IN THE HIGH COURT OF LESOTHO
(Sitting as Constitutional Court)

Held in Maseru

CC/16/2018

In the matter between:

FAKO JOHNSON LIKOTIAPPLICANT

And

PRIME MINISTER	1ST RESPONDENT
MINISTER OF FINANCE	2ND RESPONDENT
PRINCIPAL SECRETARY OF FINANCE PRINCIPAL OFFICER OFSPECIFIED OFFICES	3RD RESPONDENT
DEFINED CONTRIBUTION PENSION FUND	4TH RESPONDENT
SPECIFIED OFFICES DEFINED CONTRIBUTION	
PENSION FUND	5THRESPONDENT
ATTORNEY GENERAL	6thRESPONDENT

JUDGMENT

Coram: **:**Honourable Ms L. Chaka-Makhooane
: Honourable Mr. Justice E.F.M. Makara
: Honourable Mr. Justice K.L. Moahloli

Date of Hearing **:**9th April, 2019
Date of Judgment **:**25th September, 2019

SUMMARY

Applicant who was advisor to former Prime Minister and in that capacity benefited from a Government loan scheme by borrowing M500 000. 00 without interest from a bank. Parliamentarians and ministers equally benefiting from the scheme. Government featured as a guarantor for the payments of the loans. Post change of Government in 2017 resulting from a passing of a motion of no confidence against the then Prime Minister and the outcome of the elections, the Applicant and other holders of political offices vacated their political offices. A substantial number of parliamentarians in the 9th Parliament also lost their membership of parliament following their defeat in the elections. Resultantly, the borrowers became financially challenged to service the loans. Some however, reassumed membership in the 10th Parliament with others even becoming ministers. A new Government discharged its status as a guarantor by introducing a policy for the borrowers to settle debts on the loans. The policy decision resolved that Government would pay for the remaining debts of the borrowers who were parliamentarians while those of the Applicant and others would be settled through seizing of their gratuities to pay for their debts.Applicant lamented before the court that the decision was discriminatory on the undisputed narrated political grounds while Respondents maintained that it was a mere differentiation. The court held:

1. The policy was unfairly discriminatory since it classified people whose basic and material commonality is that they are all borrowers of money from banks under the same scheme and with the same terms and condition and that being a member of parliament is contextually irrelevant to justify the measure;
2. The advantageous debt forgiveness accorded to the parliamentarians in contrast to the disadvantageous one given to the Applicant and others reinforces the unfairness of discrimination;
3. The Respondents failed to demonstrate that the decision was in pursuit of a legitimate goal to advance national interest let alone its proportionality towards that. And, their explanation that it was intended to enhance freedom of parliamentarians to check and balance exercise of power by the Executive yet some of the beneficiaries are ministers and ex parliamentarians is rejected;
4. Consequently, the Applicant has proven that the Respondents violated his constitutional right of freedom from discrimination, right to equality and freedom from arbitrary seizure of property.

ANNOTATIONS

Cited Cases

1. Road Transport Board & Others v Northern Ventures Association C of A No. 10/05
2. Prinsloo v Van der Linde 1997 (3) SA 1012
3. Trope v South African Reserve Bank and Another and Two Other cases1993 (3) SA (A 264 (A)
4. Mabaso v Felix1981(3) SA 865 (A)
5. Radebe & Others v Eastern Transvaal Development Board1988 (2) SA 785 (A)
6. Ramohalali v Commissioner of Correctional Service & Others CC/2/2016
7. Lesotho National Insurance Co. Ltd v Nkuebe LAC (2000-2004), 877
8. Sethole & Others v Dr. Kenneth Kaunda District Municipality JS 576/13 [2017]
9. Mokone v Attorney General and Others (CIV/APN/232/2008) (CIV/APN/232/2008) [2010]
10. Attorney-General v Mopa LAC (2000-2004)
11. Van der Walt v Metcash Trading Limited (CCT37/01) [2002] ZACC 4; 2002 (4) SA 317; 2002 (5) BCLR 454

Statutes & Subsidiary Legislation

1. The Lesotho Constitution of 1983
2. The Lesotho Human Rights Act No. 24 of 1983
3. Members of Parliament Salaries (Amendment of Schedule) Regulations Legal Notice No. 156 of 2018
4. Members of Parliament Salaries (Amendment of Schedule) Regulations Legal Notice No.30 of2018

Books & Articles

1. International Covenant on Civil and Political Rights (ICCPR December 16 1966
2. African Charter on Human and Peoples Rights Adopted in 1998

MAKARA J

Introduction

[1] The Applicant instituted these proceedings challenging the constitutionality of the decision of the Government to

differentiate him from parliamentarians and then accorded them preferential treatment while he was relegated to a disadvantageous one; despite the fact he is materially similarly circumstanced with them. It is against that backdrop that he sought for justice underneath the shelter of this Court seeking for its order in these terms:

1. (a) Declaring as unconstitutional the decision of the government of Lesotho, made through and by the 2nd Respondent, to recover from the Applicant the amount of money it(government) had paid to Nedbank Lesotho on behalf of the Applicant,consequent upon the Applicant having vacated office as advisor-political and economic affairs to the prime Minister;

   (b) Declaring as unconstitutional the non-payment to the Applicant on his gratuity by the Government of Lesotho as represented by the 2nd and 3rd Respondents through the agency of the 4th and 5th Respondents, consequent upon the Applicant having vacated office as Advisor-Political and Economic Affairs to the Prime Minister;

   (c) Declaring as unconstitutional the utilisation or diversion by the Government of Lesotho of the Applicant's gratuity, through the 2nd and 3rd Respondents, including through the agency of the 4th and 5th Respondents, for the purpose of recovering for the Applicant the amount of money it(Government) had paid to Nedbank Lesotho on behalf of the Applicant, consequent upon the Applicant having vacated office as Advisor-Political and Economic Affairs to the Prime Minister;

   (d) Reviewing and setting aside as unconstitutional the decision of the government of Lesotho, made through and by the 2nd Respondent, to recover from the Applicant the amount of money it(Government) had paid to Nedbank Lesotho on behalf of the Applicant,consequent upon the Applicant having vacated office as Advisor-Political and Economic Affairs to the Prime Minister;

