CONS CASE NO/02/2019

IN THE HIGH COURT OF LESOTHO

(HELD AT MASERU)

In the matter between

TŠELISO MOKHOSI & 15 OTHERS	**APPLICANTS**
AND	
JUSTICE CHARLES HUNGWE	**1ST RESPONDENT**
THE PRIME MINISTER	**2ND RESPODNENT**
MINISTER OF LAW, HUMAN RIGHTS	
AND CONSTITUTIONAL AFFAIRS	**3RD RESPONDENT**
JUDICIAL SERVICE COMMISSION	**4TH RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPODNENT**

JUDGMENT

Coram : **Nomngcongo J, Molete J, Mokhesi AJ**

Date of Hearing : **27th March, 2019**

Date of Judgment: **02nd May, 2019**

SUMMARY

Constitutional Law – declaratory order sought by Applicants – to set aside appointments of 1st Respondent and foreign Judges – applicants allerging control of JSC by Executive arm of Government – said to interfere in appointments to ensure harsh punishment for Applicants – violating principle of independence of the Judiciary – and possible outcome being violation of Applicants right to a fair hearing before an impartial Court – whether case for Applicants established and proved – costs order in Constitutional Cases – court may not depart from the accepted rules and principles unless the Applicants case is frivolous and vexatious.

ANNOTATIONS

CITED CASES

1. **Owners and Masters of the Motor Vessel v Owners and Masters of the Motor Tugs (2008)1 EA 367**
2. **Harrikson v Attorney General of Trinidad and Tobago (1980) AC 265 (1979) 31 WIR 348)**
3. **African Guarantee and Indemnity Co. v Moni 1916 A.D. 524**
4. **Miller v Cameron (1936) 54 CLR 572**
5. **Moiloa v City of Tswane Metropolitan Municipality (249/2016) [2017] ZASCA**
6. **Scheepers and Nolte v Patel 1909 TS 353 at 360**
7. **Makoala v Makoala LAC (2009/2010) 40 at 42 H-J**
8. **Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 653 an 662-663**
9. **Bowman NO v De Souza Roldao 1988(4) SA 326 (TD) page 327**
10. **Tšehlana v National Executive Committee of the Lesotho Congress for Democracy and Another (C of A (CIV) NO.18/2005) (NULL) [LSHC216 (26 October 2005) unreported**
11. **Sole v Cullinan and Others, Constitutional Case NO.3/2002 (NULL) [2003] LSHC 9 (01 January 2002)**
12. **Sekoati and 48 Others v President of Court Martial and 2 Others (C of A (CIV) No.18 of 1999 (unreported)**
13. **The President of the Court of Appeal v The Prime Minister (C of A CIV) NO.62/2013 [2014] LSCA1 (04 April 2014)**
14. **Vumba Intertrade CC v Geomelric Intertrade CC 2001(2) SA 1068(8)**
15. **United Watch and Diamond Co. v DISA Hotels 1972(4) SA (C.P.D) at p. 415E-G**
16. **Sandton Civil Precinct (PTY) Ltd v City of Johannesburg and Another (458/2007) [2008] ZASCA 104 at para 19**
17. **Fluxmans Incorporated v Lithos Corporation of SA (NO.2) 2015(2) SA 322 (GJ) at para 5**
18. **Valentino Globe BV v Phillips and Another 1998(3) SA 775 (SCA)**
19. **Rosenberg v South African Pharmacy Board 1981(1) SA22 (A)**

STATUTES

1. **The Constitution of Lesotho**
2. **Ordinance 72 of 1830 – Evidence in Civil Proceedings (in Volume 2, Laws of Basutuland 1960)**
3. **Civil Evidence Act 1995**

BOOKS

L.H. Hoffman, *South African Law of Evidence* (Butterworths 1963) p313

MOLETE J

INTRODUCTION:

[1] This is an application by **Sixteen Applicants** for an order to stay their prosecution in proceedings under **CRI/T/0010/2018**, **CRI/T/0003/2018**, **CRI/T/0008/2018, CRI/T/001/2018, CRI/T/0002/2018** and **CRI/T/0032/2018.**

[2] The Applicants seek this urgent relief of stay of proceedings, pending the final determination of the ordinary relief that this Court declare the appointment of 1st Respondent, **Mr Justice Charles Hungwe** and all other foreign judges to be appointed to preside over their cases, to be unconstitutional.

[3] The declaratory orders are sought on the basis that in making the appointments, (it is their view) the **Judicial Services Commission** was subject to the control and direction of the Executive arm of Government in violation of the Constitution. This makes them fear that the Judges will not be impartial and give them a fair trial which is guaranteed under the Constitution of Lesotho.

[4] In the founding Affidavit of **Mr Tšeliso Mokhosi**, the Applicants say they are opposed to such appointments because they are initiated by the government which is desirous to have specific outcomes, ie their conviction at all costs and the harshest possible sentences.

[5] It cannot be denied or disputed that in terms of **section 12(1)** of the Constitution persons charged with any crime are entitled to be afforded a

fair hearing within a reasonable time by an independent and impartial court established by law.

[6] The deponent, **Mokhosi** states in his affidavit

> ".... I also suspect that I am not likely to receive a fair hearing. I should not be heard to be suggesting anything against the foreign Judges, but the manner in which they are appointed has led me to the conclusion that they were appointed specifically for a particular result i.e. to ensure that we are convicted and receive the harshest penalties possible including the death penalty"

[7] The delays in proceeding with the criminal trials, which are a direct result of the absence of foreign Judges to preside over them, is prejudicial to all parties concerned and is not desirable. **Mr Mokhosi** states that a number of postponements were occasioned by the non-availability of foreign Judges. However, in this case Applicants question the constitutionality of appointment of **Justice Charles Hungwe** and all other foreign Judges.

