others*[11], that, "*... although the matter had been urgent and that although some deviation from the provisions of the Rules would have been justified had the application been timeously instituted, the applicants, by their own delay, created the extreme urgency which existed on 24 March 2011. They must bear the consequences*". See also *Venter v S A Tourism Board* [1999] JOL 4913 (WC). In my view, the same applies in the instant matter. In *Ntombekhaya Mlondleni v Amathole District Municipality* [2009] ZAECGHC 2, the applicant, a councillor and speaker of the respondent's council, was expelled from her political party (the ANC) on 8 December 2008, in circumstances which she alleged rendered her expulsion unlawful. A meeting was to be held by the respondent on 15 January 2009 to elect a new speaker. On 15 January 2009 the applicant moved an urgent application to interdict the respondent from holding the meeting pending an application by her to challenge the decision to expel her. The applicant had waited for nearly a week before approaching the court as a matter of urgency. In ultimately discharging a rule *nisi* that was granted in the interim, as well as dismissing the urgent application for lack of urgency with costs, Plaskett J held that:

> "*In these circumstances, I am of the view that such urgency as there may have been was self-created and self-created urgency is no urgency at all. See Schweizer Reneke Vleis Mkpy (Edms) Bpk v Minister van Landbou en Ander 1971 (1) PHF 11 (T), F11-12. The*

application must accordingly be dismissed for lack of urgency. See Caledon Street Restaurant CC v D'Aviera (1998) JOL 1832 (SE)."

In the instant matter, the applicant waited longer in approaching this Court on urgent basis, namely some eleven court days.

[22] I also find that the applicant has not shown on the papers that he will not be afforded substantial relief in a hearing in due course as envisaged in Rule 8(22)(b) of the High Court Rules. The appointed Tribunal has yet to commence its sittings. In closing argument, counsel for the argument, Mr Sakoane KC, who was driven to concede, and quite correctly so in my view, that even though the impeachment proceedings against the applicant were on the cards, no date has yet been fixed for the sittings of the appointed Tribunal. The other contentions advanced on behalf of the applicant, including that he has a clear right, was not afforded a hearing when the first respondent made representations to the King to appoint a tribunal, that the suspension of the applicant was unlawful, and that the applicant's opportunity to appear before the appointed Tribunal and after the impeachment allegations levelled against him will not cure the alleged unlawful and/or irregular conduct of the first respondent in making representations to the King, are, in my view, all matters which are properly dealt with on the merits of the present application. As dealt with later below, the application is also capable of dismissal on another procedural aspect apart from the merits. For present purposes, and for the sake of completeness on the question of urgency, the applicant has failed dismally to show that he will not have a fair hearing in due course should the present application not be considered on an urgent basis. His assertions as

contained in paragraph 7 of the founding affidavit as alluded to above, and that there is continuing harm of applicant's dignity, which subsists for as long as he was denied the opportunity to be heard in the making of representations to the King, itself has rendered the whole process a nullity, are plainly untenable and misplaced in the circumstances of this case. These assertions on which reliance is placed for urgency, are not well-founded as shown later herein. The same applies to the over-reliance in argument on *Rees and Others v Crane (supra)*. The fact of the matter is simply that the applicant has not shown that he will not be afforded relief in the sittings of the Tribunal later. In *Venter v South African Tourism Board (supra)*, the facts were briefly as follows: The applicant had been interviewed on national television, and based on what he had said, the respondent suspended and charged him with misconduct. The applicant contended that the respondent had not applied the requirements of its disciplinary code in either suspending or charging him, and therefore sought an urgent and final interdict prohibiting the respondent from proceeding with the disciplinary proceedings until the dispute referred by the applicant to the Commission for Conciliation, Mediation and Arbitration ("*CCMA*") had been resolved etc. In dismissing the application on the basis of lack of urgency, the Court paras [30] to [32] held that:

> "*What the applicant has to show in order to justify bringing this application by way of urgency successfully, is that if the interdict is not issued by the court then it is likely that the violation of the rights will lead to an unfair hearing and consequently an unfair dismissal. The applicant has not done this and in any event there are other remedies for an unfair dismissal, should this occur. The applicant waited until 24 February 1998 until he approached the CCMA. It appears that the applicant is rather seeking to prevent the disciplinary enquiry from taking place, than to protect his rights in the normal course. No case*

has been made out on the papers as to why this matter should be regarded as urgent."