   (e) Reviewing and setting aside as unconstitutional the non-payment to the Applicant of his gratuity by the government of Lesotho as represented by the 2nd and 3rd Respondents through the agency of the 4th and 5th Respondents, consequent upon the Applicant having vacated office as Advisor-Political and Economic Affairs to the Prime Minister;

(f) Reviewing and setting aside as unconstitutional the utilisation or diversion by the Government of the Lesotho of the Applicant's gratuity, through the 2nd and 3rdRespondents, including through the agency of the 4th and 5thRespondents, for the purpose of recovering from the Applicant theamount of money it(Government) had paid to Nedbank Lesotho on behalf of the Applicant, consequent upon the Applicant having vacated office as Advisor-Political and Economic Affairs to the Prime Minister;

(g) Directing the 2ndRespondent to provide funds, within thirty(30) days of the making of this Order, for the purpose of payment to the Applicant by the 4th and 5thRespondents of the gratuity of the Applicant, consequent upon the Applicant having vacated office as Advisor-Political and Economic Affairs to the Prime Minister;

(h) Directing the 3rdRespondent to transfer to the 4th and 5thRespondents, within seven(7) days of compliance with paragraph 1(g)of this order, the funds provided pursuant to paragraph 1(g) of this order;

(i) Directing the 4th and 5thRespondents to pay, within seven(7) days of compliance with paragraph 1(h) of this order, the gratuity of the Applicant, consequent upon the Applicant having vacated office as Advisor-Political and Economic Affairs to the Prime Minister;

2. Costs of suit only in the event of opposition, jointly and severally, the one paying, the others to be absolved;
3. Further and/ or alternative relief.

[2] The Applicant procedurally accompanied his application with a founding affidavit upon which he sought to establish his case. Supportive affidavits were tendered in by some other former holders of political offices with whom he was similarly classified and treated differently from ministers and members of parliament (MPs).

[3] Subsequently, theRespondents filed their intention to oppose the application and duly filed their answering affidavit to respond to each and every statement canvassed by the Applicant in their founding affidavit. Subsequently, the Applicant filed his

replying affidavit to clarify the contents in the founding affidavit after being responded to by the Respondents. The development marked the completion of the requisite papers to be filed by the parties for the Court to have a comprehensive picture of the case.

Common Cause Scenario

[4] This is reflective of the material developments which are *ex facie* the papers filed by both parties acknowledged to be true revelations and, therefore, uncontested. They are also indirectly indicative of the points of divergences between them. Their basic characteristic is that they are not contested. Incidentally, those admitted facts or position of the law became instrumental in the identification of the constitutional issues involved for their consequent determination by the Court.

[5] The Respondents have in all fairness not disputed the jurisdiction of this Court over this matter since the issues involved are constitutional in nature. The same applies to the *locus standi* of the Applicant to have brought this application. This is by virtue of their recognition that he as an individual complains that his personal constitutional rights were violated by the Respondents.

[6] There is mutual recognition by the parties that the case originates from a Government policy which introduced a financial benefit to MPs and indirectly to ministers as well to borrow

amaximum amount of M500 000.00 from private banks with its interest payable by the Government. The Government featured in the arrangement as a guarantor of the payment of the loaned moneys. The scheme was sanctioned under the Members of Parliament Salaries (Amendment of Schedule) Regulations[1] read with the Members of Parliament Salaries (Amendment of Schedule) Regulations[2].

[7] The two instruments referred to conceptualize the Prime Minister,Deputy Prime Minister and ministers as MPs since they graduated to those elevated positions from their membership of parliament. Unlike ministers and MPS they each qualify for a M600 000. 00 loan. Otherwise, paying conditions applicable to them are *mutatis mutandis* similar to those pertaining to MPs.

[8] Similarly, it is acknowledged by both sides that the authorship of the illegibility of Government Secretary (GS), Principal Secretaries (PSs, Advisor to the Prime Minister which is the position held by the Applicant and other designated senior officers, is ingrained into their respective contracts. It is in that background that the Applicant took the loan from Ned Bank Lesotho. This litigation is traceable for that innocent act.

[9] Both parties are consenting that the case is primarily premised upon the question of the constitutionality of the policy

[1] Legal Notice No. 156 of 2018
[2] Legal Notice No.30 of2018

categorization of MPS and by default ministers separately from other beneficiaries of theloan scheme to determine a *modus operandi* for the settlement of the outstanding loan balances. There is no dispute that this was sequel to a realization that in consequence of the June 2017 general elections and change of Government, some of the beneficiaries would almost logically vacate offices. In the circumstances, there was uncertainty over their financial abilityto pay the outstanding loan debts balances. This led to a consensus that the Government as a guarantor of the payments became obliged to intervene.

[10] Though it is not clear from the papers that all those who qualified for the loan under the scheme utilized that opportunity, there is certainty that some including the Applicant and members of Parliament did perhaps in different amounts. It is commonly regretted that unfortunately for them, they were struck by what could be likened to a thunder bold which *inter alia* abruptly terminated their engagements in different political offices and membership of parliament. Resultantly, they experienced financial challenge and embarrassment.

[11] The parties agree also that the *discrimination in casu*s hould be comprehended contextually. Their common view hereof is that a key question concerns the constitutionality or otherwise of the classification of the borrowers of the moneys and a creation ofparallel systems for each class towards resolving its debts yet they are all similarly circumstanced. It was acknowledged that

the question was rendered important by the admitted fact that as a result of the classification policy, the beneficiaries of the scheme were differently treated.

[12] It is clear from the papers that a critical part of the policy decision hinges upon the difference in the manner in which the Government as a guarantor of the payments of the debts, would settle those of parliamentarians and incidentally ministers in contrast to that of the Applicant and those in his class. A gist of the differences is that in terms of the already implemented policy design the Government would settle the outstanding debts of the MPsof the 9th Parliament. On the contrary, the policy decision for the payment of the debts by the Applicant and those in his class was that this would be done by the Government through commandeering of their pending gratuities from the treasury to the concerned banks for settling their debts. This was accordingly done - hence this application.