[8] In support of the application, Applicants attached A1 which is a number of charge sheets in the cases for which they are charged with crimes including murder, attempted murder, contravention of Section 40(1) of the Penal Code, conspiracy to murder, aiding and abetting murder, aggravated assault, damage to property and theft. The offences relate to the murders, attempted murders, assault and conspiracy to commit these crimes in relation to **Maaparankoe Mahao, Mokalekale Khetheng, Lekhoele Noko, Molise Pakela, Mahao Mahao and Mabilikoe Leuta.**

[9] The applicants further attached to their founding affidavits, the affidavit of **Chief Justice Nthomeng Majara** and **Prime Minister Thomas Thabane** supported by **Foreign and International Relations Minister Lesego Makhothi**. The affidavits were filed in **Constitutional Case NO 13/2018.** They were the founding affidavit of the Chief Justice and opposing affidavits by the Prime Minister and Foreign Affairs Minister Respectively. It is not necessary to go into details of the dispute in that case, except to say that the affidavit of the Chief Justice made the statement that the government had initiated efforts to recruit foreign Judges without following the Constitution, and she did not support such conduct because the appointments fell within the mandate of the Judicial Service Commission and not the Executive arm of the state.

This part of the affidavit is what the case of the Applicants is based on. The Chief Justice never filed any affidavit in the present proceedings, nor did she confirm that her affidavit is relevant and applies to this case.

[10] That matter, **Case No Const 13/2018,** was vigorously opposed by the Attorney General representing the Crown, as is this matter before us. I need not refer to the dispute in case no **Constitutional Case 13/2018,** but will only do so in so far as it is necessary for the determination of the case before us.

[11] The Crown opposed this matter, and the affidavit of Attorney General **Advocate H. Phoofolo K.C.** was filed to oppose the relief sought. In the affidavit, he raised a number of points *in limine* about (a) Jurisdiction. The Court was asked to decline because Applicants have adequate alternative remedies; In support the respondents cited the decisions of, **Owners and Masters of the Motor Vessel vs Owners and Masters of the Motor**

Jugs[1] **and Harrikson v Attorney General of Trinidad and Tobago**[2] (b) Non-joinder of His Majesty the King and some of the accused persons who are not part of these proceedings. (c) That Applicants' lack of *locus standi* to represent or seek relief for those who are their co-accused, but do not question the appointment of Judges in their matters. There is also an objection to (d) urgency of the matter and (e) that Applicants have failed to make a case for the relief sought.

[12] The Court did not make any specific pronouncement on urgency, the matter was given priority due to its exigency; and the need to dispose of the trials soonest. Our Court's policy is to treat Constitutional Cases as deserving quick disposal and to be given precedence over all other matters.

[13] In order to succeed in the application, Applicants are expected to adduce evidence on affidavit that the violation is real and that their constitutional right to a fair hearing has been or will be violated. This has to be set out in an affidavit and annexures of any documents that will support the allegation must be attached. The evidence must be admissible and sufficient to support the issues canvassed.

[14] Applicants complain further that the appointment of 1st Respondent or any foreign Judge should be declared to be *null and void* and of no force or effect for violating the provisions of **sections 120(2)** and **(5)** of the Constitution as well as **sections 132(8), 12(1)** and **118(3).** It is therefore the obligation of the Applicants to show that these sections were violated and bring evidence to that effect.

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[1] (2008)1 EA 367

[2] (1980) AC 265 ((1979) 31 WIR 348)

[15] **Sections 120(2)** and **(5)** deal with appointment of Judges and provides that the King shall act in accordance with the advice of the **Judicial Service Commission (JSC)**. **Section 132(8)** deals with the **Judicial Service Commission** and says in the exercise of its functions it shall not be subject to the direction or control of any person or authority. **Section 12(1)** deals with a right to a fair trial and says accused persons are entitled to ".....be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law. **Section 118(3)** provides that:

> "the government shall accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law."

[16] The Applicants' argument was therefore to persuade the Court to conclude that the **Judicial Service Commission** was subject to direction and control of the executive, and that the King was made to act in accordance with the advice of the Executive as opposed to that of the **Judicial Service Commission** with the result that they have a reasonable fear that they will not be afforded a fair trial. They say the Executive's actions constitute an infringement of its constitutional mandate to assist the courts to protect their independence, dignity and effectiveness.

APPLICANTS' CASE IN CONTEXT

[17] Applicants used the founding affidavit of **Tseliso Mokhosi**, supported by that of **Lekhooa Moepi** and **Tladi Kamoli** to be the foundation of their case, and then attached annexures in the form of their charge sheets together with the affidavits by the Chief Justice, Prime Minister and

Foreign Affairs Minister. Their affidavits are about their suspicions, apprehension and fears that they will not be treated fairly or afforded a fair trial because they suspect that the Government is out to get them and to fix them using the foreign Judges.

[18] They are not privy to the operations of the **Judicial Service Commission** and are not part of its activities and operations, that is why they rely on the Chief Justice's affidavit; particularly paragraph 6 where she stated that;

> "Recently, the Government initiated efforts to recruit foreign Judges without following the Constitution. I warned them that the Constitution did not support their conduct as recruitment falls within the mandate of the Judicial Service Commission (JSC) and not the executive arm of the state. I advised that they should leave the issue of recruitment with the JSC. This resulted in the Defence Counsel representing the accused persons in high profile cases informing me, during our meeting with the Director of Public Prosecution and the defence that, they will vigorously object to the appointment of such Judges. I relayed their concerns to the Government through the Minister of Justice."

[19] The affidavit was signed by the Chief Justice on the **7th May 2018** and was relevant to and intended to be used in **Constitutional Case NO13/2018.** In addition, the Applicants rely on a newspaper publication of the Lesotho Times dated **3-9 May 2019** with the headline "Botswana offers Judges to Lesotho." The relevance of this publication is unclear as it goes on report that the Judges are "specifically to preside over high profile cases" and are "expected in Lesotho within a week or two." It is unclear whether this information is true or not. No Judges from **Botswana** ever arrived in

Lesotho as mentioned in the report and we have no option but to reject that report as having no value at all to the present proceedings. Applicants Counsel said it shows that this issue is in the Public domain. It may be so, but its ordinary meaning conveys no more than that **Botswana** offers to assist the **Kingdom of Lesotho**, it cannot be stretched further than that.

[20] It is therefore only the affidavit of the Chief Justice that remains to be considered and that may be directly relevant to the case of the Applicants. However, it must be admissible to be of any assistance to the Court to support Applicants' case.

[21] Respondents in opposing the matter filed the affidavit of the Attorney General, who is also a member of the **Judicial Service Commission**.

