# IN THE HIGH COURT OF LESOTHO

**Held at Maseru**

**CONSTITUTIONAL CASE NO.14/2017**

In the matter between:

| | |
|---|---|
| **TRANSFORMATION RESOURCE CENTRE** | **1ST APPLICANT** |
| **DEVELOPMENT FOR PEACE EDUCATION** | **2ND APPLICANT** |

And

| | |
|---|---|
| **SPEAKER OF THE NATIONAL ASSEMBLY** | **1ST RESPONDENT** |
| **PRESIDENT OF SENATE** | **2ND RESPONDENT** |
| **CLERK TO THE NATIONAL ASSEMBLY** | **3RD RESPONDENT** |
| **MINISTER OF LAW, HUMAN RIGHTS AND CONSTITUTIONAL AFFAIRS** | **4TH RESPONDENT** |
| **SENATE HOUSE OF PARLIAMENT** | **5TH RESPONDENT** |
| **NATIONAL ASSEMBLY HOUSE OF PARLIAMENT** | **6TH RESPONDENT** |
| **PORTFOLIO COMMITTEE ON LAW AND PUBLIC SAFETY OF THE NATIONAL ASSEMBLY** | **7TH RESPONDENT** |
| **HIS MAJESTY KING LETSIE III** | **8TH RESPONDENT** |
| **ATTORNEY GENERAL** | **9TH RESPONDENT** |

**CORAM**: **T.S. MONAPATHI J.**

**M. MAHASE J.**

**S.P. SAKOANE J.**

**HEARD**: **10 AUGUST, 2017**

**DELIVERED**:

## SUMMARY

Application by unincorporated associations challenging refusal by Parliament to afford them opportunity to make representations about a bill – bill passed by National Assembly but rejected by Senate – whether the bill should have been reconsidered by National Assembly before being sent for Royal assent – *locus standi* of applicants to impugn the legislative process and enactment of bill into an Act – Constitution, sections 20, 78, 80 and 81(1).

**ANNOTATIONS:**

CASES CITED:

LESOTHO

Development For Peace And Another v. Speaker of National Assembly And Others, Constitutional Case No.5/2016

Lesotho Human Rights Alert Group v. Minister of Justice LAC (1990-94) 653

NAMIBIA

Federal Convention of Namibia v. Speaker, National Assembly of Namibia And Others 1994(1) SA 177 (NmHC)

Parents' Committee of Namibia And Others v. Nujoma And Others 1990(1) SA 873 (SWA)

SOUTH AFRICA
Ex-TRTC United Workers Front v. Premier, Eastern Cape Province 2010 (2) SA 114 (ECB)

UNITED KINGDOM
Attorney General v. Dumas [2017] UKPC 12

Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v. The Vernon J. Symonett M.P. And 7 Others (Bahamas) [2000] UKPC 31

UNITED NATIONS
Marshall v. Canada (205/86)

ZIMBABWE
Retrofit (PVT) Ltd v. Posts And Telecommunications Corporation (Attorney-General of Zimbabwe Intervening) 1996 91) SA 847 (ZSC)

STATUTES:
Constitution of Lesotho, 1993

Local Government Elections (Amendment) Act No.5 of 2016

TREATIES:
The International Covenant On Civil And Political Rights (1966)

BOOKS;
Basu's Commentary On The Constitution Of India 7th Edition Volume G

Ely J.H. (1980) Democracy and Distrust: A Theory Of Judicial Review (Massachusetts: Harvard University Press)

Hogg P.W. Constitutional Law of Canada 3rd Edition (Supplemented) Volume I

Palmer V.V. and Poulter S.M (1972) The Legal System of Lesotho (Virginia: Mitchie)

# JUDGMENT

**SAKOANE J:**

## I. INTRODUCTION

[**1**] The applicants are civil society organizations engaged in the noble cause of strengthening democracy through public participation in governmental processes. They use the strategies of mobilizing communities through *pitsos* (public gatherings) and by encouraging them to put pressure on their public representatives to heed their voices and concerns in the discharge of their various public functions.

[**2**] In *casu*, they seek public participation in the law-making process. And the particular process which caused them to litigate is the legislative process that culminated in the enactment of the **Local Government Elections (Amendment) Act No.5** of 2016.

