

**IN THE CONSTITUTIONAL COURT OF LESOTHO**

**HELD AT MASERU**

**CC 07/2017**

**In the matter between:**

**MACHESETSA MOFOMOBE  
MOHATO SELEKE**

**1<sup>st</sup> APPLICANT  
2<sup>nd</sup> APPLICANT**

**vs**

**MINISTER OF FINANCE  
ATTORNEY GENERAL**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

**AND**

**In the matter between**

**CC 08/2017**

**HAAE PHOOFOLO KC  
CHIEF JOANG MOLAPO**

**1<sup>st</sup> APPLICANT  
2<sup>nd</sup> APPLICANT**

**vs**

**THE RIGHT HONOURABLE PRIME  
MINISTER (OUT-GOING)  
THE COUNCIL STATE  
HIS MAJESTY KING LETSIE III  
THE ATTORNEY GENRAL  
THE MINISTER OF FINANCE**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT  
3<sup>rd</sup> RESPONDENT  
4<sup>th</sup> RESPONDENT  
5<sup>th</sup> RESPONDENT**

**JUDGMENT**

**Coram:     Hon. J. T. M. Moiloa ACJ  
              Hon. S. N. Peete J.  
              Hon. L. A. Molete J.  
              Hon. E. F. M. Makara J.  
              Hon. K. L. Moahloli AJ.**

**Date of hearing:** 31 March 2017  
**Date of judgment:** 3 April 2017

### *Summary*

*On the 23<sup>rd</sup> March 2017, the applicants in the above cases respectively brought constitutional applications before the Constitutional Court. The two applications were by the consent of all the parties consolidated into one case and subsequently heard and argued as one on the 27<sup>th</sup> March 2017. The approach was adopted as a result of realization of the common material facts and the common issues of law that required determination by the court. The Judge presiding determined to assemble in full Court of 5 Judges to hear the consolidated applications. In a nutshell, the cases were primarily on the interpretation of **Section 83 (4) (b), Section 110, Section 113 and Section 91(1) of the Constitution** concerning specifically the lawfulness of the decision of the King to dissolve Parliament acting in accordance with the advice of the Prime Minister (PM). This followed the passing of a Vote of No Confidence against the Government of Lesotho. The **Section 83(4) (a)** provides that following the passing of the Resolution of No Confidence by the National Assembly, the PM has a 3 days limited option to resign from office or advice for a dissolution of Parliament. The authority to dissolve Parliament vests in the King in terms of **Section 83 (1)**. **Section 83 (4) (b)** provides that if the PM does not resign or advise for a dissolution, the King could, acting on the advice of the Council of State, dissolve Parliament.*

*Whilst the motion on the Vote of No Confidence was pending, the Minister of Finance sought to present the estimates for the new financial year 2017 – 2018 but was obstructed from doing so by the Opposition which insisted that the its motion be firstly attended to. Thus, the estimates were not tabled and, therefore, not passed by Parliament. This created a controversy on whether Section 113 of the Constitution read with Section 18 of the of the Public Financial Management Accountability Act (PFMA), allowed the Minister to utilize from the consolidated fund, one – third of the estimates for the **proceeding year**.*

*Held:*

- 1. The King acted lawfully in dissolving Parliament pursuant to the advice which he received from the PM within the 3 days limitation after the resolution was passed. This dispensed with need for him to consult with the Council of State over the matter;*
- 2. The PM was despite the resolution, qualified under the section to advise for the dissolution since to avoid a vacuum in that office, it still recognizes him as the PM though an outgoing one;*
- 3. A purposive interpretation of Section 113 of the Constitution read with Section 18 of the PFMA reveals that in the public interest they allow the Minister to authorize the withdrawal of one – third of the estimates for the proceeding (current) fiscal year, to avoid a national a shutdown of the State functions.*

## **ANNOTATIONS**

### **Legislation**

1. High Court Rules 1980
2. Constitution of Lesotho, 1993
3. Public Management Accountability Act, 2011
4. Standing Orders National Assembly
5. Interpretation Act 1977

### **Cases**

1. Sekoati vs President of Court Martial (1995-1999) LAC 812

### **Text Books**

1. Concise Oxford English Dictionary (10<sup>th</sup> Edition Revised)
2. Interpretation of Statutes: Prof. Devenish

## [1] **INTRODUCTION**

On the 23<sup>rd</sup> March 2017 two Constitutional Applications were lodged in court intended for hearing by the court on 27<sup>th</sup> March 2017. One was by Mr. Mofomobe (CC 07/2017) and the other by Mr. Phoofolo (CC 08/2017).