HISTORICAL CONTEXT AND FACTUAL BACKGROUND:

The historical setting of this case is aptly captured by the Attorney General in his answering affidavit, thus:

> "2.1 Pursuant to the political disturbance and the security challenge arising on the 14th August 2014, the Phumaphi Commission of Enquiry was established in the Kingdom of Lesotho through the facilitation and recommendation of Southern African Development Community (SADC).
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> 2.2. Among the recommendations of the Phumaphi Commission was that the members of the Lesotho Defence Force (LDF) who have been implicated in the human rights atrocities should be placed before the Courts of law and be prosecuted using best international standards. The Government of the Kingdom of Lesotho, being part of and

answerable to SADC, was bound to implement the finding and recommendations of the Phumaphi Commission, which are SADC's comprehensive decisions on Lesotho. The Government of Lesotho is therefore bound to investigate and prosecute all criminal matters related to the specific members service, particularly the LDF. There were probably about eight (8) criminal cases involving about 42 members of the LDF. Amongst these cases are included the cases involving the present applicants.

2.3 The reality was that these cases were supposed to be dealt with by the local judges in the Courts of Lesotho. However, that was faced with some challenges. First, the High Court of Lesotho is understaffed with just about 12 Judges who are burdened not only to adjudicate over about more than 4000 criminal cases which are already pending, as well as cases that are being newly registered. Third, and taking into account the political volatility in the Kingdom in the background, there were widespread perception that local judges would not be independent or impartial in dealing with the people implicated by the Phumaphi commission findings.

2.4 Consequently, the Government of the Kingdom of Lesotho approached SADC to second judges from jurisdictions that are similar to Lesotho to assist in adjudicating over the cases. Before submitting this request the Prime Minister, in a meeting in which I was present, detailed Cabinet Ministers Phamotse and Makgothi to consult the Chief Justice Nthomeng Majara concerning the recruitment of the foreign judges. The input of all stakeholders such as the JSC, Ministry of Justice and Correctional Service, LDF and others was solicited. Chief Justice Majara ultimately endorsed the recruitment of foreign judges, and I relayed

the Report to the Prime Minister. This endorsement, as Chief Justice Majara had said, was subject to the JSC approving the individual foreign judges.

2.5 The proposal by Lesotho that foreign judges be recruited in order to adjudicate on the criminal cases aforesaid was accepted by SADC, as the proposal was intended to ensure, among other things, to provide independent, impartial and highly experienced foreign judges who would objectively try those cases; to clear the backlog of criminal cases in the High Court; and to assist Lesotho to implement outstanding obligations arising out of Phumaphi Commission. In particular, SADC agreed that the judges in question would be sourced by SADC member states whose legal systems re compatible with Lesotho's such as Namibia, South Africa, Swaziland and Botswana.

2.6 The Government of Lesotho made necessary logistics clearly appearing under paragraph 6 of the Prime Minister Thomas Thabane's affidavit in **Cons case 13 of 2018** attached to applicants' founding affidavit and marked **"A8"**, and wish to incorporate averments made therein as part of my affidavit as if specifically pleaded.

2.7 I further wish to attach the Concept Note issued by the European Union (EU) for further and better background circumstances, and mark it **"HP1"**. HP1 is a joint document by the Government of SADC, the Kingdom of Lesotho, the JSC, the Director of Public Prosecutions and the EU, the reconstruction process of which I participated and have firsthand knowledge of the contents thereof.

2.8 After all this, the SJC met and resolved to task the Registrar of the High Court, Mr Realeboha Makamane concerning

the process of recruitment of experienced and qualified personnel. Mr Makamane will attach his supporting affidavit to explain how the recruitment process was undertaken by him. What I know as a matter of fact is that after the recruitment process by Mr Makamane, the Registrar, the SJC received several Curriculum Vitae (CVs) from interested candidates from several SADC member states.

2.9 The SJC sat to consider the candidates, and it is that meeting whereby the application of two candidates were rejected by the SJC on account of reasons that I may not disclose. I was personally present in this meeting as the Attorney general and member of the SJC.

2.10 Three (3) of the candidates were duly considered by the SJC and were recommended for appointment to His Majesty the King in terms of the Constitution.

One of the three has been appointed by His Majesty the King and is the 1st respondent in the present application. I seek the indulgence of the Court to permit me not to disclose the identity of the other two candidates as they are not yet judges of the Honourable Court.

2.11 From the above circumstances, it is clear that the Executive arm of the Government of the Kingdom of Lesotho did not interfere with the independence of the judiciary in their involvement in this matter concerning foreign judges. The role of the Executive was to trigger the recruitment process as it involves many factors such as securing the funding and engaging diplomatic negotiations with SADC and its member states. The recruitment process was left with and undertaken solely by the JSC through its usual and

ordinary protocols, and the appointment of 1st Respondent was then done by His Majesty the King in terms of the Constitution without any interference from the Executive". (*sic*)

[22] It is necessary to consider this background because it explains the peculiar circumstances that resulted in the Executive playing an active role in the recruitment of Judges. The question is, was the appointment done by the Judicial Service Commission which duly recommended to His Majesty as the Constitution provides? It is common cause that what the Executive did was to approach similar jurisdictions to provide Judges, and the Curriculum Vitae's were submitted to the Judicial Service Commission which was free to decide on which appointments to make and recommend to the King. As it turned out, only one of the three were accepted by the Judicial Service Commission and some were rejected.

[23] Is it reasonable to conclude that the Judicial Service Commission was under the direction and control of the executive in the circumstances? Counsel for Applicants suggested that even **Southern African Development Community (SADC)** went too far as it should have only granted the funding and left it at that. That seems to be unrealistic regard being had to the situation that brought about this SADC involvement, and also the obligations of SADC states to assist each other in any way required, including military intervention to ensure peace, stability and democratic rule within all member states. It is true to say that in Lesotho the need for Judges was paramount in the circumstances. Local Judges are over-stretched and need assistance. SADC had the ability to assist and it has done so. Indeed, another way to look at it is that the executive was fulfilling its mandate under **Section 118(3)** of the Constitution to provide

assistance to the Courts to enable them to protect their "independence, dignity and effectiveness."

MATERIAL DISPUTE OF FACTS AND HEARSAY EVIDENCE

[24] This Court is concerned about the fact that Applicants have used the affidavit of **Chief Justice Nthomeng Majara** as the only basis on which their case is founded. This is because emanating as it did from separate proceedings it would not be applicable in this case unless it is admissible as either sufficient or conclusive prove of the Applicants' case.

