IN THE HIGH COURT OF LESOTHO

Held in Maseru

CIV/APN/406/2016

In the matter between:

ALL BASOTHO CONVENTION	1ST PETITIONER
BASOTHO NATIONAL PARTY	2ND PETITIONER
REFORMED CONGRESS OF LESOTHO	3RD PETITIONER

And

THE SPEAKER OF THE NATIONAL ASSEMBLY	1ST RESPONDENT
THE ATTORNEY GENERAL	2ND RESPONDENT

JUDGMENT

Coram : Honourable Mr Justice T Monapathi
: Honourable Mr Justice S N Peete
: Honourable Mr Justice E F M Makara

Date of Hearing : 6 February, 2017
Date of Judgment : 23 February, 2017

SUMMARY

The petitioners who are duly registered political parties petitioned the Court to declare that the Speaker of the National Assembly had no power in law to pronounce a vacancy of a seat of Parliament. This was occasioned by the preliminary moves she had taken in preparation of her pronouncement which she undertook to hold in abeyance pending a decision of the Court in the matter. The petitioners maintained throughout the deliberations that the Constitution and the applicable legislation do not bestow the power upon the Speaker or if otherwise, the Legislature would have expressly stated so. On the contrary, the respondents counter argued that the status, powers and responsibilities of the Speaker under both Statute and common law, qualifies her by necessary implication, to make the declaration to avoid absurdity.

Held: The Constitution which is a supreme law of the land, expressively assigns the power to make a declaration about a vacancy of a seat of Parliament to the High Court. Thus, no law can provide otherwise. Consequently, it was declared that the Speaker did not have the power to make a pronouncement of the vacancy of a seat of Parliament.

ANNOTATIONS

CITED CASES

1. **Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council** 1999 (1) SA 374 (CC
2. **Masetlha v President of the Republic of South Africa** 2008 1 BCLR 1 (CC
3. **President of the Republic of South Africa v South African Rugby Football Union**(CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059
4. **Affordable Medicines Trust and Others v Minister of Health and Others**2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
5. **M.O. Oloyo v B.A. Alegbe (Speaker, Bendel State House of Assembly)** 1982 2 FNLR 59 (UNNLAW DOCS).
6. **Dr. O.G. Sofekun v Chief O.A Akinyemi and 3 Others**(1980) 5/7 S.C 1
7. **Sekoati & Ors v President of the Court Martial & Ors**(1995 – 1999) 812, 822
8. **Thulo v Government Secretary &Ors** LAC (2000 – 2004) 551, 556
9. **Tlouamma & Ors v Speaker of the National Assembly & Ors** 2016 (4) SA 534 (WCC)
10. **Annie Pelagie Bahamboula & Ors. v Minister of Home Affairs & Ors**9 BCLR 1021 (WCC)
11. **National Coalition for Gays & Lesbians Equality v Minister of Home Affairs** 2000 (2) SA 1
12. **AB & Ano. V Minister of Social Development** ZACC 43
13. **Masoabi v Masupha** CIV/A/10/14
14. **M.O. Oloyo v B.A. Alegbe (Speaker, Bendel State House of Assembly)** 1982 2 FNLR 59 (UNNLAW DOCS)

STATUTES & SUBSIDIARY LEGISLATION

1. **The Constitution of Lesotho 1993**
2. **National Assembly Electoral Act Act No. 14 of 2011**
3. **Societies Act No. 20 of 1996**
4. **Parliamentary Powers and Privileges Act Act NO. 8 of 1994**
5. **Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1) (h) of the Constitution No. 44 2006**
6. **National Assembly Standing Orders 2008**

BOOKS & ARTICLES

1. **Principle of Legality and the Clear Statement Principle' (2005) 79 Australian Law Journal 769.**
2. **Halsbury' s Laws of England Vol. 34 4ed (1997)**
3. **Cambridge Learners Dictionary Published by the Press Syndicate**
4. **Anyebe PA *Rules and Procedures Governing Legislative Process in Nigeria* Law journal @ 2**
5. **The Daily Monitor Newspaper of Uganda. 03 May 2013**

MAKARA J

Introduction

[1] A genesis of this case is traceable from the 10th November 2016 when the petitioners brought an urgent application before this Court seeking in the main for an order in the following terms:-

1. An interdict restraining the 1st Respondent from declaring any vacancies in the National Assembly pending finalization of this matter.
2. A declaration that the 1st Respondent has no authority whatsoever to determine whether a seat of a member of the National Assembly has become vacant.

[2] On the 16th November 2016, the respondents filed their notice of intention to oppose the petition. However, on the 2nd December 2017, the 1st respondent filed another notice in which she informed the Court and the attorneys for the petitioners that she would abide by the decision of the Court. Consequently, the present Legal Contestation remains between the petitioners and the 2nd respondent who is the Learned Attorney General (AG) of the Kingdom of Lesotho.

[3] Against the backdrop of the pertinent issues involved in this case, including the regime of legislation and the Common Law with which they have to be interfaced in resolving them, it becomes

imperative from the onset, that the material juristic personalities of the petitioners be described.

[4] The first petitioner, the All Basotho Convention bears the acronym ABC. The second one, the Basotho National Party has its as BNP while the third, the Reformed Congress of Lesotho is RCL. They shall henceforth for brevity, be individually referred to as such. It is appreciated from the papers that they are political parties registered as such in terms of the apposite laws of the Kingdom[1]. They respectively contested the 2015 general snap elections in which ABC got 215 022 votes; BNP 31 508 and RCL 6731.

[5] In consequent of the stated votes and subsequently by operation of the Mixed Member Proportional (MMP) system of representation provided for under the National Assembly Act[2], ABC is represented in that chamber of Parliament by 40 members from the constituencies it won and 6 for Proportional Representation (PR); BNP has one (1) for the constituency and 6 for PR; RCL has no constituency representative and has 2 for the PR. It is important to be noted that the total seats contested in the National Assembly (To be interchangeably also called The House) are 120 and therefore, a party or a coalition of them should, command a following of more than half of the members therein to form a Government of His Majesty the King. The petitioners who are ostensibly in a coalition, failed to satisfy the requirement and automatically become His Majesty's Government Opposition. On

[1] Societies Act No. 20 of 1996
[2] S. 54 and 67

the other hand, a seven parties coalition led by the Democratic Congress met the criterion and formed the ruling Government.

[6] This application was initially precipitated by what according to the petitioners constituted their reasonable apprehension that the Speaker of the House intends making a declaration that certain Members of Parliament (To be *mutatis mutandis* also abbreviated as MPS) have vacated their seats in the National Assembly. Their fear subsequently became grounded upon concrete basis when a few days later, the Speaker addressed letters to twelve MPS notifying them of her intention to pronounce their seats vacant following their alleged absenteeism from the House. The petitioners maintain that the Speaker has no authority whatsoever to make a pronouncement on the existence of a vacancy of a member in the National Assembly. Thus, they have prayed for a declaratory order to that effect and that she be interdicted from purporting to exercise the power which her office does not have in law.

[7] The 2nd respondent has with reference to Common Law, the National Assembly Act and most importantly the Constitution, interpreted the power of the Speaker otherwise. Notwithstanding the divergences on the interpretation to be assigned to the applicable laws, the 2nd respondent made an undertaking before the Court that the Speaker will hold her intended pronouncement pending the outcome of these proceedings. It should be noted that this interim compromise was reached on the 21st November 2016. In recognition of the urgency of the case, the Court finally directed

that the answering affidavits be filed on or before the 2nd December 2016 and the reply of the petitioners on the 6th of the same month. The plan was for the case to be heard during the Christmas holidays. Only the answering papers were duly filed and the reply was never. In the meanwhile, I decided that the significance of the case warranted a hearing before a panel of three judges. The Chief justice accordingly assigned it to that number of judges.