[**3**] Their complaint is that they had an agreement with the relevant Portfolio Committee of the National Assembly charged with consideration of the Bill to make representations following public consultations. After the Portfolio Committee's agreement and observations of the public consultative process by some of its members, the Committee denied the applicants the opportunity to make representation. The applicants then

"formally lodged a petition in terms of the Standing Order No.79 to the Clerk of the National Assembly. Until today, no response has been received regarding the said complaint."[1]

[**4**] The upshot of all this is that the Bill was processed by the National Assembly without the agreed participation by the applicants. It went to the Senate which rejected it without amendments and was thereafter presented for Royal assent and subsequently enacted into law in terms of section 80 of the Constitution.

## Relief

[**5**] The relief sought is this:

> *"1. That it be declared that the **Local Government Election (Amendment) Act No.5 of 2016** was passed and enacted in a manner inconsistent with section 78(1) and (3) read with section 80(3) of the Constitution of Lesotho, and is therefore invalid.*
>
> *2. That it be declared that the 5th and 6th respondents have failed in their constitutional duty to facilitate proper public participation before passing the **Local Government Elections (Amendment) Act No.5 of 2016**, and such failure renders the Act invalid.*
>
> *3. That the order of invalidity of the **Local Government Elections (Amendment) Act No.5 of 2016** be suspended for a period to be determined by this honourable court to enable the respondents to re-pass the law in a manner consistent with the Constitution and allows for proper public participation.*

[1] Founding affidavit para 3.2

*4. Costs of suit.*

*5. Further and/or alternative relief."*

## II. MERITS

## Locus standi

[**6**] The respondents question the applicants' title to sue by arguing that they do not have a direct and substantial interest in the passing or invalidation of a statute enacted by Parliament without their participation. A similar point was taken against these applicants and dismissed by this Court in **Development For Peace Education And Another v. Speaker of National Assembly And Others** Constitutional case No.5/2016 where it held:

> "[39] In other words, for purposes of this judgment, we assume that the Applicants truly have *locus standi* not so much as juristic persons but "as a collective or associations of citizens of Lesotho" whose principal aim is to ensure peace, human rights and democratic governance, and that every citizen, either individually or collectively, has a fundamental right under section 20 of the Constitution of Lesotho to take part in the conduct of public affairs of Lesotho. It is a right that is so hallowed and so fundamental that it must be respected by all – including Parliament, the Executive and the Judiciary in Lesotho."

[**7**] With respect, I consider that the reasoning needs some refinement to the extent of it being suggested that the applicants are a collective of persons or individuals. The applicants' *locus standi* arises from the accepted

necessity that they would not as an unincorporated body be able to carry out their function of mobilizing for public participation in legislative processes effectively unless they have power to sue in their own names. Consequently, such a power is by implication provided according to their constitutions: **Parents' Committee of Namibia And Others v. Nujoma And Others** 1990 (1) SA 873 (SWA) @ 879C-H.

[**8**] The applicants are seeking to enforce an interest which they have as bodies or organizations. They do not propose to enforce the rights of any of their members which they possess by reasons of their membership of the applicants. Put differently, the applicants are not being used as a vehicle to bring a representative suit. Their *locus standi* is to pursue an interest or right stated in their respective constitutions which forms the subject-matter of these proceedings. : **Ex-TRTC United Workers Front v. Premier, Eastern Cape Province** 2010 (10) SA 114 (ECB)

[**9**] The next question is whether the applicants have *locus standi* to challenge the enactment of a law on the basis that Constitutional procedures were not followed? Put differently, is public participation in the legislative process a constitutional imperative whose denial constitutes a violation of the Constitution? This is addressed in paras 28-36 below.

## Constitutional provisions

[**10**] The constitutional provisions at play here are sections 20(1) (a), 78 and 80. They provide in relevant parts, thus:

> *"**Right to participate in government***
>
> *20(1) Every citizen of Lesotho shall enjoy the right –*
> *(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;*
>
> ***Mode of exercise of legislative power***
>
> *78(1) The Power of Parliament to make laws shall be exercisable by bills passed by both Houses of Parliament (or, in the cases mentioned in section 80 of this Constitution, by the National Assembly) and assented to by the King.*
>
> *(2) ……*
>
> *(3) When a bill has been passed by the National Assembly it shall be sent to the Senate and –*
>
> *(a) when it has been passed by the Senate and agreement has been reached between the two Houses on any amendments made to it by the Senate; or*
>
> *(b) when it is required to be presented under section 80 of this Constitution,*
>
> *it shall be presented to the King for assent.*
>
> ***Limitation of powers of Senate***
>
> *80(1) ……*
>
> *(2) ……..*
>
> *(3) When a bill, other than a bill that is certified by the Speaker as an Appropriation bill, is passed by the National Assembly and, having been sent to the Senate at least thirty days before the end of the session, is not passed by the Senate within thirty days after it is so sent or is passed by the Senate with amendments to which the National*