[13] Interestingly, there was consensus that the membership of some of the MPs transcended into the 10th Parliament, benefited from that windfall. The same applied to some of them who in addition to their membership of parliament in the 10th Parliament became ministers in the new Government.

[14] It emerges from the papers before this Court that it is agreed that in the case of the Executive and the Judiciary, the

policy is regulation based while with MPs, Government Secretary, Principal Secretaries and specified few others, such as the Applicant, this is founded upon their individual employment contracts. The content of the terms and conditions of the loan are in essence similar save for the Prime Minister and his deputy who each qualifies for a slightly higher quantum of M600.000. The arrangement for servicing the loan is that an amount of roughly M8, 333 wouldfor a period of almost 5 yrs be deducted from the monthly salaries of each beneficiary towards a total settlement of the loan. A dimensional benefit is that Government would pay on their behalf the interest of the principal amount.

[15] For ease of reference and convenience, parliamentarians and ministers would by operation of their policy classification, be designated in this judgment as class A while the Applicant and his class would be class B.

[16] This case has actually been precipitated by the preferential treatment accorded to class A in contrast to the disadvantageous one given to those in class B despite the reality that they were both similarly situated. This presents a foundation of the case of the Applicant that the policy is constitutionally unfairly discriminative, violated their constitutional right to be treated equally with other human beings, receive equal protection under the law and be free from discrimination. It is in that respect, that he motivated his case by relying upon Sections 4(1)(n)(o) and 18(2) (3), read with 19 of the Constitution. The content and form

of these operational provisions shall subsequently be analysed, commented upon and relied upon for guidance at the decision making level of this judgment.

[17] On a transitional note towards the identification of the consequential issues, it is clear from the pleadings that the parties have acquiesced to the fact that the basic challenge lies in the determination of whether the policy classification constitutes *mere differentiation or discrimination.* Naturally, the answer would emerge from the long established jurisprudence on those mutually complementary legal terms.

The Issues

[18] An already prefigured foundational question upon which the parties vigorously disagree is whether in the circumstances of this case the classification of the beneficiaries constituted *mere differentiation* or discrimination. Its trajectory concerns whether the measure transgressed the rights of the Applicant not to be unfairly treated without constitutional justification and if the facts are indicative that his constitutional *right to equality before the law* and to *equal protection under the law* were also violated.

[19] The identified controversies would mainly be resolved through the interpretation that would be inclined to protect and advance *human dignity, freedom and equality* as the pillars of a democratic constitution.

ArgumentsAdvanced by the Parties

[20] This part consists of a synopsis of the interrogation of the salient features of the conflicting controversies between the parties. Appreciably, these would be configured upon their points of convergences and divergences primarily on the factual landscape. Since the Applicant is the one who initiated the proceedings it would be logical to have his version of the case presented first and then complemented by that of the Respondents. The rationale behind is that in the process, there would be appreciation of how the law was invoked towards their final resolution.

[21] The Applicant based his case upon a charge that the policy classification of the beneficiaries of the loan scheme into class A and B respectively was discriminatory. He attributed that to his submission that though the categorization involves individuals who are similarly circumstanced, it rendered those in class A to financially benefit from it and operated otherwise against those in class B. He projected a picture that both classes constituted of people who had borrowed money from a Government scheme that allowed them to secure a maximum of M500 000.00 loans from banks with Government standing surety for payments of loans for each beneficiary.

[22] A crucial detail of his lamentation is that the *discrimination* manifests itself from the fact that in consequence of the classification, the Government resolved that it would itself settle the debts of the debtors in class A and unilaterally use the gratuities of those in class B to pay for their debts. It is in that context that the Applicant complains that he experienced a state of bewilderment and financial desolation since for some time he could not get the answer concerning the whereabouts of his gratuity entitlement and when would it be available.

[23] In the circumstances, he submitted that while being mentally overwhelmed with many questions without answers about the whereabouts of his gratuity, he conjectured that the Respondents have deliberately discriminated him from benefiting similarly with those in class A for a political vendetta. According to him, this was designed to victimize him either directly or as a collateral damage. It is precisely in that perception, that he recounted his outstanding political science credentials, appointment as political advisor to Prime Minister Mosisili and the criticisms he published against the incumbent administration when it was in the opposition. In the process, he persistently submitted that his series of averments in the founding affidavit that he was discriminated against on political basis have not been denied in the answering affidavit and, therefore, should be accepted as a fact.

[24] On a different leg, the Applicant contended that the Respondents have not demonstrated that the categorization of the loan beneficiaries originates from a policy which seeks to achieve a legitimate Government objective to advance societal or national interest.

[25] To reinforce the point that this was a discriminatory policy which was never in pursued of any legitimate objective and, therefore, unconstitutional, he drew to the attention of the Court the contradictions inherent therein. This according to him is exposed by the fact that *post facto* June, 2017 general elections, some of the members of the 9th Parliament of the Kingdom reassumed membership in the 10thParliament.He identified a climax of that to be that some of those became ministers or retained the same standing after the dissolution of Parliament and change of Government which is suggestive that the Government settled their debts despite their capacity to service their loans.

[26] The Applicant challenged the truthfulness and credibility of the answer by the Respondents who submitted that though the classification favoured those in class A, it nevertheless, remained legitimate. They reasoned that the scheme was in pursuit of a constitutional goal of enhancing theauthority of parliamentarians to freely check and balance the Executive against its potential abuse of legislative power and authority.The Applicant counter argued that there was no merit in the submission since it is

inconceivable how the beneficiaries who became ministers in thepresent 10thparliament could discharge that role. The same paradox was posed about those who ceased being parliamentarians in the same Parliament.