[25] **Ordinance 72 of 1830 – Evidence in Civil Proceedings,** (which is in **Volume 1 of the Laws of Basutoland 1960**) is agreed by both parties to be applicable. It provides in **Section 17** that;

> " 17. Every party on whom in any case it shall be incumbent to prove any fact, matter of thing, shall be bound to give the best evidence of which from its nature such fact, matter or thing shall be capable : and no evidence as to any such fact, matter or thing shall be admissible in any case in which it was in the power of the party who proposes to give such evidence to produce, or cause to be produced, better evidence as to such fact, matter thing, except by consent of the adverse party to the suit, or when such adverse party shall by law be precluded from disputing any such fact, matter or thing, by reason of any admission proved to have been made such party".

And in **Section 22**, the said Ordinance it introduced Common Law rule against admissibility of hearsay evidence in Lesotho. It provides that;

> "22. No evidence which is of the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England".

[26] Counsel for Applicant argued that the Chief Justice may be called to give oral evidence in this case in view of factual disputes regarding interference by the Executive in the recruitment and appointment of foreign Judges. We find this unnecessary as she has not even confirmed that her statement in **Constitutional case 13/2018** is applicable and may be used in support of the Applicants in this case. *Moreso* because the affidavits of the Prime Minister and the Foreign Minister which are attached to the applicant's founding affidavit present a directly opposite scenario.

[27] **L.H. Hoffman** in the ***South Africa Law of Evidence*** **states** that;

> "A record of a witness evidence in earlier proceedings is ordinarily hearsay, but there are number of exceptional cases in which such evidence can be tendered to prove the facts which the witness has stated".... But at Common Law its evidential value is only to prove that the witness said what they are recorded to have said. Unless the parties consent it cannot be used as evidence of the facts stated."[3]

The learned author goes on further to say;

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[3] L.H. Hoffman South African Law of Evidence p313

> "At common law, the testimony of witness in earlier judicial proceedings is admissible at a subsequent trial provided that (a) the proceedings are between the same parties; (b) the issues are substantially the same, the witness cannot be called because he is dead, insane or too ill to attend....."[4]

[28] It is clear from the foregoing that the evidence of the Chief Justice cannot be used to support the case of the Applicants because their case must establish and rely on the truthfulness of the contents of the Chief Justice's affidavit. It must be clarified here that were are not concerned with the truthfulness of the affidavit of the Chief Justice, but only with its admissibility in this matter to support the case of Applicants. It is the only basis upon which we are called upon to conclude that the executive controlled and directed the JSC and interfered with the Judiciary to the extent that Applicant's Constitutional right to fair trial was violated. Its benefit to the Court is only if it was offered to for the truth of its contents. The fact that it was filed in a different case where the constitutional validity of the appointment of Judges was not the issue to be determined is also a consideration. That is why the Court deemed it unnecessary to call the Chief Justice, because in **Constitutional case no. 13/2018** she was not concerned with the Applicants and their constitutional rights. Even if Applicants had insisted on the truth of its contents it would be insufficient and inconclusive for the determination of the matter before us.

[29] Assuming, without conceding, that I am wrong to conclude that the affidavit of the **Chief Justice Majara** is inadmissible and that by conduct the latter's, the Prime Minister's and **Minister Makgothi's** affidavits have

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[4] African Guarantee and Indemnity Co. v Moni 1916 A.D. 524

been incorporated into these proceedings by conduct. It has to be borne in mind that three sets of affidavits contain raging dispute of facts regarding the Executive interference in the recruitment and appointment of foreign Judges to preside over cases involving the applicants. These disputes notwithstanding, the applicants annexed them to their founding papers and canvassed their contents lavishly. When quizzed about these obvious dispute of facts, **Adv. Mohau K.C**, being aware of the dispute of facts made an application for referral to oral evidence in terms of the rules of this Court. The so-called application for referral appears in the replying affidavit of **Mr Mokhosi** where he says, (disputing what **Mr Makamane, the Deputy Registrar** who was involved in the recruitment of foreign Judges; averred in his answering affidavit);

> "[8] But I have been advised by my counsel and attorneys, and they inform me that they represented the JSC in previous litigation and familiar with how it works, that the well – established practice is that the Chief Justice recruits judges by approaching her counterparts in the jurisdiction from which such recruitment is intended to be made and once she has sourced curriculum vitae she presents these to the JSC to consider. For wach vacant position there must be a minimum of two(2) candidates to enable the JSC to exercise its powers properly. I have been adviced that this is a well-established practice of the JSC and I invite Mr Makamane to file an affidavit contracting me on this point. Otherwise the honourable court is entitled to refer this to cross-examination." (Emphasis added)

[30] This last sentence is what **Mr Mohau** says is the application for referral. I think it needs no special skill for anyone to decipher that the applicants were not making an application for referral to *viva-voce* evidence. This feint and half-hearted reference to cross-examination, to my mind, cannot be construed as an application for referral to *viva voce* evidence. This leaves **Mr Mohau's** application as amounting to application to *viva voce* evidence from the bar, an approach which this Court will not countenance.

[31] When the applicant launched their application basing it on affidavits which are at variance with each other regarding interference of the Executive in the appointment and recruitment of acting Judges, the applicants reasonably foresaw the material dispute of facts arising but nevertheless proceeded with motion proceedings. In this case the version of the Chief Justice that the Executive unconstitutionally meddled in the recruitment and appointment of foreign judges is denied by the Prime Minister, Attorney General, Minister of Foreign Affairs. The version of the Attorney General supported by the Prime Minister and Minister of Foreign Affairs, is that due to political sensitivity and polarisation engendered by the cases involving the applicants, there was a multi-stakeholder meeting wherein the Chief Justice was involved where it was agreed that Government would ask for help from its SADC counterparts in terms of providing prospective judges to preside over those cases. Government's involvement would not include the vetting and appointment as that task would be solely for the execution by the JSC in terms of its constitutional mandate.

