

CONSTITUTIONAL CASE NO.5 OF 2014

IN THE CONSTITUTIONAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

**LEABA THETSANE (*DIRECTOR OF
PUBLIC PROSECUTIONS*)**

APPLICANT

AND

THE PRIME MINISTER

1ST RESPONDENT

**THE MINISTER OF LAW, CONSTITUTIONAL
AFFAIRS AND HUMAN RIGHTS**

2ND RESPONDENT

THE GOVERNMENT SECRETARY

3RD RESPONDENT

THE PUBLIC SERVICE COMMISSION

4TH RESPONDENT

THE ATTORNEY GENERAL

5TH RESPONDENT

JUDGMENT

**CORAM : THE HON. ACTING CHIEF JUSTICE T.
MONAPATHI**

THE HON. JUSTICE S.N. PEETE

THE HON JUSTICE L. CHAKA-MAKHOOANE

DATES OF HEARING : 2ND AND 8TH JULY 2014

DATE OF JUDGMENT: 8th AUGUST, 2014

Summary

Constitution of Lesotho 1993 – Office of the Director of Public Prosecutions – Retirement provision under Section 141 (8) of the Constitution – Effect of Section 3 of the Public Service Act 2005 excluding the Director of Public Prosecutions from the provisions of the Act – Whether the Director of Public Prosecutions can elect to consent to the alteration of retirement age of public officers under section 26 of the Public Service Act.

Where the Director of Public Prosecutions appointed as such by the Public Service Commission, elects to consent to the alteration of retirement age for public officers in general, section 26 of the Public Service Act does not apply to the Director of Public Prosecutions because section 3 of the Act explicitly provides that the whole Act does not apply to the Director of Public Prosecutions being an office listed under section 137 (3) of the Constitution.

Annotations:

Statutes

- Constitution of Lesotho 1993
- Public Service Act No.13 of 1995
- Public Service Act No.1 of 2005
- Legal Notice No.218 of 2000.

Books

Devenish – Interpretation of Statutes

Baxter – Administrative Law

Cases

- **Biowatch Trust vs Registrar, Genetic Resources – 2009 (6) SA. 21 (CC)**
- **President of the Court of Appeal vs The Prime Minister – C of A (CIV) No.62/13**
- **Judicial Officers’ Association of Lesotho and Law Society of Lesotho vs The Prime Minister – Constitutional case No.3/2005.**

THE COURT:

An Introduction:

- [1] On the 18th day of June 2014, the Applicant – *Advocate Leaba Thetsane KC* – the *Director of Public Prosecutions* – filed an urgent application in the office of *Registrar of the High Court* in which he prayed for the relief couched thus:-

“-1-

That the ordinary rules and modes of notice and service of this Honourable Court be dispensed with on account of the urgency hereof.

-2-

That a rule nisi issue and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause, if any, why the following orders shall not be made absolute:-

- (a) *That the implementation of the first respondent’s decision to remove applicant from office as Director of Public Prosecutions be stayed pending application.*
- (b) *That the respondents be restrained and interdicted from removing applicant from office of Director of Public Prosecutions pending the outcome of this application.*

- (c) *That the respondents be restrained and interdicted from appointing any person as the Director of Prosecutions pending the outcome of this application.*
- (d) *That the decision of the first respondent to remove applicant from office as Director of Public Prosecutions be declared unconstitutional.*
- (e) *That the decision of the first respondent to remove applicant from office as Director of Public Prosecutions be set aside.*
- (f) *A declarator that applicant is entitled to retire and is due for retirement as Director of Public Prosecutions upon attaining the age of sixty years.*
- (g) *That the respondent be ordered to pay the costs of this application.*
- (h) *That applicant be granted such further and/or alternative relief as this Honourable Court may deem fit.*

-3-

That prayers 1 and 2 (a), (b) and (c) operate with immediate effect as interim relief.”

Applicant’s Founding Affidavit

- [2] In his founding affidavit, the Applicant informs this Court that he has held the office of “**Director of Public Prosecutions**” since 1st January 2000¹ and that at the date of his appointment by the *Public Service Commission* the retirement age of the Director of Public Prosecutions was the age of 55 as set out in *section 141 (8)* of the **Constitution of Lesotho**. *Section 141 reads in full:-*

¹ **Legal Notice 218 of 2000** (see para 36 (infra))

“Director of Public Prosecutions

141. (1) (a) *A person shall not be qualified to be appointed to hold the office of Director of Public Prosecutions unless he holds one of the specified qualifications and has held one or other of those qualifications for a total period of not less than five years.*
- (b) *In this subsection “the specified qualifications” means the professional qualifications specified by the Legal Practitioners Act 1983, or by or under any law amending or replacing that Act, one of which must be held by any person before he may apply under that Act, or under such law, to be admitted as a legal practitioner in Lesotho.*
- (2) *If the office of Director of Public Prosecutions is vacant or if the Director of Public Prosecutions is for any reason unable to exercise the functions of his office, a person qualified for appointment to that office may be appointed to act therein, and any person so appointed shall, subject to the provisions of subsections (3), (5) and (7), continue to act until a person has been appointed to the office of Director of Public Prosecutions and has assumed the function of that office or, as the case may be, until the person in whose place he is acting has resumed those functions.*
- (3) *Subject to the provisions of section (5), the Director of Public Prosecutions **shall vacate his office when he attains the prescribed age.***
- (4) *A person holding the office of the Director of Public Prosecutions may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.*

- (5) *The Director of Public Prosecutions shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (6) and the tribunal has recommended to the King that he ought to be removed for inability as aforesaid or for misbehaviour.*
- (6) *If the Prime Minister or the Chairman of the Public Service Commission represents to the King that the question of removing the Director of Public Prosecutions 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 by the Chief Justice from among persons who hold or have held high judicial office; and*
 - (b) *the tribunal shall enquire into the matter and report on the facts thereof to the King and recommend to him whether the Director of Public Prosecutions ought to be removed under this section.*
- (7) *If the question of removing the Director of Public Prosecutions has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Public Service Commission, may suspend the Director of Public Prosecutions 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 recommends to the King that the Director of Public Prosecutions should not be removed.*
- (8) ***The prescribed age for the purposes of subsection (3) is the age of fifty-five years or such other age as may be prescribed by Parliament.***

Provided that an Act of Parliament, to the extent to which it alters the prescribed age after the appointment of a person to be or to act as Director of Public Prosecutions, shall not have effect in relation to that person unless he consents that it should have effect.” (emphasis added)

[3] In his affidavit the applicant further states that:-

-9-

“That position was then changed by the two events. The first was the enactment of the Public Service Act No.1 of 2005 which in Section 26 (1) fixed a new retirement age for Public Officers as the age of 60 years. The second was the voluntary act on my part to agree or consent to be bound by the provisions of Section 26 (1) aforesaid, requiring Public Officers to retire upon attaining the age of 60 years.

-10-

The election to be so bound was done pursuant to the provisions of Section 148 (8) of the Constitution and Section 26 (4) (b) of the Public Service Act 2005. I annex herewith and mark “DPP1” a copy of the election I made and it speaks for itself.

