CONSTITUTIONAL CASE NO 4/2013

IN THE HIGH COURT OF LESOTHO (sitting as a Constitutional Court)

In The matter between:-

TEBOHO LEPULE	**APPLICANT**
And	
'MANTHABISENG LEPULE	**1st RESPONDENT**
LEHLOHONOLO LEPULE	**2nd RESPONDENT**
'MALINEO LEPULE	**3rd RESPONDENT**
'MASISINYANE LEPULE	**4th RESPONDENT**
THE MINISTER OF JUSTICE	**5th RESPONDENT**
THE MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	**6thRESPONDENT**
MASTER OF THE HIGH COURT	**7thRESPONDENT**
THE PRESIDENT OF COURT OF APPEAL	**8thRESPONDENT**
THE ATTORNEY GENERAL	**9th RESPONDENT**

JUDGMENT

Coram : **Hon. T Monapathi J**

: **Hon. SN Peete J**

: **Hon. NJ Majara J**

Date of hearing : 8th April 2014

Date of judgment : 13th May 2014

Summary

Application for striking down section 20 of the Court of Appeal Act 1978 and setting aside the judgment of the Court of Appeal for being in violation of the and inconsistent with the provisions of the Lesotho Constitution; Whether the High Court sitting as a Constitutional Court has jurisdiction over a matter already decided by the Court of Appeal; Whether decision of the Court of Appeal has a final effect; Whether the remarks of the Court on the merits were obiter dicta.

ANNOTATIONS

STATUTES

1. Court of Appeal Act of 1978
2. Constitution of Lesotho of 1993
3. High Court Act of 1978
4. Administration of Estates Proclamation No.9 of 1935
5. Intestate Succession Proclamation of 1953
6. Land Court (Amendment) Act of 1992

CASES

1. R v Hugo 1926 AD 268
2. Matsoso Bolofo & Others v Director of Public Prosecutions 1997-98 LLR/LB 118
3. Mosuoe v Judge Peete NO & Others LAC (2007-2008) 275
4. Mokhutle NO v MJM (Pty) Ltd & Others LAC (2000-2004) 186
5. Peacock v Marley 1934 AD 1
6. Tabha v Moodley 1957 (1) SA 659
7. Marais & others v Pongola Sugar Milling Co & others 1961 (2) SA 689
8. Boland Konstrushe BPK v Petlen BPK 1974 (4) SA 980

Majara J:-

[1] The present applicant instituted proceedings before this Court in terms of which he seeks for relief stated in his prayers in the notice of motion which are couched as follows:-

1. The execution of the judgment in C of A (CIV) No.5/2013 be stayed pending finalization hereof.
2. That section 20 of the Court of Appeal Act 1978 be struck down as unconstitutional and void in the event and to the extent that it is inconsistent with section 22 of the Lesotho Constitution 1993.
3. That the judgment of the Court of Appeal in C of A (CIV) No.5 of 2013 be set aside to the extent that it violates the provisions of section 4(1)(h) read with section 12(8) of the Lesotho Constitution 1993.

4. That the judgment of the Court of Appeal in C of A (CIV) No.5 of 2013 be set aside to the extent that it violates the provisions of sections 4(1)(o) read with section 19 of the Lesotho Constitution 1993.
5. That applicant be granted judgment in terms of the amended Notice of Motion in CIV/APN/600/2011.
6. That respondents pay the costs hereof only in the event of opposition.
7. That the applicant be granted such further and/or alternative relief as this Honourable Court may deem fit.

[2] Before I get into what are the parties respective cases, I find it worthy to mention that this case is *sui generis*, a first of its kind as it seeks for relief from this Court post, or on the basis of the delivery of judgment by the Court of Appeal. I might also add that by its very nature it brings into sharp focus the question of what redress litigants may have in the event they are of the opinion that a decision of the Court of Appeal which is at the apex of the juridical structure of the Kingdom is irregular and/or wrong.

[3] It further highlights the peculiar hierarchical nature of our Courts in that while the High Court is a superior Court in terms of the law either when it exercises its ordinary jurisdiction or when it sits as the Constitutional Court per the powers invested on it by the Constitution, it is not the highest Court of the Land hence appeals against its decisions lie to the Court of Appeal. This is in direct contrast with what obtains in some jurisdiction such as South Africa post the advent of its becoming a constitutional democracy which amongst others, gave birth to the Constitutional Court which enjoys the status of the highest Court of that land.

[4] In our case, the jurisdiction of the High Court of Lesotho is provided for in the 1993 Constitution of Lesotho[1] and it reads as follows:-

> *"There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or office exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this constitution or under any other law."*

[5] With respect to the superiority status the High Court enjoys, subsection (3) provides that it *'shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court'*. The same powers are also stated in the High Court Act. [2]

[6] Against this backdrop, the present application was precipitated by the decision of the Court of Appeal in **C of A (CIV) No. 5 of 2013** whose brief summary of the facts is that the applicant herein had initially instituted motion proceedings in the High Court against the 1st respondent and others. In terms thereof he sought for relief including *inter alia*, that the 1st respondent be interdicted and restrained from disposing of the property constituting the estate of the deceased Thomas Lepule and 'Mateboho Lepule, pending the finalization of the application. Further that he should be declared the heir to the estate of both his late parents, Thomas and 'Mateboho Lepule and lastly that the 1st respondent be interdicted and restrained from interfering with his administration of the estate of the said deceased persons. The High Court granted the application as was prayed and the 1st respondent herein appealed the order in the Court of Appeal.

