IN THE HIGH COURT OF LESOTHO

(Constitutional Jurisdiction)

In the matter between:

SEFIRI PHAILA	**APPLICANT**
And	
PRINCIPAL SECRETARY MINISTRY OF LOCAL GOVERNMENT	**1ST RESPONDENT**
R.E. SHALE	**2ND RESPONDENT**
LILAHLOANE MOHAPI	**3RD RESPONDENT**
MOTHEBA MALIBENG	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

JUDGMENT

Coram : The Hon. Acting Chief Justice Monapathi

The Hon. Acting Justice Sakoane

The Hon. Acting Justice Moahloli

Date of hearing	:	22nd August, 2014
Date of expedited oral judgment	:	27th August, 2014
Date of full written judgment	**:**	September, 2014

SUMMARY

Constitutional Law – Human rights issues before a disciplinary tribunal – when s128 of the Constitution is applicable – Pending disciplinary and criminal proceedings against an employee – employees right to silence – breach of double jeopardy – interference with prosecution witnesses – pursuing parallel remedies – breach of sub judice rule – constitutional right to a fair hearing.

ANNOTATIONS

Cases

Davis v Tip NO and Others 1996(1) SA1152 (WLD)

Fourie v Amatola Water Board (2001)22 ILJ 694 (LC)

Moafrika Newspaper Re: Rule Nisi (sub judice matter) (In Rex vs Mokhantso and Others) CRI/T/95/02

Mohlala v Citibank & Others (2003) 24 ILJ 417 (LC)

Thabiso Mothobi & Another v The Crown C of A (CRI) 2 of 2010

Pakiso Mpeta v Lesotho Highlands Development Authority CIV/APN/315/05

Ramokoena and Another v Commander – LDF and Others [2005] LSHC 118

Sole v Cullinan N.O. & Others (2000-2004) LAC 572(CA)

Van Eyk v Minister of Correctional Services & Others (2005) 26 ILJ 1039 (E)

Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs And Tourism And Others 2004 (7) BCLR 687 (CC) @ 705 para [27]

Mbatha v. University of Zululand 2014 (2) BCLR 123 (CC) @ 169 para [175])

Statutes:

The Constitution of Lesotho 1993

Constitutional Litigation Rules 2011

Local Government Service Act 2008

Local Government Regulations 2011

Penal Code Act 2010

Books

Bekker et al, Criminal Procedure Handbook 6ed Juta 2003

Black's Law Dictionary 9 ed WestLaw 2013

Basu's Commentary On The Constitution of India 3rd Edition Vol A/1 (Calcutta: S.C Sarkar & Sons Ltd)

Chaskalson et al, Constitutional Law of South Africa Juta 1996 (Revsion Service 2, 1998)

Grogan, Dismissal Juta 2010

Grogan, Workplace Law 10ed Juta 2009

Palmer and Poulter (1970) The Legal System of Lesotho (Virginia : Mitchie)

Moahloli AJ:

INTRODUCTION

[1] Applicant brings an urgent application in terms of Rule 12 of the Constitutional Litigation Rules seeking (inter alia):

(a) an order that "the institution of disciplinary proceedings by 1st Respondent against Applicant in the midst of criminal proceedings for the same offence be declared invalid, unconstitutional and illegal", and

(b) an interim order that "2nd and 4th Respondent inclusive, be restrained and/or interdicted from proceeding with the disciplinary hearing of Applicant pending finalization of this application".

[2] In paragraph 4 of his Founding Affidavit [page 8 of the record] Applicant avers that this court "has jurisdiction to deal with this matter as this application is a constitutional issue and as such falls within section 128 of the Constitution of Lesotho".

[3] This is the first of the many misinterpretations of the law by Applicant that will come to light during the course of this judgment. Section 128 is not applicable to this application as that section deals with referrals to the High Court by Subordinate Courts of questions as to the interpretation of the constitution. The present application is not the type of referral envisaged in that section. When the Court raised this issue with Applicant's Counsel it could not get a coherent answer.

SURVEY OF EVIDENCE AND ARGUMENT

[4] Applicant was Administration Manager at the Thaba-Tseka District Council. He reported to the District Council Secretary, who was in turn answerable to 1st Respondent.