-11-

I verily aver that this voluntary election on my part, which the law permits, is irrevocable since I was born on the 27th of July 1958, and I made the election before I attained the age of 55 years. I will be due for retirement on the 27th July 2018, when I attain the age of 60 years.”(emphasis added)

[4] It is not in dispute that on 17th May 2000, the Applicant had written as follows to the Principal Secretary, Ministry of Public Service:

“LAW/P/16230

17th May, 2010

***The Principal Secretary
Ministry of Public Service
Qhobosheaneng Government Complex 1
MASERU***

Dear Sir,

RE: CONSENT TO RETIRE AT THE AGE OF 60 YEARS

Kindly, refer to the above matter.

Whereas section 26 (1) of the **Public Service Act** No.1 of 2005 provides that:-

“A public officer shall retire from the public service, and shall be so retired, on attaining the age of 60 years;”

And whereas pursuant to the Constitution (refer section 98 (1) and 154 (1), (3) and (4) I, as Director of Public Prosecutions, am a public officer, and, as such, the said section 26 (1) of the **Public Service Act** applies to and has effect on me in that capacity:

Provided I consent to such a state of affairs (that is, give my consent that it should apply to and have effect on me, as a public officer: refer section 141 (8) of the Constitution);

And whereas I intend to retire from the public service upon attaining the prescribed age of 60 years;

Now wherefore *I do hereby make known to you as Head of Department of the Ministry of Public Service that, pursuant to section 141 (8) of the Constitution, I consent, as it is hereby done, that section 26 (1) of the Public Service Act No.1 of 2005 should and shall, apply to and have effect on me, as a public officer, thus, in consequence, I will retire from the public service upon attaining of the age of 60 years.*

By copy hereof, the Honourable Minister of respectively Public Service and of Law and Constitutional Affairs are, as well, accordingly informed of this, my consent.

Yours faithfully,

LEABA L. THETSANE KC
DIRECTOR OF PUBLIC PROSECUTIONS

COPY²: - **HONOURABLE MINISTER OF PUBLIC SERVICE**
- **HONOURABLE MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS”**

We shall assume in applicant’s favour that all requirements prescribed by the Minister in terms of *section 26* of the **Public Service Act No.1 of 2005** had been complied with by the Applicant. No copy was apparently made to the Public Service Commission.

[5] The applicant further states:-

-12-

“The above facts notwithstanding, on the 28th of May 2014, I received a letter from the Acting Government Secretary, copy of which is annexed and marked DPP2, the gist of which was that he and the Prime Minister were of the view that I should have retired at the age of 55 years. I was

² It should be noted that the receipt of this important letter was not acknowledged by the Principal Secretary in the Ministry of Public Service.

asked to make representations. I duly did so and I annex the same and mark them DPP3. They speak for themselves.”

- [6] It is perhaps important to quote *verbatim* the letter written (a year later) to applicant on the 28th May 2014 by 3rd respondent – Government Secretary **Mr Mphaka:-**

***“Office of the Government Secretary
P.O. Box 527
Maseru – 100
Lesotho***

28 May 2014

GS/APP/1

***Mr L.L. Thetsane, KC
Ministry of Law, Constitutional Affairs & Human Rights
MASERU***

Dear Mr Thetsane,

***RE; VACATION OF YOUR OFFICE AS
DIRECTOR OF PUBLIC PROSECUTIONS***

1. *I am directed by the Right Honourable the Prime Minister to write to you about his concern that your continued occupation of the office of the Director of Public Prosecutions appears to be unconstitutional and outside the provisions of the law as it currently stands.*
2. *In terms of section 141 (3) of the Constitution the holder of the office of Director of Public Prosecutions, is required to vacate office on attainment of the prescribed age. The section provides:-*

“Subject to the provisions of subsection (5) (of section 141 of the Constitution), the Director of Public Prosecutions shall vacate his office when he attains the prescribed age”.

Section 141 (8) of the Constitution defines what the prescribed age envisaged in subsection (3) is. It reads:

“The prescribed age for the purposes of subsection (3) is the age of fifty-five or such other age as may be prescribed by Parliament.”

Subsection (8) further stipulates that-

“Provided that an Act of Parliament, to the extent to which it alters the prescribed age after the appointment of the person to be or to act as Director of Public Prosecutions, shall not have effect in relation to that person unless he consents that it should have effect”.

I observe that the prescribed age as set out in subsection (8) was similar to the retirement age of other public officers in the civil service.

3. *I am not aware that an Act of Parliament as contemplated in subsection (8) of section 141 of the Constitution was never passed in Parliament. I note, however, that the Public Service Act No.1 of 2005 altered the retirement age of public officers other than those specifically mentioned in section 137 of the Constitution. The retirement age of public officer not referred to in section 137 of the Constitution was altered by the Public Service Act 2005 from fifty-five years of age to sixty years of age. Section 3 of the Public Service Act specifically stipulated that the Act does not apply to officers specified in section 137 (3) of the Constitution. The section reads:*

“This Act does not apply to the offices specified in section 137 (3) of the Constitution to the extent therein specified”.

The office of the Director of Public Prosecutions is one of the offices specified in section 137 (3) of the Constitution (subsection (3) (c) thereof).

4. *Apparently on 17 May 2010, under your reference, LAW/P/16230, you wrote to the Principal Secretary, Ministry of the Public Service, and copied your letter to the Minister of the Public Service and the Minister of Law and Constitutional Affairs, indicating that you were opting to retire at the age of sixty pursuant to the provisions of section 26 (1) of the Public Service Act of No.1 of 2005.*

In the letter under reference you stated,

“I do hereby make known to you as Head of Department of the Ministry of Public Service that pursuant to section 141 (8) of the Constitution, I consent, as it is hereby done that section 26 (1) of the Public Service Act No. 1 of 2005 should, and shall, apply to and have effect on me as a public officer; thus in consequence I will retire from the public service upon attainment of the age of 60 years.”

5. *So far as I am aware, it is not clear to me what the response of the Principal Secretary to the letter that you wrote to him on 17 May, 2010 was. What is clear, however, is that the intimation that you desired to retired from the civil service on attainment of the age of sixty years was premised on your understanding that the Public Service Act 2005 applied to you as well. As the Prime Minister is presently advised, the Act does not apply to the office that you hold. The application of the Act to your office is expressly excluded by section 3 of the Public Service Act 2005, and of that there can be no doubt.*
6. *It is therefore the considered view of the Prime Minister that your reliance on the Public Service Act, purporting to consent to the alteration of your retirement age from fifty-five to sixty years was erroneous and had no basis in intended to circumvent the clear*

provisions of the law, the Constitution for that matter, that the prescribed retirement age in your case is fifty-five.

7. *The Prime Minister considers that you were obliged to vacate office as Director of Public Prosecutions on attainment of the age of fifty-five. He has therefore directed me to inform you that in the event that you do not agree that the prescribed retirement age in your case is fifty-five, you are free to make representations to him and show cause why he should not advise His Majesty, the King, to appoint a suitably qualified person as Director of Public Prosecutions to replace you. As instructed by the Prime Minister, I am to inform you that if you do not agree with him that the prescribed retirement age is fifty-years, you may make representations to him.*

If you wish to make representations to the Prime Minister you should do so not later than 4 June, 2014, failing which the Prime Minister will assume that you do not wish to make such representations, in which event he will take it that you accept that the prescribed retirement age in your case is fifty-five years of age.