[8] Whilst the present application remained pending, the second respondent brought a counter application in which he sought for the intervention of this Court by ordering in the main that:

> 1. The following member of the National Assembly be joined in as Respondents in reconvention:
>   a) The Hon. Dr. T. Thabane (First Respondent in Reconvention)
>   b) The Hon. T. Maseribane (Second Respondent in Reconvention)
>   c) The Hon. K. Rantso (Third Respondent in Reconvention)
>   d) The Hon. P.M. Maliehe (Fourth Respondent in Reconvention)
>   e) The Hon. M.N. Mohapi (Fifth Respondent in Reconvention)
>   f) The Hon. M. Mohlajoa (Sixth Respondent in Reconvention)
>   g) The Hon. M.M. Mokhele (Seventh Respondent in Reconvention)
>   h) The Hon. J. Molapo (Eighth Respondent in Reconvention)
>   i) The Hon. J.T. Molise (Ninth Respondent in Reconvention)
>   j) The Hon. C. Phori (Tenth Respondent in Reconvention)
>   k) The Hon. M. Tsatsanyane (Eleventh Respondent in Reconvention)
>   l) The Hon. M. Maliehe (Twelfth Respondent in Reconvention)
>
> 2. The Respondents in reconvention have vacated their seats in the National Assembly by virtue of their failure to attend the necessary number of sittings of the National Assembly as provided for in section 60 (1) (g) of the Constitution of Lesotho 1993

[9] Given the envisaged challenges in serving some of the respondents in the counter application with the papers and in recognition that the decision in the main application may have a disposal effect on the counter application, it was agreed that the

main one be heard first. Resultantly, the main was scheduled for hearing on the 6th February 2017.

Common Cause Facts and Developments

[10] It transpires from the papers before the Court that the speaker had initially contemplated making a pronouncement that the Twelve members MPS aligned to the petitioners, had contrary to Section 60 (1) (g) of the Constitution, absented themselves for one-third of the total number of sittings of Parliament. Interestingly, however, there was an agreement between the parties that they agree to disagree that the Section empowered the Speaker to have taken preliminary measures to facilitate for her final announcement that the absenteeism rendered the MPS concerned to have by its operation vacated their seats.

[11] It is a recognized fact that the Speaker had subsequently in the spirit of effecting the Section addressed letters to the twelve MPS requesting each of them to show cause why she may not on the basis of their *one third* absence from the sittings of Parliament, pronounce their seats in the House vacant. One such correspondence bears testimony *ex facie* a copy of its replication written to the leader of the Opposition Dr. Thabane by the Speaker on the 18th November 2016. It was by consent furnished to the Court.

[12] The detailed particulars of the MPS against whom the Speaker intends pronouncing their seats vacant, days of the sittings of Parliament and the days of their said one-third absences from

them have been recorded in a matrix form in Annexures A, B and C. There is at their left corners, a formula for the calculation of the relevant days. The details are here below presented:

Number of Days Set by the House From the 8th Feb – 22nd Nov 2016

Feb	March	April	May	June	July	Oct	Nov
8,9,10,11, 12,15,16, 17,18, 19	2,3,4,7,8, 9,10,14,15, 16,17,18	22,25, 26,27, 28,	3,4,6,9, 10,11,12, 13,16,17, 18	6,7,8,9,10, 13,14,15,16, 17,20,21,22, 23,24.27,28, 29,30	1,4,5,6,7, 8,11,12,13, 14,	7,10,11 ,12,13	11,14,15, 16,17,18, 21,22
10	12	5	10	19	10	5	8
Total No. of Sittings: 79							

Sittings days from 10th March to 9th Dec, 2015

March	May	June	July	Oct	Nov	Dec
10	8,11,12,13, 15,18,19,20, 21,22,26,27, 28,29,	1,2,3,4,5,15, 16,17,18,19, 22,23,24,25, 26,29,30	1	30	3,4,5,6,9,10,11, 12,13,16,17,18, 19,23,24,25,26, 27,30	1,2,3,4,7, 8,9,
1	14	16	1	1	19	7
Total No, of sittings: 59						

Attendance of Hon. Members of the Opposition

Name	No.of Days Attended	Status + Constituency	Total No. of Sitting Days 59
1. Hon. Dr T. Thabane	4	ABC - Abia	
2. Hon. T. Maseribane	3	BNP - Mt. Moorosi	
3. Hon. K. Rantšo	10	RCL - PR	

4. Hon. P.M. Maliehe	16	ABC - TY	
5. Hon. M.N. Mohapi	17	ABC - PR	
6. Hon. M Mohlajoa	18	ABC - Malimong	
7. Hon. M.M. Mokhele	10	ABC - PR	
8. Hon. J. Molapo	17	BNP - PR	
9. Hon. J.T. Molise	19	ABC Tŝoana-Makhulo	
10. Hon. C. Phori	13	ABC - Qoaling	
11. Hon. M. Tsatsanyane	12	ABC - Stadium Area	

Section 60 (1)(g) of the Constitution

$\frac{2}{3}$ of 59 days = 39 days

Attendance of Hon. Members of the Opposition

Name	**No.of Days Attended**	**Status + Constituency**	**Total No. of Sitting Days = 79**
1. Hon. Dr T. Thabane	0	ABC - Abia	
2. Hon. T. Maseribane	0	BNP - Mt. Moorosi	
3. Hon. K. Rantŝo	0	RCL - PR	
4. Hon. C. Phori	2	ABC - Qoaling	
5. Hon. M. Tsatsanyane	2	ABC - Stadium Area	
6. Hon. J. Molapo	36	BNP - PR	
7. Hon. M Maliehe	26	ABC – Butha-Buthe	

Section 60 (1) (g) of the Constitution

$\frac{2}{3}$ of 79 days = 53 days

[13] The parties fairly agreed without prejudice to any possible line of argument in the counter application that for the purpose of the main petition, the reason (if any) upon which the absenteeism

of the twelve MPS could be justified, is immaterial. They specifically agreed that in this case, focus should exclusively be on the subject of the authority of the Speaker to have planned the pronouncement and then begun taking preparatory measures to execute it. Appreciably, it was due to that common understanding that on the 24th November 2016, the Speaker undertook before the Court to stay her decision in abeyance pending judgment in these proceedings.

The Issues for Determination

[14] This has already been telescoped in the preceding last paragraph. It basically rests upon the legal competency of the Speaker to have relied upon S. 60 (1) (g) of the Constitution or any other law in contemplating a pronouncement on the vacancy of the seats in the House and already done some groundwork towards that.

[15] A rather dimensional issue would be whether there is any provision in the Constitution or any law which could be interpreted to expressly or by necessary implication, empower the Speaker to have planned for the announcement and in the interim acted as she did.

Arguments and the Applicable Laws

[16] The petitioners appreciably in motivating their case, premised their argument upon a statement that the Speaker had no authority to so *investigate the facts, consider the law, and make a determination* on the existence of a vacancy of a seat in the

National Assembly. The understanding created is that she is *ab initio,* disqualified from even establishing jurisdictional facts for her to have laid down basis for purporting to operationalize S. 60 (1) of the Constitution. In support of that they traversed relevant direct and indirect provisions of the Constitution[3], the National Assembly Electoral Act[4] (NAEA) and the Parliamentary Powers and Privileges Act[5] (PPPA).

[17] To complete the picture, reference was made to the applicable provisions in the National Assembly Standing Orders[6] (Standing Orders) which derive their legal standing from the Constitution[7] though they historically originate from the Common Law[8].