[5] In October 2011 he was charged in the Thaba-Tseka magistrate's court with embezzlement, misappropriation or diversion of public funds for his

own benefit or the benefit of his co-accused to the tune of M31,957.88, as well as theft of the amount of M11,549.94 [page 31-34 of the record].

[6] Applicant was released on bail subject to the condition, *inter alia*, that he shall not interfere with prosecution witnesses.

[7] On 16th December 2011 [see page 35 of the record] he was called before the Thaba-Tseka magistrate to answer to charges that he had breached the above bail condition by threatening the District Council Secretary, a potential witness in his trial, with the words 're tla kopana seterateng' (i.e 'we shall meet on the street'). Applicant claimed that the words were harmless, as he only meant that they would meet about work issues. The magistrate ruled that it would be naive to accord an innocent interpretation to the Sesotho expression used by Applicant because it is normally used to express threats. The magistrate ruled that it was not normal or usual for a person expressing discontent about a work issue to use the words 're tla kopana seterateng'. He made the following order:

> "The accused should tread carefully. This Court will use every means possible to ensure that witnesses are protected and feel free to come to the Court and give evidence. <u>For now the accused is warned in the strongest terms possible not to interfere with any potential witnesses</u>. The Crown's application that accused release be cancelled is refused. His conditions are still sufficient. This issue would be more important if there were substantiated allegations that he is likely to abscond." [my emphasis]

[8] I consider the magistrate's ruling to have been very balanced. He sternly admonished Applicant to desist from threatening prosecution witnesses

and making them fear to give evidence. But he never banned Applicant totally from communicating with witnesses who were work colleagues in the ordinary course of business as Applicant subsequently wanted the disciplinary committee and tribunal to believe.

[9] On 22 February 2012 Applicant appeared before a disciplinary committee of the Thaba-Tseka District Council, charged with Misappropriation, Wilful disregard provisions of law and procedure (sic), and Insubordination [as detailed to pages 60-63 of the record]. After pleading not guilty to all the charges he refused to participate any further in the proceedings because in his view this would breach his bail conditions as he had (in his own words) been strongly warned by the magistrate to "refrain from communication with … Crown witnesses in any way whatsoever pending the hearing of the criminal case. Further that if [he] should be heard or seen communicating with them in any manner whatsoever, [he] would be summarily arrested and committed to jail" [page 39-40 of the record].

[10] The disciplinary committee decided to continue with the hearing in his absence. "He was found guilty and a recommendation for his dismissal was made to the office of 1st respondent which duly confirmed" [page 26 of the record, at paragraph 11].

[11] On 5 April 2012 Applicant wrote a letter to 1st Respondent [page 39-40 of the record] appealing against "the decision of the disciplinary committee, in terms whereof [he] was found guilty on four counts without a hearing and sentenced to dismissal from the Local Government Service". He implored 1st Respondent "to reconsider the conviction and sentence …

[and] to direct that the matter be retried and the proceedings start afresh so as to allow [him] the opportunity to defend [himself]".

[12] 1st Respondent on 11 July 2012 notified Applicant that pending the setting up of the Local Government Service Tribunal to determine his appeal, he was to resume duties as Administration Manager on 1 August 2012 at his new duty station, Mohale's Hoek District Council [page 42 of the record].

[13] The said Tribunal was duly established, comprising 2nd, 3rd and 4th Respondent. In its preliminary decision of 11 June 2014 [page 45-50 of the record] the Tribunal:-

(a) states that according to section 30(1) of the Local Government Service Act 2008 it has jurisdiction to deal with appeals arising from grievance and disciplinary action; and

(c) in Applicant's case it has decided that the appeal hearing will be a full blown rehearing of the matter.

[14] The committee is scheduled to continue with the hearing of the appeal on 29 August 2014, very much against Applicant's wishes. Applicant is therefore bringing this urgent application to interdict the continuation of the appeal hearing for reasons which shall be discussed below.

[15] The criminal trial against Applicant in Thaba-Tseka (referred to in paragraph 5 above] resumed in earnest on 10 March 2014 after numerous postponements. It is set to continue on 3 September 2014.