In my view, these findings are pre-eminently apposite to the facts of the present application. The dilatoriness of the applicant from June 2013 and again from 22 August 2013 to 7 September 2013, is unexplained in the matter of significant public interest affecting, not only the functioning of the Courts in the Kingdom of Lesotho, but also the standing of the judiciary and the administration of justice on the whole. The intimation during argument that the applicant was overseas when annexures "E" and "F" were addressed to him was not only rather vague, but was also not supported by any evidence.

[24] For all the aforegoing reasons, I have come to the irresistible conclusion that the applicant has not made out a case for this matter to be adjudicated upon on urgent basis. On this ground alone, the application falls to be removed from the roll.

[25] If however, I am incorrect in the above determination, I believe that the application is also capable of dismissal on the yet another procedural aspect. This is that, the record of the representation as well as that of the King's decision in appointing the Tribunal in terms of sec 125(5) of the Constitution, and in suspending the applicant from the exercise of the functions of his office, were not placed before this Court. This in essence, raises the questions as to how and on what basis this Court is expected to exercise its powers of review in favour of the applicant in the absence of the record of the proceedings to be reviewed as prayed for in the notice of motion.

[26] The obvious starting point is Rule 50 of the High Court Rules of Lesotho. This Rule provides as follows:

> *"(1)(a) Save where any law otherwise provides, all proceedings to bring under review the decision of proceedings of any subordinate or other inferior court and of any tribunal, board or officer or any person performing judicial, quasi-judicial or administrative and delive (sic) shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings of the magistrate, presiding officer or chairman of the court, tribunal or board or the officer or person as the case may be, and all other parties who may be affected by the decision or proceedings.*
>
> *(b) Such notice shall call upon all the persons to whom the notice is addressed to show cause why such decision or proceedings should not be reviewed and corrected or set aside and a notice shall call upon the magistrate, presiding officer, chairman, officer or person (as the case may be) to dispatch, within fourteen days of the receipt of the notice, to the Registrar of this court the record of such proceedings sough to be corrected or set aside together with such reasons as he is required or desired to give, and to notify the applicant that he has done so.*
>
> *(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and the circumstances upon which the applicant relies to have decision or proceedings set aside or corrected.*
> *(3)*
>
> *...*
>
> *(7)* (Not applicable)." (underlining added)

[27] The provisions of Rule 50(2) which I have underlined above, in particular, the provisions that, "*shall set out the decision or proceedings sought to be reviewed*", are clearly couched in peremptory terms. In the instant matter the provisions of the Rule have plainly not been complied with by the applicant. In addition, there is no acceptable explanation for such non-compliance or condonation for the default. Indeed, the issue of the non-

compliance of the Rules of Court has been frowned upon in numerous decided cases, notably *Ramainoane and Another v Sello and Others* [LsHC) 1997, a judgment of Lehohla CJ.

[28] At para [27] of that judgment, the Court said:

> *"I accept also the statement that although this Court has inherent power to condone non-compliance with the Rules, condonation is not just there for the taking, special circumstances must be placed before court in a substantive application for such condonation to enable the court to consider, inter alia, the degree of such non-compliance, prospects of success, convenience of the court, the magnitude of the case, the question of avoidance of unnecessary delay in the administration of justice and the need to finality to litigation, as neatly put by Ramodibedi J in Everistus R Sekhonyana and Ors v The Attorney General Ors 1995-96 LLRLB 290 at pp 294-6."*

It is needless to say that in that matter, the application for, *inter alia*, the stay and the review and setting aside of the taxation and subsequent writ of execution, without attaching the writ of execution, and which was brought on urgent basis, was eventually dismissed for non-compliance with the Rules of Court.

