IN THE HIGH COURT OF LESOTHO
(HELD AT MASERU)

CIV/APN/184/2018

In the matter between:-

LIKELELI TAMPANE **APPLICANT**

AND

SPEAKER OF THE NATIONAL ASSEMBLY **1ST RESPONDENT**
CLERK OF THE NATIONAL ASSEMBLY **2ND RESPONDENT**
MINISTER OF PARLIAMENTARY AFFAIRS **3RD RESPONDENT**
ETHICKS, CODE OF CONDUCT, IMMUNITIES AND PRIVILEGES COMMITTEE **4TH RESPONDENT**
ATTORNEY GENERAL **5TH RESPONDENT**

JUDGMENT

CORAM : Honourable Justice Makara
HEARD : 4 September, 2018
DELIVERED: 6 September, 2018

SUMMARY

ANNOTATIONS

CITED CASES

1. Mohale Tunnel Contractors v Lesotho Security Pty Ltd CIV/APN/490/99) (CIV/APN/490/99) [2000]
2. Canada (House of Commons) v Vaid2005) page 1 of the article of Professor Muna Ndulo called 'A Sequel
3. JH Mensah v Attorney General1996 – 97]
4. Ghana Bar Associationv Attorney General[1995 -96]
5. South African National Prosecuting Authority – Democratic Alliance v The President of South Africa & Others2011] ZASCA 241
6. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)
7. R (on the application of ProLife Alliance) v British Broadcasting Corporation [2003] 2 All ER 977 (HL)
8. Nangwale v Speaker of the National Assembly & Ano (Misc. (Civil Case No1 of 2005) MWHC 80
9. Smith v Mutasa and Another (1990) LRC (Const) 87
10. 'Masefatsana Moloi v Commissioner of Police & ORS CIV/APN/203/81

11. Lekhanya and Others v Ministry of Justice and Others(CRI/APN/264/06)) [2009] LSHC 22
12. Sekoati and Others v President of the Court Martial (LT COL. G P Lekhanyane) and Others(CIV/APN/82/99) (CIV/APN/82/99) [1999] LSCA 100
13. Thabo Fuma v The Commander, Lesotho Defence Force and Others(CONST/8/2011) [2013] LSHC 68

STATUTES & SUBSIDIARY LEGISLATION

1. The Constitution of Lesotho 1993
2. Parliamentary powers and Privileges Act No.8 of 1994
3. The Declaration of Independence Action of Second Continental Congress, July 4, 1776

MAKARA J.

Introduction

[1] The present incidental case should be understood against a background of the ongoing main case in which the Applicant complains that the Respondents have violated her procedural rights. The case was scheduled to proceed for hearing on the 4th September 2018. Suddenly as the proceedings were to commence, the Respondents interjected by introducing what the Court comprehended as a point of law though it was never termed as such. In substance, the point raised was that there has been a factual development which has rendered the intended hearing of the merits of the main case an academic exercise. To substitute the point it was explained to the Court that the 4th Respondent had already proceeded with the disciplinary action against the Applicant to its finality. A clearly articulated message was that the development had taken place irrespective of the fact that the subject matter of the merits of the case was still *sub judice*.

[2] In an endeavour to evidentially demonstrate that indeed the 4th Respondent proceeded with the disciplinary proceedings, counsel for the Respondents sought to hand over to the Court a record of those proceedings. The admissibility of the record was vigorously objected to by the counsel for the Applicant who charged that the intended move was unprocedural since evidence cannot in motion proceedings be given from the bar. He then argued that the record ought to have been introduced through a notice motion which would be accompanied by affidavits with the record featuring as an annexure so that the Applicant could correspondingly answer those affidavits. In support of the point, reference was made to Rule 8 (12) and (15).

[3] It is for a comprehensiveness of a case as a whole worthwhile to be brought into perspective that the interjection which occasioned a dimensional turn under consideration, was sequel to a ruling made by the Court over a challenge mounted by the Respondents on the jurisdiction of the Court to hear the matter. The attack was based upon Section 24 of the Parliamentary powers and Privileges Act[1] which provides that:

> The president or Speaker and the Officers or the Senate or the Assembly shall not be subject to the jurisdiction of any court in respect of the exercise of any powers conferred on or vested in the President of Speaker or the Officials of Parliament by or under this act.