Upon a quick perusal of the applications it became apparent that they traversed very similar territory. The court proposed to parties that the two applications may be suitable for consolidation on account of commonality and overlapping of relief sought and legal principles involved.

Fortunately, Counsel for the parties agreed with our observation. Accordingly CC 07/2017 and CC 08/2017 were consolidated and heard as one for purposes of determining them.

[2] **URGENCY**

Noting that both matters which were of constitutional importance we invited Counsel to explore with us the possibility of utilising **Rule 32 of the High Court Rules** in order to expedite a swift determination of these matters before court. Parties readily accepted our proposal and sought to agree on the Stated Special Case to be placed before court for determination. In the case of CC 07/2017 the parties managed to agree on the nature and content of the Stated Special Case both on the facts and the formulation of the question for adjudication by the court. The facts were agreed and stated as follows hereunder:-

**FACTUAL MATRIX**

1. The parties are as described in paragraph 1, 2, 6 and 7 of Mr. Mofomobe's Founding Affidavit.
2. On 24<sup>th</sup> February 2017 the National Assembly of the 09<sup>th</sup> Parliament of Lesotho reconvened following its adjournment *sine die* on 22<sup>nd</sup> November 2016.

3. Having caused to be prepared the Estimates of Revenue and Expenditure for the Financial Year 2017/2018, the Minister of Finance through his Principal Secretary delivered those to the Speaker on 24<sup>th</sup> February 2017 for distribution, as is customary, to the Members of the House upon completion by the Minister of his address to the House on 27<sup>th</sup> February 2017.
4. The Speaker then through the Clerk of Parliament caused the presentation of the Budget to be set down on the Order Paper pursuant to Standing Order 19(2).
5. In her remarks on the 24<sup>th</sup> February 2017, The Speaker of National Assembly informed the House that Monday 27<sup>th</sup> February 2017 would be Budget Day.
6. In the National Assembly Order Paper for the 27<sup>th</sup> February 2017 a Motion of the Financial Policy by the Minister of Finance was included. A copy of the Order Paper is annexed and marked "A".
7. On the 27<sup>th</sup> February 2017 the National Assembly did sit but other than a prayer, failed to conduct its business in terms of the Order Paper for the day. This was for reasons that appear from Hansard, a copy of which is annexed hereto marked "B".

8. In particular, the House was adjourned without the Minister of Finance having moved the Motion of Financial Policy.
9. In the subsequent sittings of the National Assembly after the 27<sup>th</sup> February 2017, the Motion of the Financial Policy was not included in the Order Paper.
10. On 1<sup>st</sup> March 2017 the National Assembly passed a Motion of No Confidence in the Government of Lesotho. Subsequent to this motion the 09<sup>th</sup> Parliament of Lesotho was dissolved with effect from 6<sup>th</sup> March 2017.
11. The 09<sup>th</sup> Parliament of Lesotho was dissolved without the Motion of Financial Policy having been moved.
12. **THE ISSUE FOR DETERMINATION**

**A. Re: Mofomobe & Another vs Minister of Finance & Another  
CC 07/2017**

Whether on the basis of the afore-going facts the Minister of Finance may authorise the withdrawal from the Consolidated Fund in terms of **Section 113 of the Constitution read with Section 18 of the Public Financial Management Accountability Act 2011.** Accordingly it is primarily **Section 113 of the Constitution read with Section 18 of Public Management Accountability Act 2011.**

**B. Re: Phoofolo & Another vs Prime Minister & Others CC 08/2017**

Whether in terms of **Section 83(4)(b) of the Constitution**, The King acted constitutionally by acceding to the advice of the Prime Minister on 3<sup>rd</sup> March 2017 to dissolve Parliament after the National Assembly passed a Vote of No Confidence in the Government of Lesotho on 1<sup>st</sup> March 2017.