[29] In the present matter, and as framed in the notice of motion, as quoted above, the applicant seeks, *inter alia*, the review and setting aside of the first respondent's representations to the King that the question of removal of applicant from office of President of the Court of Appeal ought to be investigated in terms of sec 125(5) of the Constitution. Part of the alternative relief as articulated is that the King's decision to suspend the applicant from the exercise of the functions of his office to be reviewed and set aside.[12] In

the same breathe the applicant also seeks the review and setting aside of the King's decision to appoint the Tribunal.[13] However, a record of neither the first respondent's representations or the King's decision, have been placed before this Court. Not only is there no explanation for this omission, but there is also no evidence of any attempts made to the first respondent in order to secure such records. There has therefore plainly been non-compliance with the provisions of the rules, in particular Rule 50(2). This, in the circumstances where there is no accompanying application for the condonation of such non-compliance. In *Ramainoane and Another (supra)* and in dismissing the application the Court went further to state that:

> "*It had to take the Court's efforts to indicate that it would be impossible to have a complete view of the matter before it without such a document. Apparently the deponent thought that because such a document might have been lying somewhere in the Court's file it didn't quite matter that the applicant's papers were thus incomplete.*"

REVIEW IN THE REPUBLIC OF SOUTH AFRICA

[30] In the Republic of South Africa, the grounds of review of administrative actions are generally brought under the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"), as well Rule 53 of the Uniform Rules of Court. It is so that the absence of a record to be reviewed before a reviewing court, may, depending on the circumstances of each particular case, be dispensed with in certain circumstances. See for example, *Liberty Life Association of Africa v Kachelhoffer NO and Others* [2002] 3 BLLR 239 (C); and *R (on the application of CJ) v Cardiff City Council* [2012] 2 All ER 836. However, the

facts in those cases are clearly distinguishable from the facts in the present matter. It is equally so that the Court has a discretion to condone non-compliance with the Rules and free to regulate its own procedure in the exercise of its inherent jurisdiction to ensure that justice is done. See for example, *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd*[14]. The present application is however not such a matter in which the review is capable of success in the absence of the records, or in which condonation for non-compliance with the Rules ought to be granted, for reasons advanced above. Indeed in *SACCAWU and Others v President of the Industrial Tribunal and Another*[15], a decision of the first respondent was taken on review. The applicants had not used the procedures set out in Rule 53 of the Uniform Rules of Court. The result was that the record of the proceedings in the Industrial Tribunal was not before the Court. The second respondent had applied for a postponement in order to place the record before the Court. This application was refused. On appeal, Melunsky AJA, and in dismissing the appeal, at para [7] said:

> "*In terms of Rule 53 of the Uniform Rules of Court (similar to the Rule that applied in Venda at the time) the right to require the record of the proceedings of a body whose decision is taken on review is primarily intended to operate for the benefit of the applicant (see Motaung v Makubela and Another NNO; Motaung v Mothiba NO 1975 (1) SA 618 (O) at 625F and Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 660E-H). However, and depending on the circumstances, a respondent should not be prevented from placing the record, or the relevant parts thereof, before a Court simply because the applicant does not do so. Moreover – and this is of particular significance in the present matter – an applicant who does not furnish the record of the Court runs the risk of not discharging the onus, especially where the allegations upon which it relies are put in issue*." (my underlining)

In my view, this is precisely the position in the present matter. There is no record at all before us. In essence, the Court is called upon to speculate as to what exactly was contained in the representations made by the first respondent to the King as well as the King's basis for his decision. This is undoubtedly untenable, and an abuse of the court process on the part of the applicant. The main consideration in circumstances of non-compliance with the Rules of Court and procedures remains the issue of fairness to both parties. See for example, *Rampa v Rector* 1986 (1) SA 424 (O). Upon a careful balancing of the opposing interests at play here, fairness dictates that the instant application should not succeed.