[27] In the instant case, the Applicant maintained that he has demonstrated that the *differentiation* relied upon by the Respondents is effectively *discriminatory* since it is based upon political considerations and/or in the alternative upon such analogous ground. To support the proposition, he reiterated that the Respondents have not in their answering affidavit contested his averments in the founding affidavit that he and those in class B were discriminated against for political victimization. He then introduced a dimension that the discrimination ultimately undermined their corresponding *right to equality under the law, right to protection under the law and right of freedom from discrimination.*

[28] On a rather different leg, the Applicant charged that the Respondents have failed to discharge the constitutionally mandatory *onus of proof* that he and his colleagues in class B were justifiably discriminated against in pursuit of a legitimate Government objective in the public interest. And, complementarily that the measure adopted has proportionately limited their affected rights towards the achievements of the desired societal goal.

[29] In all fairness to the present Government, the Applicant cautioned that the impugned policy was actually authored by the retired Prime Minister Mosisili led Government through the stated regulations[3] and contracts[4]. Understandably, the regulations were laid before Parliament and it endorsed them. The incumbent Government inherited the arrangement and perpetuated it. In the meanwhile this mainly benefits parliamentarians to the exclusion of other beneficiaries and would continue to do so whenever there is dissolution of Parliament.

[30] The Applicant continuously appealed to the Court to carefully consider its decision in the matter, well conscious of the realities in our political landscape. He characterized it to be dominated by long deep seated hatred between the political formations, desire for vengeance against members of each party and at the earliest opportunity victimize those who are opponents of the party in power or merely perceived as such.

[31] In conclusion, the Applicant repetitively emphasised that his case for discrimination is in the main founded upon the fact that he and others in class B are similarly situated with their counterparts in class A. He ascribed that to the fact that both categories constitute of individuals who after the June 2017

[3]The Members of Parliament Salaries (Amendment of Schedule) Regulations read with the Members of Parliament Salaries (Amendment of Schedule) Regulations.

[4] Employment contract for each holder of a political office

elections ceased being MPs or holding Government political offices still owing moneys loaned to each of them by banks in accordance with the Government loan scheme policy. On that basis, he submitted that the decision to classify the same debtors into two and then treat those groups differently should have received guidance from the common law wisdom that *the likes should be treated alike while the unlike be treated unlike.*The thinking led him to a thesis that the debt clearance which the Government accorded to class A and the adverse measure under which it subjected the class B, was discriminatory and without any constitutional justification.

[32] It would be remiss for the Court not to disclose that it *mero muto* invited the counsel for both sides to address it on the relevancy of Sections 18 (4) (d) and 151 of the Constitution respectively and allowed them time to prepare heads through which they would each interrogate the subject. Expectantly, on the appointed day the Respondents argued that Section 18 (4) (d) exempted *discrimination* from consideration where the Government decides to spend money in a manner it deems appropriate in the circumstances of each case. It should suffice to be stated that the Applicant maintained otherwise without being elaborate on the point save to say that notwithstanding the section, it does contemplate that the Government would use it unilaterally.

[33] Regarding Section 151, the Applicant submitted that the Court rightly took judicial notice of it because it is pertinently relevant to this case. He then interpreted it to clearly disqualify Government from seizing any financial benefits due for payment to a public officer save with the concurrence of the Public Service Commission (PSC). The Respondent simply argued that the Court is not qualified to have taken judicial notice of the section because it had never been pleaded. At no stage did they interrogate the jurisprudence around the section.

[34] A foundational response by the Respondents is that they never *discriminated* against the Applicant together with his colleagues in class B. Instead, they maintained throughout the case that they merely *differentiated* MPs and incidentally ministers from the Applicant and the rest of the officials in class B. They hastily sought to explain a criteria used in that process by identifying the differences between the two classes. The A class was described to basically constitute of parliamentarians while the class B group comprised of officials who are contractually appointed to political offices for a duration stipulated in their individual contracts.

[35] The Respondents further justified what they perceived as their act of *differentiation* by contrasting the function of beneficiaries who are parliamentarians from that of their contractually engaged counterparts. Here emphasis was laid upon the constitutional role of parliamentarian to check and

balance the exercise of power by the Executive against possible excesses. In their view, the *differentiation* was justified by the fact that it was intended to facilitate for the Government to pay for their debts so that they could freely exercise their supervisory role over the Executive. On the other hand the roles of those who were contractually holders of political offices including the Applicant was perceived to be of a lesser significance since they had no authority to exercise power over the Executive. So, they logically concluded that the *differentiation* was constitutionally justified in that much as it may have not treated the Applicant equally with parliamentarians, this was done proportionally to achieve the said desired national objective.

[36] Though the Respondents conceded that both MPs and the contracted appointees to political offices had a common denomination in that they were beneficiaries of the Government loan scheme; they do not regard that to render both classes necessarily all equal and, therefore, that they cannot be differentiated. They, however, agreed that this should be done commensurately within constitutional limits to achieve a legitimate Government goal. In the context of this case, they submitted that they have discharged their burden to demonstrate that the *differentiation* is for the reasons they advanced constitutionally justified. Against that reasoning, they further submitted that the act has not violated the right of the Applicant to *freedom from discrimination* and incidentally to the *right of equal protection under the law*.

[37] In addition, the Respondents over emphasized that *right to equality* is not absolute but depends upon the material facts in each case. They described this case as a typical one where it became justifiable in the interest of the nation to differentiate parliamentarians from those in class B though at critical moment they were both owing moneys they had borrowed from the private banks. They in support of the proposition relied in the main upon part of a postulation of the law by Gauntlett JA in **Road Transport Board & Others v Northern Ventures Association**[5]**.** Here it was cautioned that *right to equality* is not absolute because the exigencies in that case warranted *differentiation* between operators of different types of taxis for the safety of passengers and that this did not amount to *discrimination*.

[38] On the *mero muto* invitation by the Court to be addressed on the question of the relevancy of Section 151 of the Constitution in the matter on the appointed day, the Respondents criticized it for that initiative. According to them, it was not qualified to have done so since that was not pleaded by any one of the parties.

Surveying of the Legal Landscape

[39] *Discrimination* and *differentiation* represent key operational words for a determination of their respective legal technical meanings. This is traceable from the fact that the case of the Applicant is hinges upon the charge that the policy classification and its favourable consequences upon class A when contrasted

[5] C of A No. 10/05

with its unfavourable results against class B constitute *discrimination.* On the other hand, the Respondents advance a counter view that the classification was an act of *mere differentiation* among the beneficiaries of the loan scheme and that it was intended for the achievement of a goal that would be in the national interest.