*Assembly does not agree within thirty days after the bill was sent to the Senate, the bill, with such amendments, if any, as may have been agreed to by both Houses, shall, unless the National Assembly otherwise resolves, be presented to the King for assent."*

***Regulation of procedure in Parliament etc***.

*81(1) Subject to the provisions of this Constitution, each House of Parliament may regulate its own procedure and may in particular make rules for the orderly conduct of its own proceedings."*

## National Assembly Standing Orders

[**11**] The following Standing Orders, relevant to the case, provide in relevant parts:

*"64* ***Procedure on Senate Messages Concerning Bills***

*(1) ……..*

*(2) ……..*

*(3) ……..*

*(4) ……..*

*(5) ……..*

*(6) ……..*

***(7) If the Senate***

*(a) has not signified its agreement to a bill, or to all amendments made by the House to Senate amendments to a bill at the expiry of the period stated in paragraphs (1) or (3) of section 80 of the Constitution, whichever may be appropriate; or*

*(b) has signified by message its disagreement to the second or third reading of a bill before the expiry of such period, the Clerk shall, unless the House resolves otherwise, forthwith present the bill to His Majesty as provided in paragraph (4) of section 80 of the Constitution.*

*54.* ***Procedure on Bills in Portfolio Committee***

*(1) ……..*

*(1) ……..*

*(2) The Committee shall consider whether the Bill warrants public hearings as contemplated in Standing Order No.75 (facilitation of public participation) and if it is resolved, the Committee shall conduct public hearings.*

*76.* ***Facilitation of Public Participation***

*The National Assembly and its Committees shall facilitate public participation in its legislative and other processes through implementing the following:*

*……..*

*(a) Conducting public hearings as when necessary;"*

## Senate Standing Orders

[**12**] The relevant Senate's Standing Orders provide that:

*"51* ***Bills Received From National Assembly***

*(1) ……..*

*(2) ……..*

*(3) The Bill shall then stand, referred to the Legislation Committee for consideration thereof for a period not exceeding* ***thirty (30) working days.****"*

*52* ***Procedure On Bills In Legislation Committee***

*(1) ……..*

*(2) ……..*

*(3) When the Committee recommends that the bill be passed with amendments, the Committee shall submit the text with all the proposed amendments and a text of the bill in which the amendments are inserted.*

*54* ***Second Reading***

*(1) ……..*

*(2) ……..*

*(3) ……..*

*(4) ……..*

*(5) When a motion for the second reading of a bill has been negatived or amended no further proceedings may be taken on that bill."*

## Submissions

[**13**] Dr. *Hoolo 'Nyane*, for the applicants, advances the following propositions:

11.1 Public participation is a constitutional right guaranteed under section 20 (1) (a) of the Constitution.

11.2 The Standing Orders of the National Assembly were adopted for the purpose of actualizing public participation in the legislative process.

11.3 This being the case, there is a constitutional nexus between section 20 and the Standing Orders of Parliament.

11.4 Failure to afford members of the public an opportunity to participate in the proceedings of its Portfolio Committee constitutes non-compliance with a mandatory constitutional procedure.

11.5 Any law enacted thereby is invalid and of no force and effect.

11.6 The invalidity and ineffectiveness also arises if a Bill passed by the National Assembly is negatived without amendments by the Senate but presented for Royal assent by the Speaker without reconsideration by the National Assembly.

[**14**] Mr. *Motiea Teele* KC counters, on behalf of the respondents, by advancing the following propositions:

12.1 Public participation is not a right but a privilege accorded by the Standing Orders.

12.2 The granting of the privilege is within the discretion of either House of Parliament.

12.3 A Bill passed by the National Assembly but rejected by the Senate without amendments can be presented for Royal assent straightaway. The reason being that there is no necessity for concurrence by the Senate before a Bill passed by the National Assembly can be certified by the Speaker and presented.

## Principles

[**15**] Section 20 (1)(a) of the Constitution mirrors Article 25(a) of the 1966 **International Covenant on Civil and Political Rights** (ICCPR) in respect of which the UN Human Rights Committee in its **General Comment** 25 is that:

> "6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government."