[18] In a nut shell, the constitutional provisions to which the Court was referred, address qualification for membership of Parliament[9] and the disqualification from it[10]. These have logically for the purpose of a determination of justice in the mater, been interfaced with those which elucidate the legal scenario pertaining to the:

1. Election of Speaker of the National Assembly by its membership[11];
2. Authority with jurisdiction to hear and determine any question on the existence or otherwise of a seat in Parliament or Senate[12];

---

[3] The Constitution of Lesotho 1993
[4] Act No. 14 of 2011
[5] Act NO. 8 of 1994
[6] 2008
[7] S.81(1)
[8] Anyebe PA *Rules and Procedures Governing Legislative Process in Nigeria* Law journal @ 2
[9] S. 58.
[10] S. 59.
[11] S.63(1)
[12] S. 69(1) (c)

3. One – Third threshold of absence of a member of Parliament (save for a chief) from the sittings of Parliament without authorization by the Speaker or President of the Senate as the case may be, to warrant a determination on the existence of a vacancy[13];
4. Persons or officials who have a *locus standi* to make an application before the competent forum for the said determination;
5. Authority for each house of Parliament to make rules governing its own procedure, orderliness and conduct of proceedings[14] and
6. Authority of the Speaker or his/ her Deputy to preside over the sittings of the National Assembly.

[19] In the same endeavour to demonstrate that the Speaker lacks legal credentials to have enquired and established that the concerned MPS had defaulted to warrant her envisaged verdict; reliance was further made upon the already identified operative enactments. These are for ease of reference, the National Assembly Electoral Act[15] and the Parliamentary Powers and Privileges Act[16]. It should suffice to present a resume of the arguments connected with the two statutes to be based upon a proposition that they, in rhythm with the Constitution, circumscribe the authority and the functions of the Speaker. In recognition of that, the petitioners maintain that in the scheme of both Acts, there is no express or implied provision enabling her to pronounce that a Member of Parliament who has not attended *one-third* of the sittings of Parliament has, left a vacant seat. A suggestion was that she could not even carry out the investigations to establish jurisdictional facts for considering acting so.

[13] S. 69(1) (g)
[14] S. 81(1)
[15] Act No. 14 of 2011
[16] Act NO. 8 of 1994

[20] From there, the Court was firstly taken through the relevant provisions of the Parliamentary Powers and Privileges Act which are reflective of the precise powers of the Speaker. They appear under S. 7(1) (2) (b), 8, 9 and 11 of the Act. In short, they respectively pertain to power of the Speaker acting in collaboration with the President of the Senate to:

1. Regulate admission of strangers within the precincts of Parliament and order them to withdraw from the premises;
2. Order any person to appear before Parliament or its Committee and administer oath to such person;
3. Direct the Clerk of the relevant House to issue a warrant to apprehend any person who failed to appear before Parliament or its Committee despite service of summons upon him or her for his attendance.

[21] To further explode a counter view that the Speaker had the authority to make the impugned announcement, the petitioners seemingly confidently navigated through the pertinent provisions of the National Assembly Electoral Act[17]. A synopsis of the identified provisions of significance is:

1. S.188 (2) that lists the grounds upon which a constituency elected Member of National Assembly shall be disqualified from the membership. This occurs where a member resigns, dies or becomes disqualified from it under the Act.
2. S.188 (3) sets grounds for a member of the National Assembly allocated a seat by PR to vacate it. This obtains where in addition to those prescribed under S.188 (2) a member resigns from the political party under which the member was elected and crosses the floor.

[22] The attention of the Court was specifically, for the purpose of the case of the petitioners, drawn to the fact that resulting from a vacancy of membership on any of the listed grounds, the Legislature has expressly provided that the Independent Electoral

[17] Act No. 14 of 2011

Commission shall upon being aware of the vacancy, publish that in the Gazette. In the same vein, the Commission is obliged under S.118 (5) to specify the necessary details in the publication[18].

[23] Then the petitioners exploited the express provisions in the Act to illuminate a point that the Legislature has expressly articulated its intention regarding the repository of the powers to be exercised. To buttress the point, they hastily cited S. 190 (1) which entrusts the High Court with the authority to hear and determine the question of a vacancy of a seat in the National Assembly.

[24] On the same discourse, the petitioners reiterated their both substantive and procedural point that the Speaker is excluded from the process towards a declaration on the question of the existence of the vacancy or making it herself.

[25] According to the petitioners, the fact that the Section specifically directs that the determination should be made through an application lodged by elector, a political party that participated in the elections, a candidate or a member of the National Assembly or the Attorney General[19]; *per se* excludes the Speaker.

[26] Lastly, the petitioners told the Court that even the Standing Orders do not bestow upon the Speaker with the authority to pronounce herself on the vacancy of a seat in the National

---

[18] Existence of a vacant seat of a member of a named constituency and its cause.

[19] Section 126 (4) of the Act.

Assembly or to mount any investigative procedures to establish the truth about it before making the proclamation. They acknowledged that the Standing Orders expressly endow the Speaker with the powers to be exercised by her. This was immediately qualified with the argument that those powers are delineated by those stated in the instrument. In their view, those powers appear by and large under Order No. 4. Though the petitioners almost exhaustively referred to them and systematically analyzed each applicable Order; the Court decided to concisely concentrate on what it regards to be of relevant significance for the resolution of the issues before it. These are listed as the authority of the Speaker to:

1. Preside over the deliberations in Parliament in its normal or Committee sittings[20];
2. Grant permission to a member to be absent from a sitting, seminar or training;
3. Ensure compliance with the Orders in the National Assembly and in a Committee[21]
4. Restrain a member who persist in irrelevance or tedious arguments[22]
5. Adjourn or extend or suspend the sitting of the House[23]
6. Order a member whose conduct is grossly disorderly to withdraw immediately from the House for the remainder of that day's sitting.[24]
7. Invite the House to a motion to suspend a member who undermines the authority of the Chairperson to suspend such a member from the service of the House since a magnitude of the offence warrants a punishment beyond the withdrawal from the sitting for the remainder of the day[25];
8. Lay before the House a written apology made by a member who was suspended for seriously undermining the Chairperson on a motion proposing a discharge of the order of suspension;[26]

---

[20] Order No. 9 (1)
[21] Order No. 49
[22] Order No. 50
[23] Order No. 16
[24] Standing Order No. 50 (2).
[25] Standing Order No. 50 (3)
[26] Standing Order No. 50 (5)

9. Adjourn the House unilaterally or suspend its sitting for a time determined by her when there is a grave disorder therein[27];

[27] On the same subject of the powers of the Speaker it was brought to the attention of the Court that she does not have exclusive overwhelming powers. It was instead explained that besides the powers exercisable by the House in matters of discipline, there is pursuant to the Standing Orders, Sessional Select Committees in particular the Ethics, Code of Conduct, Immunities and Privileges Committee.[28] It was then emphasized that the Committee is *inter alia* mandated to investigate and consider all complaints of alleged contravention of the Standing Orders.

[28] In concluding the subject, the petitioners submitted that *in toto,* the explored constitutional and legislative landscape does not either expressly or by necessary implication, give the Speaker procedural or substantive powers connected with a finding on the existence of a vacancy in the National Assembly. It was reiterated that her powers are limited to those expressly provided for her exercise within the constitutional and legislative framework.

[29] On a different terrain, the petitioners invoked a principle of legality and utilized it to attack the initiative taken by the Speaker and her contextually contemplated plan to state that the said vacancies exist. The principle was interrelated with the subject for consideration, against its common law postulation that it actually

[27] Standing Order No. 50 (6)
[28] Standing order No. 97 (d).

represents a dimension of the Rule of Law and, therefore, discernible in any democratic Constitution whenever, public power is to be exercised. It was explained that it imposes a duty upon a repository of the powers to conform to some minimum standards. A cardinal requirement projected for compliance with the principle was that Parliament and the Executive must in exercising their powers or performing a function; act in good faith and strictly in accordance with the relevant law. For the same reasoning, it was warned that the phenomena had contrary to the traditional common law teaching, became operational beyond Administrative Law as it is now applicable in the constitutional province.

