IN THE HIGH COURT OF LESOTHO,
HELD AT MASERU

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 16/2017

QHALEHANG LETSIKA	1st Applicant
KARABO MOHAU	2nd Applicant
MOTIEA TEELE	3rd Applicant
ZWELAKHE MDA	4th Applicant

and

DR KANANELO MOSITO	1st Respondent
PRIME MINISTER	2nd Respondent
MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	3rd Respondent
MINISTER OF JUSTICE AND HUMAN RIGHTS	4th Respondent
ATTORNEY GENERAL	5th Respondent
HIS MAJESTY, THE KING	6th Respondent
THE LAW SOCIETY	7th Respondent

HEARD ON: 13 DECEMBER 2017

CORAM: ANGULA, AJ RAMPAI, AJ UEITELE, AJ

JUDGMENT BY: UEITELE, AJ

DELIVERED ON: 9 FEBRUARY 2018

Judgment

Ueitele AJ

[1] I am in respectful agreement with the judgment written by my brothers in many respects. However, there is one or two material aspects on which I hold a different view or on which I wish to place a certain perspective.

The findings of the Brand Tribunal

[2] In this matter one of the relief that the applicants are seeking is an order declaring the appointment of the first respondent as unconstitutional because the first respondent does not meet the requirements of section 124(3)(b) as he is not a fit and proper to hold judicial office as contemplated in that section.

[3] The basis on which the applicants contend that the first respondent does not meet the requirements of section 124(3)(b) is the finding of the 'Brand Tribunal' that the first respondent was '*guilty of "misbehaviour" as contemplated in section 125(3) and, accordingly, that he should be removed from office in the Lesotho Judiciary.*'

[4] At the hearing of this matter, a question was posed to Mr Penzhorn (for the applicants) whether the *Hollington* rule is applicable to this case. The *Hollington* rule is to the effect that, in civil proceedings, evidence that a party to the lawsuit has previously been convicted of an offence arising out of the same facts as are at issue in the civil proceedings is not admissible. This rule of evidence is known as the

rule in *Hollington v. Hewthorn* [1943] 1 KB 587 after the mid-twentieth-century English case in which it was stated.

[5] The brief facts of that case concerned a road traffic accident in which the plaintiff's car was damaged and his son (who was driving the car) was injured in a collision with the defendant's car. The plaintiff and his son claimed damages on the ground that the collision had been caused by the defendant's negligent driving. However, before the action came to trial the son died and the father had no other witness who could give evidence of how the accident had happened. To prove that the defendant had driven negligently, the father sought to rely on (a) the defendant's conviction in the magistrates' court for careless driving at the time and place of the collision and (b) a statement made by the son to the police after the accident.

[6] At the trial the defendant called no evidence and submitted that there was no case to answer. The judge ruled that both the defendant's conviction and the son's statement were inadmissible but nevertheless gave judgment for the plaintiff on the basis that the defendant's negligence could be inferred from the position and condition of the two vehicles after the accident. On appeal, the Court of Appeal reversed that finding but held that the judge had been right to exclude evidence of the defendant's conviction and of the son's statement. As a result, the appeal was allowed and the claim failed for want of proof. As regards the exclusion of the defendant's conviction the Court, at p.595, said:

'It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything

that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant.'

[7] The rule stated in *Hollington v Hewthorn* was followed in later English decisions. See *Ingram v Ingram*, (1956) 1 All E.R. 785; *Goody v Odhams* Press, Ltd., (1966) 3 All E.R. 369; Barclays Bank Ltd. v Cole, (1966) 3 All E.R. 948. In the case of *Land Securities Plc v Westminster City Council* [1993] 4 All ER 124, Hofmann, J. (as he then was) stated at 126C:

'In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties.'

[8] In South Africa the rule has also been the subject of discussion in a number of cases. The Constitutional Court of South Africa, in the matter of *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC) where Nkabinde J said:

'[42] The main reason that the applicant wanted to have the transcript of the proceedings in the magistrate's court admitted was to persuade this Court to accept that court's conclusion that the evidence gathered during the search on the property should be excluded, and its conclusion that the applicant be found not guilty. It needs to be said that the provisions of ch 6 are not conviction-based. The findings of the magistrate as reflected in the transcript in a related criminal trial are, for the purpose of this judgment, irrelevant and may be

described as 'superfluous' or 'supererogatory evidence' because they amount to an opinion on a matter in which a Judge might, in the forfeiture application, have to decide. In any event, on the record, the applicant has admitted what was found on the property and has not sought to withdraw those admissions. Accordingly, the transcript falls to be excluded.'