- [3] Although parties in the CC 08/2017 failed to agree on the special Case for Adjudication, fortunately the facts concerning the events between 24<sup>th</sup> February 2017 and 6<sup>th</sup> March 2017 remain common to both parties and are hardly disputed. In CC 08/2017 the difference between the parties is essentially one of law being the correct interpretation of **Sections 83(4), 84(1), and 84(2), 91(5), 113, 114 and 119(1) of the Constitution read with Section 18 of the Public Financial Management and Accountability Act, 2011**. Accordingly, in our opinion the lack of agreement of the form and content of the Special Case for Adjudication did not present insurmountable obstacle to us to prevent us from adjudicating on the core of the dispute between the parties in CC 08/2017.

[4] In interpreting provisions of the Constitution in particular we are enjoined to adopt a purposive and remedial approach in order to give the Constitution purpose and meaning that avoids calamitous results that could cause collapse to the State and paralysis of its functions to serve the Nation.

[5] As we have seen the events that occurred in the House on the 27<sup>th</sup> February 2017 resulted in the abort of the laying of the 2017/2018 Budget in the National Assembly. On 1<sup>st</sup> March 2017 a Resolution of No Confidence in the Government of Lesotho was tabled and passed by the House.

[6] **THE LAW**

On 03<sup>rd</sup> March 2017 the Prime Minister acting in terms of **Section 83(4)(b)** advised the King to dissolve Parliament.

**Section 83(4)** reads:

*“In the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister:*

Provided that:

*(a) If the Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without*

*dissolution and a dissolution would not be in the interests of Lesotho, he may, acting in accordance with the advice of the Council of State, refuse to dissolve Parliament.*

*(b) If the National Assembly passes a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution the King may, acting in accordance with the advice of the Council of State, dissolve Parliament;*

*(c) -----”  
[Emphasis is mine]*

[7] Now, it cannot be disputed that the scenario we are dealing with in both these applications is that referred to in **Section 83(4) (b)**. Pursuant to **Section 83(4) (b)** and within 3 days the Prime Minister advised the King to dissolve Parliament. The Prime Minister’s advice was accepted by the King on 3<sup>rd</sup> March 2017. In our view, because the Prime Minister acted within 3 days and did not resign but instead opted for the second option in **Section 83(4) (b)** by advising dissolution of Parliament it made it not necessary for the King to seek advice of the Council of State. The Prime Minister had acted lawfully and constitutionally in tendering his advice to His Majesty the King. Had the Prime Minister failed to resign or to advise dissolution within 3 days, the King would have been obliged to seek the advice of the Council of State. In the circumstances disclosed by

material facts of this case we are of the opinion that His Majesty the King acted correctly and constitutionally in accepting the Prime Minister's advice to dissolve Parliament.

- [8] In terms of prayers 2.4 in CC 08/2017 the Court is asked to declare as unconstitutional and/or unlawful the decision of the King to accept the advice of the Prime Minister which he accepted without seeking the advice of the Council of State. I observe in passing that prayers 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11 and 2.12 are in repetition and/or amplification of prayer 2.4. We have already held above that these prayers cannot be sustained in law and they are accordingly refused.
- [9] Averments in the Founding Affidavit of Mr. Phoofolo supported by Chief Joang Molapo in CC 08/2017 allege that the King acted irrationally. This allegation is extraordinary for ordinarily such allegation connotes imputation of dishonourable motives on the part of the person being accused of irrationality yet no facts are placed before us by the deponents of these affidavits to establish such alleged fact of irrationality. The burden of proof is on them to substantiate these distasteful allegations. Yet nothing in the form of concrete facts is placed before us in support this serious allegation. In any case they fly in the face of the *maxim omnia rite esse acta praesu muntur* and of the presumption of constitutionality and legality of official acts. See **Devenish:**

**Interpretation of Statutes.** We conclude that this allegation in the Founding Affidavits of these Applicants are without substance in the light of the exposition of the law just made above. In any case they fly in the face of the provisions of **Section 91(5) of the Constitution of Lesotho** which reads:

