IN THE HIGH COURT OF LESOTHO

(HELD AT MASERU)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

CONS/CASE/02/2015

In the matter between:

ATTORNEY GENERAL	APPLICANT
and	
HIS MAJESTY THE KING	1ST RESPONDENT
THE RIGHT HONOURABLE THE PRIME MINISTER	2ND RESPONDENT
MINISTER OF LAW, CONSTITUTIONAL AFFAIRS	
AND HUMAN RIGHTS	3RD RESPONDENT
MINISTER OF JUSTICE AND CORRECTIONAL	
SERVICES	4TH RESPONDENT
KANANELO MOSITO	5TH RESPONDENT

CORAM: **MUSI AJ, MATHOPO AJ et POTTERILL AJ**

HEARD ON: 20 February 2015

JUDGMENT BY: MUSI et POTTERILL AJJ

DELIVERED ON: 3 March 2015

Summary: Locus standi- Attorney-General- The Attorney-General does not have locus standi in terms of s98(2)(c) to litigate against the Government.

Section 124(1) of the Constitution is not subject to section 88(2) thereof. Sections 88(2) and (3) discussed.

INTRODUCTION

[1] This application was brought on an urgent basis and on the 12th of February 2015 was ruled to be urgent by Monapathi J.

[2] The matter revolves around the impugnment of the appointment of the fifth respondent, as President of the Court of Appeal. This court is tasked with deciding

whether the appointment was made in accordance with the procedures as set out in the Constitution of Lesotho and therefore whether it withstands constitutional scrutiny.

[3] The matter is certainly unprecedented in that the Attorney-General is litigating against the Constitutional monarch, the King, and his government. It was brought amidst a looming election electrified with political tension. The Court of Appeal, though not the court of first instance, would be the forum that is ultimately tasked with hearing any urgent electoral disputes and the matter thus begs speedy adjudication.

THE FACTUAL MATRIX

[4] The applicant is the Attorney-General of Lesotho, appointed in terms of section 98 of Constitution of Lesotho, and is bringing the application in his official capacity. The first respondent is His Majesty the King and the second respondent is the Prime Minister of Lesotho both cited in their official capacities. The third respondent is the Minister of Law, Constitutional Affairs and Human Rights and is cited in his official capacity only as an interested party. The fourth respondent is the Minister of Justice and Correctional Services cited in his official capacity. The fifth respondent is Kananelo Mosito cited as an interested party to the extent that the relief sought in the application is likely to affect his appointment as the President of the Court of Appeal.

[5] The applicant sought the following relief:

"5.1 That the appointment of the Fifth Respondent as the President of the Court of Appeal be declared null and void;

5.2 That the decision of His Majesty the King appointing the Fifth Respondent as President of the Court of Appeal be reviewed and set aside as irregular and invalid;

5.3 It is declared that the Second Respondent was not entitled to make a recommendation for the appointment of the Fifth Respondent without the approval of Cabinet in terms of section 88(2) of the Constitution and consequently that His Majesty the King was not entitled to make such appointment in terms of section 124 of the Constitution.

5.4 Further and/or alternative relief."

[6] The background and chronology of the matter are as following:

[6.1] The recommendation of the fifth respondent as the President of the Court of Appeal was rumoured in December 2014. Pursuant thereto a public statement was issued by concerned legal practitioners of Lesotho. In the statement they highlighted the fact that the eminent appointment was

hurriedly made during a transitional period of government following the prorogation of Parliament.

6.1.1 The Court of Appeal is the highest court in the Kingdom of Lesotho and plays a significant role in the administration of justice. This appointment with a government in transition created the perception that there are concerted efforts by the powers that be to capture key institutions of the state;

6.1.2 Appointments to the judiciary should be made on merit through transparent and consultative processes with all stakeholders;

6.1.3 The colleague tipped for appointment was and is a legal representative of an authority responsible for recommending his appointment.