---

[1] Section 119 (1) of the Constitution of Lesotho of 1993
[2] Section 2 of Act N05 of 1978

[7] For brevity and for the avoidance of overburdening this judgment with unnecessary repetition of the facts as they appear in the respective papers in the High Court, I find it convenient to state that same are aptly summarized in the judgment of the Court of Appeal which is the subject of the present application before this Court. After hearing submissions on appeal the Court per the judgment of the learned **Ramodibedi P** upheld the appeal with costs and altered the judgment of the High Court to read; *"The application is dismissed with costs."* He further made the following order; *"the respondent's cross-appeal is dismissed with costs"*.

[8] In terms of the averments in the applicant's founding affidavit before this Court, it was the understanding of the parties herein throughout that the estate of the deceased fell outside the scope of the both **the Administration of Estates Proclamation and the Intestate Succession Proclamation.**[3] The applicant adds as follows in relevant parts of his affidavit namely, paragraphs 23 to 32 thereof:-

> *"As it turned out, the only provision of the law first respondent relied on for her alleged right was section 35 (2) and (3) of the Land Act 1979 as amended by section 5 of the land (amendment Order 1992).*
> *As will clearly appear at paragraphs 5 (4.2 and (5.2(b) & (c)) as well as pages 12 and 13 of my heads of argument in the Court of Appeal (which were similar to my heads of argument in this Court), the retrospectivity and retroactivity of the said section was, at all material times, in issue.*
>
> *For reasons unknown to me, the Court of Appeal did not decide the issue of retrospectivity or retroactivity which clearly was in issue thereby denying me a fair hearing as contemplated by section 4(1)(h) read with section 12(8) of the Constitution.*
>
> *I aver that, as I was born in 1975, my rights to inheritance had already accrued both under the customary law and section 8 of the*

[3] Proclamation N09 of 1935; Proclamation No2 of 1953

Land Act 1979 prior to its amendment and therefore subsequent amendment of section 8 could not affect my accrued rights to inheritance in terms of section 18 of the Interpretation Act 1977. Significantly the Court of appeal was referred to section 18 aforesaid at page 13 of our heads of argument. I annex hereto pages 12 and 13 of the said heads to indicate or challenge of (sic) *retrospectivity and retroactivity and mark them "TL6".*

As was correctly held by the Court of Appeal at page 17 of its judgment in the case in issue, under customary law the property (as against the right to inherit claim in that case) vests upon an heir upon the death of the deceased allottee. This means that under that law, my father's estate vested upon me as far back as January 2006 and therefore, at the time the application was launched I had every right over the same estate, and therefore a clear right for purposes of an interdict claimed.

It could therefore not be correct that under customary law, and at the time the application was lodged and argued before both the High Court and the Court of Appeal, my rights over the property in issue still remained in the form of a spes or held in expectation. They had actually materialized on the death of my father. What will appear clearly from my replying affidavit is that the allegation of such rights being in the form of a spes or in expectation referred only to a period prior to the amendment of section 8 of the Land Act and my father's subsequent marriage and death.

I aver that the effect of the judgment of the Court of Appeal is to deny me, contrary to section 4 (1)(o) read with section 19 of the Constitution, the protection of section 18 of the Interpretation Act 1977 notwithstanding that the said section is intended to protect previous rights of all and is binding on the Crown in terms of section 2(2) of the Interpretation Act 1977.
I aver that section 4(1)(o) read with section 19 aforesaid was further violated for the second reason that, as will appear in my Replying Affidavit in that case, the rights I was seeking to be protected were similar to the rights the same Court protected against retrospectivity or retroactivity of subsequent legislation in the case of Mokoena v. Mokoena appearing at page 12 of my heads of argument before that Court.

I aver further that section 4(1)(o) read with section 19 was further violated for a third reason that, as the Court of Appeal correctly ruled, the issue of allocation of property did not arise in this case and therefore I was entitled to the same protection it afforded an heir in the case of Khatala v. Khatala that appears at page 16 of my heads of argument before the Court of Appeal.

I aver that in the event section 8 of the land Act 1979 as amended is not retrospective or retroactive as I aver it is not, then annexure "ML2" translated "ML2 (a)" is not a valid document under customary law and should not have taken first respondent's case any further as heirship under customary law is not a matter of appointment by the surviving members of the deceased's family but arises from birth or deceased's written instructions."

[9] The applicant also filed an unopposed notice of intention to amend, an amended notice of motion and a supplementary founding affidavit. It is worthy to state that the amendment did not materially alter the notice of motion save to add a new prayer 5 and to renumber the subsequent prayers sequentially. Ditto the contents of the supplementary affidavit which are merely additional in nature as they do not materially alter and/or amend those that are contained in the main affidavit.

[10] Having been served with all the papers including the amended ones, the 1st respondent filed her answering affidavit in terms of which she raised some points of law. However, it is with respect to only two namely lack of jurisdiction and *res judicata*, that submissions were made on the date of hearing it having been agreed as placed on record that if upheld, they would effectively bring this matter to its finality before this Court.