[32] It is an established principle of our civil practice that where a litigant proceeds by way of motion proceedings in situations where he ought to have invoked action proceedings, and genuine dispute of fact arises, runs a real risk of his application being dismissed on the score that he should have

reasonably foreseen that material dispute of fact would arise, but nevertheless proceeded regardless. The so-called application for referral by the applicants should not be countenanced, and I proceed on the basis of the correctness of the version of the respondents that **Acting Judge Hungwe** was appointed constitutionally without any interference, either by way of control or manipulation from the Executive (see: **Tšehlana v National Executive committee of the Lesotho Congress for Democracy and Another** [5]).

[33] The applicants seem to labour under the impression that the process of recruitment of judges should be so detached that it should be devoid of any participation by the executive or anyone else it would seem. But this is not in line with the scheme of constitution, as even the Chief Justice who is the Chairman of the Judicial Service Commission (in terms of the constitution itself) is appointed by the King in accordance with the advice of the Prime Minister who is, to borrow **Mr Mokhosi's** turn of phrase a politician like himself. Further, **section 118 (3)** of the constitution enjoins the Government to accord the Courts such assistance as they may require to protect their dignity and effectiveness and in terms of **sec 132 9g)** the JSC with the consent of the Prime Minister it may confer powers or impose duties on any public officer (such as **Mr Makamane**) or any authority of the Government of Lesotho for the purpose of the discharge of its functions.

[34] **Section 132 (10)** places the matter of the participation of other persons beyond doubt when it provides that the proceedings of the Judicial Service

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[5] **C of A (CIV) NO. 18/2005) (NULL) [2002] LSHC 216 (20 October 2005)** (unreported)

Commission shall not be invalidated by the presence or participation of any person not entitled to be present or to participate in those proceedings.

[35] In his founding affidavit **Mr Mokhosi** says he has "every reason to believe that the fact that the executive and the DPP played a key role in the appointment of Judges, the process is tainted". It was held in **Vumba Intertrade CC v Geomelric Intertrade CC 2001(2) SA 1068 (8)** that

> ".....the reason to believe must be constituted by facts giving rise to such belief .... And a blind belief or belief based on such information or hearsay evidence as a reasonable man ought or could not give credence does not suffice ...
> In short there must be facts before Court on which the Court can conclude that there is reason to believe ...."

[36] The appointment of Judges is made by the King acting in accordance with the advice of the Judicial Service Commission. The Executive may have given assistance as they are enjoined to do by **section 118 (3) of the Constitution.** If **Mr Mokhosi** considers the involvement of the Executive in sourcing financial and human resources to preside over his case, this is not inimical to the constitution, as the Executive was doing what the constitution requires of them. In the circumstances the reason to believe is not based on a fact that a reasonable man can give credence to. It is in any case based on the hearsay evidence of Chief Justice **Nthomeng Majara** in different proceedings pending before a different court.

[37] **Mr Mokhosi** then unleashes an onslaught against the probity of **His Lordship, Justice Charles Hungwe** and other yet to be appointed Judges, that they have been "handpicked so that they could convict us and impose

stiff penalties including death penalty" (par. 12 of his affidavit. At par. 14 he says that the participation of the Attorney General of the Executive and the DPP gives reasonable impression that these Judges were picked to achieve certain desired criminal outcomes. At par. 22 he continues: "In appointing foreign Judges such as the first respondent I and any co-applicants have gained a reasonable impression that they have been so appointed to ensure that we would be convicted and receive the harshest sentences including death penalty".

[38] In a vain attempt to redeem himself **Mr Mokhosi** says he should not be heard to be suggesting anything against foreign Judges. But then he cannot help himself as he continues in same breath that the manner in which they were appointed has led him to the conclusion that they were appointed specifically for a particular result i.e. to ensure that we are convicted and receive the harshest possible penalties including death penalty. He concludes at par. 35 that the Executive breached its constitutional obligations ..... so that it would appoint specific persons as judicial officers to try "our cases so that they would achieve their desire to have us convicted".

[39] **Mr Mokhosi's** virulence then spills over to the **Deputy Registrar Mr Makamane**. Hiding behind some anonymous advise he says there are political reasons why he was singled out to recruit the Judges. He describes him as a political activist who sympathises with the ruling party in the current coalition government the All Basotho Convention.

[40] These unfortunate broadsides against Judges, **Justice Hungwe** in particular and the deputy registrar of this Court, are deplorable. It is regrettable that such scandalous and vexacious matter was allowed to find

its way into an affidavit. **Mr Makamane's** hands are also tied because these scurrilous allegations, levelled against an officer of this Court when he was merely performing his duties and in reply when he does not have an opportunity to refute them, is unfortunate to say the least.

[41] We do not agree with **Advocate Mohau K.C.** that as our law is based on the **English Civil Evidence Act** of 1995 and that we should evolve with it. Our Law is based on the English Common Law only and we are not obliged to adopt English Statutory enactments such as the **English Civil Evidence Act of 1995** as Mr Mohau sought to urge us to.

[42] **JUDICIAL INDEPENDENCE**

Before I conclude I need to say something about the independence of Judiciary. The indicia of judicial independence are security of salary; security of tenure and administrative independence. When these three essential features of judicial independence are present it can safely be concluded that the courts in any given jurisdiction are independent. Judicial independence in Lesotho cannot be gauged on the basis of what obtains in England or South Africa or elsewhere for that matter, but based on Constitutional imperatives peculiar to this country. **Ramodibeli J** (as he then was) in **Sole v Cullinan and Others**[6] made the following apposite remarks regarding judicial independence;

> "[51]" It requires to be stated at the outset that there is no one correct formula for judicial independence and that, provided the essential principles of judicial independence as set out at paragraph [41] are observed, it is not strictly

[6] (Constitutional case No.3/2002 (NULL) [2003] LSHC 9 (01 January 2003) at paragraph 52-53

necessary for all Court anywhere in the world to meet the same standard of judicial independence. If authority be needed for this proposition the leading Canadian Supreme Court case of Valente v The Queen 1985 24 DLR 4th) 161 (SCO 183 in directly lie in point. Although that decision is not binding on this Court it is nevertheless of persuasive authority and in the absence of any similar authority in this country it is a decision which I am happy to follow.