[**16**] The General Comment 25 goes further to state that:

> "8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association."

[**17**] From this General Comment, it becomes clear that what section 20 (1) (a) confers, is a right to participate in public affairs through elected representatives. It does not guarantee a right to directly participate in public affairs or put a corresponding duty on the elected representatives to consult or not to consult electors in the decision-making processes. The

section guarantees an opportunity for political participation by citizens and requires Government to be accountable to the electorate. A configuration of this model of democratic participation is explained in by Ely (1980) **Democracy and Distrust: A Theory Of Judicial Review** (Massachusetts: Harvard University Press) pp 77-78 to be:

> "Representative democracy is perhaps most obviously a system of government suited to situations in which it is for one reason or another impractical for the citizenry actually to show up and personally participate in the legislative process. But the concept of representation, as understood by our forebears, was richer than this. Prerevolutionary rhetoric posited a continuing conflict between the interests of "the rulers" on the one hand, and those of "the ruled" (or "the people") on the other. A solution was sought by building into the concept of representation the idea of an association of the interests of the two groups. Thus the representatives in the new government were visualized as "citizens", persons of unusual ability and character to be sure, but nonetheless "of" the people. Upon conclusion of their service, the vision continued, they would return to the body of the people and thus to the body of the ruled. In addition, even while in office, the idea was that they would live under the regime of the laws they passed and not exempt themselves from their operation: this obligation to include themselves among the ruled would ensure a community of interest and guard against oppressive legislation. The framers realized that even visions need enforcement mechanisms: "some force to oppose the insidious tendency of power to separate…the rulers from the ruled" was required. The principal force envisioned was the ballot: the people in their self-interest would choose representatives whose interests intertwined with theirs and by the critical reelection decision ensure that they stayed that way, in particular that the representatives did not shield themselves from the rigors of the laws they passed."

[**18**] In **Marshall v. Canada** (205/86), the UN Human Rights Committee had to decide whether members of a tribal society had the right, by virtue of

Article 25 (a) of the ICCPR, to attend and participate in constitutional conferences. The decision reached was that:

> "5.4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.
>
> 5.5 It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interests of large segments of the population or even the population as a whole, while in other instances it affects more directly the interests of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a)."

[**19**] What matters then is how the legal and constitutional frameworks provide for modalities of public participation. And in this regard, section 20 (1) (a) should be interpreted consistently with the jurisprudence of the UN Human Rights Committee because of Lesotho's treaty obligations. This being the position, the applicant's proposition that the section confers a

constitutional right of public participation in the legislative process is without merit and must be rejected.

[**20**] This brings us to their second proposition, namely, that the **Standing Orders of the National Assembly** (i.e. Orders No.54 and 76) provide for a peremptory procedural requirement for public participation. This proposition was rejected by this Court in **Development For Peace And Anther v. Speaker of National Assembly And Others** (supra). It rests on a fallacy that the internal rules of Parliament made pursuant to section 81 (1) have constitutional force and, therefore, any irregularity in following them is a violation of a peremptory constitutional procedure.

[**21**] This proposition raises issues which have implications for separation of powers and the jurisdiction of courts to enforce internal rules of Parliament. While courts of law are granted jurisdiction to pronounce on the constitutional validity of compliance with process by Parliament when enacting laws, they exercise no functions as regards compliance with the Standing Orders except where non-compliance constitutes a breach of the Bill of Rights and peremptory provisions of the Constitution: **Federal Convention of Namibia v. Speaker, National Assembly of Namibia And Others** 1994 (1) SA 177 (NmHC) at 191J-192A-B; **Bahamas District of the Methodist Church in the Caribbean and the Americas**

**and Others v. The Hon. Vernon J. Symonett M.P and 7 Others** (Bahamas) [2000] UKPC 31 paras 47-51; **Basu's Commentary On The Constitution of India** 7th Edition Volume G pp. 178-179.

[**22**] The hurdle that confronts the applicants is that there is no peremptory provision for public participation in the text of the Constitution. The applicants want us to read in such requirement in section 20 (1) (a). But as earlier indicated, this section does not guarantee public participation in the sense contended for. Thus, our Constitution differs from that of South African which specifically provides for public participation.

[**23**] Reading in public participation would, in this context, be tantamount to devination and not an interpretative process that respects the language in the written text of the Constitution. For this reason, the proposition stands to be rejected.