[1] No.8 of 1994

[4] The Respondents assigned to the section a meaning that it excludes the jurisdiction of the courts from entertaining a case emanating from the affairs of Parliament and that this would be in accord with a constitutional notion of separation of State powers into the Legislative, Executive and Judicial arms of government. This was followed by a repetitive emphasis that the configuration qualifies Parliament to exclusively manage its affairs independent of interference by the Judiciary and that this includes its exclusive competency to deal with the disciplinary cases of its members. In that context, it was stressed that Parliament was at liberty to proceed with the hearing.

[5] Intriguingly and ironically the Respondents who maintain that to traverse the merits of the case before this Court would be moot, have side by side with that legal point noted an appeal against the interlocutory ruling on jurisdiction. This would be analysed and decided upon in the subsequent relevant part of the judgment.

[6] On the other hand, the Applicant counter argued that the very nature of her complaint that the 4th Respondent has violated her procedural right warrants an intervention by this Court.

[7] The Court having had the parties ruled that it has jurisdiction over the matter. It premised its reasoning upon recognition that in principle, the Court should be reluctant to interfere in the affairs of Parliament which would be well in harmony with the theory of *Separation of Powers.* This is, however, qualified with an

underwriter that the separation is not absolute since the arrangement is elementarily intended to institutionalize checks and balances against abuse of power or authority by any of the three arms of State. It was stated that it is for that reason that the Judiciary has a constitutional authority to *inter alia* ensure that Parliament exercises its authority within the Constitution. To illustrate the point, it was, thus, overemphasized that the classical idea of *Parliamentary Supremacy* does not exist under a democratic constitution. Instead, what obtains is *constitutional supremacy*. It is for the same reason that any legislation irrespective of its origin is subject to a challenge before this Court for its compliance with *the letter, spirit and purport* of the Constitution. This is further provided for through the Section 119 of the Constitution[2], review powers entrusted upon this Court by inscribing that:

> There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law

[8] The provision is clear that under the appropriate circumstances the Court has jurisdiction to review the decisions of the Executive arm of Government.

[9] It was also reasoned that at common law a legal provision which excludes intervention of the courts must be strictly

[2]The Constitution of Lesotho 1993

interpreted in favour of a presumption that this was never the intention of the Legislature. This was well articulated by Olayinka[3] these terms:

> On what should be the attitude of the courts to ouster of its jurisdiction, the Supreme Court in Engineering Works Ltd v Danap Ltd and 1 Other urged the courts to jealously guide their jurisdiction, ouster should be compulsorily examined and should not be held to extend beyond its ordinary meaning. The efficacy of ouster provisions thus depends on the extent to which the court is prepared to allow the constriction of its powers. The courts exercise their powers of interpretation of the Constitution to protect their jurisdiction from being unnecessarily restricted. The discourse of ouster provision can only be properly undertaken where the protection of human right is given adequate attention. The courts however play prominent role in interpreting such provisions as they ensure that the enjoyment of human right is not unduly curtailed.
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> Ouster clause provision prevents a court from exercising its jurisdiction to review specified administrative decisions, and is thus an obstacle towards the protection of human right. The Courts in the exercise of their judicial review queries the authenticity of provisions ousting their jurisdiction by virtue of the judicial oversight on the decisions of the political organs. Any contrary disposition of the judiciary establishes that ouster clause provision is an absolute barrier to the enjoyment of human right. The courts are therefore expected to observe ouster clause provision to the level of compliance with the constitutional provisions. The power of the courts to review cases is however restricted through the promulgation of laws that oust the courts' jurisdiction. The judiciary is thus unable to adopt strict interpretation of ouster clause provisions where it does not enjoy independence in its composition and in discharging its activities.[4]

[10] Moreover, an ouster provision would further have to be scrutinized for its constitutionality.

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[3] Judicial Review of Ouster Clause Provisions in the 1999 Constitution: Lessons for Nigeria @ 143

[4] *Ibid*

The Issues

[11] Hitherto, legal controversies projected from the incidental case concerns the correctness or otherwise of the proposition that hearing of the main case would be academic and the procedural appropriateness of the manner in which the Respondents seek to present the said record of proceedings to the Court. This would include a dimension whether the record is intended to serve as evidence of the proceedings qualifies for admissibility.

The Decision

[12] This has to be considered against the backdrop that the 4th Respondent is said to have proceeded with the disciplinary proceedings to a conclusion on the 29th August 2018 despite the fact that the subject matter of the merits of the case was already pending before the Court. It is also of material significance that the counsel for the Respondents is on record having undertaken to prevail over his clients not to proceed with the disciplinary hearing pending a conclusion of the main case. This was made and recorded as such by the Court on the 26th August 2018. The resultant understanding was that there was recognition by both parties about the imperativeness of respecting the Court to discharge its constitutional mandate by firstly dealing with the case judiciously.