[31] In argument, counsel for the applicant, Mr Sakoane KC, was driven to concede that the decisions to be reviewed are not in fact placed before this Court. His submission that the applicant was not privy to the representation of the first respondent to the King and that it must ergo be assumed that such representation recommended to set up the Tribunal in order to impeach the applicant, although worthy of some sympathy in the circumstances, was not helpful at all. What is clear however, is that the King obviously acts and is responsible through the first respondent. For all these reasons, I have come to the conclusion that the application on the ground of the absence of the record to be reviewed, must also fail.

THE MERITS OF THE CASE

[32] In any event, even if I am incorrect in the above determinations, I believe that on the merits, the application should also fail. By its very nature, the ongoing litigation between the applicant and the Government of the Kingdom of Lesotho, is of such significant importance and public interest, that there must now be a speedy resolution to the impasse. The current dispute affects palpably both the administration of justice as well as the entire judiciary of Lesotho. It is therefore compelling to deal, even if briefly, with some of the contentions advanced by the applicant.

THE RULES OF NATURAL JUSTICE AND THE *AUDI* RULE

[33] The essence of the applicant's bone of contention, as articulated succinctly in the respondents' heads of argument comes to the following: That he has been denied so-called procedural justice and equality before the law by not being given an opportunity to make representations prior to the appointment of the Tribunal. In other words, the applicant contends that he was entitled to a hearing prior to the appointment of the Tribunal by the King, as opposed to, as matters currently stand, a hearing before the Tribunal later. As a consequence, the principle of *audi alteram partem* comes into play. The applicant contends therefore that the whole process, from the first respondent's decision to make representations to the King to the appointment of the Tribunal is flawed and devoid of any legality.

[34] The pertinent question which arises is whether the applicant was entitled to be given a hearing before the appointment of the Tribunal. In Hoexter,[16] it is stated:

> "*Procedural fairness in the form of audi alteram partem is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants but it is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy. This was well explained by the Constitutional Court in Janse van Rensburg NO v Minister of Trade and Industry NO, where Goldstone J linked the importance of fairness to the growth of discretionary power:*
>
> > *'In modern States is has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness are thus all the more important … Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.'*"[17]

[35] According to Baxter[18], the principle of procedural fairness is closely tied up with the duty of an applicant to exhaust domestic remedies before approaching a court of law for relief. See also *Basotho African Congress v Mandor* [2004] LsHC 38. In *Mamonyane Matebesi v The Director of Immigration and Others* LAC (1995-1999) 616, one of the decided cases on which the applicant relies in the instant matter, the issue was whether the applicant, a public servant in Lesotho, was entitled to be heard before being dismissed in terms of sec 10(1)(i) of the Public Service Order, 21 of 1970. It was common cause in that case that the applicant was not accorded a hearing before being dismissed. The applicant had been absent from work

and refused to take up her transfer, after her representations in that regard had failed, and after she had chosen not to institute legal proceedings to challenge that decision. In dismissing the appeal, and finding that the decision to dismiss was not vitiated by the determination not to accord her some form of hearing, the Court at para [7] said:

> *"The right to audi is however infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation (Blom, supra at 662H-I and Baxter Administrative Law 1984 (569-570)). (Thus in appropriate instances fairness may require only the submission and consideration of written representations; the right to be heard is not necessarily to be equated with an entitlement to judicial-type proceedings with the full attributes). Or while a statute may not per se exclude the operation of the rule, it may confer an administrative discretion which permits that result. Or the operation of the rule may be ousted or attenuated by a particular set of facts, where it cannot practicably be implemented, at all or to its fullest extent, respectively. As is apparent from (3) above, section 66(4) of the Labour Code 1992 provides this expressly."*

[36] It is plain from the above that the entitlement to *audi* although an important one, and entrenched in the common law of Lesotho and indeed other jurisdictions, is flexible. It is equally contextual and relative. See *Thabo Mogudi Security Services CC v Randfontein Local Municipality and Another*[19]. Each case must be decided on its own particular circumstances. This is enforced by the fact that the *Mamonyane Matebesi* case (*supra*) concerned an ordinary public servant, whilst in the present matter, the applicant is an eminent senior judicial officer. On the latter basis, it seems to me that although it would have been ideal to have accorded the applicant *audi* prior to the appointment of the Tribunal, such omission has undoubtedly not vitiated the process thus far. This, based mostly on the huge importance of the

matter as well as the public interest and administration of justice in Lesotho. In any event, as stated earlier in this judgment, the applicant was accorded *audi* in regard to his suspension from office. He chose, without any explanation, not to exercise this right.