[11] In this regard the 1st respondent averred as follows at paragraphs 2.1 to 2.2.2. of her answering affidavit:-

> *"***Absence of Jurisdiction:**
>
> *On a proper interpretation, the concept of "redress" in section 22 (1) of the Constitution of Lesotho does not include a motion for review of the judgment of the Court of Appeal made in exercise of its judicial powers conferred by section 129 of the Constitution of Lesotho; neither does it include the powers of the above Honourable Court to sit on appeal against the judgment of the Court of Appeal.*
>
> *The Court of Appeal established in terms of section 123 (1) (2) and (4) read with sections 118 (1) and 129 (1) and (2) of the Constitution and section 20 of the Court of Appeal Act, 1978, is an apex Superior Court of the Kingdom of Lesotho; there is no court vested with review or appeal powers over its judgment.*
>
> *Section 20 of the Court of Appeal Act, 1978 is consistent with the provisions of section 123 (1), 129 (1) (b) and (2) of the Constitution. Consequently, the said section (s.20 of the Court of Appeal Act) is not amenable to being struck down as unconstitutional.*
>
> *Applicant is seeking orders setting aside the judgment of the Court of Appeal on C. of A. (CIV) No.5/2013 and substituting same with this Honourable Court's judgement granted in terms of the amended Notice of Motion in CIV/APN/600/2011. In as much as this Honourable Court has no jurisdiction to grant the relief sought, this application ought to be dismissed with costs even on that ground alone.*
>
> ***Res judicata***
>
> *On the facts it is common cause that the parties in CIV/APN/600/2011 before the above Honourable Court were the appellant and 1st Respondent; the subject matter of the dispute was the estate of the late Thomas Lepule and Mateboho Lepule; and Applicant's claim was founded on his alleged customary right of succession.*

The judgement of the Court of Appeal in C. of A. (CIV) NO.5 of 2013 settled the dispute finally as between the parties. Consequently, the said judgement is res judicata the relief sought in Prayer 5."

[12] The above points are reacted to as follows in relevant parts of the applicant's replying affidavit:-

"... I aver that, the High Court exercising constitutional jurisdiction have (sic) *been empowered by the draftsmen of the Constitution to have* ***original*** *jurisdiction to hear and determine* ***any*** *application, and* ***any*** *question on such application, wherein violation of the bill of rights is alleged. Neither section 22 nor section 29 referred to provide for the alleged limitation or ouster powers or jurisdiction of the High Court in this regard. What only appears in section 22 is that circumstances under which the High Court has been empowered to decline to exercise jurisdiction are clearly and specifically stipulated and those circumstances do not include the alleged limitation. It could therefore not have been the intention of the draftsmen of the Constitution to restrict the ambit of the concept of "redress" as appear* (sic) *under section 22 (1). On the contrary, courts exercising constitutional jurisdiction, like the High Court in this instance, have a constitutional duty and power to award an effective remedy.*

Contents thereof are denied to the extent that deponent seems to opine or allege that the original jurisdiction of the high court (as against the review or appeal jurisdiction that deponent improperly invokes on the basis of jurisdiction herein) vested upon it by section 22 is excluded by the sections referred to. Nothing in those sections seems to exclude such jurisdiction either specifically or by necessary implication. The fact alone that the Court of appeal is given the status of an apex court does not render it immune to constitutional scrutiny otherwise that would give it status superior to the Constitution. This is moreso when the Court of Appeal itself is a creature of the same Constitution and therefore subservient to the same Constitution. In view of section 4(2) of the Constitution, judges of the Court of Appeal, sitting as such and discharging their duty as public officers in terms of section 123 (2) and the definition of "public office" and "public officer" in section

154(1)(ii) read with section 144(3) cannot have been intended by the draftsmen of the Constitution to be immune from constitutional challenge for alleged violation of a bill of rights the minute they sit as a judicial body to exercise judicial functions, which are in any even (sic) *functions of a public office as contemplated by section 4 (2) aforesaid.*

Context thereof are denied only to the extent that it is alleged that section 20 of the Court of Appeal Act 1978 is not amenable to be struck out in the manner and to the extent as appears at prayer 2 of my Notice of Motion. The clear import of the section is that it does not vest on the Court of Appeal any jurisdiction as contemplated by section 123(1) but only renders its decisions not subject to appeal. However, if the section has the import of ousting the original jurisdiction of the High Court in terms of section 22 then the section is inconsistent with constitutional provisions I referred in (sic) *preceding paragraphs reads* (sic) *in conjunction and this can be cured by striking it down only to the extent that it is so inconsistent in terms of section 2 of the Constitution. Similarly, the jurisdictional provisions of the Constitution should not be interpreted in such a manner that they will create inconsistency in the Constitution. I aver that the only plausible way to achieve this goal is to interpret the sections of the constitution referred to by deponent at paragraph 2.1.2.1 as not ousting the jurisdiction conferred by section 22.*

... I specifically aver that the High Court, exercising constitutional jurisdiction in terms of section 22 has a constitutional duty and power to give an effective remedy in line with the principle that ***'where there is a right there is a remedy.****'*

RES JUDICATA

... I aver that to the extent that I invoke the constitutional jurisdiction of this Honourable Court and challenge the same judgment alleged to render this matter res judicata, the cause of action, on the proper construction of the concept, is not the same and therefore the plea of res judicata unsustainable."

The above are the respective assertions of the parties that are contained in the papers as they stand before us together with the prayers (as amended) sought for.

[13] On the date of hearing **Adv. Z Mda KC** who appeared for the respondents had the first opportunity to address the Court as the 1st respondent had raised some points of law in her answering papers. As I have already stated, arguments and submissions were confined to two points, namely lack of jurisdiction of this Court and *res judicata*.