8. *I wish to convey to you that in light of the view that the Prime Minister takes of the matter under discussion, he desires, in the interest of all concerned, that this matter should be speedily resolved. He also desires that, if it is possible to do so, the issue as to when you should vacate office should be settled amicably. If you are amenable to discussing with me how best to take this matter forward, feel free to arrange a meeting to discuss with me whether an agreement can be reached as to when and on what terms you should vacate office as Director of Public Prosecutions (Attorney-General). You may, if you so wish, anticipate the time frame that I have suggested and come forward for discussions in advance of that date.*

Yours sincerely,

MOAHLOLI MPHAKA

ACTING GOVERNMENT SECRETARY”

- [7] *En passant*, it should be clarified beyond all doubt that the Director of Public Prosecutions is not appointed by the King acting upon the advice of the Prime Minister as stated in para 7 of the letter cited above, but by the Public Service Commission.
- [8] On the 2nd June 2014, and on behalf of the Applicant, **Adv. Teele KC** replied as follows:-

***“The Right Honourable The Prime Minister
Government Complex
MASERU 100***

Dear Sir

**RE: REPRESENTATION BY AND ON BEHALF OF ADV.
THETSANE KC, WHY YOU SHOULD NOT ADVISSE HIS
MAJESTY TO APPOINT ANOTHER PERSON AS DPP WHILE
HE IS STILL IN OFFICE AS THE DPP**

The above matter refers.

We are the legal representatives of Adv. Thetsane KC, hereinafter referred to as the DPP. The DPP has instructed us to respond to a letter written to him, ostensibly on your authority, by the Government Secretary, referenced GS/APP/1 dated the 28th of May 2014.

We have carefully studied the contents of that letter and the law regarding the retirement age of the Director of Public Prosecutions, which is raised as an issue therein. We note that, whereas the letter of the Government Secretary, in its first and some other paragraphs,

purports to convey your concern that the continued occupation of client of Office of DPP is unconstitutional, some of the paragraphs, read closely, appear to reflect the views of the Government Secretary. Be that as it may, to the extent that those views appear to be in line with your concerns summarised in para 1 of the letter, we categorically state and represent to you sir, that the current DPP's term of office has not yet come to an end, and the following are our reasons:-

1. *In the letter by the Government Secretary reliance is placed on the provisions of Section 141 (3), read with Section 141 (8), of the Constitution. Indeed, these two subsections are starting points, but are only a small part of the legislative scheme relevant to the issue of retirement of the DPP.*
2. *Before we point to the other relevant parts, it is imperative that Section 141 (8) be clearly understood. The subsection has three parts. First it states that the prescribed age is fifty five years, but goes on to say "or such other age as may be prescribed by parliament". That is, the second part. What this means is that 55 years is the retirement age unless there is another age fixed by an Act of Parliament. That much appears to be the understanding of the letter of the Government Secretary. The last part of the subsection is that, where there is an Act of Parliament altering the prescribed age, it shall not apply retrospectively to the person already acting as the DPP, unless he consents that the Act should apply to him. This again appears to be the understanding that informs the letter of the Government Secretary.*
3. *The difficulty comes in where the Government Secretary says he is not aware that an Act of Parliament contemplated in Section 141 (8) was ever passed. He then dismissed as irrelevant the Public Service Act 1 of 2005. This is where an error occurs.*
4. *Section 3 of the Public Service Act 2005, on which he relies, he not been correctly understood. It reads thus, "this Act does not apply to the officer specified in Section 137 (3) of the Constitution **to the extent therein specified.**"*
5. *We have emphasised the words "to the extent therein specified". The proper approach to interpretation is to establish what these*

- words mean. If they were not included in the Section, a different meaning would attach to Section 3 of the Public Service Act. The words simply mean that on the subject matter regulated in the Constitution in relation to those officers, the Act will not apply to the extent in inconsistency with such constitution regulation.
6. Let us use a neutral example of a judge of the Court of Appeal or of the High Court. A Judge of the Court of Appeal is appointed under the scheme set out in S. 124 of the Constitution, and Judge of the High Court are appointed under the scheme set out in Section 120. So in that manner, the Public Service Act does not apply to the Judges to “that extent” specified in the Constitution.
 7. Returning to the office of the DPP; he is not subject to the disciplinary authority of the Public Service Commission. If he misbehaves, for example, he may only be removed following a Tribunal established pursuant to Section 141 (6) of the Constitution. The Public Service Act, on the other hand, in Section 6 confers the power to discipline holders of the Public office on the commission. So **“to that extent”** the Act will not apply to the DPP, even though he is a public officer, a fact to which we shall revert, in as much as the Act is subject to the Constitution, a fact expressly set out in section 6 of the Public Service Act 2005.
 8. It is important to note that Section 5 of the Public Service Act provides that:-

“The provisions of this Act are ancillary to those of the Constitution that relate to the Public Service, Public Offices and Public Officers.”

9. This is a very important provision that has been overlooked in the letter of the Government Secretary. That section must be read, in so far as it relates to the DPP, with the provisions of Section 99 (1) of the Constitution Section 99 (1) reads:-

“There shall be a Director of Public Prosecutions whose office shall be an office in the Public Service.”

10. What that means is that the DPP is a Public Officer. The Public Service Act 2005, provides that the meaning of “Public Officer” is a meaning assigned to the words in the Constitution. A Public

Officer is defined in the Constitution as a person holding or acting in any public office, and a public office is defined as any office of emolument in the Public Service. The DPP no doubt, therefore, is a Public Officer. (See Section 154 of the Constitution.)

11. Now the Public Service Act provides in Section 26 (1) that:-

*“A **public officer**” shall retire from the public Service and shall be so retired on attaining the age of 60 years.”*

12. Section 26 (4) (b) then provides that notwithstanding subsection (1), a public officer who was already employed when the Public Service Act 2005 came into force, is given a right to elect to retire at the age of either 55 or 60 years. That is exactly what the Constitution contemplates in the proviso to Section 141 (8).

13. We have already demonstrated, sir, that the DPP is a Public Officer, and that Section 26 deals with the retirement of public officers. The DPP is not exempted from the application of the provisions of that section. You will have been advised that the Constitution you seek to uphold is based on equality. On that principle therefore, the DPP is included as a Public officer.

14. That there is no law passed to cover the DPP is plainly not accurate. It is inconceivable and absurd that Parliament would only sit to enact a law dealing with the DPP alone while he is a public officer. Parliaments do not normally sit down to consider such *ad hominem* legislation. It would in an event have been very difficult to justify such legislation that does not take into account that the DPP falls into a class of officers, called Public Officers. He is entitled in terms of section 19 of the Constitution to equality before the law and equal protection of the law, unless such different treatment is sanctioned and authorised by the Constitution itself.

15. Our client has made the election that is authorised both in the Constitution and under Section 26 of the Public Service Act. He is not due for retirement on that basis. He will retire upon attaining the age of 60 years.