[16] Applicant is not happy that the two proceedings/hearings will be running concurrently, hence this urgent application. He is arguing "that the

disciplinary hearing is completely flawed, invalid, unconstitutional and outright illegal" for the following reasons [**In his own words**]:

(a) He is "being exposed to double jeopardy with the disciplinary hearing as he may be dismissed from employment if he is found guilty. This would be absurd if the criminal court acquitted him [paragraph 12.3, page 12 of the record].

(b) His employer, who is complainant in both hearings, is pursuing parallel remedies, a course which is not only illegal but unconstitutional and impermissible. [paragraph 12.3, page 12 of the record].

(c) The holding of the disciplinary hearing "breaches the sub-judice principle in that someone is trying to interfere by word and mouth with a pending and proceeding case before a criminal court which has jurisdiction". [paragraph 12.1, page 11 of the record].

(d) He is "being called to traverse his defence to the potential prosecution witnesses even before they appear formally before the criminal court", which is a breach of his constitutional right to a fair hearing [paragraph 12.2, page 11 or the record].

(e) The disciplinary hearing will result in his breaching his condition of bail not to interfere with witnesses because once he cross-examines them outside the criminal court he will be jailed for interfering with them [paragraph 12.4, page 12 of the record].

(f) The Tribunal is illegal because the Public Service Act 2005 and the Code of Good Practice No. 194 of 2008 do not make provision for a tribunal to deal with disciplinary hearing of officers as the forum of first instance. Such tribunal may only be engaged on an appellate basis

having exhausted all other departmental remedies [paragraph 12.5, pages 12-13 of the record].

[17] Respondents challenge the legal soundness of all the grounds relied upon by Applicant to substantiate his contention that the disciplinary proceedings are invalid, illegal and unconstitutional. I will touch upon some of their arguments in the course of my analysis below.

ANALYSIS OF EVIDENCE AND ARGUMENT

[18] I must right from the outset mention that I found most of Applicant's submissions and arguments very difficult to follow because he distorted some of the facts to fit his case and misconstrued and misapplied most of the legal concepts he sought to rely upon. This was brought to the attention of his counsel throughout his argument, to no avail.

Double jeopardy [*Ne bis in idem]:*

[19] The American rule of 'double jeopardy' is known by the maxim *ne bis in idem* in Roman Dutch law, which literally mans 'not twice in the same [thing]'. It refers to the deep-seated doctrine of our system of criminal law and procedure to the effect that no one shall be twice tried for the same offence. In our law this rule is upheld by the defences of *autrefois convict* and *autrefois* acquit, as well as the *exceptio rei judicatae.*

[20] The rule is provided for in section 12 (5) of our Constitution, which states that:

> "no person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall be tried again for that offence or for any other criminal offence, of which he could have been convicted at the trial for that offence

save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal".

[21] It also finds expression in the Penal Code Act 2010, section 5:

> "A person cannot be tried or punished twice under the provisions of this Code for the same act or omission, except in the case where the act or omission is such that by means thereof he or she causes the death of another person, in which case he or she may be convicted of the offence of which he or she is guilty by reason of causing such death, notwithstanding that he or she has already been convicted of some other offence constituted by the act or omission".

[22] Contrary to Applicant's argument, this doctrine cannot be relied upon by a person who is being or has been tried criminally to avoid undergoing disciplinary proceedings. Grogan [Dismissal, p289] aptly explains the rationale for this as follows:

> "An employer's disciplinary powers extend only to acts which constitute breaches of contract by the employee. An employer has no criminal jurisdiction over it employees. But an employee's misconduct may amount to both a breach of the employment contract and a criminal offence. In such cases the employee may face the wrath of both the employer and the state. An employee cannot plead either in disciplinary proceedings or in a criminal trial that prosecution breaches the 'double jeopardy' principle because action has already been instituted in another tribunal: disciplinary proceedings against employees in their capacity as *employees*, and criminal proceedings against employees in their capacity as subjects of the state are different and separate proceedings. An employee can therefore be 'punished' separately by both a criminal court and their

employer even if both proceedings arise out of the same criminal act". [my emphasis]

Authority for this can be found in the cases of **Davis v Tip NO; Fourie v Amatola Water Board; Mohlala v Citibank; Van Eyk v Minister of Correctional Services; Pakiso Mpeta v Lesotho Highlands Development Authority.**

Parallel remedies:

[23] Applicant's second argument is that Respondents' pursuit of displinary proceedings against him is illegal because, on the authority of **Sole v Cullinan NO,** Respondents are is not allowed to pursue parallel remedies.