[14] Insofar as the question of lack of jurisdiction of this Court goes, the case of the respondents is premised on the relationship between, and the hierarchical nature and/or structure of the Courts of the Land as established prior to Lesotho gaining her independence, and as retained and provided for in the 1993 Constitution and other laws.[4]

[15] It might be worthy for me at this stage to hasten to state that the fact that in terms of their hierarchy, the Court of Appeal is superior to the High Court whether the latter sit in its ordinary jurisdiction or when it exercises its powers as a Constitutional Court itself is not disputed and/or put in issue. The point of departure lies in the different interpretations accorded to the powers of the High Court sitting as a Constitutional Court insofar as a litigant's rights to be heard with respect to those matters that are provided for in the Bill of Rights post a judgment of the Court of Appeal.

[16] For the respondents, it was the contention of **Adv. Z Mda KC** that the High Court remains as such even when it sits in terms of section 22 of the Constitution and that its relationship with the Court of Appeal remains the same, i.e. the Court of Appeal is structurally and institutionally superior to the High Court and that

[4] High Court Act 1978; Court of Appeal Act 1978

appeals from final judgments of the High Court even where it is sitting under its constitutional jurisdiction lie to the Court of Appeal and not vice versa.

[17] Counsel for the respondents made the submission that consequently, it is untenable in law for the High Court to be called upon to review a decision of the Court of Appeal and/or make any order with the view to set its judgment aside on the ground that it violated the Bill of Rights or on any other ground whatsoever. Further that when the Court of Appeal was sitting on appeal in **C. of A. (CIV) NO.5/2013** and duly delivered its judgment the subject matter of this application, it was exercising its constitutional powers in terms of section 129 read with section 118 and other relevant provisions. He added that the Court of Appeal cannot be accused of contravening the alleged fundamental Rights while exercising the very powers given to it by the Constitution.

[18] It was Counsel's further submission that the common law principle *ubi jus ibi remedium* i.e. '*where there is a right there is a remedy*', does not find application in this case for the reasons *inter alia* that, there has been no right violated by the Court of Appeal and that in any event, the Constitution as the supreme law can displace the application of the said principle upon which the present applicant seeks to rely.

[19] Over and above that, it was **Adv. Mda KC**' s contention in Court that when the relationship of this Court and the Court of Appeal is considered there is no direction pointing towards the High Court on decisions coming from the Court of Appeal when all the statutory provisions are looked at.

[20] He added that on the **stare decisis** principle, decisions of superior Courts are binding on the inferior Courts and that in this jurisdiction it is only the Court of

Appeal that can review all decisions as it is unknown for its decisions to revert to the High Court.

[21] It was his further submission that if there was to be a departure from the norm, same would warrant an express provision to that effect in the Constitution. He added that the application and/or interpretation of section 22 of the Constitution cannot entail review or appeal by this Court and the nomenclature of the two Courts cannot change the position of their hierarchical structure. Further that section 119 of the Constitution does not change the fact that this Court is the High Court except to confer on it additional powers so that it cannot exercise powers that would have the effect of setting aside decisions of the Court of Appeal.

[22] Coming to the applicant, his counter argument is premised on the application of section 22 of the Constitution which per his written submissions, it, in its peremptory terms per subsection (2), and without any savings or qualification, (other than where in its opinion redress was available under any law) vests in the High Court the original jurisdiction to hear and determine any application brought before it in terms of subsection (1) of the said section.

[23] In this regard, it was submitted on his behalf that the term '**any**' is very wide and normally without limitation so that by its application the section should be understood to be giving the High Court unlimited original jurisdiction. To this end the Court was referred to the case of **Rex v Hugo** [5] in which the court stated thus:-

> *"Any" is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited."*

[5] 1926 AD 268 at 271

[24] Another submission that was made in this regard is that section 22(2) of the Constitution further gives the High Court powers to grant such relief as may be appropriate for the enforcement of the Bill of Rights in respect of which such jurisdiction is vested.

[25] It was further submitted that the powers of the High Court as enunciated in the section should be given a wide and purposive interpretation and a distinction should be drawn between the High Court when it sit in its ordinary jurisdiction and when it sits as a exercising Constitutional Court with all powers invested in a such a Court and that the High Court has been established, as provided for in the Constitution, as a superior court with unlimited original jurisdiction.

[26] It was the contention of the applicant that a superior court can do all that is not specifically excluded by law and that although the Court of Appeal is the highest court in this jurisdiction, there is no provision of law that says its decisions cannot be constitutionally challenged as no restriction is placed on the High Court with respect to the orders it may make in cases where decisions of the Court of Appeal are subject to constitutional challenge under section 22 (1).

[27] That in addition, while section 119(1) of the Constitution gives the High Court jurisdiction to review decisions or proceedings of lower courts and tribunals, when read with section 22, the provision does not exclude or prohibit it from setting aside decisions of the Court of Appeal as a form of redress contemplated under section 22.

[28] Further, that the purport of section 12(8) of the Constitution is to bind even the Court of Appeal itself to observe the Bill of Rights.[6] To this end it was submitted that it could not have been the intention of the draftsmen of the

[6] Matsoso Bolofo & Others v The Director of Public Prosecutions 1997- 98 LLR/LB 118 at 134

Constitution to bind the Court of Appeal in the observance of the Bill of Rights in the discharge of its judicial duties without affording corresponding remedies to persons upon whom such rights are vested.