[30] The petitioners supported their preposition concerning the principle of legality and its appropriateness in the instant matter, with the jurisprudence developed in several cases and jurisdictions. The cases cited for the purpose are **Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council**[29]**; Masetlha v President of the Republic of South Africa**[30]; **President of the Republic of South Africa v South African Rugby Football Union**[31]**; Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the Republic of South Africa & Others**[32]**; Affordable Medicines Trust and Others v Minister of Health and Others**[33]**; Pharmaceutical Manufacturers Association of SA & Another: In re Ex**

---

[29] 1999 (1) SA 374 (CC).
[30] 2008 1 BCLR 1 (CC).
[31] (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059
[32] 2002 (2) SA 674 (CC)
[33]Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

parte President of the Republic of South Africa & Others[34]**;** and **Affordable Medicines Trust and Others v Minister of Health and Others**[35]**.**

[31] Notably, a rather novel notion of a *Clear Statement Principle*[36] in our jurisdiction was introduced by the petitioners in the addresses. They described it as a recent innovation by the jurists and judges in the common law states of America and Australia for the enhancement of the principle of legality and its appreciation. This was said to be rendered by its stress on the requirement that whenever the Legislature or the Executive seeks to adversely affect the rights, liberties and the legitimate expectations of anyone, it must adhere to a clear statement of the law.

[32] To fortify their case, the petitioners complemented their arguments and submissions by referring the Court to a *plethora* of decisions by the courts in some of the countries within the continent. They were strategically selected from different jurisdictions, cases founded upon analogously similar facts and issues around the question concerning who between Parliament / the Speaker and on the other hand or Superior Courts, has legal authority to pronounce a vacancy of a seat in Parliament. Also, the choice made is conveniently intended to demonstrate the difference in the court decisions between the countries which have their legislation inscribed in *pari materia* terms with ours in the Kingdom in contrast to where the legislation is written otherwise.

[34] 2002 (2) SA 674 (CC)
[35]Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
[36] Hon J JSpigelman AC, 'Principle of Legality and the Clear Statement Principle' (2005) 79 Australian Law Journal 769.

[33] In that comparative scenario, the petitioners persuaded the Court to follow the decisions made by its counterparts in the Republics of Uganda, Mauritius, Nigeria and Zambia respectively. The basic reason was that the legislations in those countries were materially similar to ours. It was also submitted that it will be jurisprudentially healthier to maintain the same precedence for consistency and certainty of the law on similar controversies. Major cases relied upon were **M.O. Oloyo v B.A. Alegbe (Speaker, Bendel State House of Assembly)**[37]**;** and **Dr. O.G. Sofekun v Chief O.A Akinyemi and 3 Others**[38].

[34] A succinct but comprehensive counter response presented by the 2nd respondent started from the acknowledgement of the facts already recorded as being of common cause content. This relates in particular to his narration of the history of the case, description of the petitioners, the declaratory order they seek for and the immediate background facts which occasioned the petition. It was from the onset, warned that the relieve asked for was not dispositive of what is considered as the central question of whether any seat of the House had actually been vacated and, thereby, rendering the case abstract.

[35] Since there is no disputation on the dates of the sitting of Parliament and those on which the twelve MPS were absent, there is no need to register the argument made for the AG on that point. It would, however, be remiss not to state that his Counsel accused

---

[37] 1982 2 FNLR 59 (UNNLAW DOCS).
[38] (1980) 5/7 S.C 1

the Twelve for their failure to have secured a dispensation for their absences from the Speaker contrary to the law[39].

[36] In passing, a legal challenge was raised concerning the procedural correctness of the petitioners to have lodged the petition case yet it does not deal with a question of whether or not a seat has actually been vacated.

[37] A foundational preposition was made for the AG that the status, responsibilities and the powers of the office of the Speaker that are explicitly stated in the laws are in-exhaustive. It was maintained that there were several others which are necessarily and inherently implicit subject to the dictates of the merits in each exigency.

[38] To demonstrate the outstanding position of the Speaker of Parliament, it was projected that Parliament is a legislative branch of Government consisting of the King, Senate and the National Assembly. To reinforce the idea, it was explained that the Speaker is per the Constitution elected by members of the National Assembly[40] and in principle presides over the proceedings in the House.[41] Coincidentally though understandably, this were basically followed by a reiteration of the legislative powers and responsibilities of the Speaker already narrated by the petitioners. The additional ones were that she provides a Certification of

---

[39] S.60 (1) (g)

[40] S.63 of the Constitution

[41] S. 73 of the Constitution

Appropriation Bills[42], is a spoke person of the House, A majority of the Standing Orders make reference to her office, is the interpreter and custodian of the rights and privileges of the members of the House. Most significantly, it was with reference to the Halsbury' Laws of England asserted that *impartiality* and *authority* are the principal characteristics of the office of the Speaker.[43] Cognizant of the presented magnanimity of the status, responsibilities and powers of the Speaker, a submission was tendered that they must be interpreted purposively. The cases of **Sekoati & Ors v President of the Court Martial & Ors**[44] and **Thulo v Government Secretary &Ors**[45] were heavily relied upon for the suggestion.

[39] On another note, Counsel for the AG interrogated relevant statutory provisions to establish legal justification of the procedural moves taken by the Speaker towards her consideration to find that none attendance by the Twelve, indicated vacancies in their seats in the House. A determinative provision cited was S.60 (1) (g) of the Constitution which as already stated, renders a member of Parliament who has missed *one-third of the total sittings of Parliament* without a permission of the Speaker, to vacate his /her seat in Parliament. He then with the same mind, read to the Court, the inexhaustive extra ordinary ways in which a member can by operation of law vacate the seat. They consisted of paying allegiance to a foreign State, being declared mentally unsound,

[42] S. 60 (1) (g) r/w S.80 of the Constitution
[43] Halsbury' s Laws of England Vol. 34 4ed (1997) para 637
[44] (1995 – 1999) 812, 822
[45] LAC (2000 – 2004) 551, 556

insolvency, dissolution of Parliament and ceasing to be registered as an elector.

[40] Logically, he came to the predominant S.69 of the Constitution. The Section from the onset, *inter alia,* dictates that the High Court has jurisdiction to hear and determine any question whether the seat in Senate or National Assembly of any member has become vacant[46]. Afterwards, it prescribes that an application procedure be followed for the High Court to make that determination[47]. Finally, it specifically grants *locus standi* in the proceedings to a member of the National Assembly, any registered elector in elections to the National Assembly or the AG provided the latter may intervene where the proceedings were not brought by his office.

[41] The Court was further alerted that S. 190 of the National Assembly Electoral Act, similarly extends the jurisdiction of this Court to make the same determination on the vacancy or otherwise of the seat of a member of the House.

[42] An intriguing legal attack was mounted against the petitioners for what was termed their failure to allege that a **question has arisen** regarding whether a seat of any member of the House has become vacant as contemplated by S. 69 of the Constitution and thus, the procedure adopted by the petitioners is not appropriate. It was maintained that the election petition procedure, as contemplated by S. 69 (5) of the Constitution, is

---

[46] S.69 (1) r/w (c)
[47] S69 (4)

intended to deal with actual matters arising from elections and the questions arising from the vacation of seats, not abstract questions relating to the constitutional powers of the Speaker. The submission was developed by cautioning that the Court should use the discretionary powers it has under S. 2 (1) (b) of the Constitution by declining to make a declaratory order on hypothetical, abstract or academic questions. A case of **Tlouamma & Ors v Speaker of the National Assembly & Ors**[48] was advanced in support of the thinking.