[24] Once more, Applicant misunderstands the legal concept involved. The rule against parallel remedies only bars future litigants from asserting claims or litigating issues that a court has already finally determined in connection with prior litigation. Its *raison d'etre* is to prevent litigants from endlessly relitigating the same claims and issues. The doctrine is not applicable *in casu,* where the criminal trial and the disciplinary hearing are different, separate and distinct types of proceedings.

Breach of *sub judice* principle:

[25] Applicant further contends that continuing with the disciplinary hearing constitutes breach of the *sub judice* rule as this matter is already being dealt with in the magistrates' court.

[26] Yet again he demonstrates a misconstrual and misapplication of this legal concept. The essence of the *sub judice* rule is that it is inappropriate to publish or comment in the media on pending or on-going judicial proceedings. Any such conduct is punishable as contempt of court. The

aim of the rule is to protect the administration of justice. [see, *inter alia*, the **Moafrika Newspaper** case].

[27] I fully agree with Respondents' counter-argument that the question of *sub judice* does not arise at all *in casu*, as the conduct of disciplinary proceedings does not amount to publication and is not likely to influence the magistrate. That is to say, there will be no real risk of substantial prejudice to the administration of justice. The disciplinary hearing is taking place internally in Maseru and it is highly unlikely that the magistrate in Thaba-Tseka will ever be privy to what is happening administratively in Applicant's employment. Members of the public and even non-affected employees do not attend such hearings and they are very rarely reported in the media.

Interference with prosecution witnesses:

[28] In our law interference with witnesses generally means threats or bribes intended to influence the way in which witnesses give their evidence – either offering money in return for favourable evidence or threatening violence if unwanted evidence is given.

[29] This type of conduct is a criminal offence in terms of section 87 (4), (5) and (6) of the Penal Code Act 2010:

> "(4) A person who applies or threatens to apply any sanction against any witness or prospective witness because such witness has given evidence or is likely to be required to give evidence before judicial proceedings or an officially constituted public enquiry, commits an offence.

(5) A person who makes an approach to any witness or prospective witness in judicial proceedings or officially constituted public enquiry with the intention that such witness should alter his or her testimony or refrain from giving testimony, commits an offence.

(6) A person who dismisses a servant or employee because he or she has given evidence or refused to give evidence on behalf of a certain party to judicial proceedings or at an officially instituted public enquiry, commits an offence."

[30] There is no way in which merely cross-examining potential crown witness who also testify at the disciplinary hearing can be regarded as interfering with prosecution witnesses. Applicant's fears were unfounded. The Thaba-Tseka magistrate never intimated that Applicant was forbidden to do so. Applicant's "fears" arise from a misconstrual of the true legal position and a distortion of the magistrate's ruling as discussed in paragraph 7 to 10 above.

Legality or Illegality of the Tribunal:

[31] Applicant's allegation that the tribunal which 1st Respondent has set up to hear the appeal is illegal is completely unfounded. It is not a forum of first instance as he alleges, but an appellate forum properly set up pursuant to section 30(1) of the Local Government Services Act 2008.

[32] In the premises, I make the following order:

1. This application (as well as the application for interim relief) is dismissed with costs.

[33] These the full reasons of the expedited *extempore* judgment I delivered rally on 27 August 2014.

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K.L. MOAHLOLI
ACTING JUDGE

I agree

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T.E. MONAPATHI
JUDGE

Sakoane AJ:

[34] I have read the main judgment by my Colleague Moahloli AJ. I agree with the outcome he reaches and the analysis in paras [2] and [3]. Because in my view, he goes further to deal with the merits of the application, which exercise I respectively consider not called for, I find it necessary to file separate reasons to elaborate on the dismissal of the application on non-referral only.

[35] The anterior and fundamental question is whether we are properly seized with this matter in view of the applicant's reliance on section 128 of the Constitution. In short, is there a referral by the tribunal? If the answer is in the negative, then *cadit quaestio*.

[36] The question is raised in paras [2] and [3] of the main judgment and the answer given is that these proceedings do not constitute a referral as envisaged by section 128 of the Constitution. I respectfully agree. In my view that should have been the end of the enquiry. The application ought to have been dismissed on that ground and on that ground alone.