[29] That in addition, even the Roman-Dutch impediment against a superior court reviewing decisions of another superior court would not be applicable insofar as the High Court sitting as a Constitutional Court is giving a remedy that effectively reviews and sets aside a decision of the Court of Appeal. In this respect, Counsel for the appellant quoted the case of **Mosuoe v. Judge Peete NO and Others.** [7]

[30] Insofar as the applicant's challenge with respect to the constitutionality of **section 20 of the Court of Appeal Act** [8] is concerned, it was submitted that if the effect thereof is to deprive litigants the right to ventilate their constitutional rights before the courts of law pursuant to section 22, then the said section violates the purport and spirit of the Bill of Rights and is by virtue of sections 1(1) and 2 of the Constitution, void to that extent.

[31] Over and above these written submissions, **Adv. M. Teele KC** who appeared together with **Adv Thulo** for the applicant made further submissions which I find apposite to state they added a new dimension to the case of the applicant and his written submission as I will show immediately below.

[32] Counsel posed the first question for consideration as being whether the judgment of the Court of Appeal has a final effect. In answer to this question, it was **Adv. Teele KC's** submission that once the Court of Appeal pronounces itself on procedural impropriety with respect to a case before it then such a judgment is

[7] LAC (2007- 2008) 275 AT 277 - 8
[8] Act N0. 0f 1978

not final in nature. In support thereof, Counsel quoted several decided cases which shall be dealt with in due course.

[33] **Adv. Teele KC** added that if this approach is accepted as correct, then the crux of the case of the appellant is that when one looks at the wording of the decision of the Court of Appeal and its effect, it does not become a decision on the merits because the point of non-joinder does not have a final effect which in turn means this Court has the power to order a re-opening of the case.

[34] That in addition, this Court can simply refer the issue in question to the High Court sitting in its ordinary jurisdiction on the strength of the proviso in Section 22(2) (b) of the Constitution, rather than dismiss the applicant's case as its powers have to ensure conformity with the Constitution. It was his submission that this matter is not concerned with the hierarchy of the Courts and that when looking at the common law vis-à-vis the Constitution this Court should not be deterred from considering the two.

[35] It was Counsel's further contention that at this stage, jurisdiction should not be conflated with the issue of validity of a constitutional challenge. He added that there could not have been a judgment on the merits when the Court of Appeal found that other parties that ought to have been joined were not before the Court. It was his submission that the Court's consideration on the merits was merely *obiter* which leaves this Court in a position to can entertain this case.

[36] In his reply, **Adv. Mda KC** submitted that jurisdiction should be looked at within the conspectus whether this Court has the power to grant the relief sought which in turn puts in issue the question of the relationship of the two Courts. That in considering the issue of jurisdiction, this Court has to look at the entire judgment of the Court of Appeal and not certain pronouncements in isolation to find the

import and total effect of that judgment. He added that the judgment of the court of Appeal can have the final effect even on the point of non-joinder itself. It was his submission that any other approach would be radical/revolutionary such as to require a specific pronouncement.

[37] Before I turn to consider the main issues at hand, I find it apposite to state from the outset that I fully agree and accept as correct the position of the law as it was stated on behalf of the applicant i.e. that every Court of the land, the Court of Appeal included is bound by the Constitution and to exercise its powers in accordance with the provisions thereof. Further that the Court of Appeal is constrained to interpret the law in accordance with the dictates of the Constitution as the supreme law and the investiture of the Court's constitutional and other powers. Indeed, this fact is not debatable and authorities in this regard are legion including those that were quoted to this Court on behalf of the applicant.

[38] I now turn to deal with the nub of the issue before us, i.e. whether in exercising its powers as a Constitutional Court this Court has the jurisdiction to entertain this application which was instituted post and/or on the basis of the judgment of the Court of Appeal. In order for me to put it in its proper context, I find it convenient to quote the main provision upon which the applicant's case rests, namely, section 22 of the Constitution in its entirety sans subsections (5) and (6) which in my view do not have any bearing on the issues at hand. The section reads as follows:-

> *(1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this constitution has been, is going or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action*

with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection 3,
and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 4 to 21 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of section 4 to 21 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under section 129 of this Constitution to the Court of Appeal, in accordance with the decision of the Court of Appeal.

[39] It is my view that the question whether or not this Court has the jurisdiction to entertain this application must be looked at in conjunction with the relief sought. This becomes especially important when account is taken of the peculiar nature of

the present case as I have already outlined above. The present applicant seeks for this Court to *inter alia* set aside the judgment of the Court of Appeal in **C of A (CIV) No. 5 of 2013** to the extent that it violates the provisions of the Constitution.

[40] Without much ado, I hasten to state that it is my view that this kind of approach is flawed for the reason that the prayers sought by the applicant seek to challenge the decision of the highest Court of the land yet that is not permissible in law because the Court of Appeal decisions are not challengeable and or appealable and or reviewable per the statutory provision of the **Court of Appeal Act,** *to wit*, section 20 thereof as well as in terms of the Constitution.

[41] Further the prayers in the notice of motion seek to repose upon the High Court sitting as a Constitutional Court, powers to review and set aside the decision of the Court of Appeal which is premised on the ground that it violates the right to a fair hearing which is guaranteed under section 12(8) of the Constitution. **Section 20 of the 1978 Act** reads as follows:-

> *"Notwithstanding anything to the contrary in any other law there shall be no appeal from any judgment of the Court."*

[42] It is therefore my considered opinion that any prayer that seeks from this Court an order to set aside a decision of the Court Appeal can at best be described as an attempt to circumvent the above provision and is therefore not tenable. Movement of decisions of cases in this land goes in one direction only and that is upwards. There is therefore no provision that can be properly relied on in calling for this Court to do otherwise. I might add that matters might be different if the remedy sought had nothing to do with setting aside the decision of the highest Court of the land.