[6.2] The Attorney-General had to prepare the necessary instruments for the publication in the Government Gazette and had to ensure that it was published in the Government Gazette. On 1 December 2014 the second respondent requested the office of the Attorney-General to prepare the necessary instruments.

[6.3] The fifth respondent was appointed as the President of the Court of Appeal on 15 January 2015 by His Majesty the King in terms of section 124(1) of the Constitution.

[6.4] The King, appointed the fifth respondent on advice of the second respondent in terms of section 124(1);

[6.5] The fifth respondent's swearing-in ceremony was held on the 27th of January 2015.

[7] On the 26th of January 2015, the applicant wrote a letter to the second respondent requested that the swearing-in process should be halted until the matter had been thoroughly discussed by their respective offices and all parties concerned. The second respondent denied that any such letter was received by his office.

ISSUES TO BE DECIDED

[8] During the argument of this matter the issues were narrowed down to three issues.

[8.1] The first issue to be decided is whether the Attorney-General had the authority to launch this application.

[8.2] The second is whether section 88(2) is applicable to the appointment of the President of the Court of Appeal under section 124(1) of the Constitution.

[8.3] The third issue would have been whether sections 91(5) and 155(8) precludes the applicant from bringing this application. This point was however jettisoned and not argued.

[9] **DOES THE ATTORNEY-GENERAL HAVE *LOCUS STANDI* TO BRING THIS APPLICATION?**

LEGISLATIVE FRAMEWORK

Section 98 of the Constitution states the following:

"98. Attorney-General

(1) There shall be an Attorney-General whose office shall be an office in the public service.

(2) It shall be the duty of the Attorney-General -

(a) to provide legal advice to Government;

(b) to exercise ultimate authority over the Director of Public Prosecutions;

(c) to take necessary legal measures for the protection and upholding of this Constitution and the other laws of Lesotho;

(d) to exercise or perform any of the rights, prerogatives, privileges or functions of the State before courts or tribunals; and

(e) to perform such other duties and exercise such other powers as may be conferred on him by this Constitution or any other law.

(3) The Attorney-General may exercise his functions personally or through officers subordinate to him in accordance with his general or special instructions.

(4) In the exercise of the functions vested in him by subsection (2)(a) and (b) and section 69 of this Constitution, the Attorney-General shall not be subject to the direction or control of any other person or authority."

Section 50(5) of the Constitution states:

"50. Protection of the King and of certain persons in respect of legal proceedings

(5) Any civil right of action that the King, or any person exercising the functions of the office of the King as Regent or by virtue of a designation under section 45(3) of this Constitution, would have in his private capacity, shall vest in the Attorney-General who may institute appropriate proceedings, and any proceedings therefrom shall be paid to the King or, as the case may be, to the person exercising the functions of the office of the King."

Section 3 of Government Proceedings and Contracts Act, Act 4 of 1965 provides:

"(1) In any action or other proceedings which are initiated by virtue of the provisions of section 2 of this Act, the plaintiff, the applicant or the petitioner (as the case may be) may make the Principle Legal Advisor the nominal defendant or respondent.

(2) Save as may otherwise be provided as law sections or other proceedings by Her Majesty in her Government of Basotoland shall be instituted by and in the name of the Principal Legal Advisor."

[10] The Attorney-General resorted to this litigation due to the public importance of the litigation to the legal profession, judiciary and the rule of law. He also saw it as his duty to protect the integrity of the judicial officers and to assist judicial officers in the discharge of their duties. He furthermore felt obliged to launch the application where the government itself violated the provisions of the Constitution and other laws. He was of the view that he would be abdicating his duty and responsibility if his only recourse was to resign, because he is a public servant and not bound by the principle of collective responsibility.

[11] The Attorney-General submitted that section 98(2)(c) of the Constitution obliged him to protect and uphold the Constitution and other laws of Lesotho. He launched this application without authorisation by the government, but by the authority and functions of his office. According to him, the fact that the Attorney-General is the legal advisor to the Government does not bar him from acting against the Government.