[37] Section 128 of the Constitution provides as follows:

> "(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 to 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 the decision of the Court of Appeal." [Emphasis added]

[38] A textual reading of this section is that:

(a) there must be proceedings before a tribunal;

(b) a question as to the interpretation of the Constitution must arise in those proceedings;

(c) the tribunal must form the opinion that the question involves a substantial question of law;

(d) then the tribunal may (and not must) refer it to the High Court and is obliged to do so if a party so requests;

(e) The High Court has to give a decision upon the referred question to enable the tribunal to dispose of the proceedings in accordance with the decision of the High Court on the interpretation of the Constitution.

[39] The enquiry, in my view, falls within the narrow compass of whether the requirements of section 128 have been met in this application. The starting point must be to read the founding papers to find out if it be so. Para 4 of the founding affidavit reads:

> "The Honourable Court has jurisdiction to deal with this matter as this application is a constitutional issue and such falls within section 128 of the Constitution of Lesotho."

[40] This is all that is said about section 128. None of the jurisdictional facts I have described in para [38] above have been pleaded. In other words, we are not told how and why this Court "has jurisdiction to deal with this matter" as a referral under section 128. It is as if by merely mentioning section 128, that by itself makes this application "a constitutional issue". This cannot be. Reliance on a law in pleadings must be followed by an articulation of the fulfilment of its requirements and the legal conclusions that a court is asked to arrive at.

[41] Although it is not necessary, it is desirable to identify the provisions of the law relied on when pleading a cause of action so that a connection is established between the cause of action and the law. In other words, it must be clear from the alleged facts that the provisions of the law are relevant and operative. If there is a disjuncture between the pleaded facts and the law, as is the case *in casu*, this may be fatal to the cause of action. (See **Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs And Tourism And Others** 2004 (7) BCLR 687 (CC) @ 705 para [27]; **Mbatha v. University of Zululand** 2014 (2) BCLR 123 (CC) @ 169 para [175])

[42] In my judgment, the jurisdictional requirements (a) – (d) mentioned in para [38] above are not met. There is, thus, no constitutional basis to reach the questions raised in the so-called application as a constitutional issue. If anything, all those issues ought to have been raised before the tribunal. And if, and only if, the tribunal formed an opinion that the issues involved substantial questions of law (and not questions of fact) as to the interpretation of the Constitution would such issues be referred to this Court in terms of section 128 for the sole purpose of giving its decision for the tribunal to follow in disposing of the disciplinary proceedings.

[43] Before forming its opinion in the matter of referral, it is instructive that the issues before the tribunal must involve substantial questions of law as to the interpretation of the Constitution. As to the test of substantial question, Palmer and Poulter write:

> "The meaning of a 'substantial question' of law may be taken in both a generic and technical sense. Substance, from a technical point of

view, is related to the rules of precedent. A question that has been long settled by the highest court is not substantial. There must be doubt or difference of opinion as to what the law is, such that arguments in favour of more than one interpretation can reasonably be adduced. By 'settled', however, we may mean something more than binding under the rules of precedent; it refers as well to the maturity and incontestability of the binding precedent in question. Basu has observed, 'A question ceases to be substantial if it is so explicitly foreclosed by previous decisions as to leave no room for real controversy'.

……

On the other hand, substance in the generic sense refers to the importance of the question as a matter of constitutional interpretation. Thus a matter of substance would certainly be a question of 'great general or public importance'… There would be an understandable tendency for the courts of Lesotho at first to regard every constitutional question as substantial where two positions can be maintained plausibly and no prior ruling exists. On the other hand, a question of substance in the generic sense may be defined not only in terms of the public importance of the matter but with reference to its intramural importance to the outcome of the litigation. A question of great general interest may be of no relevance where other issues in the case are dispositive. This follows from the general rule that constitutional issues are decided only as a last resort. Thus in **Gamioba v. Esezi II** [1961] All N.L.R. 584 the lower court referred a question of constitutional interpretation to a High Court in Nigeria at the joint request of the parties without ever having seen the pleadings. The High Court

remanded the case to the lower court on the ground that before a matter can be referred it must be determined whether or not it must necessarily be decided. Since this step had not been taken, the question was *prima facie* insubstantial." (The **Legal System of Lesotho** (Virginia : Mitchie) pp. 357-358)