[9] The rule stated in *Hollington v Hewthorn* was also, the subject of severe criticism. Thus in *Goody v Odhams* Press, Ltd., (1966) 3 All E.R. 369 at pp. 371 - 372, Lord Denning, M.R., stated

'... There is a strange rule of law which says that a conviction is no evidence of guilt, not even prima facie evidence. That was decided in Hollington v F. Hewthorn & Co. Ltd. I argued that case myself and did my best to persuade the court that a conviction was evidence of guilt. But they would not have it. I thought that the decision was wrong at the time. I still think that it was wrong. But in this Court we are bound by it.'

And Danckwerts, L.J., said in the same case, at p. 373,

'... I wish to say only that I think the law on the subject which we have been discussing has got into some queer twists and tangles.'

[10] As a result of these criticisms, the implications in the rule stated in *Hollington v Hewthorn* were referred to an English Law Reform Committee appointed to consider the law of evidence in civil cases. Pursuant to the recommendations of this committee, the rule was superseded by legislation. See secs. 11, 12 and 13 of the Civil Evidence Act, 1968. The effect of these provisions is, broadly speaking, that, in civil proceedings in the United Kingdom, the fact that a person has been convicted of an offence in the United

Kingdom is now admissible in evidence to prove that he committed that offence.

[11] It was not argued that the rule stated in *Hollington v Hewthorn* was not part of the Laws of the Kingdom of Lesotho nor were we referred to any authority to the effect that the rule is not part of the Laws of the Kingdom of Lesotho so I accept that the rule stated in *Hollington v Hewthorn is part of the* Laws of the Kingdom of Lesotho.

[12] Section 12(8) of the Constitution of the Kingdom of Lesotho in material terms reads as follows:

> 'Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be; independent and impartial and where proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.' (Underlined for emphasis)

[13] What is therefore clear from section 12(8) of the Constitution is the fact that, it is the duty of a court to form its own opinion on the basis of the evidence placed before it; and that it would not be proper for the court in forming that opinion to be influenced by the opinion of someone else (including a judge sitting in another matter), however reliable that person's opinion is likely to be. I am therefore of the view that in so far as the applicants placed before us the findings of the "Brand Tribunal" as proof that the first respondent is not a fit and proper person to be appointed to Lesotho Judiciary is inadmissible.

[14] But does the fact that the findings of the 'Brand Tribunal' are inadmissible as evidence in this proceedings lead to a conclusion that the applicants have failed to make out a case for the relief they seek. I do not think so. I say so for the following reason. In the second prayer to the Notice of Motion the applicants seek an order reviewing and setting aside the second respondent's decision to recommend to His Majesty the King the appointment and the subsequent appointment of the first respondent as President of the Appeal Court of the Kingdom of Lesotho, because so the applicants contend, that decision is unlawful and unconstitutional.

[15] Section 124 (1) of the Constitution of the Kingdom of Lesotho provides that the President of the Court of Appeal shall be appointed by the King on the advice of the Prime Minister. Mr Letsika who deposed to the affidavit on behalf of the applicants had the following to say about the exercise of the powers by the second respondent:

> '31.8 The second respondent in making the recommendation to His Majesty clearly acted in violation of the principle of legality which is recognized as part of the Constitution and law of Lesotho. First, the second respondent misconstrued his powers in terms of section 124 (1) of the Constitution. It was his duty to make sure that the person he recommends for appointment as President of the Court of Appeal is a fit and proper person and possesses the necessary integrity required by the said office. Had he done so he would have found that the first respondent did not meet the necessary requirements for appointment as the President of the Court of Appeal in the light of his previous removal in terms of the Constitution for misbehaviour.
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> 31.9 Second, and related to the first matter discussed, it was the duty of the second respondent to have taken into consideration that the first respondent had been found to be unfit to hold office of the President of the Court of Appeal

by a constitutional tribunal referred to earlier. By failing to take this into account he acted unconstitutionally. Assuming without conceding that he considered the advice given to His Majesty previously by the Brand tribunal, he had no power to ignore the advice given to His Majesty by the tribunal and could not undo its findings merely by stroke of a pen. The Constitution sets out the circumstances under which the second respondent may make recommendations, but this does not entitle him to ignore constitutionally determined matters falling outside of his powers.

31.10 In advising His Majesty to appoint the first respondent the second respondent also acted arbitrarily, irrationally and unreasonably. There is no way in which the second respondent could have considered himself authorized to remove Mr Justice Nugent as the President of the Court of Appeal and by stroke of a pen replace him with the first respondent. Had he applied his mind he would have known that Mr Justice Nugent could only be removed after the due process set out in section 125 of the Constitution.

31.11 The power to advise His Majesty in terms of section 124 (1) of the Constitution for the appointment of the President of the Court of Appeal is not unfettered. It must be exercised in good faith and with due regard to the fact that the person to be appointed into a vacant office. The vacancy ought to have been one that came about in due course and in accordance with the Constitution and not created by him. The second respondent by purporting to remove Mr Justice Nugent, without due process set out in the Constitution, could only have acted in bad faith.'