[12] In argument, on behalf of the Attorney-General it was emphasised that section 98(2) empowered the Attorney-General to launch this application. It was submitted that section 98(2)(c) in fact necessitated the application. The Attorney-General was of the view that the text of section 98 should not be interpreted as an implied prohibition against him fulfilling his duty and taking legal measures against the

Government. He averred that there is no bar in the Attorney-General Act 1994 against the Attorney-General initiating legal proceedings against the Government. Section 3 of The Government Proceedings and Contracts Act 1965 provides in permissive terms that the Attorney-General may be a nominal defendant or respondent in proceedings against the Government of Lesotho. It was pointed out that to the extent that these two statutes limits the Attorney-General's right to take legal measures to protect the Constitution, then the Acts are inconsistent with the Constitution and are void to the extent of the inconsistency. However, so it was argued, these statutes are instead complimentary to the provisions of section 98(2)(c) in that they fulfil the objects of section 98(2)(e) that the Attorney-General "shall perform such other duties and exercise such other powers as may be conferred on him by this Constitution or other law". According to the applicant, the respondent's interpretation of section 98 does not heed the warning that constitutional instruments are to be interpreted differently to the ordinary statutes. The courts are to avoid what Lord Witberforce termed "the austerity of tabulated legislation ..."[1]

[13] The applicant argued that it is not novel that an Attorney-General can sue the government. The Namibian Constitution authorises the Attorney-General to institute

[1] ***Sekoati and Others v The President of Court Martial and Others*** **(1995-99) LAC 812** at 820 paragraph 3 (**[1999] LSCA 100).**

action against the Government. In ***Thorson v Attorney-General of Canada*** the court recognised that the Attorney-General has an undoubted right to bring proceedings to indicate the public interest.[2] The only bar was that the Attorney-General a member of the Government that had secured the passage of the Act was the Minister responsible for its implementation.

[14] The respondent submitted that in the specific wording of section 98(2)(a) and (b) the Attorney-General has a duty to provide legal advice to the Government and to exercise ultimate authority over the Director of Public Prosecutions. Section 98(4) expressly only refers to section 2(a) and (b) and not to (c). Plainly section 98(4) authorises the Attorney-General as the Head of the Director of Public Prosecutions to run his office without any political interference. On the plain text of section 98(4) the Attorney-General can institute proceedings against any interference in his office, but he cannot litigate against the Government. In ***Gouriet and Others v The Union of Post Office Workers and Others*** the court found that in a relator action the Attorney-General brings an action to assert a public right.[3] However this is done to invoke the assistance of civil courts in aid of the criminal law. In these matters the Attorney-General's discretion is absolute and non-reviewable. The distinction is that in these matters the Government of the day is not the opposing party.

---

[2] **[1975] 1 S.C.R. 138**

[3] **[1977] 3 All ER 70**

[15] It is the Attorney-General's constitutional and statutory duty to act as legal representative for the Government and not as the Government's opponent. Section 98 of the Constitution and section 3 of the Office of Attorney-General Act 1994 does not empower the Attorney-General to initiate litigation against the entity he is supposed to represent in litigation. The Government Proceedings and Contract Act 1965, in fact, requires the Attorney-General to defend the Government in legal proceedings.

[16] The Attorney-General acting by the authority and as part of the function of his office is claiming substantive relief against a decision of his Majesty the King. The Attorney-General purports to do so in the interests of the legal profession. However that is the function of the Law Society of Lesotho and not the Attorney-General. On the facts the Attorney-General brought this application based on his interpretation of what would be good or best practice for the appointment of the President of the Court of Appeal. The Constitution however does not authorise him to protect or uphold good practices. Effectively he is litigating against his own client because the client had not sought his advice as the Attorney-General and a member of Cabinet.