[**24**] The only proposition remaining is that denial of public participation under the Standing Orders renders the legislative process and ensuing laws unconstitutional. This proposition rests on the reasoning that the public participation procedure provided under the Standing Orders is also part of the peremptory constitutional procedures under sections 78 and 80 of the Constitution.

[**25**] The Standing Orders vest Portfolio Committees with powers to make a determination as to the necessity to invite public participation or consultation when processing Bills. If and when a promised opportunity is denied after such determination, the remedy lies in Parliament as any such grievance is not justiciable in courts of law for the reason that Parliament is the master of its internal proceedings. Public consultation does not render the process an external one as to make it reviewable by members of the public on the traditional grounds of illegality irrationality and procedural impropriety. The remedy lies in the political process and not the judicial process.

[**26**] By vesting Parliament with powers to regulate its own procedure and to make Standing Orders in that regard under section 81 (1), the Constitution does not thereby deprive Parliament of the power to regulate its own affairs. And as put in the **Bahamas District** case (supra) at para 51 – "Clearer language would be required before it would be right to construe this provision as having the far-reaching effect of opening up to court scrutiny the procedures followed in Parliament on all Bills, motions and petitions initiated by members."

[**27**] Standing Orders No.54 and 76 are internal rules of parliamentary procedure. They are couched in language which makes them directory and not mandatory. Thus, failure to follow them would not invalidate the resulting statute: Hogg P.W. **Constitutional Law of Canada** 3rd Edition (Supplemented) Volume I 12-14.

## Do applicants have standing to challenge the law?

[**28**] Having found that public participation is not a constitutional imperative, I turn to the inquiry whether the impugned Act was passed and enacted in compliance with the constitutional procedures under sections 78 and 80.

[**29**] This inquiry brings us back to the issue of applicants' *locus standi* to challenge the law. If they do not have *locus standi*, *cadit quaestio*. While they have *locus standi* to sue in pursuit of their stated objects and functions, challenging the constitutionality of a law is a different kettle of fish. A corporate body and an unincorporated voluntary association, just like natural persons, do not have:

> "…. *locus standi* in *judicio* to seek redress for a contravention of the Declaration of Rights other than in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. Put otherwise, a constitutional right that invalidates a law may be invoked by a person affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law…. The exception is where the person is the accused in a prosecution for

> breach of the law." (**Retrofit (PVT) Ltd v. Posts And Telecommunications Corporation (Attorney-General of Zimbabwe Intervening**) 1996(1) SA 847 (ZSC) at 854 D-F)

[**30**] The applicants' contention is that they are acting in the public interest. The respondents counter by submitting that this is tantamount to exhumation of *actio popularis* which was ceremoniously buried in **Lesotho Human Rights Alert Group v. Minister of Justice** LAC (1990-94) 652

[**31**] Since the contention by the applicants is at odds with principle and for that reason rejectable, the only remaining leg that they can possibly stand on is that of rule of law review in relation to alleged non-Bill of Rights unlawful constitutional action. This leg rests on section 2 of the Constitution 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."

[**32**] This section grants citizens a legitimate interest in upholding the Constitution and the rule of law by invoking the unlimited jurisdiction of this Court under section 119 (I) of the Constitution. This is a proposition that the Court of Appeal of Trinidad and Tobago articulated and subsequently endorsed by the Privy Council in **Attorney General v. Dumas** [2017] UKPC 12 para 13 thus:

> "In our opinion, barring any specific legislative prohibition, the court, in the exercise of its supervisory jurisdiction and as a guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action, provided that the litigation is bona fide arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous or otherwise an abuse of the court's process."

[**33**] In my respectful view, the time has arrived to accept this proposition in this Kingdom. It stands apart from and above the principle in **Lesotho Human Rights Alert Group** as it articulates a jurisdiction which the Constitution provides post the said judgment.

[**34**] I would, therefore, accept that the applicants would have *locus standi* to challenge a law which, in their bona fide belief and as a matter of public interest, is enacted in violation of peremptory constitutional procedures.

[**35**] The case made by the applicants for impugning the Act is that following the failure by the National Assembly to consider their formal petition made in terms of Standing Order No.79 to be afforded an opportunity to make representations to the Portfolio Committee, the Bill was passed and went to the Senate. The applicants then approached the Senate which graciously afforded them the opportunity. After some debate, the question was put on

whether the Bill should be read for the second time but it was negatived. It was, thereby, killed and should not have been sent for Royal assent.