[43] In addition, while the contention of the applicant herein with respect to the correctness or otherwise of the decision of the Court of Appeal might be arguable, the problem lies with the relief that he seeks as couched in his prayers because it goes against the deep rooted traditions of judicial hierarchy and precedence which is a non-starter because it is the Court of Appeal that exercises appellate powers over decisions of the High Court and not vice-versa. I hasten to add that I am yet to deal with the oral submissions that **Adv. M. Teele KC** made on behalf of the applicant.

[44] In this regard I am fortified by the provisions of the very same section that the applicant invokes in support of his case namely section 22 (3) of the Constitution which makes specific mention of when and how matters will be brought before this Court exercising its original jurisdiction. It reads thus:-

> *"**If in any proceedings in any subordinate court** any question arises as to the contravention of any of the provisions of section 4 to 21 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."* (My emphasis)

[45] I have already stated that the argument that was made on behalf of the applicant was that when read together with section 119 of the Constitution which gives the High Court jurisdiction to review decisions or proceedings of lower courts and tribunals, section 22 does not exclude or prohibit it from setting aside decisions of the Court of Appeal as a form of redress contemplated under it. It is however my view that this submission is incorrect for the reason that both sections are specific when and how recourse will be sought before this Court whether it is exercising its ordinary jurisdiction or sitting as a Constitutional Court.

[46] Further that there is nothing that can be read into these provisions that seems to suggest that matters can be brought back to this Court from the Court of Appeal after it has already given its decision more especially where by their very nature, the prayers sought seek to repose upon this Court whether directly or indirectly, revisionary or appellate powers over that Court's decision and thus undermine the fundamental principles of juridical hierarchy.

[47] It would also fly in the face of the unassailable, fundamental and deep rooted principle of judicial precedence and *stare decisis,* as well as the fact that every matter has to reach its finality whether or not litigants are happy with it. Such is the nature of litigation. Beyond this point of finality, amendment to the Constitution and/or other laws seems to be the only remedy, not for the High Court to be asked to review the constitutionality of a judgment of the Court of Appeal.

[48] For the avoidance of doubt I find it apposite to reproduce the provisions of section 128 of the Constitution which read thus:-

> *" (1) Where any question as to the interpretation of this Constitution* ***arises in any proceedings in any subordinate court or tribunal*** *and the court or tribunal is of the opinion that the question involves a substantial question of law, the court or tribunal may, and shall, if any party the proceedings so requests, refer the question to the High Court.*
>
> *(2) Where any question is referred to the High Court in pursuance of this section, the High Court shall give its decision upon the question and the court or tribunal in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under section 129 of this Constitution, in accordance with decision of the Court of Appeal*." (my emphasis)

This section clearly excludes the Court of Appeal from the referral process of cases from it back to the High Court.

[49] Further, section 129 of the Constitution provides as follows in relevant parts:-

> *"In addition to the right of appeal accorded by section 47 of this Constitution, an appeal shall lie as of right to the Court of Appeal from decisions of the High Court in the following cases, that is to say:*
>
> *subject to section 69 of this Constitution, final decisions in any civil or criminal proceedings on question as to the interpretation of this Constitution, including any such decisions made on a reference to the High Court under section 128;*
>
> *final decisions of the High Court in the determination of any question in respect of which a right of access to the High Court is guaranteed by section 17 of this Constitution and final decisions of the High Court under section 22 of this Constitution."*

[50] In all the above quoted provisions, a common thread that runs through is that they all enable parties to seek remedy in pursuance of any of the basic rights and fundamental freedoms that are contained in sections 4 to 21 of the Constitution either instituted by the parties or as referred by the Subordinate Courts or tribunals before this Court sitting in its original jurisdiction. None of the provisions accord the same rights with respect to matters that have already been determined by the Court of Appeal. I am yet to deal with the question whether the decision of that Court the subject matter of this application has a final effect.

[51] I now turn to consider another leg of the applicant's case as it is stated in his papers *to wit;* that by its failure to consider the question of the *retrospectivity* or

retroactivity of the Land Act,[9] the Court of Appeal denied the applicant a fair trial which is guaranteed under section 12(8) of the Constitution. The latter section reads thus:-

> *"Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."*

[52] The contention of the applicant in this regard begs the question - what is a fair trial? As it is generally understood, a fair trial denotes *inter alia*, an equitable, non-discriminatory, unbiased and speedy process where all parties are accorded equal opportunities and where the same rules and procedures are applied equally to them by the Court or adjudicating authority without any fear, favour or prejudice. It does not envisage a judgment that will make all litigants satisfied and/or happy as it is indeed in the nature of litigation that in the normal course of things, one side will win whereas the other will lose.

[53] It further cannot be understood to mean that all judgments and/or outcomes of proceedings will be 'perfect' including a situation wherein as the present applicant contends, in its judgment the Court of Appeal did not pronounce itself on one of the issues that were canvassed and/or traversed before it. In my opinion, to find otherwise would mean that every party that is dissatisfied with any decision or a part thereof would be permitted to approach the Constitutional Court on the basis that it was not accorded a fair trial pursuant to section 12 (8) of the Constitution which would be a wrong interpretation of the concept.