[17] There is no anomaly in section 98(4) excluding 98(2)(c). The Attorney-General must be able to run his own office. In terms of section 98(2)(a) and (b) he could

thus foreseeably institute action against the Government if there is political interference in his office, but he cannot on any other basis act against the Government. It was argued that he is not the functionary to protect the interests of the legal profession as the Law Society of Lesotho fulfils this function. His function is *inter alia* in terms of section 50(5) of the Constitution to institute civil proceedings on behalf of the King. If regard is thus had to the text of the Constitution then section 98(2)(c) does not authorise the Attorney-General to institute these proceedings.

[18] To ascertain whether the Attorney-General has *locus standi in iudicio* section 98 of the Constitution must be interpreted. "A Constitution is no ordinary statute. It is the source of the legislative and executive authority. It determines how the country needs to be governed and how legislation is to be enacted. It defines the power of the different organs of State, including Parliament, the executive and the court, as well as the fundamental rights of every person which must be respected in exercising such powers."[4]

[19] As this enquiry relates to the rights of the Attorney-General; i.e. his right to appear in court as a party against the Government the court must interpret the written

[4] ***S v Makwanyana*** **1995 (3) SA 391 (CC)** paragraph 5.

instrument, while being conscious of the values underlying the Constitution and the approach should be one of generous interpretation.[5]

[20] Section 98 institutes the office of the Attorney-General as the ultimate authority over the Director of Public Prosecutions. The Attorney-General may exercise his functions personally or delegate it through offices subordinate to him in accordance with his general or special instructions. In exercising his ultimate authority over the Director of Public Prosecutions as well as his duties set out in section 69 of the Constitution, the Attorney-General shall not be subject to the direction or control of any other person or authority. In interpreting section 98(2)(b) read with section 98(4) it is clear that pertaining to the running of his own office, performing all the duties and functions thereof, he is not to be controlled or directed by any person or authority. The Attorney-General is accordingly as the ultimate authority over the Director of Public Prosecutions above political, governmental, or any other interference. It is thus conceivable that he could litigate against the Government if there were to be interference with his office or his duties.

[21] The interpretation of section 98(2)(a) read with section 98(4) relates to the Attorney-General providing legal advice to the Government and the Attorney-General not being subject to the direction or control of any other person or authority. The

[5] ***S v Zuma*** **1995 (2) SA 642 (CC)**.

Attorney-General thus has the duty to independently provide legal advice to the Government. In ***Motanyane and Others v Ramainoane and Another*** the court found as follows:

> *"The matter leaves no doubt that the Attorney-General is the government's legal advisor and representative in legal matters ..."*[6]

This positive duty cannot conceivably include the duty to litigate against the entity that you must advise.

[22] In terms of section 3 of the Government Proceedings and Contracts Act the Attorney-General is in fact the principal legal advisor to the King and the Attorney-General is the nominal party on behalf of the King. The reliance by the applicant on the ***Thorson*** matter ***(supra)*** is not support for the proposition that the Attorney-General has *locus standi*. The Attorney-General's right to institute proceedings was qualified as follows:

> *"If a previous request to the Attorney General to institute proceedings or to agree to a relator action is a condition of a private person's right to initiate proceedings such as this on his own (See Attorney General v Independent*

[6] **1995 LAC 460** at 472

> *Broadcasting Authority, ex parte McWirther p698) that condition has been met in this case.* ***I doubt, however, whether such a condition can have any application in the federal system where the Attorney General is the legal officer of a government obliged to enforce legislation enacted by Parliament and a challenge is made to the validity of the legislation. The situation is markedly different from that of Unitary Great Britain where there is no unconstitutional legislation and the Attorney General, where proceeds as guardian of the public interests, does so against subordinate delegated authorities.*** *Indeed, in such situations the decision of the Attorney General to proceed on his own or to permit a relator action is within his discretion and not subject to judicial control."*[7] [My emphasis.]

