

**IN THE CONSTITUTIONAL COURT OF LESOTHO
(Sitting in its Constitutional Jurisdiction)**

CONSTITUTIONAL CASE NO/27/2018

In the matter between:-

TEBELLO MOFEREFERE SENATLA

APPLICANT

AND

MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	1ST RESPONDENT
HON. MONYANE MOLELEKI M.P DEPUTY PRIME	
MINISTER OF LESOTHO	2ND RESPONDENT
HON. MATHIBELI MOKHOTHU M.P OFFICIAL	
LEADER OF OPPOSITION	3RD RESPONDENT
DIRECTOR OF THE DIRECTORATE ON CORRUPTION	
AND ECONOMIC OFFENCE	4TH RESPONDENT
ACTING DIRECTOR OF PUBLIC PROSECUTIONS	5TH RESPONDENT
ATTORNEY GENERAL	6TH RESPONDENT

AND

CONSTITUTIONAL CASE NO/28/2018

In the matter between

THABO KHETHENG	1ST APPLICANT
‘MAMPHANYA MAHAO	2ND APPLICANT
‘MAMONAHENG RAMAHLOKO	3RD APPLICANT
‘MALEHLOHONOLO NTESO	4TH APPLICANT
‘MAMOHAI QOBETE	5TH APPLICANT

AND

MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	1ST RESPONDENT
MINISTER OF JUSTICE AND CORRECTIONAL	
SERVICES	2ND RESPONDENT
HON. MATHIBELI MOKHOTHU	3RD RESPONDENT
ATTORNEY GENERAL	4TH RESPONDENT

JUDGMENT

CORAM : Honourable Mr. Justice E.F.M. Makara
Honourable Mrs Acting Chief Justice M. Mahase
Honourable Mr. Justice S.N. Peete

HEARD : 22 November, 2018

DELIVERED: 22 November, 2018

MAKARA J

[1] This judgement is sequel to an interim order made by this Court on the 7th November 2018 on the question of the constitutionality or Otherwise of the impugned Clause 10 of the Memorandum of understanding concluded by the Government of Lesotho & the Coalition of Opposition Parties. For ease of reference the memorandum reads:

The Government of the Kingdom of Lesotho shall ensure the safety of all citizens in exile and must provide adequate security for Mr. Metsing and other similarly placed exiled. Mr. Metsing and similarly placed persons will not be subjected to any pending criminal proceedings during the dialogue and reform process. The Coalition of Opposition Parties undertakes to convey the Government of the Kingdom of Lesotho's undertaking to Mr. Metsing and other persons in exile. They further undertake to persuade Mr. Metsing to return to the Kingdom of Lesotho no later than the commencement of the National Dialogue. Should Mr. Metsing not return as envisaged, the National Reform Process will nonetheless continue.

[2] It is at this stage worthwhile to be recorded that the judgment is premised upon the consolidated cases of **Tebello Senatla¹ and Thabo Khetheng and 4 Others v Minister of Law and Constitutional Affairs and Other²** a common denominator in both cases is that they were both inter alia founded upon the said constitutionality or otherwise of the clause 10 memorandum of understanding hence their consolidation.

¹ Constitutional case No: 27/2018

² Constitutional case No 28/2018

[3] In summarised terms, the focus was on the consistency of the clause with sections 18 and 19 of the constitution to the extent that the said clause 10 seeks to suspend any criminal proceedings against Honourable Mothetjoa Metsing and other similarly placed persons in exile during the national dialogue and reforms. Section 18(1) creates a right of freedom from discrimination in these words:

Subject to the provisions of subsection (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

[4] Subsection 2 complements the former proviso in these words:

Subject to the provisions of subsection 6 no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of any public office or any public authority.

[5] Section 99(3) another provision of significance in the matter. It provides:

The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

[6] On the strength of the above provisions, the parties perceived the memorandum to effectively violate the constitution in that it purports to discriminate them from Metsing MP and similarly placed persons in exile including others who are scheduled for criminal prosecution.

[7] Consequently, the court granted the interim relief by ordering that:

1. The operationalization of clause 10 be held in abeyance pending finalisation of these matters.

2. In the meantime, the parties should continue to explore possible political solution to resolve the impasse in the best interests of Lesotho and Basotho. At the end of the day solution should come from us as Basotho. Litigation may not be the precise answer.

[8] Today the 22nd November 2018 is the return date for the interim order that was granted. Against the backdrop of the national importance of controversy around the constitutionality or otherwise of the clause in question, it was resolved by the counsel in the court that this be firstly and urgently determined today and that the rest of the issues on the validity of sections 12 (2) of Prevention of Corruption and Economic Offences Act of 1999 and 46 of the CP&E 1981. To achieve the purpose it was further agreed that the court should deliver an *ex tempore* judgment later today. Thus the court reserved its right to subsequently write a comprehensive judgment in the matter.

[9] It is worthwhile also to mention that there was a mutual consensus between the counsel that clause 10 was inherently unconstitutional *ab initio* on account of its inconsistency with section 18 and 19.

Decision

[10] In the premises clause 10 is unconstitutional in as far as it undermines and is inconsistent with section 99(3) of the constitution. In principle, the court cannot compromise the exercise of powers by the Director of Public Prosecutions (DPP). The same applies to the arresting powers assigned to the police by law

and those entrusted upon the Directorate on Corruption and Economic Offences (DCEO). It can only intervene through a review against abuses of such powers or where there are unconstitutional acts.

[11] The pronouncement is however, without prejudice to the powers of the Police and the DCEO to exercise the powers entrusted upon them by the law. In this regard, even the courts do not in principle have the power to interfere with the arresting powers of the Police and the DCEO.

[12] In the meanwhile, we reiterate our suggestion that the parties should consider exploring possible political solution under the facilitation of SADC and the Christian Council of Lesotho. The latter has for decades demonstrated its ability to neutrally guide the nation under mercy of the Almighty God towards resolving politically oriented national challenges. Unfortunately, its word is hardly ever heeded to. Perhaps, it is because it comprises of members of the clergy who happen to be locals.

EFM MAKARA
JUDGE

I agree

M MAHASE
ACTING CHIEF JUSTICE

I agree

SN PEETE
JUDGE

For Applicants : Attorneys K.J Nthontho and T Mosotho

For Respondents : Adv. Seema of the DCEO