*“91(5) Without prejudice to the generality of **Section 155(8) of this Constitution**, where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into in any Court.”*

After drawing Mr. Ndebele and Mr. Rasekoai counsel for Applicants to this Section and **Section 119** on the first day of hearing they still persisted with allegations that the King acted irrationally and for less than honourable reasons although Mr. Rasekoai later back-paddled somewhat later to say that he submitted that the King had acted on the advice of a wrong person or authority. In this sense he urged on us to hold that the King had acted on the advice of outgoing Prime Minister instead of the Council of State. But what was urged on us by both of them for Applicants was that the King acted irrationally and should be reviewed and corrected for that reason. Applicants alleged that the King’s decision to dissolve Parliament was premised on ill-driven and/or irrelevant advice. In any case as we have explained above **Section 83(4)(b)** does

not prescribe that the King ought to act with the advice of Council of State if he is advised to dissolve Parliament following passing of No Confidence Motion in the National Assembly if he tenders his advice within 3 days. On the contrary it is clear that if the King receives advice of the Prime Minister within 3 days of a Resolution of No Confidence by the National Assembly and he advises the King to dissolve Parliament, the King will act in accordance with the advice of the Prime Minister alone. We are fortified in this view by **Section 87(5) of the Constitution** which reads”

*“87(5) The King may, acting in accordance with the advice of the Council of State, may remove the Prime Minister from office –*

*(a) If a resolution of no confidence in the Government of Lesotho is passed by the National Assembly and the Prime Minister does not within three days thereafter, either resign from his office or advise a dissolution of Parliament;”*

This section is more clearly and elegantly drafted than **Section 84(4)(b)** to reflect the intention of the Constitution makers in the circumstances where a vote of no confidence in the Government of Lesotho is passed by the National Assembly.

[10] The case hinges primarily upon the interpretation of **Section 83 (4) (b)** which as we have already observed, is repeated more clearly under **Section**

**87 (5) (a)**; the counsel involved did not refer the Court to any case law in which the sections were interpreted. Thus, the Court was left on its own to look for precedence for guidance. Appreciably, this could be because there could be no such precise precedence. This could be attributable to the fact that normally similar political challenges are peacefully resolved through conventions. However, the Court received relative guidance from the **Doctoral Thesis of Luke Dalli** in postulating over the interpretation assigned to a provision in the **Constitution of Malta** which is written in *pari materia* terms with section **83 (4) (b) and 87 (5) (a)**. The relevant provision in that **Constitution is Article 76 (5)**. It reads:

“In the exercise of his powers under this article the President shall act in accordance with the advice of the Prime Minister: Provided that:

*(a) If the House of Representatives passes a resolution, supported by the votes of a majority of all the members thereof, that it has no confidence in the Government, and the Prime Minister does not within three days either resign from his office or advise a dissolution, the President may dissolve Parliament<sup>1</sup>”.*

In analysing the Article, the author synthesized that:

*“Such uncommon situations, where the President is given discretionary power and can act on his own initiative when deciding, are addressed by Article 76 (5)*

---

<sup>1</sup> The Constitution of Malta of 1964 as amended in 1974

*(a) of the Constitution which endows the President with the power to dissolve Parliament following a vote of “no confidence” by the same House of Representatives against the government. If, subsequently, after three days, the Prime Minister has not yet resigned or advised dissolution, the President has the constitutional duty to dissolve Parliament on his own initiative<sup>2</sup>”.*

[11] We subscribe to the above interpretation save that in the case of a Constitutional Monarch (as in our situation), the king cannot act on his own initiative. He is throughout the scheme of the Constitution obliged to act in accordance with the advice of a prescribed official of the State or some Council. This is underscored in the saying that the King does not err but is caused to err by his adviser (s). (*Motlotlehi ha a fose oa fosisoa*) – hence the wisdom in Section 91 (5).