[37] As argued by the respondents, and correctly so in my view, on the mere appointment of the Tribunal, none of the applicant's rights have been affected adversely. The process of the enquiry to be undertaken at the Tribunal simply implies that no actual finding or decision has already been made against the applicant. The appointment of the Tribunal is only a preliminary step. It is to ensure the observance of the applicant's right to a hearing. There, is nothing preventing the applicant, as a senior judicial officer, to place his side of the story in full before the appointed Tribunal. In these circumstances, he is therefore clearly not without alternative remedy. See *Sharman McNicholls v Judicial and Legal Services Commission* [2010] UKPC 6, Privy Council Appeal No 0023 of 2009, discussed briefly below.

[38] The contention that the applicant's rights to dignity, equality before the law, and other rights have been violated by the process adopted by the first respondent thus far is plainly without merit. The fact that the applicant is the President of the Court of Appeal should accord him no exceptional or special treatment in matters of this nature. On the contrary, the applicant is expected, by virtue of his office, to play an active role in the speedy resolution of the complaints and allegations levelled against him. In *Langa v Hlophe*[20]:

> *"The fact that the respondent is a judge does not give him special rights or special protection. Judges are ordinary citizens what applies to others applies to them (Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO 2005 (3) SA 238 (SCA) at para [39]."*

[39] The question of procedural fairness and the rules of natural justice in regard to allegations of misconduct against a senior judicial officer also arose in *Sharman McNicholls v Judicial and Legal Services Commission (supra)*. In that case, the applicant was the Chief Magistrate of Trinidad and Tobago. The respondent ("*the JLSC*"), is the body constitutionally appointed to appoint, remove and exercise disciplinary control over all judges and judicial officers except the Chief Justice. The appeal arose out of a decision by the JLSC which had preferred certain disciplinary charges against the appellant, including appellant's refusal to testify for the prosecution in committal proceedings against the then Chief Justice of that country. In giving notice of the charges, the JLSC also informed the appellant that it proposed to suspend him on full pay and invited him to make representations to it as to why he should not be suspended. The applicant in denying the charges also instituted proceedings for judicial review seeking an order that the JLSC's decision to prefer the charges and its proposal to suspend him be quashed.

[40] Pursuant to partial success on review before a lower court, the appellant, unhappy with the process followed by the JLSC in preferring the charges against him appealed to the Board. In dismissing the appeal the Board held, *inter alia*, that there was no basis for a conclusion that the JLSC was acting unfairly or contrary to the rules of natural justice in preferring the

remaining charges against the appellant. The Board also held that there was no reason whatever why there should not be a fair trial of those charges by an appropriate tribunal. The applicant would be able to make his case before the disciplinary tribunal in his own defence.

[41] In my view, the findings quoted above, are apposite to the facts of the instant matter. In addition, there is no statutory obligation to afford the applicant a hearing in the appointment of the Tribunal. Section 125 of the Constitution is silent on this aspect. In any event, on the facts of this matter, no case has been made out to interpret the provision as creating such obligation. See para [43] below. The applicant's rights, including the right to dignity, have not been impaired at all by the appointment of the Tribunal. It is a preliminary step to enquire into the alleged misconduct of the applicant. The applicant retains all his constitutional and other rights to challenge his prosecution and to place fully his side of the story before the appointed Tribunal. The applicant's contentions in regard to his suspension need no consideration at all for present purposes. They are plainly without merit.

[42] There are more than compelling reasons, including public interest and that reputation of the entire judiciary in the Kingdom of Lesotho, to have the complaints against holders of public office, such as in the present matter, properly and transparently investigated by an independent tribunal. This is certainly required by sec 125(5) of the Constitution.