[43] A follow up attack of the petitioners was that they are actually asking for interdict and declaratory orders to advance the interests of their unrevealed absentee members pending the determination of what was maintained to be an abstract question of law. In elaborating the point, it was said that overtly the petitioners, who as political parties are manifestly closely involved with the absentee members and, indeed, bring the petition as a surrogate for those absentee members while at the same time avoiding any decision in respect of the actual status of the absentee members.

[44] The Counsel asked the Court to be contextual minded by acknowledging obvious scenarios where the Speaker could competently recognize the developments in the House and then react according to the law. Reference was immediately made to the present case where the records of its Clerk reveal that the members missed *one-third* of the total sittings of the House without a permission of the Speaker contrary to the law and thereby, by its

[48] 2016 (4) SA 534 (WCC) paras 101 - 104

operation vacating their seats. On that note, the Counsel over - emphasized that the preparations made by the Speaker for a final pronouncement that the absentees had vacated their seats was genuinely intended to give effect to S.60 (1) (g) of the Constitution. It was submitted that she is qualified to do so without the intervention of the Court. To illustrate the point further, an example was made about where the Speaker is in possession of a sequestration order against a member. The proposition was that the order *per se* would suffice for her to publicize that the affected member has by operation of law vacated the seat.

[45] In concluding this level of the arguments, the Counsel warned that if the law would be strictly interpreted to invariably require a Court order for a vacancy to exist even *where no question has arisen,* it means that vacancies in the House would not exist. This would in his view create absurdity in that it would always require the Speaker or some other competent person to make an application to Court even where a vacancy is occasioned by dissolution of Parliament or by the imposition of death upon a member.

[46] Though it was maintained that under the narrated circumstances including those obtaining in the instant case that the Speaker would be qualified to take notice of the development and *mero muto* pronounce a vacancy; it was suggested that the High Court would only assume jurisdiction when **a question has arisen.** The impression given was that before that occurs; the Speaker cannot be regarded to have undermined the constitutional

authority of the High Court or usurped it. Instead, she shall have acted within the powers which, given the stature of her office and its responsibilities, are readable from the relevant laws.

[47] Before resuming his seat, the Counsel stated that the Twelve have by operation of law vacated their seats in the House and prayed for the petition to be dismissed with costs including for both counsel.

The Decision

[48] At this juncture, it becomes initially imperative for the Court to preliminarily address a legal point raised by the respondents. This constitutes of a contention that the order sought for by the petitioners is not dispositive of a determinative issue on the question of the existence of a vacancy or otherwise of any seat in the National Assembly and consequently that it remains abstract to form any basis for adjudication before the Court. The same point was reinforced with a charge that the petition was based upon a speculative thinking since actually the Speaker had not made any pronouncement on the subject. Guidance has in considering the issue been sought from a direction detailed in **Annie Pelagie Bahamboula & Ors. v Minister of Home Affairs & Ors[49].** Here the Constitutional Court was quoted to have explained in **National Coalition for Gays & Lesbians Equality v Minister of Home Affairs[50]** as follows:

> A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract prepositions of law[51]

[49] 9 BCLR 1021 (WCC)
[50] 2000 (2) SA 1
[51] Para 22

[49] The above enunciated traditional principle has, however, due to constitutional challenges been developed to bestow upon the court discretion to depart from it in the public interest. The factors to be considered in that dispensation are:

1. The nature and extent of the practical effect that any possible order might have;
2. The importance of the issue;
3. The complexity of the issue;
4. The fullness or otherwise of the argument advanced; and
5. Resolving disputes between different courts.

[50] In considering a ruling on the standing raised question of the mootness of the petition, regard would firstly be had on the founding facts on the ground and then interface them with the latest law propounded in **Annie Pelagie Bahamboula & Ors. v Minister of Home Affairs & Ors (supra).** The pertinent facts unfolded themselves from the 18th November 2015 when the Speaker wrote letters to the Twelve, calling upon them to individually show cause why she may not by operation of S. 60 (1) (g) of the Constitution pronounce that they have vacated their seats in the House. The invitation is paradoxically preceded by two successive paragraphs in which *in verbatim* reads:

> Thus, in consequence, your absenteeism, dating back from 2nd June 2015, and running through to 9th of December 2015 and 14th July 2016 brings into play the constitutional provisions above, and is in my tentative view, detrimental to your holding of a parliamentary seat in the 9th Parliament of Lesotho. It is my view that, regard being had to all the foregoing, you have, by operation of law, vacated your seat as a member of the National Assembly effective from 9th December, 2015.
>
> It is in all the circumstances above that I intend in due course of time, to make an appropriate pronouncement and inform the Independent Electoral Commission regarding what in my view is an existing vacancy in relation to the parliamentary seat you held.

[51] To elucidate the contents of the letter, in its background in a paragraph which could be the third, the author has indicated her

skepticism about the truthfulness of the security related circumstances which according to the Twelve, forced them to run into exile and, therefore, fail to satisfy the S. 60 (1) requirement.

[52] The letter appears to be couched in contradictory terms since it could be subject to different interpretations. The first could be that the Speaker has already concluded that the MPS concerned have by virtue of their one third absences from the sittings, vacated their seats and that hers is just to formally make the pronouncement. The show cause dimension could contextually be perceived as a pretext to give them a hearing while she already holds a conviction that they have vacated the seats and that what is remaining is for her to officially publicize it.

[53] A counter interpretation could be that despite the appearances of ambiguities and subjective views in the correspondence, it actually seeks for the responses of the addressees for the Speaker to consider them in good faith and then reach a justifiable decision or make any constructive intervention.

[54] In the light of the conceivably conflicting reasonable interpretations, it means that the concerned MPS could justifiably identify the letter as a mere pretension through which the Speaker gives an impression that she complied with the *audi alteram partem rule* of natural justice. The identified uncertainties in its message considered together with what appears to be her convictional thinking in the matter, could have reasonably justified their perceptions.

[55] The reality of the potential threat posed to the MPS by the letter was evidenced on the 21st November 2016 when Counsel for the respondents told the Court that the Speaker has undertaken **to hold her decision to terminate their membership** pending finalization of the case.

[56] Persuaded by the discretionary considerations which in terms of the judgment in **Annie Pelagie Bahamboula & Ors. v Minister of Home Affairs & Ors,** should be attached to the issue of the abstractness or mootness of a case, it emerges that the petition is founded upon a serious matter of substantial public interest. It concerns rights of the individual MPS and their respective representativeness in the House. Also, the order asked for would have a practical effect in that it seeks to ascertain an important constitutionally related controversy which has featured almost throughout the continent. Each jurisdiction resolved the question subject to the applicable laws. Equally, this could be an opportune moment for us to also do likewise for future reference.

[57] In the stated factual and legal posture, we decline to find that the petition is premised upon abstract basis.

[58] The Court appreciates a challenge made by the respondents that the petitioners should have approached the Court by way of an application since it has not been approached to declare a vacancy of a seat in Parliament. We, nonetheless, recognize that though this case is not a constitutional one, it has to be primarily determined with reference to the Constitution and substantively

has the character of a constitutional case. In that consideration, we feel that emphasis should be attached to the substance of the case rather than form. On that account, we decline to sustain the point.

[59] Upon turning to the merits of the case, it transpires that the central controversy is basically premised on the question of the authority of the Speaker to declare the existence of a vacancy of a seat in the House. This has been triggered by the divergences in the interpretation of S. 60 (1) (g) of the Constitution[52]. It reads:

> A Senator (other than a Principal Chief) or a member of the National Assembly shall vacate his seat as such if, in any one year and without the written permission of the President of the Senate or, as the case may be, the Speaker of the National Assembly is absent from one -third of the total number of sittings of the House of which he is a member.