[13] It would appear logical to firstly interrogate the procedure followed by the Respondents in a move to show that the disciplinary proceedings were for whatever reason conducted and, therefore, rendered proceeding with the merits mood. In this

respect, the Court primarily acknowledges the fact that it is seized with a motion or application case and that this is a characteristically paper based mode of litigation in which a case and evidence thereof are presented through a set of papers. This was succinctly described in **Mohale Tunnel Contractors v Lesotho Security Pty Ltd**[5] where it was cautioned that in motion proceedings a party stands and falls by its papers[6]. Thus, in the instant case, the Respondents as enjoined under Rule 8 (12) to have approached the Court through a notice of motion or application accompanied by affidavits to evidence that there has been a new development that legally militates against the hearing of the merits of the case. This would have enabled the Applicant to equally respond to the contents of the founding affidavit. The Rule prescribes:

> No further affidavit may be filed by any party unless the court in its discretion permits further affidavits to be filed.

[14] Alternatively, the Respondents could have introduced the new development through the instrumentality of Rule 8 (15) which directs:

> The court hearing an application whether brought ex parte or otherwise may make no order thereon, save as to costs if any, but grant leave to the applicant to renew the application on the same papers supplemented by such affidavits as the case may require.

[15] The underlying philosophy behind the rules is to facilitate for a *fair trial*[7] between the parties by avoiding surprises to each other and rendering litigation open and transparent.

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[5](CIV/APN/490/99) (CIV/APN/490/99) [2000] LSHC 98

[6]*Ibid* @ page 5

[7] This is a right provided for under Section 12 of the Constitution

[16] Even if the information about the proceedings had just come to the attention of the counsel for the Respondents, their counterparts ought to have been notified about the intention to apply for an indulgence for the hearing to be postponed. This would enable the Applicant to react to the new challenge for a ruling by the Court. The enthusiasm of the Respondent was on the advancement of the record for the Court to realize that it would be academic to proceed with the merits. There was throughout no verbal or written application for postponement even after the Court had intimated the approach. All that was stressed was a plea for a dispensation to hand in the record upon the reasoning that it had just been brought to their attention.

[17] To this end, the indication is that there is no evidence before the Court that the disciplinary proceedings took place. Consequently, the case qualifies to continue as originally determined.

[18] The appeal noted by the Respondents against a ruling of this Court on the question of its jurisdiction to hear the mater which emanates from the affairs of Parliament, is found intriguing and deserving analysis to determine its merit. A starting point in this exercise should proceed from their key statement that to continue with the merits would, by virtue of the fact that the 4th Respondent has already concluded the disciplinary proceedings, become academic. Analytically, this main statement is irreconcilable with the noting of the appeal since if that holds, the appeal itself would equally be academic, it would logically follow that the appeal itself

would equally be moot. It would be nonsensical that the matter would be so in this Court but be otherwise before the Court of Appeal. The contradiction sheds light on the genuiness of the appeal itself.

[19] It is of fundamental importance to be realized that the 4th Respondent has effectively undermined the authority of the Court by proceeding with the disciplinary hearing despite its awareness that the lawfulness of the initiation was a subject of challenge before it. Interestingly, the Respondents sought to justify the action taken by the 4th Respondent by saying that though the merits of the main case were at all material times pending before the Court, there was no order interdicting it from conducting the hearing. This is an unfortunate explanation and a total misconception of an interdict relief to justify the undermining of the authority and the *decorum* of the Judiciary. A mere institution of proceedings renders their subject matter *sub judice and* binds the parties to respect the *status quo.* Otherwise, it would be meaningless to bring a case before courts. In the context of this case an interdict would apply where any party unilaterally disturbs the *status quo.* A good example could be made about where whilst in a court case involving parties contesting ownership rights over a field intended for producing crops, one of them unilaterally mines quarry from it upon a naive reasoning that there is no interdict order against that. In that event, the adversely affected party would be entitled to apply for an interdict to stop the destruction of the subject matter. It would be absurd and disastrous to the *rule of law* if notwithstanding the pending of a case, one party

could be allowed to do as he pleases with the field. This would create chaos and encourage self help. The poor and the less powerful would suffer irreparably.