[23] There is Australian authority to support a declaratory action by a State Attorney-General to challenge the validity of Commonwealth legislation where that legislation amounts to an invasion of state's legislative power (***Attorney-General for Victoria v The Commonwealth*** **[1946] 71 C.L.R. 237)**. *In casu* this cited Australian case does not go so far as to support the contention that the Attorney-General can pray for the setting aside of a judicial appointment made on the advice of the Prime Minister.

---

[7] At p146

[24] From ***Gouriet and Another v Post Office Engineering Union (supra)*** it is clear that in the United Kingdom there is a massive body of law supporting the proposition that only the Attorney-General can seek and obtain injunctive relief in relation to criminal acts, whether threatened or committed, which do not involve the invasion of private rights of person or property. The Attorney-General thus has the power to consent or refuse to institute related proceedings in the Attorney-General's name. The Attorney-General does this based on a public right upon consideration of public interest. The Attorney-General is not in terms of section 98(2)(c) acting against a public right upon consideration or public interest. He purports to do so in the interests of the judiciary and the legal profession. Furthermore in such relief the Attorney-General of the UK is not acting against his own Government, as *in casu*. The Attorney-General brought the application to protect what he sees as good practice, but section 98(2)(c) of the Constitution does not authorise, or allow the Attorney-General to protect good practice.

[25] The Attorney-General has no *locus standi* to bring this application. Section 98(2)(c) cannot be interpreted as to clothe the Attorney-General with *locus standi* to seek substantial relief against the Government.

Section 88(2) and section 124(1)

[26] There is another reason why this application cannot succeed. Mr Teele submitted that section 124(1), which is the appointment section, should be read with and subject to section 88(2) of the Constitution. Section 124(1) and (2) read as follows:

> *"124. Appointment of judges of Court of Appeal*
>
> *(1) The President shall be appointed by the King on the advice of the Prime Minister.*
>
> *(2) The Justices of Appeal shall be appointed by the King, acting in accordance with the advice of the Judicial Service Commission after consultation with the President."*

[27] Section 88(2) reads as follows:

> *"(2) The functions of the Cabinet shall be to advice the King in the government of Lesotho, and the Cabinet shall be collectively responsible to the two Houses of the Parliament for any advice given to the King by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office."*

[28] Before discussing sections 124(1) and 88(2) and the interrelation, if any, between them, we pause to set out the general scheme of the Constitution.

[29] Lesotho is a sovereign democratic kingdom, and the Constitution is the supreme law of Lesotho.[8] The executive authority of Lesotho is vested in the King which His Majesty exercises subject to the Constitution through officers or authorities of the Government of Lesotho.[9] The Government of Lesotho consists of the Prime Minister and at least seven Ministers. This is regulated by section 87 which reads as follows:

> *"(1) There shall be a Prime Minister who shall be appointed by the King acting in accordance with the advice of the Council of State.*
>
> *(2) The King shall appoint as Prime Minister the member of the National Assembly who appears to the Council of State to be the leader of the political party or coalition of political parties that will command the support of a majority of the members of the National Assembly:*
>
> *Provided that if occasion arises for making an appointment to the office of Prime Minister while Parliament stands dissolved, a person who was a*

[8] See sections 1 and 2 of the Constitution. Section 1 states that:

> "Lesotho shall be a sovereign democratic kingdom."

Section 2 reads:

> "This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

[9] See section 86 of the Constitution.

member of the National Assembly immediately before the dissolution may be appointed to the office of Prime Minister.

(3) There shall be, in addition to the office of Prime Minister, such other offices of Minister of the Government of Lesotho (not being less than seven in number and one of which shall be the office of Deputy Prime Minister) as may be established by Parliament or, subject to any provision made by Parliament, by the King, acting in accordance with the advice of the Prime Minister.

(4) The King shall, acting in accordance with the advice of the Prime Minister, appoint the other Ministers from among the members of the National Assembly or from among the Senators who are nominated as Senators by the King under section 55 of this Constitution:

Provided that if occasion arises for making an appointment to the office of Minister other than Prime Minister while Parliament stands dissolved a person who immediately before the dissolution was a member of the National Assembly or such a Senator may be appointed to the office of Minister."