[12] As regards **Section 91(5)** the words “enquire” in that subsection is to be purposively interpreted to determine the nature and scope of its meaning. In our view it is sufficiently wide to cover a decision of the type that the Prime Minister tendered to him on 3<sup>rd</sup> March, 2017. This court does not have competence to demand from the King production of Minutes of his meeting with the Prime Minister and to disclose the nature of the advice given to him by the Prime Minister. It is simply absurd to do so in the face of a clear and unambiguous instruction of **Section 91(5)**. It cannot

---

2 Dalli L, The President and the Prime Minister of Malta: A Way Forward @ 13

be done. In terms of **Section 91(5)** we certainly are precluded from doing so.

[13] **IN RE: MOFOMOBE APPLICATION CC 07/2017**

It will be remembered that in this application the question for our answer is whether on the basis of the agreed facts of that case the Minister of Finance may authorize withdrawal from the Consolidated Fund in terms of **Section 113 of the Constitution read with Section 18 of the Public Finance Management and Accountability Act, 2011.**

[14] Chapter X of the Constitution deals with finance provisions. In this Chapter is found *inter alia* Section 110 which establishes the Consolidated Fund. It reads:-

*“110. All revenues or other moneys raised or received for the purposes of Government of Lesotho (not being revenues or other moneys that are payable, by or under an Act of Parliament, into some other fund established for any specific purpose or that may, by or under such an Act, be retained by the authority that received them for the purpose of defraying the expenses of that authority) shall be paid into and form a Consolidated Fund.”*

[15] **Section 91 (5) of the Constitution** delineates the jurisdiction of the Court over matters concerning its competency to inquire into the consultations made by the King before acting. It decrees:

*“Without prejudice to the generality of section 155 (8) of this Constitution, where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be **enquired** into in any court”.*

*(Court’s emphasis)*

- [16] The word “*enquire*” is of significance in the section since it is the one which has a telling effect on the competency of the court in the matter. Ordinarily, the words “*enquire into*” which are employed in the section, mean to investigate or to ask about. The meanings should consequently be harmonised with the section by being given a purposive interpretation to determine the nature and scope perceived therein. In our view, the meaning is sufficiently wide to cover the advice that the Prime Minister tendered to the King on 3<sup>rd</sup> March, 2017. Its effect is that it specifically, through a consideration of the verb “enquire”, disables this Court from ordering the King to produce the minutes of his meeting with the Prime Minister and to disclose the nature of the advice given to him by the Prime Minister. The perceived order would go against the contemplation of **Section 91 (5)** and thereby occasioning absurdity. We accordingly decline to make the order sought.
- [17] **Section 111** regulates withdrawals from Consolidated Fund or other public funds. **Section 112** provides for authorisation of expenditure from

the Consolidated Fund by appropriation. **Section 113** provides for authorisation of expenditure in advance of appropriation. While all of the above duties are important, it is **Section 113** that is of particular interest to us in this case for our purposes now. **Section 113** reads as follows:-

*“113. Parliament may make provision under which, if it appears to The Minister for the time being responsible for finance that the Appropriation Act for any financial year will not come into operation by the beginning of that financial year, he may authorise the withdrawal from the Consolidated Fund of moneys for the purpose of meeting expenditure necessary to carry on the Government of Lesotho in respect of the period commencing with the beginning of that financial year and expiring four months thereafter or on the coming into operation of the Act whichever is the earlier:*

Provided that:-

- (a) *the moneys so authorised to be withdrawn in advance of the Appropriation Act for any financial year shall not exceed in total one third of the sums included in the estimates of expenditure for the proceeding financial year that have been laid before the Assembly;*
- (b) *no sums shall be so authorised to be withdrawn to meet expenditure on any head of expenditure in that financial year if no sums had been*

*voted to meet expenditure on that head of expenditure in respect of the preceding financial year; and*

*(c) any moneys so withdrawn shall be included, under separate votes for the several heads of expenditure in respect of which they were withdrawn, in the Appropriation Act.”*  
[Emphasis is mine]

[18] “Financial year” is defined in the **Interpretation Act 1977** to mean the period commencing on the 1<sup>st</sup> April in any given year and ending on the 31<sup>st</sup> March of the immediately succeeding year. But the phrase “preceding financial year” is not defined. Does it mean “preceding year” or the year in which the Minister realises he cannot have the estimates for the next year in time passed and authorised by Parliament.