[43] In *Langa v Hlophe (supra)*, the case arose from a complaint of judicial misconduct laid by the appellants against the respondent, the Judge President of a High Court, with the Judicial Service Commission ("*the JSC*"). The respondent later laid a counter-complaint against the appellants. The essence of the complaint was that certain of the respondent's constitutional rights had been violated by the laying of the complaint, and by issuing a media release stating that the complaint had been laid. The Supreme Court of Appeal of South Africa dismissed the claims by the respondent who was accused of serious misconduct and that he was entitled to be heard before the complaint was referred to the JSC for investigation. In considering the relevant authorities, the Court at para [40], found that:

> "*While a judge is obviously entitled to be heard in the cause of the investigation of a complaint (as appears from the various cases and protocols referred to by the High Court and referred to in the heads of argument) that is not what we are concerned with in this appeal. We are concerned instead with the act that initiates such an enquiry (the 'trigger'), which is the decision to lay a complaint. In that respect there is no authority to which we were referred or of which we are aware – whether in decided cases or in judicial protocols anywhere in the world – that obliges a complainant to invite a judge to be heard before laying the complaint.*"

See also in this regard *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*[21], and *Competition Commission v Yara (SA) (Pty) Ltd*[22].

[44] In the United Kingdom courts, and in *Wiseman and Another v Barneman and Others*[23], the issue on appeal was as follows: Whether the tribunal in determining a question between the taxpayer and the

Commissioners of Inland Revenue referred to it under sec 28(5) of the Finance Act 1960, was bound to observe the rules of natural justice, and to give the taxpayer the right to see and comment upon material adverse to the taxpayer placed before the tribunal by the Commissioners of Inland Revenue. In dismissing the appeal, the Court at 305G-H said:

> "*It is established that where a statutory tribunal is charged with making a decision determining rights, one approach is the construction of the Act in question with the presumption that it does not take away the right of a party to be heard.*"

Later in the judgment, and after expressing the view that the Court will be slow to add further protection by means of involving the doctrine of natural justice,[24] the Court went on to say that:

> "*Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no-one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party. Even where the decision is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see material against him. I do not think that a case has been made out in that it is unfair to proceed as the statute directs …*"

[45] From all of the above legal principles, I have come to the conclusion that the applicant was firstly, not entitled to be heard prior to the decision to appoint the Tribunal. Secondly, none of the rights of the applicant, as he alleges, have been violated in the process of the first respondent representing to the King and the subsequent appointment of the Tribunal. The applicant

retains all his rights to be presented and argued before the Tribunal. The paramouncy of resolving the present impasse in the administration of justice, and the preservation (if not the restoration) of the integrity of the judiciary in Lesotho, by far outweigh whatever grievances and concerns the applicant might have. The heavy reliance by the applicant on the cases of *Mokoena and Others* LAC (2000-2004) 540, *Matebesi and Rees and Others v Crane (supra)*, in advancing this case, was clearly misplaced in the circumstances of this matter. The same applies to the reliance on sec 19 of the Judicial Services Commission Amendment Act 20 of 2008 of the Republic of South Africa. See *Langa v Hlophe (supra)*. For all the aforegoing reasons, the application falls to be dismissed as well.

THE INTERIM INTERDICT SOUGHT BY THE APPLICANT

[46] The determinations I have made above make it unnecessary for me to deal in any greater length with the applicant's contentions that he has made out a case for interim relief. A substantial part of the aspects determined above are plainly interwoven with the requirements of interim relief. These requirements are that the applicant must show that the right which is the subject of the main action, and which he seeks to protect by reason of the interim relief is clear, or is *prima facie* established though open to some doubt, that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant should the interim relief not be granted, that the balance of convenience favours the granting of the interim relief, and finally, the applicant for relief must establish that he has no

other alternative remedy. See *Setlogelo v Setlogelo*[25], and as refined some 34 years later in *Webster v Michelle*[26].