[20] A theory that Parliament in constitutional democracy is sovereign or supreme and that its actions or decisions cannot be questioned in a court of law has been denounced in a number of jurisdictions. One of the proponents of that notion is reported to be found in the article by Mushaya wa Mushaya relied upon his interpretation of a decision in **Canada (House of Commons) v Vaid**[8]. He is quoted by Professor Ndulo to have written that:

> *Separation of Powers* doctrine gives Parliament freedom to debate matters according to its own rules and procedures and does not get orders from any institution including a court of law ..... Parliament can ignore an order of court because it cannot not be interfered with by court of law[9].

[21] In his critique Professor Ndulo firstly accuses Mushaya to have distorted the judgment in the Canadian case. From there he cautions that the latter's legal reasoning is deeply flawed since it lacks basic understanding of constitutional theory, constitutionalism and the difference between *a parliamentary democracy and a constitutional democracy.*

[22] This Court notes that this limitation is opportunistically exploited by some politicians and lawyers in pursuit of extra constitutional objectives to achieve that by deliberately

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[8](2005) page 1 of the article of Professor Muna Ndulo called 'A Sequel to Mr. Mushaya wa Mushaya: Parliament and the Courts'

[9]Quoted verbatim from an article by Professor Muna Ndulo of the Cornel University Law School titled ' A Sequel to Mr. Mushaya wa Mushaya: Parliament and the Courts p1. The citations given here are as appear in the article of Professor Ndulo

misdirecting members of the public who may genuinely be ignorant about the distinctions. The truth is that Parliament is sovereign in a parliamentary democracy but not in a constitutional democracy such as is the case in Lesotho. So, in our constitutional context, *parliamentary sovereignty or supremacy* is inapplicable. Courts can resultantly, by operation of the Constitution intervene in matters of Parliament. It would be otherwise if we were a *parliamentary democracy* because then parliament would be supreme. The *supremacy of the Constitution* is in clear words inscribed under Section 2 of the Constitution of Lesotho[10] 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.

[23] There is an abundance of catalogue of cases from different countries that have addressed the role of a Judiciary in a constitutional democracy. In Zambia despite the fact that parliamentary rules are made under the authority of the constitution[11], the court in **Biiti & Ano[12]** decided that notwithstanding that the rules have status of the law and must be complied with, they cannot have the same status as a constitutional provision and that to suggest so would be illogical and legally unsound. Incidentally that country has the same supremacy clause in its constitution[13].

[10] The Lesotho Constitution of 1993
[11] Section 86
[12] 2002 page 2
[13] Article 91

[24] Ghanaian Supreme Court has consistently maintained that under a *constitutional democratic dispensation* in contrast to a *parliamentary democracy,* courts can intervene in the affairs of Parliament. To attest to this in **JH Mensah v Attorney General**[14] where the issue was on a controversy whether courts could interfere where parliament had nominated ministers acting in terms of its Standing orders. The Court decided that in the affirmative reasoning that the power must be exercised in accordance with the *letter* and *spirit* of the constitution. Otherwise, it would run the risk of its action being struck down by the court as unconstitutional and, therefore, null and void. Equally, in **Ghana Bar Associationv Attorney General**[15] Edward Wiredu JSC stated that:

> ..... with the coming into force of the 1992 constitution, parliamentary sovereignty as practised in Britain where no act or decision of parliament can be questioned in courts is expelled and in its place we are now in an era of constitutional supremacy where acts of parliament which are contrary to the constitution can be effectively challenged in court and their validity or otherwise pronounced upon.

[25] In South Africa it was ruled in **South African National Prosecuting Authority – Democratic Alliance v The President of South Africa & Others**[16] that:

> The legislature has no mandate to make a law which transgresses the powers vesting in it in terms of the constitution. Its mandate is to make only those laws permitted by the constitution and to defer to the judgement of the court, any conflict generated by an enactment challenged on constitutional grounds. If it does make laws which transgress its constitutional mandate or if it refuses to defer to the judgment of the court on any challenge to such laws, it is in breach of its own mandate. The court has a constitutional right and duty to say so and it protects the very essence of a

[14] [1996 – 97]
[15] [1995 -96]
[16][2011] ZASCA 241

> constitutional democracy when it does. **A democratic legislature does not have the option to ignore, defy or subvert the court[17].**(Court's emphasis)

[26] Regard being had to the highlighted part of the above judgment it should be recalled that the 4th Respondent ignored the fact that the question of the violation of the procedural right of the Applicant was *sub judice* but unilaterally decided to ignore that and proceeded with the hearing. A paradox is that this was after its counsel had undertaken to prevail over it to hold the proceedings in abeyance pending the conclusion of this case by the court. Surely, any parliament operating in a constitutional democracy and properly advised would not have behaved in a manner tantamounting to ignoring, defying and subverting the court by going ahead with its hearing despite the propriety of that pending before the court. It would, in the circumstances, constitute a dereliction of duty for the Court to hold that the unconstitutional behaviour of the 4th Respondent has rendered the hearing of the merits of this case academic. Otherwise, Parliament would be allowed to undermine the constitutional authority of this Court.