[19] **Section 113 of the Constitution** is an enabling section that essentially empowers Parliament to make provision for funds to be made available in order for the Government of Lesotho to carry on should it appear to the Minister that an Appropriation Act cannot be passed by the beginning of any financial year.

**Section 113 of the Constitution** is mirrored in **Section 18 of the Public Financial Management and Accountability Act, 2011** enacted by Parliament. It provides that:-

*“18 If it appears to the Minister that an Appropriation Act for any financial year will not come into operation by the beginning of the financial year, the Minister may approve withdrawals from the Consolidated Fund in accordance with **Section 113 of the Constitution.**”*

[20] **Section 18 of the Public Financial Management and Accountability Act** then comes into play when for any reason, the usual budgetary process contemplated by **Section 112 of the Constitution** cannot take its normal course and the Minister forms, as a result of such circumstances, an opinion that it will not be possible for Parliament to pass an Appropriation Act before the commencement of the new financial year. In the instant case it has not been suggested that the Minister cannot form such a necessary opinion. But it is contended by Applicants nevertheless that the Minister cannot act on **Section 18**.

[21] It seems to us that on a proper purposive construction of **Section 113 of the Constitution** read together with **Section 18 of the Public Financial Management and Accountability Act** the following is intended:-

- Should it appear to the Minister that an Appropriation Act will not be passed by the beginning of the financial year, then he may authorise withdrawals from the Consolidated Fund for the purpose of carrying on the functioning of the Government of Lesotho.

- Such withdrawals are limited to a period of four months from the beginning of financial year or for a shorter period if an Appropriation Act is passed before the expiry of the four months period.
- The amount of such withdrawals are limited to one third (1/3) of the amounts that have been laid before the National Assembly for the proceeding year.
- The amounts so withdrawn are further limited in that they must have been also be included now the heads of expenditure for the immediately previous Appropriation Act.
- In due course the amounts that have been withdrawn must be included in the Appropriation Act that is passed in respect of the current financial year.

[22] Ordinarily words in any statute must be given their ordinary grammatical meaning unless such construction leads to absurdities. We agree that for the purposes of interpreting the Constitution a broad and purposive approach is required that avoids “the austerity of tribulated legislation” as it was put in the **Sekoati vs President of Court Marital (1995-1999) LAC 812 @ 822**. We also agree that the intent and purpose of **Section 113 of the Constitution and Section 18 of the Public Financial Management Accountability Act** are that the trigger empowering the

Minister to act is the view or opinion (“appears to”) of the Minister that an Appropriation Act will not come into operation by the beginning of the financial year. That is the *sine qua non* empowering the Minister.

[23] In recognition of the applicability of the purposive interpretation, it transpires to us that Section 113 of the Constitution read with Section 18, should be constructed in such a manner that it would advance the best interests of the realm and its citizens. This must be premised on the recognition that the Constitution uncompromisingly contemplates the continued existence of Lesotho as a fully functional sovereignty under a democratic Government which throughout commands a majestas enabling it to provide services to all people who may need them<sup>3</sup> and continue to transact with the world at large. In that context, **Section 113 of the Constitution and Section 18 of the Public Financial Management and Accountability Act**, should be visualized as legislative measures to rescue the country from ever experiencing a paralysis of the State due to the failure to have the financial estimates for the next financial year passed. It is for the same reason that though the Constitution of the United States of America empowers Congress to cause a Government shutdown the essential services funded from the Federal Reserve would still be provided to mitigate the harshness of that extra ordinary measure.

---

<sup>3</sup> These at least include health, safety, security and unforeseen emergency services.

[24] It startled our minds when the Counsel for the applicants in the **Phoofolo case** convictionally argued that the this Court commands no jurisdiction to seek to circumvent the obvious catastrophic consequences which would be occasioned by the granting of an order restraining the Minister to authorize the withdrawal of one- third of the estimates for the proceeding (current) year. In support of their proposition they warned that unlike in the Constitution of South Africa where under Section 172 (1) (b) (ii), the Court has the power to make a just and equitable order, there is no such constitutional power bestowed upon this Court.