[30] The Prime Minister and the other Ministers are a Cabinet of Ministers (the Cabinet).[10]The core functions of the Cabinet are set out in section 88 (2) of the Constitution.

[31] Section 88 (3) on the other hand sets out under what circumstances section 88(2) shall not apply. It reads as follows:

> *"(3) The provisions of subsection (2) shall not apply in relation to-*
>
> *(a) the appointment and removal from office of Ministers and Assistant Ministers, the assignment of responsibility to any Minister under section 89 of this Constitution or, save in circumstances set out in the proviso to section 90(3), the authorisation of another Minister under section 90 of this Constitution to exercise the functions of the Prime Minister during the latter's absence or illness; or*
>
> *(b) the dissolution or prorogation of Parliament."*

[32] We agree with Mr Teele that section 88(2) can be divided into four parts namely:

[10] See section 88 (1).

a) The function of the Cabinet is to advice the King in the Government of Lesotho.

b) Cabinet is collectively responsible to the two Houses of Parliament for the advice given to the King.

c) The collective responsibility also relates to any advice given to His Majesty under the general authority of the Cabinet.

d) The responsibility also relates to all things done by or under the authority of any Minister in the execution of his office.

[33] Section 88(2) deals with giving advice to the King, accountability for such advice and collective responsibility for rendering such advice.

[34] The Cabinet's primary function is to advice the King in the Government of Lesotho. This is not contentious and needs no further elaboration except to say that the advice relates broadly to policy making in order to govern the country *inter alia* to achieve the principles of State policy set out in sections 25 to 36 of the Constitution.

[35] The second part of section 88(2) only deals with the Cabinet's accountability to the two Houses of Parliament. This is to ensure that the Cabinet is accountable to the elected representatives of the people and therefore the people whom they serve. The fact that the Cabinet is made collectively responsible to the two Houses of Parliament "ensure the smooth functioning of the democratic machinery."[11]

[36] Section 88(2) therefore serves to give constitutional recognition to the convention, which originates from the United Kingdom, which requires that any member of government or Cabinet must publically support and promote government policy. If the policy emanates from a Cabinet decision, all Ministers must support it although they might in private disagree therewith. If the policy or advice emanates from a Minister, the Cabinet is duty bound to support and to promote it in public. This is so because the government must enjoy the confidence of those whom it governs. The Cabinet must therefore maintain a united front because open division amongst Cabinet members will erode public confidence in the government. A Cabinet member who does not want to adhere to this principle should resign.

[37] Geoffrey Marshall, with reference to the British system, points out that there are three strands of collective responsibility and explains it thus:

[11] See SP Anand; Indore v H D Devegonda 1996 (6) SCC 734, AIR 1997 SC 272

"1. The confidence principle: A government can only remain in office for so long as it retains the confidence of the House of Commons, a confidence which can be assumed unless and until proven otherwise by a confidence vote.

2. The Unanimity principle: that all members of the government speak and vote together in Parliament, save in situations where the Prime Minister and Cabinet themselves make an exception such as a , free vote or an "agreement to differ".

3. The confidentiality Principle: This recognises that unanimity, as a universally applicable situation is a constitutional fiction, but one which must be maintained and is there to allow frank ministerial discussion within Cabinet and Government."[12]

[38] The appointment of the President of the Court of Appeal is not a policy issue that needs Cabinet approval. Although the Prime Minister is the first amongst equals in the sense that he is a Minister, he is however a very powerful Minister. He is in a sense, if not in reality, the King's chief advisor. He is the pivot point around which the political process revolves. He is given express power, by the Constitution, to give the King advice on certain specific issues.

[12] Marshall G: Ministerial Responsibility 1989 at page 2-4. See also Attorney-General v Jonathan Cape Ltd [1976] QB 752.