"[52]" Writing about the constitutional position in England, Cownie & Bradney; English Legal System in Context 2nd edition page 164 categorically state that 'complete independence for the Judiciary is, of course, impossible.' It is not difficult to understand the reason for this proposition as for example, the Judiciary does not normally control the funds which are necessary to enhance its independence and effectiveness. In the first place the budget for the Judiciary is approved by the Legislature which does not always fully appreciate the needs of the Judiciary and thus often cuts them mercilessly under misguided perception that the Judiciary is non-income-generating and consequently unimportant. Secondly and the **Cownie and Bradney** supra) rightly point out, 'the central threat has been seen to come from the executive via mechanisms of financial control.' In this connection the following words of **Sir Nicholas Browne – Wilknson**; Independence of the Judiciary in the **1980 (1988)** bear reference:

"Judges are sitting in an environment wholly determined by executive decision in the Lord Chancellor's Department, which is in turn operating under financial constraints and pressures imposed by the Treasury. The yard-stick for decision making is financial value for money, not the interest of justice."

> [53] In **Sekoati and 48 Others v President of the Court Martial and 2 Others C of A (CIV) No.18 of 1999** (unreported) the Lesotho Court of **Appeal** held at **page 21** thereof that no judicial system is entirely devoid of any relationship with the legislative or executive branches of government. I respectfully agree."

The views expressed above are reflected in **S.118(2** and **(3)** of the Constitution, which provide;

> "(2) The Courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law.
>
> (3) The Government shall accord such assistance as the Courts may require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law."

[43] Whenever an issue is raised regarding judicial independence, the question for determination is always whether a well-informed, thoughtful and reasonable person (not hypersensitive one), or observer, would harbour a perception that the Court is truly independent. (**Sole** ibid at **para 56; Sekoati** and **48 Others v President of Court Martial and 2 Others (C of A (CIV) NO. 18 of 1999** (unreported). This enquiry is context-sensitive and must not be applied in an all or nothing manner.

[44] Reverting back to the factual circumstances of this case and in line with the version of the respondents, this Court is of the view that when Government, following the recommendations of the **Phumaphe**

Commission, approached its development partners and **SADC** counterparts regarding funding for the prosecution of cases involving the applicants, Government was acting constitutionally in terms of **S.118 (3)** of the Constitution to enable the Courts to deal effectively with the said cases. It is a matter of common knowledge that Judges in this jurisdiction are wallowing under a heavy load of cases due to understaffing, and so, when Government sourced financial and human resources to deal with the cases which are potentially complex and time-consuming, potentially presenting as they do, a real possibility of disrupting the normal schedules of the Judges in this jurisdiction it was acting in terms of the Constitution.. A smooth and disruption-free prosecution of these cases is of vital importance to ensure their prompt disposal.

COSTS

[45] Counsel for Respondents **Advocate Maqakachane** urged the Court to award costs on a punitive scale, but the Court will be slow to order costs in matters of this nature at all unless Applicants conduct of the case required strict censure, or they acted frivolously, vexatiously or *mala fide* in some way. The Courts are there to protect the constitutional rights of public and in particular the Applicants should not readily award costs in these matters. **(The President of the Court of Appeal v The Prime Minister (C of A (CIV) NO.62/2013 [2014] LSCA1 (04 April 2014)**

[46] The result is that the Application is dismissed and there will be no order as to costs.

L.A. MOLETE

JUDGE

I agree

T. NOMNGCONGO

JUDGE

MOKHESI AJ

[47] I agree with the conclusion of the main judgment that the application falls to be dismissed. I however, disagree with the approach of the main judgment which glosses over the points *in limine* which were pertinently raised and vigorously argued by Counsel on the first day of hearing of this matter. I consider it procedurally flawed not to deal with points so raised, as some of the points raised are threshold issues which this court has to pronounce itself upon. In any event the parties who raised these points are entitled to know why they were not successful. The approach which was agreed upon by Counsel and the Court was the holistic one. Holistic approach does not give the Court a licence to gloss over or completely ignore the points *in limine* raised. What this approach entails is that for the sake of making savings on the time of the Court by avoiding piece-meal treatment of the matter, the points *in limine* have to be argued together with the merits, but when the Court retires to consider the matter it may dispose of the matter solely on the points *in limine* despite that they were argued together with the merits. But if the Court considers the points *in limine* not to be properly raised it proceeds to deal with the merits. Perhaps at the risk of being repetitious the main consideration here is to make savings on the Court's most precious resource – time – by avoiding unnecessary proliferation when the matter should have been argued all at once.

[48] I deal with the points *in limine* so raised. It is important first of all to appreciate the approach the Court has to afford a point *in limine* whenever it is raised, and also what it is it, and the consequence of its being raised successfully. These two issues would appear quite frankly to be taken for granted by Counsel with the result that the Courts in this jurisdiction are perennially bedevilled with the so-called points *in limine* raised by Counsel when they are not points *in limine* properly so-called. A point *in limine* is a quintessentially a convenient point of law which whenever successfully raised has consequence of disposing of the dispute or the proceedings before even the merits of the dispute can be touched upon (see : **Moiloa v City of Tswane Metropolitan Municipality**[7]**; Scheepers** and **Nolte v Patel**[8]**).** Whenever a point *in limine* is raised only the applicant's founding affidavits are looked at to determine whether they make out *a prima facie* case for the relief sought. (**Makoala v Makoala**[9]). For the purposes of determining the validity of the point *in limine* the applicant's founding affidavit are treated as true. I now deal individually, with the points of law so raised.

[49] (a) Jurisdiction:

In respect of this point the respondent (The Attorney General) urged this Court to decline jurisdiction in terms of **s. 22(2)** of the Constitution as the applicants have adequate alternative remedies such as applying for the recusal of **Acting Judge Hungwe**; applying for a permanent stay of their prosecution; applying to be released in terms of the provisions of the Speedy Trials Act.