*16. In summary, when Section 3 provides that the Public Service Act 2005, does not apply to the offices specified in S.137 (3) of the Constitution, it is not dealing with retirement age. It is simply contrasting the powers conferred on the Public Service Commission by the Act, in relation to the Offices specified in Section 137 of the Constitution, and excludes the application of the Act in so far as there is inconsistency between the Constitution and the Act. This is a general interpretative approach, which has only been, *ex abundanti cautela*, expressly stated in the provisions of Section 3 of the Public Service Act. Its expression therein should not be source for confusion at all.*

In all the circumstances, there can be no doubt that the DPP is still occupying his constitutional position lawfully and you will allow him to continue to do so.

Yours faithfully,

ADV. M.E. TEELE, KC

**CC: GOVERNMENT SECRETARY
MASERU 100**

**PUBLIC SERVICE COMMISSION
MASERU 100”**

[9] In the letter dated 5th June 2014, the 3rd Respondent replies thus:-

“Dear Mr Thetsane,

**NOTICE TO VACATE OFFICE AS DIRECTOR
OF PUBLIC PROSECUTIONS**

1. *I write to inform you that in response to the letter that I wrote you on 28th May, 2014, my reference GS/APP/1, I am in receipt of*

representations made on your behalf by your Counsel, Advocate M.E. Teele KC, as to why you should not be required to vacate office of the Director of Public Prosecutions. In the said letter I requested you to show cause why you should not be required to vacate office that you hold, as the Prime Minister has received advice, which we accepted, that you were obliged to vacate office as you have attained the prescribed retirement age which is specified in section 141 (3) of the Constitution, read with section 141 (8) thereof.

- 2. When I wrote to you I indicated that you were required to vacate office on attainment of the prescribed age as stipulated in the Constitution. Nowhere in my letter under reference did I seek to suggest that you are not a public officer as contemplated in the Constitution and the Public Service Act 2005. I categorically stated that in the light of the advice to the Prime Minister, he considered that the Public Service Act does not apply in your case as section 3 of that Act specifically provided that the Act did not apply to officer specified in section 137 (3) of the Constitution. The office of Director of Public Prosecutions is one of those offices specified in section 137 (3). Further, on the strength of the advice that the Prime Minister has received the Public Service Act is not legislation that expressly or by inference was intended to alter the prescribed age specified in section 141 (8) of the Constitution.*
- 3. Having carefully considered representations that your Counsel had made to the Prime Minister, the Prime Minister is not persuaded that your retirement age was altered to sixty years of age. Consequently the Prime Minister reiterate that your retirement age remains fifty-five as specified in the Constitution.*
- 4. In my capacity as acting Government Secretary and as such charged with overall responsibility over all public officers, **I direct you to vacate office of Director of Public Prosecutions with immediate effect.** By copy of this letter I have advised Public Service Commission that I have directed you to vacate office.*
- 5. As regards your retirement benefits and other entitlements that may be due to you, that is a matter that will be dealt with by the Public Service Commission and the Treasury.*
- 6. On behalf of the Prime Minister and the Government, I take this opportunity to thank you for the services that you have rendered with*

dedication and selflessness over a number of years. I wish you well on whatever future endeavours that you may undertake on your retirement.

I remain

Yours sincerely,

MOAHLOLI MPHAKA
GOVERNMENT SECRETARY (a.i)

CC: Secretary – Public Service Commission”

[10] On the same day, the 3rd respondent also wrote to **Adv. Teele KC** as follows:

“5 June, 2014.

*Att: Teele Chambers
P.O. Box 730
LERIBE 300
Lesotho*

Dear Sir,

RE: THE DIRECTOR OF PUBIC PROSECUTIONS
ADVOCATE L.L. THETSANE, KC

The above captioned subject matter bears reference.

On behalf of The Right Honourable the Prime Minister, Dr M.T. Thabane, I acknowledge, with thanks, receipt of your letter dated 2 June

2014 concerning the above-mentioned matter, your reference M.E.T 190/14 addressed to the Prime Minister and copied to me.

The Right Honourable the Prime Minister has given careful consideration to the submissions you made on the question as to the retirement age of your client, Advocate L.L. Thetsane, KC. I reiterate that the Prime Minister persist in that your client has attained the prescribed retirement age envisaged by the Constitution and that he is in terms of the Constitution required to vacate the office that he holds as the Director of Public Prosecutions of the Kingdom of Lesotho.

I further wish to place on record that the Prime Minister never suggested nor hinted that your client was not a public officer. There is no doubt that he is a public officer in as much as other office holders specified in section 137 (3) of the Constitution are public officers despite the fact that the Public Service Act 2005 does not apply to them. The Prime Minister's view with which I agree and align myself with, is that in as far as your client's retirement age is concerned, the Public Service Act 2005 does not apply to him. Moreover there is no indication whatsoever that the Public Service Act is the type of legislation intended to alter the prescribed age contemplated in section 141 (3), read with section 141 (8) of the Constitution.

Having considered the submissions you have made on behalf of your client, the Prime Minister is not persuaded that his retirement age has been altered from fifty-five years to sixty years of age.

In my capacity as the acting Government Secretary and as such charged with overall responsibility over all public officers. I will be writing to your client under separate cover directing him to vacate office as the Director of Public Prosecutions of the Kingdom of Lesotho with immediate effect.

I thank you for the representations that you have made on your client's behalf albeit we do not agree as to what his retirement age is.

I remain

Yours sincerely,

MOAHLOLI MPHAKA

GOVERNMENT SECRETARY a.i.” (emphasis added)

[11] On the 17th June 2014 the applicant personally wrote to the 3rd respondent as follows:-

Dear Mr Mphaka,

NOTICE TO VACATE OFFICE AS DIRECTOR OF PUBLIC PROSECTIONS

1. *I acknowledge receipt of your letter referenced GS/APP/1 dated 5th June, 2014 which letter was **only**, delivered to me on the 16th day of June, 2014 at about 3.00pm. I note that in paragraph four (4) of your letter you are the one in your capacity as the Government Secretary who is directing that I should vacate office as Director of Public Prosecutions “**with immediate effect**”. It would be useful if you could explain whether you are acting on the instructions of the Prime Minister or on your own behalf.*
2. *Be that as it may, I should hasten to record that I do not agree with most of the contents of your letter under reference. I wish to place it on record at the outset, and in no uncertain terms that I do not agree with your contention that I should vacate office of the Director of Public Prosecutions “**with immediate effect**” for reason set out in your letter referred to above.*
3. *The disagreement between us being one that is legal in nature, as it involves the interpretation of the Constitution and the relevant laws, I would have thought that you should have approached a Court of law for a declaratory that I am no longer occupying my position lawfully. May I also direct your attention to the provision of Section 155 (4) of*

the Constitution as it relates to the Office of the Director of Public Prosecutions which reads as follows:-

“(4) References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service:

Provided that:-

(a) Nothing in this subsection shall be construed as conferring on any person or authority the power to require a judge of the Court of Appeal or a judge of the High Court or the Attorney General or Director of Public Prosecutions or the Chief Electoral Officer or the Ombudsman or the Auditor General to retire from the public service; and

(b) Any power conferred by any law to permit a person to retire from the public service shall, in the case of any public officer who may be removed from office by some person or authority other than a Commission established by this Constitution, vest in the Public Service Commission.