[9] Section 5 of the Amendment Act of 1992

[54] At any rate, the applicant's point is arguable as in my view the issue he contends was not considered was considered as a matter of fact by the learned **Ramodibedi P** as he made a specific finding in his judgment that the 1992 Amendment favours the appellant's (1st respondent herein) clear right as a widow for the reason that the respondent (present applicant) *'could not have claimed ownership of the property during the deceased's lifetime*.' The fact that he did not actually use the words *retrospective* or *retroactive* is therefore, neither here nor there. For the avoidance of doubt at p 17 of the judgment, the learned Judge made reference to the decision in **Mokhutle NO v MJM (Pty) Ltd and Others** [10] **2000-2004 LAC 186** as follows:-

> *"... the alleged "expectation' or "spes" is not sufficient to confer a clear right on the respondent. This is so because at customary law the property vests in an heir on the death of the deceased.* ***Until then he has no rights*** *or ownership and control of the estate."* (my emphasis)

[55] It therefore cannot be correct that by omitting to use the word *retrospective* or *retroactive* the Court of Appeal did not consider the issue. In addition, I also cannot accept as correct, the submission that where the Court gives a decision in the exercise of its powers as they are conferred on it by the law it can be accused of contravening the provisions of the Constitution for the simple reason that it did not make a specific pronouncement. If that argument could be accepted it would mean that in most of the decided case, litigants were not accorded a fair trial.

[56] I now turn to deal with the prayer that the applicant seeks from this Court per his amended notice of motion *to wit*, that section 20 of the Court of Appeal Act be struck down as unconstitutional and void in the event and to the extent that it is inconsistent with section 22 of the Constitution. I am cognizant that this

[10] 2000-2004 LAC 186

prayer was not properly canvassed by both sides because it forms part of the merits but I find it apposite to consider its import vis-à-vis the very issue of the jurisdiction of this Court in this matter.

[57] I will however only do so to the extent of the effect I believe taking such a view might have. In my opinion, if this argument were to be accepted, it would bring about absurd results and/or an anomaly to the extend that it would set a precedent that any statutory provision can be attacked on the basis that by its import, it brings matters to rest after they has been dealt with by the apex Court and for that reason alone. Indeed such a finding would create an untenable situation where matters would never reach their finality. Otherwise a similar argument could be raised against any decision of the highest court in any jurisdiction including the Constitutional Court of South Africa in the event its judgment is considered procedurally or substantively flawed.

[58] I might add that I am cognizant that the highest courts are not infallible and have been known to make mistakes many at times hence they have at a later stage altered a position held in their previous decisions. However, on the very rationale that a fair trial includes bringing matters to finality, there is currently no better option within the justice delivery system. Mistakes/errors are part of the human nature but that per se cannot justify matters being heard endlessly *ad infinitum*. I need say no more in this regard.

[59] The next question for consideration is whether as it was submitted on behalf of the applicant**,** the decision of the Court of Appeal does not have a final effect, the gist of which is that the Court pronounced itself on a procedural impropriety namely, the issue of non-joinder of Lehlohonolo Lepule, the son of the deceased Thomas Lepule and the 1st respondent in this application and that for this reason,

this Court has the power to re-open the case. It was the submission of Counsel that non-joinder is a *plea in abatement*.

[60] I find it worthy to point out that this submission was a departure from the applicant's case as it is contained in the papers before us when one looks at the prayers sought therein in that it was never raised at that stage nor was it brought to the attention of the respondents prior to the hearing of the matter. However, due to the fact that Counsel for the respondents did not make an issue out of it and because this case is of great importance, it is my view that justice dictates that it we must also be properly considered that factor notwithstanding.

[61] To support his submission, Counsel for the applicant referred the Court to the case of **Peacock v Marley**[11] in which the Court had to consider amongst others the effect of a plea of non-joinder. To this end, the Court per **Gardiner AJA** had this to say:-

> *"Now where a plea in abatement is taken, on the ground that a person, who ought to have been made a plaintiff, has not been joined, the onus is upon the defendant to prove his plea. Moreover the plea in abatement should first be disposed of before the Court enters upon the merits of the action; for until the Court has decided that the proper parties are before it, it ought not to consider the issues raised in the declaration. To do so, when a person who should be made a party is not before the Court, would be to express an opinion upon his rights without giving him an opportunity to be heard."*

[62] These remarks were subsequently quoted with approval in the cases of **Tabha v Moodley**[12] and in **Marais & Others v Pongola Sugar Milling Co. & Others**[13]. I entirely agree with this position however, the salient point before us is whether as it was submitted on behalf of the applicant the order of the Court as it

[11] 1934 AD 1 at 3
[12] 1957 (1) SA 659 at 660
[13] 1961 (2) SA 698 at 703

appears at page 18 of the judgment to wit; '*The appellant's appeal is upheld with costs and the judgment of the court a quo is altered to read:- The application is dismissed with costs",* – is tantamount to an order of *absolution from the instance* for the reason that the Court had already stated that the respondent (present applicant) was guilty of non-joinder. In this regard the learned Judge stated as follows in relevant parts at page 14 to 15 of his judgment:-

> *"I pause here to return to a consideration of the appellant's point of non-joinder. It will be remembered from paragraph [15] above that the respondent conceded that the appellant's eldest son stands to inherit the specified property belonging to her. According to the respondent's own version in paragraph 6 of his replying affidavit the items of property involved are .....*
>
> *There cannot be the slightest doubt in my mind in the foregoing circumstances, therefore, that the appellant's eldest son is an interested party in the matter. He has a direct and substantial interest in the disputed property. In my view he ought to have been joined. I should stress that this Court has repeatedly deprecated non-joinder of interested parties….*
>
> *I should be prepared in light of these considerations to dismiss the respondent's application for non-joinder."*