[39] The Constitution does not make his advice to the King subject to Cabinet approval or recommendation. It must have been in the contemplation of the drafters that the Prime Minister should advice the King on certain appointments irrespective of the preceding steps that he takes in order to settle on a fit and proper person to fulfil the function e.g. the President of the Court of Appeal and the Ombudsman.[13]

[40] Where the Prime Minister must consult a person or entity the Constitution expressly makes provision therefor. Section 120(4) reads as follows:

> *"(4) If the office of Chief Justice is vacant or the Chief Justice is for any reason unable to exercise the functions of his office, then, until a person has been appointed to and has assumed the functions of that office or until the person holding that office has resumed those functions, as the case may be, they shall be exercised by such one of the judges of the Court of Appeal or the puisne judges or such other person qualified to be appointed as a judge of the High Court as the King, acting in accordance with the advice of the Prime Minister, may appoint. Before rendering advice to the King for the purposes of this*

[13] Section 134 (1) which reads that:

"There shall be an Ombudsman who shall be appointed, subject to the provisions of subsection 2, by the King acting in accordance with the advice of the Prime Minister.

subsection the Prime Minister shall consult the Chief Justice if he is available."

[41] In terms of this section the Prime Minister must consult the Chief Justice, if he is available, before advising the King. If the Chief Justice was available but was not consulted by the Prime Minister before he advised the King such advice will be subject to challenge and may be set aside by a court.

[42] Section 143 (1) and (2) of the Constitution reads as follows:

"(1) The power to appoint persons to hold or act in offices to which this section applies and to remove from office persons holding or acting in such offices shall vest in the King, acting in accordance with the advice of the Prime Minister.

(2) Before tendering advice for the purposes of this section in relation to any person who holds any office in the public service, other than an office to which this section applies, the Prime Minister shall consult the Public Service Commission."

[43] Here again, the Prime Minister is obliged to consult the Public Service Commission before advising the King.

[44] There is nothing in the text of the Constitution as I have said above, that calls for or demands that section 124 (1) must be read subject to section 88(2). In Director of Immigration v Lekhoaba[14] it was said that:

> *"It is only in exceptional cases that a court may alter the unambiguous words of a statute and a fortiori of a constitution. As Corbett JA remarked in Rennie NO v Gordons 1988 (1) SA 1 (A) at 22E:*
>
> > *"Over the years our Courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statutes as it stands."*

[45] There is no basis in law or logic to read section 88(2) into section 124 (1) of the Constitution. There is no room for the applicant's submission that the Act of advising the King to appoint the President of the Court of Appeal should be preceded by advice or a recommendation from the Cabinet.

[14] (C of A (CIV) NO 22/07) [2008] LSCA 4 at para 14

[46] In our view section 124 (1) is a substantive appointment clause which is independent from section 88(2). Our view is fortified by section 91(1) which reads as follows:

> *"(1) Subject to the provisions of section 137(4) of this Constitution, the King shall, in the exercise of his functions under this Constitution or any other law, act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution or any other law to act in accordance with the advice of any person or authority other than the Cabinet."*

[47] When the Prime Minister advises the King on specific things mentioned in the Constitution, like the appointment of the President of the Court of Appeal, he does so not under the general authority given to him by the Cabinet or as a member of Cabinet but because the Constitution gives him the power to do so. He does not need authorization from the Cabinet for an act that is governed by the Constitutional.

[48] Section 88(3) is also of no assistance to the applicant. All that subsection 88(3) seeks to achieve is to make plain that the Cabinet should not take collective

responsibility for the acts mentioned therein. We do not agree with the submission that subsection (3) excludes the matters that are the exclusive preserve of the Prime Minister and that any other matter falling outside subsection 3 should therefore be done with the concurrence or recommendation of the Cabinet. This section deals with matters over which the Cabinet should not be held collectively responsible to the two Houses of Parliament. It would be impracticable and senseless to expect the Cabinet to take collective responsibility for acts not done by them, for example their appointment.