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[7] (249/2016) [2017] ZASCA
[8] 1909 (45) 353 at 360
[9] LAC (2009-2010) 40 at 42H-I

S.22 (2) provides:

> "(2) The High Court shall have original jurisdiction –
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1); and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive of this Constitution:
>
> *Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redness for the contravention alleged are or have available to the person concerned under any other law." (emphasis added).*

[50] The point that the applicants have adequate means of redress available to them is ill-conceived, for the following reasons. It needs to be remembered that **Acting Judge Hungwe** and other judges who will be similarly recruited and appointed are appointed to preside over cases involving these applicants, and therefore the issue of constitutionality of his appointment has to be dealt with head-on and not be skirted around by invoking procedures which do not seek to address what is essentially a critical question – the constitutionality of his appointment. If **Judge Hungwe's** appointment is constitutionally deficient, then he is non-suited to preside as a Judge in this jurisdiction. Constitutionality of **Judge Hungwe's**

appointment is a threshold question which has to be dealt with before he presides over cases involving these applicants, and by its very nature cannot be brought before the same Judge as it would essentially be requesting **Acting Judge Hungwe** to be a Judge in own cause. Not much need to be said on this point as it is self-evident.

[51] (b) Locus standi:

The 6th respondent has raised a point that the applicants have no *locus standi* to challenge the appointment of the first respondent as they are not claiming that they should have been appointed in the place of the first respondent nor have they established that the first respondent would be sitting in judgment over their cases, and further that **Mr Mokhosi** cannot bring application on behalf of applicants who have not filed their affidavits. On the other hand applicants argue that it is not necessary that they should be claiming that they should have been appointed in the place of the first respondent and the argument goes to say, it is enough that they contend that the first respondent and other similarly appointed acting Judges have been appointed unconstitutionally to preside over cases in which they are charged.

On the issue of **Mr Mokhosi's** authority to institute the current proceedings on behalf of his co-applicants who have not filed affidavits to substantiate their claims it is common cause that only **Lekhooa Moepi** and **Tlali Kamoli** filed their confirmatory affidavits. This leaves thirteen "applicants" out of the picture. The fact that **Mr Mokhosi** in his founding affidavit says he has been authorised by his co-applicants to institute these proceedings on their

behalf, does not help the cause of these 'co-applicants' in the absence of their confirmatory affidavits being filed of record. In these proceedings only **Messrs Mokhosi, Lekhooa Moepi** and **Tlali Kamoli's** affidavits have been filed of record. As it will be observed **Mr Mokhosi** testifies about, among others, his feelings and his co-applicants' which are engendered by their cases not proceeding to finality. As far as he testifies about the feelings of others this is clearly hearsay, and therefore inadmissible evidence. The same situation as this happened in **Selikane and Others v Lesotho Telecommunications and Others LAC (1995 – 1999) 739** at **742I – 743A** where **Browde JA** (as he then was) said:

> "I would also point out that even had the persons in question authorised the first appellant to include them as co-applicants that could not mean he could give evidence on their behalf of facts of which he had no personal knowledge. In the papers before us there are statements made by the 1st appellant in the founding affidavit which deal with the feelings and attitudes of other appellants engendered by the transfers. These statements are clearly hearsay and the authority allegedly given to the 1st appellant does not render them admissible."

In the light of the above discussion it follows that, apart from **Tšeliso Mokhosi, Lekhooa Moepi** and **Tlali Kamoli**, the rest of the "applicants" did not join in as applicants in the absence of their confirmatory affidavits, and therefore cannot be regarded as one of the parties in these proceedings.

[52] While the question of *locus standi* of the applicants to lodge this application is a procedural one, it also touches on the substance of the

dispute, requiring that the applicants establish the legal nexus between themselves and the entitlement to come to Court. This point was aptly stated in **Sandton Civil Precinct (Pty) Ltd v City of Johannesburg and Another (458/2007) [2008] ZASCA 104** at **para. 19** where **Cameron JA** (as he then was) said:

> "**[19]** As **Harms JA** has pointed out, while procedural, it also bears on substance. It concerns the sufficiency and directness of a litigant's interest in the proceedings which warrants his or her title to prosecute the claim asserted. This case illustrates the point. The applicant must establish the legal lineage between itself and the rights–acquiring entity the resolution mentions. That it has not done. While in a sense this is technical, and procedural, it also goes to the substance of the applicant's entitlement to come to Court. It has failed to show that it is the rights – acquiring entity, or is acting on the authority of the entity, or has acquired its rights."

What the applicants are seeking to achieve by these proceedings, is to challenge the constitutionality of the appointment of the 1st respondent to preside over the cases in which they are charged. In my view the applicants have established a clear nexus between the relief they are claiming and themselves. This point has to be dismissed for want of merit.

[53] (c) Non-joider

This point should not have been raised as a point *in limine* because it is not, and this has been decreed by the highest court in this jurisdiction, but Counsel seem not have heeded the injunction. Non-joinder of a party is incapable of disposing of the proceedings as the

Court has an option to either stand down the matter for the person who has a direct and substantial interest of the proceedings to be given notice thereof, and to solicit his or her response. In appropriate cases where a person who has direct and substantial interest is aware of the proceedings and decided not to intervene, the Court may exercise its discretion to proceed with the matter without such an interested party being part of the proceedings through joinder. These issues were aptly addressed in **Makoala v Makoala** (supra at **para. 6**) where **Melunsky J.A** said:

> "The non-joinder of a party who has a direct and substantial interest in the outcome of the proceedings, might not inevitably entail the dismissal of the application. Depending on the circumstances of the case the Court could decide to take other steps, including permitting the matter to stand down to enable notice to be given to an interested party and for this response to be obtained. Such a step can even be taken by a Court on appeal in order to avoid unnecessary expense or delay (see the discussion in **Amalgamated Engineering Union V Minister of Labour 1949 (3) SA 637 (A)** at **653** and **662-663**). In the present case the interested party, **Sechaba**, was the respondent's son. He was aware of the proceedings and had gone so far as to depose to an affidavit in support of the respondent. He could have intervened in the proceedings, duly assisted, had he wished to do so..."

Furthermore, In **United Watch and Diamond Co. v DISA Hotels**[10] it was said:

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[10] 1972(4) SA (C.P.D) at p.415E – G

"It is settled law that the right of the defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see **Amalgamated Engineering Union v Minister of Labour, 1949 (3) S.A. 637; Koch** and **Schmidt v Alma Modehuis (EDMS) Bpk., 1959(3) S.A. 308 (AD).** In **Henri Viljoen (Pty) Ltd. V Awerbuch Brothers, 1953 (2) S.A. 151 (0), Horwitz A.J.P** (with whom **Van Blerk, J.**, concurred) analysed the concept of such a "direct and substantial interest" and after an exhaustive review of the authorities came to the conclusion that it connoted (see p.169) –.