[47] The present matter is of such an unusual nature that the grant of an interdict will ineluctably have serious implications for the judiciary and the rule of law in Lesotho, as correctly argued on behalf of the respondents. The obvious alternative relief for the applicant is the expeditious hearing in the hearing at the Tribunal. It is at such hearing where the allegations of misconduct against the applicant can be investigated completely and determined. In *Gool v Minister of Justice and Another*[27], writing for the Full Bench, Ogilvie Thompson J said:

> "*The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of mala fides, the Court does not readily grant such an interdict ...*"

Later on in the judgment and on the same page, the learned Judge stated:

> "*The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a strong case being made out for that relief. I have already held that the Court has jurisdiction to entertain an application such as the present but in my judgment that jurisdiction will, for the reasons I have indicated, only be exercised in exceptional circumstances and when a strong case is made out for relief.*"

[48] In my view the remarks quoted above are equally applicable to the facts of the present matter. In addition, for reasons mentioned previously, public interest and the speedy resolution of the matter, the balance of convenience does not favour the granting of the interdict[28]. The appointed Tribunal, which the King was obliged to institute, ought to be allowed to investigate the rather serious allegations levelled against the applicant without any further delay. The applicant has suffered no procedural unfairness or prejudice. He is not precluded from safeguarding and asserting his rights at the Tribunal. For all these reasons, I have come to the conclusion that, in the exercise of my discretion, the application should also fail on this score.

THE COSTS

[49] There remains for determination the question of costs. It was in issue. The respondents have successfully resisted the granting of the ill-conceived relief which is obviously an abuse of court process. The matter was somewhat complex but of national interest. There is plainly no reason why the costs should not follow the result. It is just and equitable that the applicant be ordered to pay the costs, including the costs consequent upon the employment of two counsel.

[50] I must mention that our brother Musi AJ indicated that although he agrees with the conclusion reached in this judgment, he was considering certain proposed amendments. This, as I understood it correctly relate to the issue of the applicant's right to *audi*. However, as at the date of despatching

this judgment to the Court, such proposed amendments were not received. In our view to delay the matter further would prejudice the interested parties. This matter was heard on 26 September 2013.

ORDER

[51] In the result the following order is made:

1. The application is dismissed with costs.

2. The costs shall include the costs of two counsel.

D S S MOSHIDI
ACTING JUDGE OF THE LESOTHO HIGH COURT

I concur:

S POTTERIL
ACTING JUDGE OF THE LESOTHO HIGH COURT

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INSTRUCTED BY	K J THONTHO ATTORNEYS
DATES OF HEARING	26/27 SEPTEMBER 2013
DATE OF JUDGMENT	22 NOVEMBER 2013

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[1] Gazette not specified.
[2] See annexure "TT1".
[3] See para 3 of the answering affidavit.
[4] See para 3 of the replying affidavit.
[5] See para 4 of the replying affidavit.
[6] 1977 (4) SA 135 (W).
[7] At 137F.
[8] 2006 (1) SA 591 (SCA) paras [21] and [23].
[9] 2004 (2) SA 81 (SE).
[10] [2001] 1 All SA 567 (Tk) para [7]
[11] 813/2011, 2011 ZAECGHC 8, 8/3/2011.
[12] See prayer (3)(iii) of notice of motion.
[13] See prayer (4) of notice of motion.
[14] 1991 (2) SA 366 (C).
[15] 2001 (2) SA 277 (SCA).
[16] *Administrative Law in SA* – pp 326-327.
[17] 2001 (1) SA 29 (CC) para [24] (footnotes omitted).
[18] *Administrative Law* at 720-723.
[19] (2010) 4 All SA 314 (GSJ) paras [11], [15] and [38].
[20] 2009 (4) SA 382 (SCA) para [54].
[21] 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) paras [37] to [39].
[22] 784/12 (2013) ZASCA 107.
[23] [1971] AC 297 (HL).
[24] At 307C.
[25] 1914 AD 221.
[26] 1948 (1) SA 1186 (W).
[27] 1955 (2) SA 682 (C) at 689.
[28] See *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A).