[40] The two terms should be comprehended within their constitutional meanings as opposed to their ordinary dictionary definitions. The approach would culminate into a discovery of the common law genesis of *discrimination* and subsequently its evolvement since the ancient, medieval and during the industrial revolution times[6]. The trend was authored by the pressing challenge for the ascertainment of , and fundamental freedoms. This applied in particular over the question of the *right of equality among the human kind, right of freedom of people from discrimination and limitations thereof.* Resultantly, these rights were throughout the centuries progressively acknowledged in publications which to date exist as the primary sources of recognition of human rights. Amongst the notable would be the philosophical writings[7] Magna Carta Liberatum[8], The post French Revolution Declaration of the Rights of Man and of the citizens[9] which specifically proclaimed rights of men on *equality, freedom*

[6] A philosophy about the equality of men emerged from the ancient writings of Plato particularly in his publication *Res Republica,*380 BC on justice and from the philosophical postulation by his teacher Socrates (469 – 399 BCE)

[7] Augustine one of the greatest Catholic Church fathers, Roman Philosopher Severenus Boethius 1385 in his *DeTrinitate* and Saint Thomas Aquinas in his *Summa Contra Gentiles* and *Summa Theologia* (1256 – 1259)

[8] The charter of rights endorsed by King John of England at Runnymede on the 15th June 1215,

[9] Drafted and passed by the French Constituent Assembly in 1789 after consultation with a great American statesman Thoms Jefferson and drafted by a renowned legal scholar of his times Marguis de La Fayete.

and liberty. In the modern times, such sacrosanct acknowledgements were *inter alia* made through the Lesotho Human Rights Act[10], International Covenant on Civil and Political Rights (ICCPR)[11] The Universal Declaration on Human Rights,[12] African Charter on Human and Peoples Rights[13]. There are in addition, several international treaties and conventions on same.

[41] In the Kingdom of Lesotho human rights and fundamental freedoms are catalogued for recognition, promotion and enforcement vertically and horizontally under Chapter II of the constitution of Lesotho[14]. The fact that according to the Applicant the classification under consideration is *discriminatory* whilst the Respondents maintain that it is *merely differential* renders the Court to explore relevant sections of the Constitution and its corresponding jurisprudential dynamics forguidance.

[42] The constitution conceptualizes *discrimination* and its parameters under Section 18. To reveal the intention of the legislature in the section, it is headed "**Freedom from Discrimination**" and it is accordingly configured:

> (1) Subject to the provisions of subsections
> (4) and (5), no law shall make any provision that
> is discriminatory either of itself or in its effect.
> (2) Subject to the provisions of subsection (6),
> no person shall be treated in a discriminatory

[10] No. 24 of 1983
[11] December 16 1966
[12] Adopted by the UN Assembly at its 183rd Session on the 10th Dec. 1948 per Res. 217 at Palais de Chilot in Paris France.
[13] Adopted in 1998.
[14] The Lesotho Constitution of 1983

> manner by any person acting by virtue of any written law **or in the performance of the functions of any public office or any public authority.**
> (3) In this section, the expression "discrimination" means affording different treatment to different *persons* **attributable wholly or mainly to their respective descriptions**by race, colour, sex, language, religion, **political or other opinion,** national or social origin, property, birth or **other status** whereby persons of **one such descriptionare subjected to disabilities or restrictions to which persons of another such description are not made subject or are accordedprivileges or advantages which are not accordedto persons of another such description** (Court's emphasis).

[43] It is clear from the scheme of the section that the legislature has in principle dedicated it towards the exclusion of *discrimination* among similarly circumstanced people. This resonates the trite common law notion that the like must be treated alike and the unlike must be treated unlike. It is readable from Section 18 that it prohibits *discrimination* both vertically[15] and horizontally[16].Section 4 (2) succinctly articulates this in these terms:

> For the avoidance of doubt and without prejudice to any other provision of this Constitution it is hereby declared that the provisions of this Chapter [that is, Chapter II of the Constitution which guarantees fundamental human rights and freedoms] shall, except where the context otherwise requires, apply as well in relation to things done or omitted to be done by persons acting in a private capacity (whether by virtue of any written law or otherwise) as in relation to things done or omitted to be done by or on behalfof the Government of Lesotho or by any person acting in the performance of the functions ofany public office or any public authority.

[15] Pertains to discrimination or violation of human rights by Government
[16] Pertains to discrimination or violation of human rights by private persons

[44] The Section 18 provisions operationalize the *right of freedom from discrimination*. It is logically foreshadowed by Section 4 (1) (n) of the Constitution which is a substantive provision that actually creates the right itself by inscribing in part that:

> Whereas every person in Lesotho is entitled,
> whatever his **race, colour,** sex**,** language, religion,
> **political or other opinion, national or** social origin, property, birth or *other status* to fundamental human rights and freedoms, that isto say, to each and all of the following-
>
> **Freedom from discrimination.**

[45] To demonstrate that the Chapter II rights are not just a regimen of pious declaration but intended for recognition and legal enforcement it is concluded with the wording that **its provisions shall have effect for the purpose of affording protection to those rights and freedoms.....** (Court's emphasis). Moreover, this is specifically attested to under Section 22 (1) of the Constitution that bestows upon this Court a jurisdiction to hear cases over allegations of violation of the provisions of **Section 4 to 21** (inclusive) of the Constitution.