[16] The second respondent dealt with the above allegations as follows in his answering affidavit as follows:

"Ad paragraph 31: Alleged irrationality arbitrariness, legality and irregularity

(a) Based on the assertion that my decision to advise His Majesty to appoint 1st respondent was irrational, arbitrary and unreasonable, deponent

seeks to make out a case that the recommendation of the second respondent to His Majesty was irrational. I deny this conclusion, which itself rests on a wrong understanding of the 1st respondent's fitness to hold a judicial office. It is not correct to suggest that the 1st respondent does not have the requisite integrity and professional fitness to hold the position of President of the Court of Appeal. He has no previous criminal record. Attempts by the previous government which were aimed at criminalizing him have hitherto been unsuccessful. Tax charges were trumped up by the previous government aimed at causing a dent to his professional career resulting in the appointment of a Tribunal to look into his professional life. All these did not bear any fruit.

(b) I am advised that irrationality applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. In the case relating to the 1st respondent, I considered that, the Tribunal set up to investigate his conduct, decided to proceed with rendering its advice even after the 1st respondent had resigned and ceased being the President of the Court of Appeal. I also considered that, although the actual inquiry had already been carried out so as to resolve or determine the mater, by the 1st respondent's resignation from office, the Tribunal could not make a recommendation for his removal even if the hearing had proceeded. In conclusion, the Tribunal's mandate had already been achieved to the extent that the 1st respondent had pre-empted the Tribunal's recommendation by removing himself from office by way of resignation.

(c) In terms of the actual inquiry, I was and am of the view that the same can be considered to have been frustrated by the resignation in that at the end of the inquiry, the Tribunal's recommendation for the lifting of the suspension or removal from office wold be ineffective as against the 1st respondent. Thus, the Tribunal wanted to determine a matter that had already been resolved or determined through the respondents' resignation, and thereby rendering the tribunal hearings otiose. I considered that the Tribunal was therefore determined to spend huge sums of tax payers' money on an academic exercise whose outcome would not be implementable following the 1st

respondent's resignation. I therefore concluded that the findings and purported advice of the tribunal were of no legal consequence.

(d) I aver that, the Tribunal acted in excess of jurisdiction by insisting on proceed to render the advice after the 1st respondent had resigned. How could the 1st respondent be investigated as a private individual under section 125 of the Constitution that relates to judges, following his resignation? On that first part of the gourd, I find that the Tribunal is acting in excess of its jurisdiction by insisting on proceeding against the applicant.'

[18] What the reply of the second respondent suggest is that, he has made a judgment call to reject the findings of the "Brand Tribunal" by reason of its perceived and *ultra viresness* and irrationality. This conclusion by the second respondent is not only worrisome but it is also at odds with the rule of law. The conclusion is at odds with the rule of law because no decision grounded in the Constitution or law may be disregarded without recourse to a court of law whatever reservations the affected party (in this instance the second respondent) might have about its fairness, appropriateness or lawfulness. The comments of Mogoeng CJ in the matter of *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) at p 610 para [72], when he said:

'... our constitutional order hinges also on the rule of law... To do otherwise would 'amount to a licence to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve opposite outcome lawfully, an order of court would have to be obtained.' This was aptly summed up by Cameron J in Kirland as follows:

"The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality." '

[19] I therefore echo the words of the Constitutional Court of South Africa that the rule of law does not permit an organ of state or an executive/ administrative officer for that matter to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process. For a public official to ignore irregular administrative action on the basis that it is a nullity and amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid. I therefore agree with the applicants that the second respondent misunderstood the law and therefore acted unconstitutionally. For this reason the decision of the second respondent to recommend and the ultimate appointment of the first respondent as President of the Lesotho Court of Appeal is reviewed and set aside.

[20] Having arrived at the conclusion that the second respondent has acted unconstitutional when he recommended the appointment of the first respondent as President of the Lesotho Court of Appeal I find it unnecessary to deal with the question of the removal of Judge Nugent.

[21] I therefore make the following order:

1. The decisions of the second respondent to recommend the appointment of the first respondent to His Majesty the King and his subsequent appointment as President of the Court of Appeal of Lesotho are reviewed and set aside as irregular and unconstitutional.

SFI UEITELE
Acting Judge

APPEARANCE:

On behalf of the applicants: with him Instructed by:	Adv GH Penzhorn SC Adv RA Suhr Webbers Newdigate Maseru
On behalf of the 1st – 5th respondents: Instructed by:	Adv TE Motinenga KJ Nthontho Attorneys
On behalf of the 6th respondent:	No appearance
On behalf of the 7th respondent: with him Instructed by:	Adv H Nathane KC Adv CJ Lephuthing The Law Society