4. *Against this backdrop your decision cannot stand in terms of the provisions of the Constitution. In the premises, I stand by contents of the letter earlier sent to you by my Counsel; and will in the result continue to discharge my functions as the Director of Public Prosecutions in terms of the relevant Laws of Lesotho.*

Yours sincerely,

LEABA L. THETSANE
DIRECTOR OF PUBLIC PROSECUTIONS

Cc: Secretary – Public Service Commission”

- [12] Throughout all this correspondence, the **Public Service Commission** was maintaining a mute silence despite the fact that the Commission was the repository of power under the provisions of **Section 133** of the Constitution which even further provides that:-

“136. (11) The Commission shall, in the exercise of its functions under this Constitution, not be subject to the direction or control of any other person or authority.”

- [13] For avoidance of any doubt, this case is not about removal of the Applicant from the office of the Director of Public Prosecutions. It is about whether the 1st respondent has lawful authority to request as he did the Applicant to vacate the office of the Director of Public Prosecutions. The 1st respondent duly advised, understood that the Applicant had reached and had passed his retirement age of 55 and that *section 26* of the **Public Service Act No.1 2005** did not apply to him. In contrast, the applicant held that since he was “*public officer*” he had elected to consent to the alteration of his retirement age from 55 to 60. Applicant contents therefore that he will only go on retirement when he reaches the age of 60 – that is on 27 July, 2018 (four years hence from now!)

Applicant’s submissions

- [14] Through his counsel **Advocate Teele KC**, the applicant contends in the main that the 1st and 3rd respondents had no power under law to order him to vacate his office as Director of Public Prosecutions; that their decision

to do so was *ultra vires*. This was conceded, and correctly so, by the respondents in the answering affidavit of the 3rd respondent³.

[15] *Adv Teele KC* tables a very ingenious interpretation to *Section 3* of the **Public Service Act No.1 of 2005** and to the retirement provisions of *Sections 141 (3) and (8)* of the Constitution. He earnestly submits that *Section 3* of the **Public Service Act No.1 of 2005** can gainfully be understood by giving it what he termed “...a positive interpretation...” i.e. that the **Public Service Act** applies to the office of the Director of Public Prosecutions to the extent that such application is not inconsistent with the relevant provisions of the Constitution. He vigorously submits that being “a public officer” *section 26* of the **Public Service Act** applies to the Director of Public Prosecutions without discrimination. Statutory primacy of *section 3* of the Act cannot be ignored or given a blind eye.

[16] *Advocate Mosito KC* on the other hand submits that “the purported election by the applicant to retire at 60 is incompetent” and argues that although a public officer as defined under the Constitution of Lesotho, the Director of Public Prosecutions was excluded from the ambit of the **Public Service Act No.1 of 2005** by *section 3* of that Act. He submits that the purported election to consent was *non scripto*. In short, he submits that the Public Service Act did not expressly provide that it also alters the age of retirement of the Director of Public Prosecutions and that the Act only made provisions in *section 26* for the retirements of the public officers in general. An express *ad hominen* Act was requisite to

³ Para 8 of the 3rd Respondent.

alter the retirement age of the Director of Public Prosecutions in terms of *section 141 (8)* of the Constitution of Lesotho.

Import of section 3 of the Public Service Act – 2005.

- [17] In interpreting *section 3* of the **Public Service Act No.1 of 2005** and *sections 137 (3) (c)* and *141 (8)* of the Constitution, absurdity should be avoided. The section must be given a plain interpretation so as to understand the intention of Parliament in excluding the specified offices from the ambit of the Act.
- [18] The salutary effect of *section 3* of the **Public Service Act** is to remove the office of the Director of Public Prosecutions from the ambit of the Act and this exclusion *mutatis mutandis* applies equally to *section 26* of the Act. In other words, if *section 26* of the Act was intended to apply to the Director of Public Prosecutions, then all other sections of the Public Service Act should apply to the Director of Public Prosecutions, and understandably such an interpretation would obviously nullify and emasculate the clear provisions of *section 3* of the Act.

Respondents' answering affidavit

- [19] The 3rd respondent has deposed to an answering affidavit in which he contents that “...*the Public Service Act 2005 did not alter the retirement age of the deponent (applicant) inasmuch as that Act did not apply to the position of deponent*” (applicant). He refers to *section 141 (3)* and *section 141 (8)* of the Constitution. He contends that the **Public Service Act** in its totality (*section 26* included) has no application to the applicant.

[20] More importantly the 3rd respondent states at para 8 that “...*It is correct that the Prime Minister and I have no power to retire the applicant...*”.

The cruciality of this concession affects in a large measure the success of prayers (a) (b) (c) (d) (e) of the notice of motion. More about this later.

[21] He further states that the Respondents are “...*merely enforcing the expressed terms of the Constitution as regards the retirement age of a person in the position of the deponent...*” **Advocate Mosito KC** used the words “...*cracking the whip...*” Cracking of the whip may be necessary but it must be done within the parameters of the law and of the Constitution!

[22] The “*positive interpretation*” as suggested by **Advocate Teele KC** can inadvertently also overreach and affect other offices mentioned under *section 137 (3)* of the Constitution. There exists a trite presumption of interpretation that a law (statute) does not intend absurd or anomalous results.⁴ Incidentally, the applicant has not specifically prayed for declarator “that *section 26* of the **Public Service Act No.1 of 2005** applies to him “*as a public officer*” as defined under the **Constitution of Lesotho**.

[23] It is common cause that having been born on 27th July 1958, the Applicant – The *Director of Public Prosecutions* – reached his retirement age of 55 on the 27 July 2013 as prescribed by *section 141 (8)* of the

⁴ **Devenish** – *Interpretation of the Statutes* (1996) page 177; - see also **Vente v R** – 1907 TS 910

Constitution but the Director of Public Prosecutions contends that being a “*public officer*” appointed as such by the Public Service Commission under *section 133* of **Constitution of Lesotho**, he had made a voluntary written consent⁵ to retire at 60 and that the *section 26* of the **Public Service Act** applied to him *in toto*.

- [24] We assume in favour of the Director of Public Prosecutions that all procedural requirements under *section 26* were met. It is not denied by *Advocate Teele KC* that *section 137 (3) (c)* lists the “*office Director of Public Prosecutions*” as one of the offices to which the **Public Service Act No.1** “*does not apply*”; and in other words this exclusion means that *section 26* (on retirement) of the Act “*does not apply*” to the Applicant, his office having been listed under *section 137 (3) (c)* of the Constitution – this is very explicit and clear; and to impute any other meaning or interpretation to *section 3* of the Act and *section 137 (3) (c)* would bring about “*a grotesque distortion*” such as even rendering all other sections of the **Public Service Act** to be applicable to the Director of Public Prosecutions! That was certainly not the intention of Parliament; its only clear intention was to list the specified offices under *section 137 (3)* because the **Constitution of Lesotho** provides specific and clear terms of appointment – including retirement – for each office as a separate *cadre* or regime – see *section 121 (8) (Judges)*; **Attorney General** *section 140*; **Auditor General** *section 142 (3) and (8)*. The Constitution makes clear provisions for the retirement of the holders of these offices whereas *section 26* of the **Public Service Act 2005** applies generally to all public officers regardless of offices held.