[44] The applicant's cause of action is that he is facing disciplinary proceedings before the tribunal. He complains (in para 12 of the founding affidavit) that those proceedings are "completely flawed, invalid, unconstitutional and outright illegal". The nature of the alleged unconstitutionality is articulated as follows:

"12.2 I have already read the statements of other potential prosecution witnesses who may be called to the disciplinary hearing. I am being called to this disciplinary hearing in order to traverse my defence to these witnesses even before they appear formally before the criminal trial. This is against the constitution and fair hearing/trial.

12.3 I am being exposed to double jeopardy with this disciplinary hearing as at its conclusion I may be dismissed from my employment if I am found guilty. This would be absurd if the criminal trial acquits me. On the other hand, if the criminal court finds me guilty whilst the disciplinary (sic) acquits me, my employer through 1st Respondent will still dismiss me. In short my employer who is a complainant in both the hearing

(sic) is pursuing parallel remedies which I am informed by my counsel and verily believe him, is not only illegal but unconstitutional and impermissible. This is extremely prejudicial to me. Meantime I have to pay attorneys and counsel for this (sic) dual appearances and this is affecting my pursue (sic) and livelihood."

[45] I merely quote these averments not to determine their veracity and legal validity, but to show that there is nothing therein said which suggests that the alleged unconstitutionality was ever raised before the tribunal so that it could form an opinion on whether the allegations raise questions involving substantial questions of law to be referred to this Court to make a decision thereon, which decision would then give guidance as to how the proceedings should proceed.

[46] It is my view that this Court must not accede to this unprocedural step. We do not sit here to usurp the role and jurisdiction of tribunals. They should be given their constitutionally ordained jurisdiction to form opinions, whenever constitutional questions are raised in their proceedings so that they may decide whether or not to refer them to this Court for guidance. There is nothing in the Constitution that permits a litigant facing disciplinary charges to, as it were, boycott the tribunal and come to this Court to complain about alleged unconstitutional conduct which the tribunal was never given an opportunity to apply its mind and consider whether to first get the guidance of this Court before taking any further steps in its proceedings.

[47] I am fortified in the opinions that I have expressed by the commentary of Basu on Article 228 of the Constitution of India which is comparable to our sections 22 (3) and 128 on referrals by subordinate courts and tribunals. Basu comments thus:

> "If either party to a suit or proceeding in a court subordinate to the High Court has impugned the validity of the law upon which the rights of the parties in the suit or proceeding depend, the High Court shall withdraw such suit or proceeding to itself, under Art. 228, if it finds that the suit or proceeding cannot be disposed of without determining the constitutionality of the law.
>
> The object of this Art. 228 is to make the High Court the sole interpreter of the Constitution in a State and to deny to the subordinate courts a right to interpret the Constitution, for the sake of attaining some degree of uniformity as regards constitutional decision. Under this Article –
>
> (a) It is the duty of the High Court to withdraw from a subordinate Court a case which involves a substantial question of law as to the interpretation of the Constitution.
>
> (b) It is also the duty of the subordinate Court to refer the case to the High Court as soon as it discovers that it involves such a question.
>
> The conditions to be satisfied are threefold –
>
> (i) A suit or case must be **actually** pending in a Court subordinate to the High Court. No one can move the High Court under Art.228 stating that such a suit or case is intended to be filed. Nor

will Art. 228 apply where the case has already been disposed of.

(ii) The Court must be satisfied that the case involves a substantial question of law as to interpretation of the Constitution. A mere frivolous allegation that such a question is involved or a mere plea that an Act is unconstitutional will not do.

(iii) The Court must be satisfied that the determination of the constitutional question is necessary for the disposal of the case." (Basu's **Commentary On The Constitution Of India** 7th Edition, Vol. A/1 (Calcutta : S.C. Sarkar & Sons Ltd) pp 313-314)

[48] During the pendency of the disciplinary proceedings before the tribunal, the questions raised in this application must first be raised there.

S.P. SAKOANE
ACTING JUDGE

For the Applicant: Adv. M. Ntlhoki KC

For the Respondents: Adv. M. Sekati (with him Adv. Mohapi)