[25] Whilst we recognize that our Constitution does not have an express provision for the Court to make a remedial order, we conjecture from the letter, spirit and purport of our Constitution that under exceptionally deserving circumstances, this Court has an inherent jurisdiction to make a just and equitable remedial order. This rhymes with a sense of right, reason and realism for the Court to save the Country from descending into an abyss of chaos to sustain its sovereignty and functionality throughout. In **Black Sash Trust & Anor v Minister of Social Development & 6 Ors**<sup>4</sup> the Court pro actively allowed a contract which it had earlier pronounced as invalid and unconstitutionally concluded to continue. It went further to even suspended its order of invalidity. This judicial

---

<sup>4</sup> CCT 48/2017 @ 26

ingenuity was done to save what was described as a measure to avoid a breach of the right of millions of people to social assistance<sup>5</sup>. In that case, we recognise the wisdom which inspired the purposive oriented pro activism intended to save multitudes of souls. In the present case, even if there was no constitutionally sanctioned remedial discourse, the Court would interpretationally develop the Constitution to bring some salvation to the nation. Judicial wisdom would never in the best interest of the citizens countenance a paralysis of the basic Government services and risk an international perception of the Kingdom as a failed State. The Judiciary owes its loyalty to the country and the nation.

[26]In the present matter Applicants contend that the lodging of the estimates of expenditure with the Speaker does not constitute “laying before Assembly” as intended by Section 113. On the other hand Respondents contend that it did not amount to laying before the Assembly “as contemplated by the Standing Orders of the Assembly. According to Respondents objectively viewed the estimates which were prepared by the Minister for consideration of the Assembly but was frustrated from presenting on the 27<sup>th</sup> February, serve to determine the one third limitation provided for in the proviso (a) to **Section 113**. In our view “laying” or “tabling” before the National Assembly is a process which

---

<sup>5</sup> Ibid @ para 43

commences with the lodgement of the document for discussion by Members in Parliament.

[27] What does “proceeding financial year” mean in **Section 113(a)**? The Concise Oxford Dictionary (10<sup>th</sup> ed.) has the following meaning for this word: “begin a cause of action; go on to something; carry on or continue; move forward.” Our view is that proceeding financial year is the year which will move forward across the cut off date being 31 March 2017. In other words it refers to the financial year 2016/2017 and not 2017/2018 financial year.

[28] The applicants in the **Mofomobe case** proposed that the harshness of Government shutdown would be circumvented by an order that Parliament be reinstated for it to specifically deliberate on the estimates to end the impasse. We hold that we lack jurisdiction to prescribe agenda for Parliament since we cannot enforce its compliance. That would undermine the Separation of State Powers and constitute an unwarranted interference with the prerogative of Parliament. **Section 113 of the Constitution** read with **Section 18 of the Public Financial Management and Accountability Act**, provides for an interim solution in the existing circumstances of this case.

[28] **CONCLUSION**

In the result the following orders are made:

1. **IN RE CC 07/2017: (MOFOMOBE)**

The Court declares that the Minister of Finance may authorise the withdrawal from the Consolidated Fund in terms of **Section 113 of the Constitution** read with **Section 18 of the Public Financial Management Accountability Act 2011** not exceeding in total one-third of the estimates of the last financial year (2016/2017). Mofomobe application must therefore fail.

2. **IN RE CC 08/2017 (PHOOFOLO)**

Prayers 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10 and 2.11 are hereby refused.

3. This matter being one of some constitutional importance, the court determines that there will be no order as to costs.

---

---

**J. T. M. MOILOA**  
**ACTING CHIEF JUSTICE**

I agree

---

**S. N. PEETE**  
**JUDGE**

I agree

---

**A. L. MOLETE**  
**JUDGE**

I agree

---

**E. F. M. MAKARA**  
**JUDGE**

I agree

---

**K. L. MOAHLOLI**  
**ACTING JUDGE**

For Applicants: CC 07/2017 – Mr. T. Mosotho (Instructed by Mosotho Attorney)  
Assisted by S. O. Selikane

For Applicants: CC 08/2017 – Adv. Ndebele with him Adv. Rasekoai and Adv. Makotoko

For Respondents 1, 3, 4, and 5: Adv. G. H. Penzhorn SC and Adv. Surh (Instructed by Webber Newdigate)