⁵ See letter dated 27th May 2010 [para 5 (supra)]

[24] Regardless of however benevolent or purposive an interpretation this Court may give, the Court cannot stretch such interpretation of *Section 3* to exclude the office of the Director of Public Prosecutions from the list of offices under *section 137 (3)* – the (c) of which section effectively removes it from the ambit of the **Public Service Act No.1 of 2005**.

[25] In this constitutional matter, since the main thrust of the applicant’s case is that the **Public Service Act No.1 of 2005** applies to him and in particular *section 26* thereof, it is perhaps important to cite in full *section 3* of the **Public Service Act**. It reads as follows:-

“Application

3. *This Act does not apply to the offices specified in section 137 (3) of the Constitution to the extent therein specified.*” (emphasis added)

[26] The office of Director of Public Prosecutions is listed under (c) thereof. In this context, the words “*to the extent therein specified*” should simply be understood to mean “*...within the Constitution...*” meaning the **Constitution of Lesotho**. The brevity of this Section can precipitate many if not conflicting interpretations – but it must be given a plain meaning contextual to all facts and circumstances.

[27] *Section 137 (3)* of the **Constitution of Lesotho** reads:-

“Appointment, etc. of public officers

137. (1) *Subject to the provisions of this Constitution the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointment), the power to*

terminate appointments of such persons, save the power to discipline and terminate the appointment of such persons for disciplinary reasons., is vested in the Public Service Commission⁶.

- (2) *Subject to the provisions of this Chapter, the Public Service Commission may, by direction in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (1) to any one or more members of the Commission or, with the consent of the Prime Minister, to any public officer.*
- (3) *The provisions of this section shall not apply in relation to the following offices, that is to say-*
- (a) *the office of a Judge of the Court of Appeal or of the High Court, the office of the Attorney-General, the office of Auditor-General and the office of Ombudsman;*
 - (b) *the office of the Chief Electoral Officer; (now chairperson of the Independent Electoral Commission)*
 - (c) ***except in relation to appointments thereto or to act therein, the office of Director of Public Prosecutions;***
 - (d) *so far only as concerns appointments thereto or to act therein, the office of Principal Secretary, and the office of Government Secretary;*
 - (e) *any office to which section 133 of this Constitution (which relates to offices within the jurisdiction of the Judicial Service Commission) applies;*
 - (f) *any office of the power to make appointments to which is vested in a Teaching Service Commission established in accordance within section 144 of this Constitution;*
 - (g) *the office of Ambassador, High Commission or other principal representative of Lesotho in any other country; and*

⁶ As amended by the Fifth Amendment to the Constitution Act No. 8 of 2004.

(h) the office of Commander of the Defence Force and offices of members of the Defence Force, the office of Commissioner of Police and offices of members of the Police Force, the office of the Director of National Security Service and offices of members of the National Security Service, and the office of Director of Prisons and offices of members of the Prison Service. (emphasis added)

[28] Crucial to the applicant's case is the answer to the question whether the Director of Public Prosecutions being "*a public officer*" is entitled to be covered by the beneficial provisions of *section 26* of the **Public Service Act 2005**. *Section 26* reads:-

“RETIREMENT OF PUBLIC OFFICERS

26. (1) *A public officer shall retire from the public service, and shall be so retired, on attaining the age of 60 years.*⁷
- (2) *A public officer may, by written notice to the Principal Secretary of his or her Ministry, voluntarily retire from the public service on attaining the age of 50 years.*
- (3) *Where notification is given under sub-section (2), officers on Grade I and above shall give three (3) calendar months' notice prior to the intended day of retirement. Officer on Grade H and below shall give one calendar month.*
- (4) *Notwithstanding sub-sections (1) and (2), a public officer already employed in the public service on the coming into force of this Act shall, within a period and in a manner to be prescribed by the Minister –*

⁷ Retirement age of Public Officers under the 1995 Public Service Act had hitherto been 55.

- (a) *elect to voluntarily retire from the public service on attaining the age of 45 or 50 years; or*
- (b) *elect to retire on attaining the age of 55 or 60 years.*
(emphasis added)
- (5) *Other circumstances for retirement or termination of employment shall be as prescribed by the Minister in the conditions of employment.*
- (6) *Notwithstanding sub-section (1), the Commission may, having regard to the conditions of the public service and after consultation with the Minister and the officer concerned, retire an officer from the public service before or after the public officer attains the age of 45 or 50 years.*
- (7) *A public officer is liable to retirement at the discretion of the Commission:-*
 (a) *for medically proven incapacity to perform the duties of the officer's office; or*
 (b) *for the purpose of facilitating improvements in the public service by which greater efficiency or economy may be effected."*

Office of Director of Public Prosecutions

[30] **The Constitution of Lesotho** – is the supreme law (*Grundnorm*) in the Kingdom of Lesotho and it provides and establishes the “*Office of Director of Public Prosecutions*”.⁸ *Section 99 (1)* reads:-

“Director of Public Prosecutions

⁸ Historically since 1938, the **Criminal Procedure and Evidence Proclamation No.59 of 1938** had provided that the Attorney General prosecuted on behalf of Her Majesty the Queen. **The Criminal Procedure and Evidence Act NO.9 of 1981** provides for the Director of Prosecutions to prosecute for and on behalf of the King. Presently the Director of Public Prosecutions functions under the authority of the Attorney General – sections 98 (1) (b) and 98 (4) of the Constitution.

99. (1) *There shall be a Director of Public Prosecutions whose office shall be an office in the public service.*
- (2) *The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –*
- (a) *to institute and undertake criminal proceedings against any person before any court (court than a court-martial) in respect of any offence alleged to have been committed by that persons;*
- (b) *to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and*
- (c) *to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*
- (3) *The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.*
- (4) *The powers conferred on the Director of Public Prosecutions by subsections (2) (b) and (c) shall be vested in him to the exclusion of any other person or authority except the Attorney-General.”*

[30] Section 141 (8) of the Constitution clearly provides;-

“(8) *The prescribed age for the purpose of subsection (3) is the age of **fifty-five years** or such other age as may be prescribed by Parliament:*

*Provided that **an Act of Parliament**, to the extent to which it alters the prescribed age **after the appointment of a person to be or to act as Director of Public Prosecutions**, shall not have effect in relation to **that person** unless he consents that it should have effect.” (emphasis added)*

The “*personal*” character of the Act of Parliament is clear for all to see.

The Act of Parliament should relate to the Director of Public Prosecutions as a person holding office.

[31] *The Oxford Dictionary* defines the word “...*retire*...” as meaning -

“...*to leave one’s job and cease to work especially because one has reached a particular age...*”

The Constitution of Lesotho categorically uses the words “...*vacate his office...*” The effect seems to be the same and requires no enforcement things being normal.

[32] In this case, it is important to determine whether the words “*an Act of Parliament*” used in the proviso to *section 141 (8)* can contextually also include the **Public Service Act 2005** and particular *section 26* of the **Public Service Act 2005 Act** or whether an *ad hominem* Act is necessary to provide for alteration of a prescribed age.