[27] In passing, it deserves to be underscored that in advanced parliamentary supreme jurisdictions such as Britain, there are strong inbuilt checks and balances in Parliament. The freedom of individual members to vote according to one's conscience but not along party lines is one such asset. This is also supported by the financial security of a substantial number of the members. There

[17] *Ibid* @ para 122

Parliament has for ages demonstratively checked and balanced the Executive from excesses. This could be contrasted with some jurisdictions where effectively the Executive effectively directs and controls Parliament.

[28] Notwithstanding the inherence of the elaborately explained constitutional duty of the Court to intervene in matters of Parliament, the intervention must be done only under strictly deserving case such as where a violation of human right of a member is an issue. In principle, however, courts must, whenever they consider interfering in the affairs of Parliament or the Executive, always be guided by the theory of *judicial difference* as it was postulates in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**[18] that:

> Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function …. The use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.[19]

[29] Again, the principle of judicial deference was succinctly stated by Lord Hoffmann in **R (on the application of ProLife Alliance) v British Broadcasting Corporation**[20] that:

> My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making

[18] (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)
[19] *Ibid* @ 30-31
[20] [2003] 2 All ER 977 (HL)

> power and what the limits of that power are. **That is a question of law and must therefore be decided by the courts**.
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> This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. . . . **[W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law**.[21](Emphasis by Court)

[30] The 4th Respondent seems to be labouring under the impression that Parliament is sovereign and supreme such that its actions cannot be challenged in the court. This is a destructive misconception with a propensity to create a precedent to be regretted for generations and generations by even those who may now find it convenient or expeditious. It must be cautioned that under a constitutional democracy the Constitution is the one which is supreme and that the Judiciary is constitutionally mandated to censure the Executive against abuse of its power and authority *ultra vires* the Constitution. The same applies to the Parliament in that the Judiciary is constitutionally enjoined to ascertain that it enacts laws which are within the parameters of the Constitution to ascertain compliance with the *letter, spirit and* its *implications.* These would subsequently influence the

[21] *Ibid* at paras 75-76.

interpretative direction and development of the enactment by the courts.

[31] The constitutional delineation of the powers of each of the three arms of government within the context of constitutional supremacy, was captured succinctly in the Malawian case of **Nangwale v Speaker of the National Assembly & Ano**[22] in these terms:

> All the three arms of government are subservient to the constitution. The Executive must promote the principles of the constitution, the Legislature must further the values of the constitution and the Judiciary must protect and enforce the constitution[23].

[32] The same wisdom was reiterated in the South African case of **Pharmaceutical Manufactures Association of SA and &Ano. in re: the ex parte application of the President of the RSA & Ors**[24] in these words:

> The 1983 Constitution also entrenched the Supremacy of Parliament though it made provision for courts to have jurisdiction in respect of question relating to the specific requirements of the Constitution. This however has been fundamentally changed by our new Constitutional order. We now have a detailed written Constitution. It expressly rejects the doctrine of Supremacy of Parliament .... The rule of law is specifically declared to be one of the fundamental values of the Constitutional order, fundamental rights are identified and entrenched and provision is made for the control of public power **including judicial review of all legislation and conduct inconsistent with the Constitution. (Court's emphasis)**

[33] It must complementarily for the purpose of this case, be highlighted that the jurisdiction of this Court is triggered immediately a human right question is brought before it. This is naturally authored by the fact that in a constitutional democracy *human rights and fundamental freedoms* constitutes a cardinal

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[22] (Misc. (Civil Case No1 of 2005) MWHC 80 (24Aug.2005

[23] *Ibid* @ 14

[24] (CCT31/99) 2000 (2) SA 674

part of a constitution that features as a *suprema lex* in the realm. In the instant case, it should be appreciated that the Applicant is firstly a human being and incidentally a Member of Parliament (MP). Her cause of action in this case is simply that Parliament has violated her procedural right to have been accorded *natural justice* by virtue of her existence as a humankind. A mere fact that she is an MP cannot be a reason to have that Godly ordained right dispensed with.