[46] Notwithstanding the traversed scheme of the Constitution against discrimination, it has constitutionally created exceptions from that principle position. In a nutshell, this applies where the law makes provision applicable over:

> (a) None citizens or persons connected with them;
> (b) Adoption, marriage, divorce, burial, devolution of property after death or other like matters which is the personal law of persons of that description or for application of customary law of Lesotho upon persons over whom it is applicable;
> (c) Appropriation of public revenues or other public funds;
> (d) Whereby persons falling under subsection 3 may be disabled or restricted or be privileged due to special circumstances;

(e) Laws intended to remove restrictions against equality of persons;
(f) Laws intended to maintain standards of qualifications **excluding** those based upon the specified grounds for discrimination under Section 18 (3) of the Constitution for appointment of a person to a public office;

[47] A Constitution as a whole in particular the Chapter II human rights and the corresponding freedoms lead to a discovery that incidentally the *discrimination* controversy *in casu* transcends into a consideration of its effect on the *right to equality* under Section 4(1) (o) that in part provides:

> Whereas every person in Lesotho is entitled whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following-
> **The right to equality before the law and the equal protection of the law,**

Section 19 of the Constitution is similarly factored in since it operationally complements Section 4 (1) (o) of the Constitution by reiterating the right to equality before the law and by introducing *right of* equal protection of the law.

[48] There must be realization that the Chapter is concluded with a provision that it shall have effect for the purpose of affording protection to the listed rights and freedoms…….

[49] To complete the legal landscape reference should be had to *differentiation* as a constitutional concept. In the context of this case, it applies to a categorization of people to serve a legitimate Government purpose for the advancement of societal or national

interest in a measured manner that is leastintrusive against the rights of those who may be adversely affected. Differentiation could, however, translate into *discrimination* if it based upon any one of the grounds listed under Section 18 (3) of the Constitution and, therefore, presumed *unfair*unless proven otherwise by the authority or person who relies upon the differentiation. This is indicative that once it is *prima facie* established that the measure is premised upon any of such enumerated grounds, the onus shifts over to the side that took the measure to justify its constitutionality.

[50] *Differentiation* was *inter alia* acknowledged asdeveloped phenomena in our constitutional thinking and well distinguished from *discrimination* in **Road Transport Board & Others v Northern Ventures Association[17].** Here as it has already been recorded, the Court of Appeal drew a distinction between *differentiation and discrimination* by citing with approval the decision in **Prinsloo v Van der Linde[18]**that:

> It must be accepted that, in order to govern a modern country efficiently and to harmonize the interests of its entire people for their common good. It is essential to regulate the affairs of its inhabitants extensively. Itis impossible to do so without differentiation which treats people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation[19].

[17] *Supra*
[18] 1997 (3) SA 1012 (CC)
[19] @ 1024 E-F

Application of the Law to the Facts& Issues

[51] The impasse should elementarily be resolved by determining if the Applicant has established a case of *discrimination.* It is of significance for the purpose of this case that the Applicant has specifically pleaded that:

(a) The categorization of the beneficiaries of loan scheme exceeded the bounds of *mere differentiation* by assuming *discriminatory* characteristics since it transgresses the rights of the other class of the beneficiaries including him;

(b) The categorization was inspired by political consideration to victimize him and others in his class on the basis of actual or perceived political affiliations;

(c) The manifestations of the *discrimination* authored by the policy classification are that it was resultantly decided that the Government would clear the loan debts of parliamentarians; On the other hand,

(d) The Government unilaterally decided that the debts of the Applicant and those with whom he was classified, would be paid by rerouting the gratuities already due to them for the settlement of the same debts in the banks which provided the loaned moneys.

(e) The *discrimination* under which he and others were subjected to did not bear any rationale connection with a demonstrated Government legitimate objective save that it is indicative of a pursuit of a political vendetta.

[52] A rather intriguing aspect of this case lies in the manner in which the Applicant *in seriatim* unfolded a series of averments to demonstrate that the classification and its stated results originate from a political design. A large part of the depositions intended to support the proposition could be perceived as of a

circumstantial nature while a few could be substantive. They range from paragraphs 72 – 115 and are presented in a rhetorical manner reminiscent of political statements. Whatever attitude and scepticism the Court might have about those averments, a decision should turn upon the form and the content of the answers provided by the Respondents to each of those numbered paragraphs in his founding affidavit. A key consideration for guidance would be the rules governing pleadings and not necessarily what the Court may believe or incline to. A general *verbatim* response of the 3rd Respondent to those paragraphs is:

> I aver that the decision was reached at by the government well aware of the Applicant. The decision is not discriminating in terms of S18 and 19 of the Constitution. In short, he is complaining about unfair discrimination on grounds which are not specified in section 18 (2). I aver that the constitutional challenge should be explicit so as to enable the participants to prepare their case. As a result, I have been advised that there is no presumption in favour of unfairness under the circumstances. I believe the advice to be true and correct. In the nutshell, I strongly argue that there is no discrimination but rather differentiation between classes of people and the said differentiation is rational in as much as the government had a legitimate purpose to make such a differentiation. I further pray that this case be dismissed with costs because this is not an instance where the constitutional challenge has been mounted in the public interest. It relates to the commercial interest of the Applicant alone[20].

[53] *Ex facie* the verbatim quoted answer which the Respondents advanced in response to paragraphs 72 to 115 that constitute of the political victimization complaints, it is evident that they have not addressed the allegations therein to give a different version. This could have enabled the Court to judge on which of the versions could be true. Instead, they have simply pleaded their conclusion of law from the averred

[20] Para 48

facts. This is contrary to a trite procedural requirement comprehensibly explained by Grosskopf JA in **Trope v South African Reserve Bank and Another and Two Other cases**[21] thus:

> A party has to plead – **with sufficient clarity and particularity – the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts** (Mabaso v Felix 1981 (3) SA 865 (A) at 875A-H; Rule 18 (4). **It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it**. (Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 792J-793G. (Court's emphasis)

[54] The said Rule 18 (4) of the South African High Court Rules referred to in **Trope v South African Reserve Bank and Another**[22] **(supra)** is *mutatis mutandis* written *in pari materia* terms with Rule 20 (4) of our High Court Rules that directs:

> Every pleading shall contain a clear and concise statement of the facts upon which the pleader relies for his claim, defence or answer as the case may be, with sufficient particularity to unable the opposing party to reply thereto.

[55] The similarity between the two rules renders the decision in **Trope v South African Reserve Bank & Another**[23]to be strongly persuasive since it basically addresses the same procedural requirement upon almost the similarly couched rule in our mist. It is analogously instructive that the Respondents ought to have systematically and sufficiently answered each of the paragraphs through which the Applicant intended to give the Court an impression that the classification was planned to politically victimize him.