[33] Under the **Constitution of Lesotho 1993** there is no doubt that the appointment of the Director of Public Prosecutions institutionally differs from the appointments of – for example – the Attorney General and of the Auditor General. The holders of these latter offices are appointed by the King acting on the advice of the Prime Minister. *Section 99 (1)* of the Constitution only states:

Director of Public Prosecutions

“99. (1) *There shall be Director of Public Prosecutions whose office shall be an office in the public service.*”

Although appointed by the Public Service Commission, the Director of Public Prosecutions functions under the authority and control of the Attorney General⁹, and the Director of Public Prosecutions enjoys security of tenure like other royal appointments. He is a public officer of special and unique status under the **Constitution of Lesotho**.

[34] *In casu*, the Chairman of the Public Service Commission signed the *Legal Notice* which appointed Applicant to the office of Director of Public Prosecutions. The Legal Notice reads:-

“LEGAL NOTICE NO. 218 OF 2000

Appointment of Director of Public Prosecutions

Pursuant to Section 137 (3) (c)¹⁰ of the Constitution of Lesotho the Public Service Commission appoints

MR LEABA LINUS THETSANE

as Director of Public Prosecutions with effect from 1st January, 2000.

*Chairman,
Public Service Commission”*

⁹ Section 98 of the Constitution.

¹⁰ It should be “pursuant to section 137 (1) of the Constitution of Lesotho and not section 137 (3) (c).

[35] It is very important to note that the Director of Public Prosecutions is appointed by the Public Service Commission seemingly and the 1st Respondent – the Prime Minister – has no role to play in the process of appointment; nor is he appointed by the King.

[36] *Section 26* of the **Public Service Act No.1 of 2005** effectively altered the prescribed age for retirement from 55 to 60 for all “*public officers*” in the public service. It clearly reads:-

“Retirement

26. (1) *A public officer shall retire from the public service and shall be so retired, on attaining the age of 60 years.”*

[37] At issue, the question is whether the applicant is “*a public officer*”¹¹ envisaged under *section 26 (1)* or the office of the Director of Public Prosecutions is excluded from beneficial provisions of *section 26* of the **2005 Act** by *section 3* of the Act. A public officer under the Act has the same meaning as that specified under the Constitution. “*Public Officer*” must be given a contextual meaning because being generic the words may be used in differing scenarios. Some public officers are sometimes colloquially called “*civil servants*”; some public officers are statutory office holders and all of these officers are remunerated from the public purse.

[38] The provisions of *section 3* of the Act are clear and must be given a plain interpretation. All the section says in brief is this: “**Public Service Act No.1 of 2005** does not apply to the offices specified in *section 137 (3)* of

¹¹ The contextual definition of “Public Officers” can be found in the **JOALE Case (Judicial Officers Association of Lesotho vs The Prime Minister & Others)** – Constitutional Case No.3 of 2005.

the Constitution.” Consequently the **Public Service Act** does not apply to the office of the Director of Public Prosecution save to the extent specified i.e. his “*appointment*”; in the Constitution and it is common cause that the Director of Public Prosecutions is appointed by the Public Service Commission. If at all *section 26* of the **Public Service Act** were to apply to the Director of Public Prosecutions, why then should other sections of the Act also not apply? Not only to the Director of Public Prosecutions but also to other offices under *section 137 (3)* of the Constitution.

[39] It is clear to all that for Judges, for the Attorney General and for the Auditor General and for the Director of Public Prosecutions, the Constitution of Lesotho has specific provisions for their retirement: **Judges** – *section 121 (3) and (8)*; for **Attorney General** - *section 140 (4) and (9)*; for **Auditor General** – *section 142 (3) and (8)*. It seems that only a specific “*Act of Parliament*” can alter the age of retirement ages of these office holders.

[40] No wonder, the holders of these offices are “*especially*” cited in their respective provisos above. This means an *ad hominem Act* of Parliament has to be passed for each alteration of the prescribed age. *Sui generis* as this application is, there is no other possible interpretation that could qualify or classify the **Public Service Act 2005** as an “*Act of Parliament*” in terms of the particular provisions (cited in para 30 above) of the **Constitution of Lesotho**.

[41] The listing under *section 137 (3)* of the Constitution of the office of the Director of Public Prosecutions as one of the offices to which the **Public**

Service Act shall not apply, should be given full effect and the Court should not stretch the meaning of *Section 3* to the extent that its true import is distorted or is rendered absurd.¹²

[42] It seems to this Court that though it is an office in the public service, the office of the Director of Public Prosecutions enjoys a special status, a status quite unique and superior to other public officers. It enjoys security of tenure like Judges, the Attorney General and the Auditor General, for instance. The age of retirement of the Director of Public Prosecutions is specially prescribed under *Section 141 (8)* of the Constitution. The *rationale* which underpins *section 3* of the **Public Service Act** in excluding from its ambit and parameter is that for all those offices the retirement ages have been separately and specially provided for under the **Constitution of Lesotho**.

[42] It would indeed occasion a grave absurdity if all sections (including *Section 26*) of the **Public Service Act** were to apply to the Director of Public Prosecutions. If *section 26* applies to the Director of Public Prosecutions, then all sections of that Act should “*mutatis mutandis*” apply to him without exception! **Advocate Mosito KC** submits – correctly in our view – that before the applicant can benefit under *Section 26*, he must show that the whole **Public Service Act No.1 of 2005** applies to him *in toto*.

¹² Devenish – *Interpretation of Statutes* – p.177

[43] “*Contractually speaking*”, an alteration of a prescribed retirement age obviously changes the terms of appointment. This necessitates the consent on the part of the public officer concerned. In this case, it seems an “*ad hominem*” legislation has to be passed to alter the retirement age of the Director of Public Prosecutions from 55 to 60. This equally may apply to the **Judges**, to the **Attorney General** and **Auditor General**, as circumstances of each will require.

[44] The only acceptable interpretation of *section 3* of the **Public Service Act 2005** and its effect is the one which excludes the **Director of Public Prosecutions** from all provisions (*section 26* included) of the Act save those relating to his appointment. Any other interpretation other than this would amount to a total distortion and to an absurdity, for it would mean that if Director of Public Prosecutions can consent to an alteration of his retirement under *section 26*, all other provisions of the Act would also have to apply to the Director of Public Prosecutions, which scenario would fly in the face of the clear provisions of the Constitution.

[45] Understandably, this is a case *sui generis* (a case of its own kind) – perhaps one without precedent in the country. We are all sailing in waters unchartered! We have to reconcile carefully the provisions of the **Public Service Act** with those of the **Constitution of Lesotho** and we should violate neither.

[46] As already stated, the need for an *ad hominem* “Act of Parliament” in the proviso can be gleaned from other provisions of the Constitution in relation to the alteration of retirement ages of **Judges** (section 121 (8)), of **Attorney General** (section 140(9)) **Auditor General** (section 142 (8)). All these provisions indicate that a particular “Act of Parliament” can change the retirement age of a Judge, of an Attorney General or of an Auditor General and of the Director of Public Prosecutions provided he or she consents thereto.

[47] In the unique circumstances of this case, this Court is therefor wholly convinced that the retirement age of the Director of Public Prosecution can only be altered by a special “Act of Parliament” possibly titled “**...Office of Director of Public Prosecutions (Retirement Age) Act...**” altering the retirement age of Director of Public Prosecutions from 55 to 60 and thus for him to be in line and *at par* with other public officers under the **Public Service Act No.1 of 2005**.