[63] In my view the effect of the dismissal of an application must always depend on the particular circumstances of the case. There may be a situation where a dismissal will have the effect of an order of absolution from the instance. In most cases this would normally be where the Court dismisses an informal or interlocutory application as opposed to when it dismisses the application either on the points of law or on the merits. In the latter situation the dismissal has a final effect and any re-opening of the case will call for the other party to raise the special plea of *res-judicata.* To this end the remarks quoted in the Court in the case

of **Boland Konstruksie Maatskappy (Edms.) BPK v Petlen Properties (Edms.) BPK**[14] are quite instructive wherein it was stated as follows:-

> *"When an action, or motion, or application, is dismissed by a judicial tribunal after a trial or hearing, it is often a question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. The answer to this enquiry depends on whether on reference to the record and such other materials as may properly be resorted to, the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of fact or law, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought."*

[64] Coming back to the present facts, the judgment and language of the Court is clear and unambiguous that the appeal was upheld with costs. This in turn leads me to the last leg of the applicant's submission that the Court of Appeal having merely pronounced itself on the procedural impropriety of the non-joinder of Lehlohonolo Lepule, the rest of the judgment was merely *obiter dicta* and thus the decision was not one on the merits having a final effect and as such, this Court can make an order for the case to be re-opened.

[65] Further that this Court can consider the decision of the Court of the Appeal on the strength of the proviso in section 22 (3) of the Constitution and simply refer this matter back to the High Court sitting in its ordinary jurisdiction. In this connection **Adv. Mda KC'**s submission was that in order to find the import and total effect thereof, this Court has to look at the judgment of the Court of Appeal as a whole and not on certain pronouncements in isolation. Further that at any rate, even the issue of non-joinder could on itself be one where a final and definitive

[14] 1974 (4) SA 980 at p 982 par. B

judgment can be made. I can find no fault with this submission as it is indeed correct.

[66] In so far as the meaning of the term *obiter dictum* goes, one definition is found in the Concise Oxford English Dictionary at p981 and it reads as follows:-

> *"a judge's expression of opinion uttered in Court giving judgment, but not essential to the decision and therefore without binding authority; an incidental remark."*

[67] As I have already stated, the answer to the question whether or not the rest of the remarks of the learned Judge were *obiter* is to be found in the wording and the context of the entire judgment and to this end I find it convenient to quote the relevant parts thereof and these appear at paragraph [21] at the bottom of page 15 onwards. They read as follows:-

> *"I should be prepared in light of these considerations to dismiss the respondent's application for non-joinder.*
>
> *Finally, I deal next with the respondent's cross-appeal…*
> *It follows from these considerations that the respondent's cross-appeal must fail.*
>
> *There is one further point to consider. To the extent that the respondent applied for a final interdict, the law is well-settled that in order to succeed he had to establish a clear right….*
>
> *That statement formed the high-water mark of Adv Thulo's submission on the respondent's behalf, a submission which was upheld by the court a quo. I hold the view that this submission is untenable in the circumstances of this case…*
> *… I conclude, therefore, that the respondent's application should also have been dismissed on the ground that he failed to establish a clear right…."*

[67] The above remarks are followed by the order of the court upholding the appeal and altering that of the court a quo to read *'the application is dismissed with costs'*. The Court further dismissed the cross-appeal with costs. In my view, it is clear that aside from having found that the matter ought to have failed on the basis of non-joinder of the 1st respondent's son, the Court of Appeal went ahead and dealt with the issues that were raised on the merits at the end of which it made its order. Thus, the submission that the rest of that judgment was *obiter* cannot be correct. The Court's remarks were clearly not made *en passant*, but were based on the consideration of the entire case.

[68] While **Adv. Teele KC** made the contention that in considering his submissions in this regard, the Court need not delve into the question **'whether in doing so the Court of Appeal acted rightly or wrongly'** under the circumstances, it is my considered view that the question is indeed relevant to the Court's consideration whether it has the jurisdiction to re-open the case between the parties.

[69] At any rate, even if it could be argued that the Court of Appeal was not correct to uphold the appeal as it did and upon the grounds or reasons stated by **Ramodibedi P**, I accept the submission by the respondents' Counsel that it is not for this Court to analyze the judgment piecemeal and classify some of its conclusions as being *obiter*. What is patent is that the Court of Appeal came to the decision that the appeal ought to succeed and that judgment has a final effect. If the applicant feels that it ought to be interpreted, he should request that from the Court of Appeal and not from this Court.

[70] Finding otherwise would create a bad precedent for it would mean this Court can review and set aside decisions of the Court of Appeal yet its revisionary

powers are only limited to decisions of inferior courts and tribunals as stipulated in the provisions of the constitution already referred to above. In this regard see also the remarks of the Court in the case of **Davids and Others v Van Straaten and Others 2005 (4) SA 468 at 486 C-D.**

[71] In conclusion, it is my view that this application was totally misconceived not to mention that the prayers sought were not very elegantly drawn. The application further flies in the face of the very pillars of constitutional jurisprudence and the structural hierarchy of the Courts and thus, stands to be dismissed. It is accordingly ordered as follows:-

The respondents' points are upheld and the application is dismissed with costs.

_____
NJ MAJARA
JUSTICE OF THE HIGH COURT

I agree:- _____
T MONAPATH
ACTING CHIEF JUSTICE

I agree:- _____
SN PEETE
JUSTICE OF THE HIGH COURT

For Applicant : Adv. M Teele KC
Adv. Thulo

For Respondents : Adv. Z Mda KC