[**36**] It is contended that this constituted passing of a Bill and its enactment into law without compliance with sections 78 and 80 of the Constitution. Succinctly put, this was not the type of Bill excepted under section 80 and, therefore, could not be enacted into a law absent concurrence by both Houses of Parliament.

[**37**] I consider this challenge to be bona fide, not fanciful and grounded in a legitimate, concrete public interest capable of being reasonably and effectively disposed of. The issues raised were fully ventilated and argued before us and all parties agreed that their resolution was warranted.

## Was passing of the Bill constitutionally compliant?

[**38**] In my judgment, the proposition that all non-Appropriation Bills can only become law if passed by both Houses is an agitation for a deadlock in the passing of laws by Parliament. The proposition suggests that if the Senate rejects a Bill duly passed by the National Assembly, such a Bill must die.

[**39**] I do not think such a proposition has any merit. The equality of powers of both Houses in passing Bills is recognized under section 78 (1). But the section yields to the notion of superiority of powers of the National Assembly in those cases mentioned under section 80 (3).

[**40**] After a Bill passed by the National Assembly is sent to the Senate, the latter have thirty days within which to pass it with or without amendments. If passed by the Senate with amendments that are agreed to by the National Assembly, it is sent for Royal assent. This is the procedure under section 78 (3) (a). It envisages that the amendments by the Senate should be considered in the plenary of the National Assembly for it to make a positive resolution on them. The question of where the Bill goes thereafter is for the National Assembly to answer. The Bill can still go for Royal assent with or without an agreement on the amendments by both Houses.

[**41**] Where the Senate does not make any amendments but merely rejects the Bill, there would be no need to send it back to National Assembly to make a resolution about its fate because the National Assembly would, as it were, be *functus officio*. The Bill would be a finished product for enactment into law.

[**42**] This interpretation answers the complaint of the applicants that the Bill being the impugned law should not have gone for Royal assent before the National Assembly convening to make a resolution about its fate. I did not understand for what purpose or reason that this should be so.

[**43**] When pressed on the matter, Dr. *'Nyane* could only say that the reason is equipollence in the powers of both Houses to pass Bills under section 78 (1). But this would be to advocate for a deadlock, which deadlock can be broken by section 80 (3). In terms of section 80 (3), the National Assembly's word is final on a Bill returned with amendments by the Senate.

## III. DISPOSITION

[**44**] Since it is common cause that the Senate rejected the Bill without any amendments, there was no need for it to go for Royal assent via the National Assembly. Once received by the Speaker, hers was to provide a certificate and then dispatch it to the Royal Palace.

[**45**] The configuration of the legislative powers of both Houses under sections 78 and 80 has its constitutional genesis from Lesotho's pre-independence protectorate. It is from this history of constitutional development that the

Lesotho post-independence Parliament was designed on the British model of an elected House of Commons and an unelected House of Lords.

[**46**] The power relations between the two Houses is explained by Professors Palmer and Poulter thus:

> p. 306 "Similar in power to the House of Lords after the reforms of 1911 and 1949, the Senate had powers merely of amendment and delay. Its concurrence was not essential in the passage of legislation. When a bill was passed by the National Assembly and brought before the Senate for its deliberations, amendments could be proposed by the Senate and submitted to the National Assembly, yet if such amendments were not accepted the bill pushed on regardless, subject to appropriate delays, to the British Government Representative who would submit it to Motlotlehi for his signature."
>
> p. 306 "Secondly, under section 65[2], the Lesotho Senate is restricted to powers of debate, amendment, and delay and cannot veto bills that have passed through the National Assembly. This provision embodies the essence of the British convention now statutorily enacted in the Parliament Acts of 1911 and 1949, that the House of Lords cannot indefinitely oppose the House of Commons whenever it is clear that the latter represents the will of the Nation." (**The Legal System of Lesotho** (Virginia: Mitchie))

[**47**] The result is that the applicants' case is dismissed. I am, however of the opinion that there should be no adverse costs order because of the novel but important constitutional point raised by the applicants. During oral argument, the respondents indicated that they would not press for costs.

[2] Similar to current section 80

**Order**

[**48**] The following order is issued:

1. The application is dismissed.

2. There is no order as to costs.

_____

**S.P. SAKOANE**
**JUDGE**

I agree:

_____

**T.S. MONAPATHI**
**JUDGE**

I agree:

_____

**M. MAHASE**
**JUDGE**

**For the Applicants**: Dr. H. 'Nyane

**For the Respondents**: M.E. Teele KC