.....an interest in the right which is the subject matter of the litigation and ...not merely a financial interest which is only an indirect interest in such litigation."

In **Fluxmans Incorporated v Lithos Corporation of SA**[11], **Victor J** had this to say;

"Parties may only be joined as a matter of necessity and not convenience. It is only necessary if the parties sought to be joined would be prejudicially affected by the judgment of the Court in the proceedings. See **Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA)** at **para. [12]**."

[11] (NO. 2) 2015(2) SA 322 (GJ) at para. 5

The Attorney General is a party in these proceedings and it can safely be said that he represents the Government in inclusive of His Majesty the King) as its chief legal Advisor, and so this consideration alone renders it unnecessary to join His Majesty the King in these proceedings. His Majesty does not have a direct and substantial interest in the issues involved in this case. His Majesty's joinder not be necessary but merely convenient. It follows, therefore, that this point stand to be dismissed as well.

[54] **(d)** No *Prima facie* case for the relief sought:

It is trite that in application proceedings, an application take place of pleadings and the evidence, and formulate the issues which the applicant wishes to have determined and contain evidence upon which he/she relies for the relief sought. **(Rosenberg v South African Pharmacy Board 1981(1) SA 22 (A) 30H-31C).** It follows therefore that the applicant must set out in his founding affidavit facts which establish a prima facie case for the relief sought.

It is the respondents' argument that the applications have failed to make out *a prima facie* case for the relief sought in the sense of establishing how and when the said appointment of **Judge Hungwe** infringed their constitutional rights. The 6th respondent further attacks the applicants' reliance on the Chief Justice's is founding affidavit. He says the Chief's Justice's affidavit is simply an expression of opinion and unsubstantiated conclusions by her, and therefore cannot be regarded as evidence of the things she makes reference to and therefore the applicants' reliance on the said affidavit proves that they have not made out *a prima facie* case for the relief they seek.

In order to determine whether those founding affidavits inclusive of the annexures, make out *a prima facie* case the applicants' founding papers have to be looked at and be taken as true for the purpose of determining whether they make out *a prima facie* case for the relief sought. The objection that the applicant's founding affidavits do not make out a case for the relief claimed is recognized in our law, and in **Bowman NO v De Souza Roldao[12], Kirk-Cohen, J,** said;

> "This type of objection must be considered on the basis of an exception to a declaration or combined summons. The relevant consideration are:
>
> (a) The founding affidavit alone is to be taken into account;
>
> (b) The allegations in the founding affidavit must be accepted as established facts;
>
> (c) Are these allegations, if proved, sufficient to warrant a finding in favour of the applicant?"

The equation of this procedure, with an exception received some criticism from **Harms, JA,** in the case of **Valentino Globe BV v Phillips and Another[13],** wherein he said;

> "It seems to me to be wrong to permit the use of this procedure in a Court of first instance of fact on the papers, as is the case here. But having used the procedure unsuccessfully at that level, does not mean that an appellant is entitled to use it again on appeal. In any event, it seems to me that the analogy with the exception procedure may be inappropriate and that comparison

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[12] 1988 (4) SA 326 (TPD), at p.327I-J

[13] 1998 (3) SA 775 (SCA)

> should rather be with an application for absolution from the instance in a trial action. Having lost an application for absolution, a defendant cannot thereafter lead evidence and on appeal argue that absolution should have been granted at the end of the plaintiff's case."

Whether this procedure is akin to exception or absolution is of no moment, as its essence remains what was stated in **Bowman NO** (above) (See : **Ladychin Investments (Pty) Ltd v South African National Roads Agency, 2001 (3) SA 344 at 359B-I)**

[55] In *casu*, the applicants are challenging the appointment of **Judge Hungwe** and similarly-appointed Acting Judges to preside over their cases. Their appointments are challenged on the basis that they breached **section 118(3)** of the Constitution which guarantees the independence of the Judiciary as they were recruited and appointed at the instigation of the Executive arm of Government; that their appointment violated the applicants' right to fair trial as contained in **section 12(1)** of the constitution ; that their appointment violated sections **120 (2)** and **(5)** of the Constitution; that their appointments violated the provision of **section 132 (8)** of the Constitution as the Executive directed and controlled the **Judicial Service Commission** in the said appointments, against the prescripts of **S.132 (8)** of the Constitution. It is appropriate to mention that as evidence of the alleged aforesaid constitutional breaches, the applicants rely on the affidavits of the **Chief Justice Majara, The Prime Minister** and **the Minister of Foreign Affairs**. All these affidavits were uplifted from the case where **the Chief Justice** was seeking an interdict and other relief against, **The Prime Minister**. This, **Mr Mokhosi** made plain in his founding affidavit when he said;

> "[10] I and my co-applications have keenly been following the cases involving the Chief Justice and other Judges. I am aware of an affidavit sworn to by the Chief Justice who is in terms of the Constitution of Lesotho, also the Chairperson of the Judicial Service Commission that the Government of Lesotho ("the Executive") had contrary to her advice and protestations, initiated efforts to recruit foreign Judges without following the Constitution..."

And further at para. 11, he says;

> "[11] The second respondent opposed the application of the Chief Justice in Constitutional Case Number 13/2018. The second respondent's affidavit is attached hereto in its entirety and marked annexure "AB". It will be clear from the affidavit of the Prime Minister particularly paragraph 6.5 that he detailed the Cabinet Ministers Phamotse and Makgothi to consult "the chief Justice" as regards recruitment of foreign Judges because [His] report to SADC had to incorporate her input and that of the Director of Public Prosecutions over contemplated prosecutions and adjudication functions following from the constitutional frame". It is clear that the issue of recruitment of foreign Judges was initiated and pursued by the Executive under the direct control and supervision of the second respondent."

All these allegations, in my considered view make out *a prima facie* evidence of the case for the applicants. It follows that the attack that Mr Mokhosi's affidavit does not make out a case for the relief sought falls to be dismissed.

M. MOKHESI
ACTING JUDGE

For Applicants	**:**	**Adv. K Mohau K.C. with Advocates Letuka and Mafaesa , Instructed by Mei & Mei Attorneys**
For Respondents	**:**	**Adv. S.T. Magakachane, Instructed by Attorney General and K. Ndebele Attorneys**