Factual dispute

[49] There is another reason why this application should fail. The applicant alleged that the Prime Minister does not have the "authority to recommend the appointment of the President of the Court of Appeal acting unilaterally and without the involvement of the Cabinet".[15] He further averred that the appointment of the President of the Court of Appeal was never discussed by Cabinet.

[50] The Prime Minister, on the other hand, in his answering affidavit, stated that the recommendation to appoint the fifth respondent as the President of the Court of Appeal was referred to Cabinet. He further stated that he informed Cabinet of the proposed appointment, at a Cabinet meeting. He did not state when such meeting

[15] Paragraph 6.3 of the founding affidavit.

occurred, but stated that the applicant and the Deputy Prime Minister did not attend the Cabinet meeting at which his recommendation was discussed.

[51] The applicant in his replying affidavit stated the following:

> *"I reiterate the fact that there was no Cabinet meeting held in which the issue of the appointment of the President of the Court of Appeal was discussed. I have minutes of all meetings that I attended and those that I did not attend. I am entitled to such minutes by virtue of my office. There is nowhere in any of the minutes in my possession where the issue of the appointment of the President of the Court of Appeal is discussed. It would be impracticable and burdensome to attach all the minutes of Cabinet in my possession referred to earlier."*[16]

[52] The applicant alleged that the issue was never discussed at a Cabinet meeting. The period within which this issue could have been discussed is very short. The answer of the Prime Minister is that the issue was discussed at a meeting which the applicant did not attend. The applicant failed to attach any of the minutes covering the relevant period. Although he alleged that it would be impracticable and

[16] Paragraph 33 of the replying affidavit.

burdensome to attach all the minutes of the Cabinet meetings in his possession, he did not make any or all of the relevant minutes available for our perusal.

[53] The applicant although having access to the minutes elected not to submit any evidence. It should have been obvious to the applicant that in the absence of any countervailing evidence, particularly since the Prime Minister contended that there was a Cabinet meeting, more was required from the applicant to clarify his position instead of seeking refuge in the practicalities of attaching the minutes. The facts submitted by the Prime Minister cried out for an answer, yet the applicant elected not to respond. The applicant imperilled his position, in the circumstances, by failing to put up any cogent explanation or evidence as to why his version should be preferred.

[54] Considering the Plascon Evans rule, this factual dispute has to be resolved in the favour of the Prime Minister.[17] It is unfortunate that the Prime Minister did not state the date of the Cabinet meeting at which this issue was discussed but, as we have said, above, this issue must be resolved in his favour, irrespective of the omission. We find that the issue was probably discussed at a Cabinet meeting.

[55] Although we are not called upon to decide this issue, we are constraint to state *en passant* that we are of the view that a permanently appointed judicial officer should not hold any other permanent employment. The terms and conditions of the fifth

[17] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635

respondent's appointment is a matter that should be given attention by the powers that be in order to avoid future litigation or conflict of interest challenges.

Costs

[56] The Applicant acted courageously when he brought this application. It is clear that he had no regard for the consequences of his action because he genuinely, albeit mistakenly, believed that he is doing the right thing. We are convinced that he should not be mulcted with the costs of this application. He raised important constitutional issues.[18]

Order

[57] We accordingly make the following order:

The application is dismissed with no order as to costs.

_____ _____

Musi AJ Potterill AJ

I agree.

_____

Mathopo AJ

[18] See Biowatch Trust v Registrar, Genetic Resourses & Others 2009 (6) 232 (CC) para 21 to 23. President of the Court of Appeal v The Prime Minister and Others C of A (CIV) No 62/2013 at para 27.

For the applicant: Adv Teele KC

Assisted by: Adv Mohau KC and Adv Phafane KC

Instructed by: Mei & Mei Attorneys Inc

Maseru

For the first and second respondents: Adv Gauntlett SC

Instructed by: K Nthontho Chambers

Maseru