[34] On an elaborate note, Dumbutshena CJ in **Smith v Mutasa and Another**[25] had an opportunity to discuss parliamentary privileges in this manner:

> When considering parliamentary privileges in most Common Wealth countries including Zimbabwe, it is to remember that these countries have embodied in their Constitutions declarations of human rights. The judiciary in countries like India, Zimbabwe and many others can lawfully strike down legislation passed by Parliament. That is why when privileges, immunities and powers claimed by the House of Assembly conflict with provisions of the Declaration of Human Rights in the Constitution the courts will resolve the conflict in favour of the fundamental rights of the citizen ……. It is clear that the Senate and the House of Assembly hold, exercise and enjoy the privileges, immunities and powers bestowed on them, their members and officers, in terms of the provisions of the Act or any other law. …… The relationship between Parliament and the Court of justice on matters affecting parliamentary privileges is well summarized by Evans CJ HC in Re Clark et all and A.G of Canada (1978)81 DLR (3rd)33 at 51. The remarked:
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> "Historically, there has always been some question whether the courts have jurisdiction to determine the nature and extent of parliamentary privileges. As the Supreme law-giving body it would seem only natural that Parliament should be the source of authoritative guidelines on the subject. On the other hand, there is something inherently inimical about members of Parliament determining the nature and extent of their own rights and

[25] (1990) LRC (Const) 87 at 96

privileges. The courts have seized on this to consistently review the nature and extent of parliamentary privileges.

[35] A history of our Judiciary bears testimony on how it has profoundly comprehended its duty to protect human rights even throughout the testing times in the Kingdom. Thus, it has continually maintained a strict interpretation over the ouster clauses intended to exclude its jurisdiction in order to maintain an avenue through which it could intervene to address human rights issues. Rooney J (as then was) in a *habeas corpus* case of '**Masefatsana Moloi v Commissioner of Police & ORS**[26] cautioned that once a human being complains about a violation of a human right, that automatically mandates the High Court to invoke its inherent power to intervene. In the same vein, the learned Judge warned that if otherwise, the indication would be that in practical terms there is no Judiciary but arbitrary rule without the basic elements of constitutionalism. Incidentally, the judgment was made during the era when there was no constitutional democracy.

[36] It should be repetitively stressed that the inherence of *natural justice* in a man was exemplified by God the Almighty who despite His omnipotence called upon Adam to account for his commission of the original sin before pronouncing a punishment. He did likewise to Cain after killing his brother Abel. The examples, as propounded in the philosophy of Thomas he opened the **Declaration of Independence**[27], demonstrate that every humankind has indeed

[26]CIV/APN/203/81
[27]The Declaration of Independence Action of Second Continental Congress, July 4, 1776 @ page 1

sacked the right from nature's own breast. This philosopher opined that:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[28]

[37] A procedural right for one to be accorded *rules of natural justice* transcends pre trial including pre charge and trial phases in any judicial or *quasi judicial* processes. An impression gathered from the papers filed by the applicant is that she is complaining that her pre trial rights were transgressed. In this connection the Court is inspired by the approach adopted by my brother Monapathi J in **Lekhanya and Others v Ministry of Justice and Others[29]** that in the materially similar scenario, justice dictates that a court should investigate if there is merit in the complaint presented before it. **Sekoati and Others v President of the Court Martial (LT COL. G P Lekhanyane) and Others[30], Thabo Fuma v The Commander, Lesotho Defence Force and Others**[31].

[38] In the premises, the appeal is found to have no merit but simply intended to delay the proceedings. The argument that this

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[28] *Ibid*
[29] (CRI/APN/264/06)) [2009] LSHC 22 @ 42
[30] (CIV/APN/82/99) (CIV/APN/82/99) [1999] LSCA 100 (11 October 1999)
[31] (CONST/8/2011) [2013] LSHC 68 (10 October 2013)

case has become academic is similarly without merit. A move to hand in the record of proceedings is refused because the move was taken without compliance with the applicable Rules 8 (12) or (15). In any event, in the mist of the constitutional reasons already advanced, the value of record is inconceivable. It is, consequently, determined that the merits of the case be traversed.

E.F.M. Makara
JUDGE

For Applicant **: Mr. Letsika of Mei & Mei Attorneys**
For Respondent **: Adv. R.Thoahlane assisted by Adv. R. Sepiriti instructed by Messrs T. Maieane & Co**