[48] Although the “*Terms of Appointment*” of the Applicant have not been placed before the Court nor have they been annexed to the papers, the Court can safely surmise that when the Director of Public Prosecutions was appointed on the 1st day of January 2000 by the Public Service Commission, the **Constitution of Lesotho 1993** made a specific provision under section 141 (8) for the retirement age at 55 for the Director of Public Prosecutions.

[49] Whereas *Section 90* of the Constitution creates and establishes the “*Office of Director of Public Prosecutions in the Public Service*”, the description of the Director of Public Prosecutions as a “*public officer*” does not *per se* and automatically place him the under the **Public Service Act 2005**. Save for his appointment, the special status of the Director of Public Prosecutions is governed by the Constitution in that he cannot be removed except in accordance with the provisions of the Constitution; and his retirement at 55 is governed by *section 141 (8)* of the Constitution unless or until altered by an “*Act of Parliament*”.

Correspondence over the retirement of Applicant

[50] The executive or administrative handling of the “*retirement issue*” began in earnest on the 28th May, 2014 when the 3rd respondent wrote a letter whose clear message and request was to ask the Applicant “*to vacate*” the office of the Director of Public Prosecutions because – upon the advice – the Director had passed his prescribed age of retirement on the 27th July 2013.

[51] Instead of writing directly to the Director of Public Prosecutions on the 28th May 2014 – “*ideally for administrative etiquette*” – the 3rd respondent – *the Government Secretary* – should have addressed his concerns to the *Public Service Commission* – the body which appointed the Applicant – Director of Public Prosecutions – on 1st January 2000 upon certain terms and conditions one of which must have been retirement the age at 55 years as provided in *section 141 (8)* of the **Constitution of Lesotho**. The *Public Service Commission* should have

then engaged the *Attorney General* and the *Director of Public Prosecutions* over the applicability of *section 26* of the **Public Service Act 2005** and the purported election and consent by the Director of Public Prosecutions to have the alteration of his retirement age from 55 to 60.

[52] In his prayers, the applicant prays that the decision of the first respondent to remove applicant from office as Director of Public Prosecutions be declared unconstitutional. In his answering affidavit, the 3rd respondent concedes that they “...had no power to request the applicant to vacate office...”.

[53] Indeed, the 3rd respondent in his letters does not mention any section under the Constitution of Lesotho empowering the 1st respondent to ask the applicant to vacate office. Under the rule of law and legality, all executive action or decision – regardless of good motive or good intention – must always be within the parameters of the law¹³. The legal issue of retirement should have from the very beginnings been placed before the courts of law which would have declared the correct legal position:

[54] Reference was also made by **Adv. Teele KC** to *section 155* of the Constitution. It reads in part:-

“155. (1)

(2)

¹³ See generally **Baxter** – Administrative Law.

(3)

(4) *References in this Constitution to the power to remove a public officer from his office shall be construed as including reference to any power conferred by any law to require or permit that officer to retire from the public service:*

Provided that-

(a) *nothing in this subsection shall be construed as conferring on any person or authority the power to require a judge of the Court of Appeal or a judge of the High Court or the Attorney-General or **Director of Public Prosecutions** or the Chief Electoral Officer or the Ombudsman or the Auditor-General to retire from the public service; and*

(b) *any power conferred by any law to permit a person to retire from the public service shall, in the case of any public officer who may be removed from office by some person or authority other than a Commission established by this Constitution, vest in the Public Service Commission.*”(emphasis added)

[55] Section 141 (3) of the Constitution reads:-

“141. (3) Subject to the provisions of subsection (5), Director of Public Prosecutions shall vacate his office when he attains the prescribed age.”

Enforcement of this provision can only be made through the courts of law.

[56] In the particular circumstances of this case, the *Director of Public Prosecutions* being a public officer who has been appointed as such by the *Public Service Commission* and while not being subjected to the

Public Service Act 2005, has seemingly not been fairly or equitably treated in that all public officers (or civil servants) have had their retirement age altered from 55 to 60 years. But in the circumstances of this case, the only solution regrettably seems to lie in the Parliament of Lesotho to provide remedy by passing an Act or Acts altering the retirement ages of the Director of Public Prosecutions and possibly of other office holders like Judges, the Attorney General, and the Auditor General.

- [57] The tenor of the correspondence between the 3rd respondent one hand and the applicant and his counsel **Adv. Teele, KC** on the other, can be explained by the only fact that the 1st respondent and 3rd respondent believed – upon advice – that the Director of Public Prosecutions had “*overstayed*” beyond his retirement age of 55 years and that he could not benefit from *section 26* of the **Public Service Act 2005**. The Applicant and his counsel steadfastly took a different stance and understanding of the relevant provisions of the **Public Service Act** and of the **Constitution of Lesotho**.
- [58] In that scenario, the Director of Public Prosecutions was directed by the 1st and 3rd respondents to vacate office with immediate effect. The lawfulness of this instruction or order must be tested against the provisions of *section 155 (4)* of the **Constitution of Lesotho**. (*supra*)
- [59] To the extent that the 1st and 3rd respondents sought to require the Applicant to vacate office and retire, the respondents themselves later

conceded that in law they “...have no power to retire the applicant.....”¹⁴
Semantics aside, the applicant is correct to state that an application ought to have been made for “*a declarator*” of the High Court for determination.

[60] For the purposes of a declarator, *Section 2 (1) (a) and (b)* of the **High Court Act No. 9 of 1978** provides thus:

“2. (1) (a) *The High Court for Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have – unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho;*

(b) *in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.” (emphasis added)*

[61] It is not necessary to decide the points raised *in limine* by the respondents namely jurisdiction of this court, save to point out that as already demonstrated in this judgment important issues constitutional and interpretation of provisions do ear mark this case as a constitutional matter justiciable before this court, and **Advocate Teele, KC** has correctly referred us to many useful cases; and even further stressed the constitutional importance of the case in the criminal justice system.

¹⁴ Answering affidavit of the 1st respondent para 8

[62] *Conclusion*

In the light of all that has been stated in this judgment, the substantive *prayer (f)* of the Notice of Motion fails. Consequently, in view of the **clear concession by the 3rd respondent that the 1st respondent has no power to retire applicant, the Court directs that the 4th Respondent as the repository of power under section 136 and section 137 of the Constitution of Lesotho** determine the retirement status of the Applicant having retired at the age of 55 as provided by section 141 (8) of the Constitution.

Costs

[63] This case being a unique constitutional case of its own kind (*sui generis*), no order as to costs is made.¹⁵

[64] We take this opportunity to thank **Advocate Teele KC** and **Advocate Mosito KC** for their brilliant submissions which were very helpful to this court.

Delivered at Maseru this 8th day of August 2014.

ACTING CHIEF JUSTICE T. MONAPATHI

¹⁵ **Biowatch Trust vs Registrar, Genetic Resources – 2009 (6) SA 232 (cc).**

I agree:

JUSTICE S. PEETE

I agree:

JUSTICE L. CHAKA-MAKHOOANE

For Applicant : **Adv. Teele, KC**

For Respondents : **Adv. Mosito, KC**