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[21] 1993 (3) SA (A 264 (A) at 273 A-B
[22] *supra*
[23] *supra*

[56] It is further a basic requirement that a Respondent in a notice of motion should inanswer the contents in each paragraph in the founding affidavit since they represent evidence through which the Applicant presents what he regards as a fact on a particular subject. This would in fact be similar to the evidence given by the Plaintiff against the Defendant in trial proceedings. In that situation, the Defendant would have to evidentially sustain his defence by responding to each material *viva voce* evidence proffered by plaintiff including any such evidence intended to support it.

[57] There is an ages long entrenched procedural principle that prescribes the form and content that a Respondent should follow when answering the founding affidavit filed by the Applicantto establish a case. The main requirement is that the Respondent must answer each of all the paragraphs in the founding affidavit. The understanding is that the Applicant sought to strategically present some fact in every paragraph so that they would cumulatively sustain his main ground that he is a victim of political discrimination or of such comparable basis.

[58] It emerges from the same *verbatim* text of the answer given by the Respondents to paragraphs 72 to 115 of the founding affidavit that they failed to realize its potential legal technical effect and the wisdom in addressing them individually. This holds especially in recognition of a trite principle of law that in motion proceedings a litigant stands and falls by his papers.

[59] Had the Respondents denied the political charges contained in each paragraph and advanced a counter factual scenario, it is **inconceivable** that the Applicant would succeed to sustain the allegations in those paragraphs. At best the Court could only suspect political victimization but would not have basis to make such a deduction or reach any conclusion thereon. However, since in this case the Respondents have not raised an iota of an explanation contradicting factual assertions in each of those paragraphs, the rules on pleading provide the answer. Here the **elementary** principle is that in motion proceedings one stands and falls by his papers and that resultantly what is not denied should be regarded as a fact. An exception would obtain where that notwithstanding, the Court takes judicial notice that the uncontested allegation is itself pertinently *non scripto,* deceptive or that a pleaded fact applies to a mentally challenged person etc.

[60] Incidentally, during the deliberations on the political oriented paragraphs the Court initially found it difficult to appreciate the relevance and truthfulness of the allegations therein. It even ordered for an adjournment for the Applicant to reconsider the value and the relevance of those seemingly political statements. When the Court resumed, the Applicant explained that the representations projected the history behind the discrimination as part of circumstantial evidence. Most significantly, he laboriously and repetitively cautioned the Court that despite whatever reservations it may have over the averments, the Respondents have, nevertheless, not contradicted them anywhere in their answering affidavits.

[61] Seemingly also, the Respondents have failed to realize that pleadings are in the main based upon facts which constitute the basis of the application as the Applicant has narrated them in a paragraphed form in the founding affidavit. They appear to have operated under the impression that the political oriented paragraphs were nonsensical or untrue to the extent that they did not warrant a dedicated response. They resultantly, committed a fatal mistake by simplistically recording in general terms their legal perception of those paragraphs without initially pleading to the facts alleged in each paragraph. The approach contradicted a key common law principle expressed in **Trope v South African Reserve Bank and Another and Two Others**[24] which emphatically warned that it is not sufficient to plead a conclusion of law without pleading the material facts giving rise to it. The pronouncement was made against the backdrop of the same expositions of law stated in **Mabaso v Felix**[25], **Radebe & Others v Eastern Transvaal Development Board**[26]**.**

[62] The general answer that the Respondents tendered to the explained paragraphs 72 –115 of the founding affidavit is intrinsically their legal interpretation of what the Applicant presented as progressive developments leading towards the violation of the constitutional rights under consideration. There must be recognition that failure by the Respondents to contradict that renders the uncontested version to be accepted as true. So,

[24] *supra*
[25] 1981(3) SA 865 (A)
[26] 1988 (2) SA 785 (A) @ 792J – 793G

the matter turns on the wrong form, content and style adopted by the Respondents in answering vital accusations levelled against them.

[63] In the circumstances, however, what remains material and determinative in the matter, is a clearly standing fact that the policy classified the beneficiaries of its loan scheme. The constitutionality or otherwise dimension originates from the Government decision to settle the debt of those in class A and unilaterally use the gratuities of those in class B to pay for their outstanding loan advancements.

[64] The already cited definition of *discrimination* under Section 18 (3) and the legal science developed around that legal notion provides a systematic guidance for a determination of a scenario where categorization of people is *discriminatory* in contrast to where it is a *mere differentiation.* Section 18 (8) cautions that the provisions under the section in its entirety must be read without any compromise to the generality of Section 19 which introduces the *right to equality of persons under the law and the to the* equal protection under the law.This denotes that *right of freedom fromdiscrimination* is incidental to the *equality right* and that it must always be considered with reference to the *equality right.*

[65] In dealing with this matter, the Court must be mindful of a *plethora* of instructive authorities that when dealing with a constitutional case of this nature, it must throughout, interpret the rights involved broadly and purposively towards a realization

of the constitutional values and not search for the literal meanings. It is worthwhile to reiterate that the core values of a democratic constitution are *human dignity, freedom and equality.*

[66] Towards a final determination of the issues, the Court received guidance from a diagnostic methodology designed throughout constitutional democracies in distinguishing *differentiation* from *discrimination.* In this jurisdiction, these were cited with approval in **Ramohalali v Commissioner of Correctional Service & Others**[27]where it waspostulated:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1) (equality before the law and equal protection of the law). Even if it does bear a rational connection, it might nevertheless amount to discrimination;

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
   (i) Firstly, does the differentiation amount to "discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
   (ii) Secondly, if the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed.
   If on an unspecified ground, unfairness will have to be established by the complainant.

The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of Section 8(2) (unfair discrimination).

[27] CC/2/2016 at 14-15

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (S.33).