[60] A comprehensive and systematic approach towards a holistic understanding of the operational provisions in the matter, would be attained by seeking to appreciate the intention of the legislature within the scheme of the pivotal S. 60 (1) (g) read in conjunction with Sections 59 (1), 60 (1) (b) and ultimately with S. 69 (1) (c) and (4) of the Constitution. Both counsel appear to have inadvertently paid less attention to S 60 (1) (b). Since the main section has been quoted *in extenso,* the same projection should be made with the other material provisions.

[61] S. 59 (1) applies to the grounds upon which a person may not qualify for election to Parliament. As already stated, the grounds include acknowledging allegiance to a foreign state, being

[52] The Second Amendment to the Constitution Act, 1979

sentenced to death or a term of imprisonment exceeding six months, being legally declared to be of unsound mind, being legally declared insolvent, ceasing to be citizen of Lesotho, dissolution of Parliament, ceasing to be registered as an elector or being disqualified to vote.

[62] S. 60 (1) (b) states that for the same reasons under S.59 (1) that one may be disqualified from holding a seat in either house of Parliament, such a person shall vacate their seat if already a member.

[63] The S. 69 provisions feature under a sub heading:

Decisions of Questions as to Membership of Parliament

Prior to its relevant interrogation, it is befitting to state that a sub heading in a statute presents one of the aids for discernment of the intention of Parliament in the provisions thereunder. This was recently affirmed by the Constitutional Court in South Africa in **AB & Ano. V Minister of Social Development**[53] in these words:

> The objective of the provision is evident from the plain language used in the heading of and the provision itself. The heading reads: "Genetic Origin of Child".

[64] The sub-heading based approach to statutory construction is invoked to buttress a point that a sub-heading under which S. 69 falls, is specifically dedicated to the decisions of *questions as to membership of Parliament.* It comprises of both substantive and procedural provisions and reads in part:

> 69 (1) The High Court shall have jurisdiction to hear and determine any question whether –

[53]ZACC 43 (29 November 2016) Para 275

(a) …..
(b) …..
(c) The seat in Senate or National Assembly of any member thereof has become vacant;
(2) …..
(3) …..
(4) An application to the High Court for the determination of any question under subsection (1) (c) may be made by any member of the National Assembly or by any person registered as an elector in elections to the National Assembly or by the Attorney General and, if it is made by a person other than the Attorney General, the Attorney General may intervene and may then appear or be represented in the proceedings.

Applicable Statutory Enactments

[65] Besides in the Constitution, the question of a vacancy of a seat in Parliament is addressed in the National Assembly Electoral Act. The relevant provisions in the enactment are basically in rhythm with those in the Constitution and are intended to serve as its working instruments on the grounds. A testimony for that analysis is immediately hereunder dealt with.

The National Assembly Electoral Act

[66] To some limited extent it reiterates the constitutional provisions on the grounds on which a member elected to the National Assembly should upon their occurrence vacate the seat. The events provided emerge where a member resigns, dies or becomes disqualified from the membership under the Act[54]. In the same manner, it states grounds for vacation of a seat by a member allocated a seat by proportional representation. They are listed as death of a member, resignation from the membership of the House

[54] S.188 (2)

or from a political party, under which one was allocated a seat, crossing of the floor or becoming disqualified under the Act[55].

[67] In the context of this case, it is of significance to be realized that in terms of S. 188 (5) of the Act, the Independent Electoral Commission (IEC) is, upon being aware that a member's seat has become vacant, mandated to publish that with the prescribed details[56].

[68] In tune with the Constitution, the Act envisages the emergence of a question on the vacancy of seat of a member of the House and provides under S. 190 that it shall be determined by the High Court in accordance with S. 125 of the Act. The latter directs in the clearest terms that the High Court shall exercise **exclusive** jurisdiction over the matter. It also reveals that it provides so in harmony with S. 69 of the Constitution.

[69] The Act finally prescribes a procedure for a determination of the question by providing that it shall be brought before the High Court by an elector, a political party which participated in the elections, a candidate or a member of the National Assembly or the Attorney General.[57]

Meaning of a Question has Arisen

[70] It seems logical for the subject to be analytically discussed before the above presented pertinent legislative scheme is

---

[55] S.188 (3)
[56] Section 188 (5) of the Act.
[57] Section 126 (4) of the Act.

dissected to establish whether or not the Speaker has the authority to make the impugned pronouncement. This is because Counsel for the respondents elevated it to assume technical legal significance in this case. He was inspired to do so by the wording of S. 69(1) of the Constitution that:

> The High Court shall have jurisdiction to hear and determine **any question** whether the seat in the Senate or National Assembly has become vacant.

[71] In the understanding of the Court, he conceptualizes the words to denote that the Court can only assume jurisdiction over the matter when there is a dispute over a vacation of a seat. In simple terms, the existence of a dispute or a question over the subject is the one which would create jurisdictional facts over which the Court can be approached for a declaratory order or any qualifying relief. It is precisely on that account that he submitted that since it is common cause that the petitioners had contrary to S. 60 (1) (g) of the Constitution, been absent for one–third of the sittings of the House, the Court has not attained jurisdiction. Instead, the pronouncement about that fact could competently be made by the Speaker.

[72] The Court well appreciates the wisdom brought into the picture by the Counsel by assigning what could be viewed as a strictly technical meaning to the word *question.* A meaning of a word is usually determined by the context in which it is being used. Its reading from the provision radiates an impression that contrary to its ordinary dictionary meaning, it refers to **a subject or something to be attended to.** The interpretation is attested to in the Cambridge

Learners Dictionary[58] where besides the usual meaning, it is defined as:

> Any matter that needs to be dealt with or considered.

[73] What needed to be dealt with in this case was the absence of the petitioners under the circumstances in which there are grounds for a *prima facie* conclusion that they have by operation of law, lost their seats in the House. Then, a declaration that they have resultantly vacated their seats would have to be made by a competent authority according to law.

[74] Thus, we are not persuaded that the word *question* as employed in the section necessarily means a *dispute* which would establish a cause of action. Accordingly, we refuse to accept the definition. Otherwise, it would mean that any official who is not empowered by the law could, in the absence of any contestation, make the pronouncement.

Presentation of the Applicable Legal Matrix

[75] The key answer is here provided under S.69 (1) of the Constitution. This occurs where it specifically provides that The High Court shall have jurisdiction to hear and determine **any question** concerning the vacancy of any seat in Senate or the National Assembly. The same is reiterated in similar terms under S.190 (1) of the National Assembly Electoral Act.

[58] Cambridge Learners Dictionary Published by the Press Syndicate of the University of Cambridge

[76] S.69 (1) is inscribed in such a manner that it is intended to have a general application to all instances which the law contemplates to have the effect of creating a vacancy in Parliament. It should be highlighted that what is material for the pronouncement under S.69 (1) read in conjunction with S.190 (1) of the National Assembly Electoral Act, is the question of the vacancy of a seat. The grounds required mainly under S.60 (1) of the Constitution and other laws give rise to a cause of action for a consideration of the declaration by the legally empowered authority. In this regard, emphasis should not be made on the grounds themselves but rather on the determination of its consequence on the existence or otherwise of a vacancy.

[77] The legislature has expressly under S.69 (1) of the Constitution and S.190 (1) of the National Assembly Electoral Act, entrusted the High Court with the power to declare a vacancy under the narrated circumstances. It would be appropriate to recognize this power against the background of S.119 (1) of the Constitution which provides that:

> 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 decision or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred upon it by this constitution or by or under any other law.

[78] Notwithstanding the unlimited jurisdictional powers of the High Court under S.119 (1), this Court is mindful that it has been circumscribed in accordance with the applicable laws. This is illustratable by the decision in **Masoabi v Masupha**[59] where it was

[59] CIV/A/10/14 para (unreported)

decided that matters relating to land should be tried before the District Land Courts and not the High Court by virtue of its unlimited jurisdiction.

[79] It should be recognized that at the time Parliament conferred the powers upon the High Court to have jurisdiction to make the determination, it was fully conscious of the existence of the office of the speaker in conjunction with its status, powers and responsibilities under both the law and standing orders. It, nevertheless, enacted in the clearest terms under the provisions referred to that the High Court shall be vested with the power to determine the vacancy of a seat in Parliament.

[80] There is merit in the proposition by Counsel for the respondents that the Court should interpret provisions of the Constitution purposively. What remains contentious is whether the approach would lead to a discovery that the power to pronounce a vacancy is necessarily implied within the scope of the responsibilities of the Speaker.

[81] In the understanding of the Court, the express dedication of the determination powers unto the High Court primarily through the Constitution and the National Assembly Electoral Act, dictates that purposive interpretation should under a democratic rule, be geared towards the protection of Parliament and parliamentarians. The philosophy behind is a recognition of the representativeness of the different spheres of the electorate by members of the Parliament particularly in the National Assembly. Thus, any

legislation which could be relied upon by any authority to cause a member to vacate a seat in Parliament would have to be strictly interpreted so that the representative *status quo* is not easily adversely disturbed. This is indicative that the Speaker must identify to the Court a clear legal source of her authority to make the declaration on the vacancy of the seat in Parliament.

[82] The consistency maintained by the Legislature in granting the determination powers upon the High Court, is persuasively reflective of its resolute and conscientiously made decision to do so. It deserves to be repeated for emphasis sake, that the Legislature resolved so, definitely well aware of the status, powers and the responsibilities of the Speaker. The awareness included the constitutional and legislative contemplation of a challenge which could be posed by the occurrence of circumstances which would occasion a vacancy in a seat of Parliament.

[83] Also, the repetitious express legislative designation of the High Court for the exercise of the declaratory power in the matter, without any mention of the Speaker or any other authority, renders the applicability of the rule of statutory interpretation: E*xclsio unius est exclsio alterus.* Resultantly, the narrative is that it is only the designated court which can make the declaration to the exclusion of any other authority. A conceivable rationale could be that the Legislature saw it wise to entrust the power upon the Court for it to neutrally make the determination and protect the Speaker from the possible adverse perceptions concerning neutrality especially where he / she is a politician.

[84] It has to be realized that prevalence of the **rule of law** is a foundation of governance in our constitutional democracy and that towards a realization of that ideal, Government constitutes of the Legislature, the Executive and the Judiciary. The three are individually created under different provisions in the Constitution[60] to denote their relative separate existence and functions. The configuration is designed to institutionalize checks and balances against possible abuses of power by each of them. The Judiciary in particular is entrusted with a sacred role to interpret the law to ascertain its compliance with the *letter, spirit and purport* of the Constitution, censure administrative acts and policies to be executed in terms of the law and paramount intervenes where rights are vertically or horizontally violated.

[85] A clear testimony of a commitment to the rule of law appears under S. 2 of the Constitution which is a *supremacy clause* which provides:

> 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.

[86] A narrative which is interpretable from the supremacy clause is that the law upon which any decision could be justified must inherently be consistent with the Constitution. Otherwise, the decision itself cannot stand since it would be legally foundationless.

---

[60] The executive is created under section 86; Legislature under section 54 and Judiciary under section 118

[87] One of the theoreticians on the rule of law emphasizes that *we must all be slaves of the law to be free*[61] and that this should equally apply to State officials in that they must make decisions which are sanctioned and guided by the law. A translation of this abstract note to the issue of the moment, is simply that the Speaker must be seen to have rendered herself to be *a slave of the law* by justifying her pronouncement or actions with reference to an identifiable law consistent with the Constitution.

[88] The requirement for the Speaker to demonstrate that she acted pursuant to a particular enabling law is inescapably also imposed by the *principle of legality* test. This is traditionally a common law concept that has gained recognition into democratic constitutions and, therefore, enforceable. It has been comprehensibly postulated in **Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council**[62] where it was described as part of the doctrine of the rule of law, but separate from the administrative justice clause itself. The principle, it said, was not written down anywhere in particular. Rather, it was necessarily implicit in the Constitution.[63] Most significantly to the case at hand, it was further augmented that *legality* means:

> The legislature and executive in every sphere are constrained by the principle that **they may exercise no power and perform no function beyond that conferred upon them by law.**[64] (Emphasis by the Court)

[61] Authored by Marcus Tullius Cicero
[62] 1999 (1) SA 374 (CC).
[63] At para [59].
[64] At para [58].

[89] The last dimension of the immediately above definition of the principle was repeated by Moseneke DCJ in **Masetlha v President of the Republic of South Africa**[65], save for an addition that the power conferred must not be misconstrued.[66]

[90] To rub in the appreciation of this legal theory and its relationship with governance in the Kingdom, the theory was captured in **Pharmaceutical Manufacturers Association of SA & Another: Where In re Ex parte President of the Republic of South Africa & Others**[67] Chaskalson P, giving judgment for a unanimous court, explained the principle thus:

> It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[68]

[91] It seems that the same song on the principle was sung by the Constitutional Court of South Africa in **Affordable Medicines Trust and Others v Minister of Health and Others**[69]**.** To avoid repetition, an attempt is made to project new tunes into the music which starts with a tone that the principle entails that:

> Both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.' In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power[70].

---

[65] 2008 1 BCLR 1 (CC).
[66] At para [81].
[67] 2002 (2) SA 674 (CC)
[68] At para [85].
[69]Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
[70] Para 49

[92] A rather *sui generis* warning was specifically directed at the Judiciary for it to also be conscious of its constitutional parameters when exercising judicial powers. The message was that it equally falls under the Constitution. This was expressed in these terms:

> … The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society…[71]

[93] It transpires to the Court that the jurisprudence propounded in the cited foreign judgments elucidates the significance of the express provisions of the Constitution when interpreting corresponding provisions in our Constitution. In the same manner, it recognizes the constitutional importance of *Separation of Powers* in maintaining the *rule of law* and the *principle of legality* particularly in relation to the exercise of power by a public authority.

[94] The Court is indebted to the attorney for the petitioners for drawing to its attention a development made on the principle in other jurisdictions by introducing its recent dimensional nomenclature that has generated a more profound understanding of the principle. Its innovated version is termed **a Clear Statement Principle**.[72] It seems the initiative is attributable to the United States of America, other common law countries of America which came to recognize the instrumentality of the principle in the

[71] para 86
[72] Hon J JSpigelman AC, 'Principle of Legality and the Clear Statement Principle' (2005) 79 Australian Law Journal 769.

preservation and furtherance of constitutional values within the democratic governance. On our side, there should be acknowledgement that the new phenomena would enrich our cannons for construction of any statute to discover a meaning where the constitutionality of the exercise of power by officials in authority is being challenged.

[95] The practical content of the improvement over the original term is captured by the Chief Justice of the Supreme Court of New South Wales in his 2005 publication on **Principle of Legality and Clear Statement Principle.** He pointed out that If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality.[73]

Determination on the Speaker's Power to Make the Pronouncement

[96] The Court towards a final decision proceeds from a reality that S.69 (1) of the Constitution specifically and in express terms confers upon the High Court jurisdiction to hear and determine **any question** concerning the vacancy of any seat in Senate or the National Assembly. Subsequently, S. 190 (1) of the National Assembly Electoral Act, entrusts the same Court with the same jurisdiction in materially similar terms. From the interpretational perspective the harmony between the two provisions is indicative that the Legislature intended the Act to give a practical effect to a constitutional provision.

[73] At para [88].

[97] There is absolutely nothing in both the Constitution and the Act which expressly excludes the jurisdiction of the Court from hearing and determining the question if it was occasioned by any specified ground. In fact the words **any question** have a telling that a list of the grounds which would spontaneously trigger its jurisdiction is endless. The interpretation is justified by the fact that when both legislations were made, the law maker was fully aware of the constitutionally listed grounds for causing a vacancy of a seat in Parliament including the S. 60 (1) (g) absenteeism and the rest in the National Assembly Act. A consequent picture is that the S. 69 (1) jurisdictional powers of the High Court to hear and determine **any question** over the vacancy has a general application in relation to all the grounds that could occasion the incidence. This becomes even clearer in the light of S. 119 of the Constitution which in principle provides for the unlimited jurisdiction of the High Court.

[98] One major factor for recognition is that both a constituency and a proportional representation Member of Parliament are holders of an office of eminence within the Basotho nation and abroad. Their representative stature is, thus, accorded reverence by assigning to each member a designation of Honourable Member of Parliament. The electorate of all stations in life within each constituency invests their trust and hope upon a Member whom they shall have elected to represent them in Parliament for normally, a five year term unless the mandate is renewed through the next elections. This scenario is self-explanatory that behind

every parliamentarian lies the multitudes who within a democratic dispensation have a constitutional right to be represented in Parliament. The same representative credentials apply *mutatis mutandis* to a proportional representation Member of Parliament except that here one represents a given political sphere.

[99] At a personal level, a Member enjoys rights, privileges, remuneration etc and even develops legitimate expectations such as qualifying for pension.

[100] The legal consequence of the narrated official and personal attributes of a members and their developed legitimate interests, automatically qualify them for a stringent interpretation of the law to ascertain that their status and rights could only be negatively interfered with in accordance with the law which sanctions the invasion. The view lends support from the principles propounded in **Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council** and other cases cited on the *principle of legality or a clear statement principle*[74].

[101] In addition, the Court must in considering the issue, attach significance to the fact that Parliament is a major integral institution in a constitutional democracy. Its electorate representative character translates into reality the revered *Vos populi vos Dei* statement which in the Sesotho language relatively resemble a traditional notion, "*Lentsoe la Sechaba ke poho*". So, members of Parliament must be seen to be its lifeblood – hence it

---

[74] https://sydney.edu.au/law @page 2

is incumbent upon the Speaker to indicate an expressly provided legal source of her authority to make the pronouncement.

[102] It is recognized that the *principle of legality* and its recently translated version constitute part of our Constitution in that they are *readable* into it as a human right dimension. This is because it resonates a trite human rights law requirement that the authority vested with the power which could impact adversely upon the existing rights, must act strictly in accordance with the identifiable provision of the law. This will present basis for a determination if the power has indeed been expressly or by necessary implication conferred upon the authority concerned and, if so whether it was properly exercised within the parameters of the provision.

[103] In order to assist the Court to resolve the issue, it was commendably provided with foreign judgments from the African jurisdictions of Malawi, Mauritius, Nigeria, Uganda and Zambia. The decisions were precisely intended to reveal to it the interpretations assigned to the provisions comparatively similar to the ones which call for the same task in the present case.

[104] The said judgments from foreign jurisdictions are classifiable between those where the Legislature has expressly decreed that a designated court shall make a declaration about a vacancy of a seat of a Member of Parliament. The other category is where the power is so entrusted upon the Speaker acting in collaboration with Parliament. Here, it should be underscored that the grounds

which could occasion the pronouncement, are written in almost similar wording as ours in the Kingdom. The same applies to the provisions of the laws in relation to which the interpretations were made.

[105] In Malawi the Speaker is unambiguously under sections 63 and 65 given the power to pronounce the vacancy. This was acknowledged in the matter of **Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1) (h) of the Constitution**[75]

[106] The rest of the mentioned countries have unequivocally provided in their respective constitutions that the High Court (Supreme Court for Mauritius) has jurisdiction to hear and determine the existence of a vacancy of a seat of Parliament.

[107] Uganda presents an interesting political and legal encounter in which members of the ruling National Resistance Movement requested the Speaker to declare that some four Members of Parliament expelled from the party, have vacated their seats in Parliament. The Speaker who appears to be blessed with legal scholasticism, cautioned that her decision on the matter would have potential serious Constitutional ramifications and that the office of a Member of Parliament is a weighty office which goes to the core of democracy. She then explained that in any event, the power to make the declaration sought was in terms of S. 86 of the constitution assigned to the High Court. And, directed that the declaration on a supportive reason can only be made on **clear,**

[75] No. 44 2006

unambiguous and unequivocal provisions of the law.[76] Subsequently, the Supreme Court exercising its constitutional jurisdiction, upheld the decision of the Speaker. It went further to stress on the importance of adherence to the principle of separation of powers to avoid the erosion of the constitutional functions of other arms of Government[77].

[108] In the Nigerian case of **M.O. Oloyo v B.A. Alegbe (Speaker, Bendel State House of Assembly)**[78]. The Speaker had here in the face of S. 237 (1) of the Constitution of Nigeria made a declaration that a vacancy existed of a seat of a Member of Parliament. This was made after a member had absented himself from the sittings of Parliament for the number of days rendering him to be regarded to have lost his seat by operation of law. Ogbobine J in rejecting the argument of the Speaker that she has the declaratory power said for the court:

> In my view, if it was the intention of the Constitution to vest the Speaker with any power to declare the seat of a member of a Legislative House vacant, it would have done so in clear terms and there would have been no need for the existence of section 111 of the said Constitution of 1979. That section clearly explains that in case of a dispute whether the seat in a House of Assembly of a member of that House has become vacant it is eminently for the court to decide and not for the Speaker to pronounce upon as the Constitution did not clothe him with such power.

[109] In another Nigerian case of **Dr. O.G. Sofekun v Chief O.A Akinyemi and 3 Others**[79] Fatayi Williams, C.J.N warned:

> …The jurisdiction and activities of the Court cannot be usurped by either the Executive or the Legislative branch of the Federal State or State Government under any guise whatsoever.

---

[76] Published in the Daily Monitor Newspaper of Uganda. 03 May 2013. *How Kadaga decided MPs' fate*.

[77] *Ibid*

[78] 1982 2 FNLR 59 (UNNLAW DOCS).

[79] (1980) 5/7 S.C 1

[110] The Court does not agree with the proposition made by the Counsel for the respondents that the decision in **Thulo v Government Secretary** is applicable to this case. There it was held that membership of Parliament was by operation of law terminated by dissolution of Parliament. It was on that basis that it was submitted that the same eventuality happened with the Twelve, as they missed the sittings for one–third of the total sittings and thereby analogously by operation of law, vacating their seats in Parliament. A dissolution of Parliament is distinguishable from the instance of the members who missed the sittings since there could be reasons advanced for the absences. As for the dissolution of Parliament, it means that Parliament scheduled for a specified term, has ended. It would, therefore be nonsensical to talk about membership to none existing Parliament. In any event, what remains material in this case is the question of the Speaker to make the declaration on the vacancy of a seat in Parliament.

[111] It is found that the Constitution which is the supreme law of the land, has in clear terms provided that the power to hear and determine the question of a vacancy of a seat of a Member of Parliament vests in the High Court. No law can therefore, be interpreted to provide otherwise either expressly or by necessary implication. In any event such a law would be inconsistent with the Constitution and consequently void to that extent.

[112] In the premises, it is accordingly declared that the Speaker does not have the power to declare a vacancy of a seat of Parliament. This being a constitutionally related case, there is no order on costs.

E.F.M. MAKARA
JUDGE

I concur:

T.E. MONAPATHI
JUDGE

I concur:

S.N. PEETE
JUDGE

For the Petitioners **:** Attorney T. Mosotho

For the Respondents : Adv. G.H. Penzhorn SC assisted Adv. R.A. Suhr
Instructed by Webber Newdigate