[67] It is, however, imperative to be realized that the above step by step inquiry to discover whether a law or conduct is merely *differential* or *discriminatory,* should primarily be approached liberally in furtherance of *human dignity, equality* and *freedom* which are the key pillars in a democratic dispensation. The jurisprudence was comprehensively articulated by the Court of Appeal in **Lesotho National Insurance Co. Ltd v Nkuebe**[28]- dealing with section 18 and 19 of the Constitution (discrimination and equality provisions). It said:

> It is well-established that the proper approachto interpretation of a bill of rights is a purposive one.This is a generousrather than a legalistic one, aimed atprotecting the interests that theconstitution was meant to secure..... Thisapproach also deplores an interpretation which applies "the austerity of tabulated legalism", whichfails to give individuals the full measure of theprotection envisaged by the Bill of Rights.

[68] In applying the above prescribed methodology over the material facts that culminated into this case, there is a revelation that indeed the Government policy introduced a differentiation between the beneficiaries of the loan scheme. This was done through a categorization of MPs into one group and the holders of political offices including the Applicant into another.

[28]LAC (2000-2004), 877 at 882,

[69] Appreciably, the Applicant who contents that it reached discriminatory indications, is by operation of the second requirement; obliged to establish that by demonstrating that the *differentiation* is founded upon one of the specified grounds under Section 18 (3). It is precisely in that context that the Applicant has dedicated a series of paragraphs averring that in the instant case, the *differentiation* was inspired by political motive intended for his personal political victimization or as a collateral damage. In Sesotho this is referred to as *"Nonyana e otlelloa le sehlahla"* (A shrub which is incidentally hit with a stone as a result of a targeted bird sitting on it or inside it). He has as a prelude narrated historical background to show the victimization trends in the political episodes in this country and that his case is one such incidence.

[70] The Court appreciated the revelations as his endeavour to contextualize his lamentation. Also, the Court interpreted the disposition to be a move to tender past and current circumstantial evidence to support his view that the policy is *discriminatory.*

[71] The difference in the treatment of the two classes immediately triggers a question about the constitutionality of the classification itself regard being had to the *right of freedom from discrimination* and the *right to equality before the law and its protection.* In seeking to resolve that question, it emerges for

the purpose of this case that both classes fundamentally bear similar characteristics. These are that they were all:

(a) Debtors arising out of a Government loan scheme;
(b) In the post *facto* June, 2017 general elections change of the administration, having outstanding balances to be paid to the private banks which gave them loans;
(c) In consequence of the change experiencing difficulties to service the loans since they had lost either membership of Parliament or political offices; and,
(d) Having settlement of their payments of the loan guaranteed by the Government.

[72] Notwithstanding the identified material aspects which characterize the similarity of people concerned andto the commonness of their situation, the Government innovated policy that categorized them into class A and B. The Court finds that the parliamentary membership of some of borrowers does not rescue them from that description. They remain so similarly with the Applicant and his colleagues who were appointed to political offices. A reality is that the loans were given to borrowers individually in terms of the contract concluded between the concerned banks and each borrower. It has to be over emphasized that the Government simply existed as a guarantor for the payment of the borrowed moneys and not as a co-debtor.

[73] The Respondents have perfectly articulated a principle that *differentiation* amongst people is, under justifiable situations indispensable and for that proposition cited the case of **Sethole & Others v Dr. Kenneth Kaunda District Municipality[29].** In that case, it was stated that for *differentiation*

[29] JS 576/13 [2017]

to violate a right, it must be unfair. However, a more elaborate distinction between *differentiation* and *discrimination* was comprehensibly elucidated by the Court of Appeal in **Lesotho National Insurance Company Ltd v Bofihla Nkoebe**[30] in these words:

> ..... It is important to draw a distinction between whathas been called "mere differentiation", which is often necessary to regulate the affairs of the community *in the* interest of all its inhabitants, and unfair differentiation. Differentiation which fallsinto the former category will not normally result ininequality before the law or the unequal protection of the law and will not, therefore, infringe the Constitution. It becomes unfair, however, when thereis no rational connection between the differentiation and the purpose for which it appears in legislation (see Prinsloo v van der Linde and Another.[31]

[74] The Applicant changed the game by charging that the policy was from the onset designed to *discriminate* against him and those in class B by subjecting them under an unequal treatment on account of their real or perceived political affiliations. So, in rhythm with the methodology prescribed in **Ramohalali v Commissioner of Correctional Service**[32] a mere fact that political ground is cited to support the point establishes a *prima facie* view that this is so. Automatically, this changes a *pendulum* of proof by requiring the Respondents to demonstrate that the policy simply introduced *differentiation* and is, therefore, not *discriminatory.* Alternatively, they could admit that it is so, but avoid the charge by revealing that the *discriminatory* treatment against the Applicant and all those in class B is constitutionally justified in furtherance of the

[30] *Supra*
[31] 1997 (3)SA 1012(CC) at 1024-1025, paras 23-25).

[32] *(supra)*

societal or national interest. To complement the account, they should have shown that in that noble endevour, the concerned rights of the Applicant have been proportionately compromised to minimize adverse impact upon them.

[75] Intriguingly, the Respondents have not answered any one of the several averments through which the Applicant progressively presented his main narrative that the Government had from the beginning classified the borrowers in order to create a ground for his victimization on political basis. The fact that the Respondents have not answered the politically related charges levelled against them by the Applicant, is fatal to their case since it renders those accusations to be regarded as true. This is so by operation of *inter alia* the operation of the legal principle enunciated in **Mokone v Attorney General and Others**[33]that:

> If one does not answer issuably[34] then his defence will be considered no defence at all[35]

[76] Now the Court addresses a second level of the case of the Applicant that it be found that he was also *discriminated* against upon an analogous ground. Perhaps, it should be revisited that this refers to a non specified basis for *discrimination* under Section 18(3) which is, nevertheless, comparatively recognized as a ground for the same treatment.On this subject, the operational

[33](CIV/APN/232/2008) (CIV/APN/232/2008) [2010] LSHC 53
[34] Meaning inter alia that a misrepresentation made by a party in a paragraph must be controverted to avoid an impression that it is true.
[35]*Ibid* at para 11

words here are found in the last part of the section which in this respect specifically provides:

> .....or **other status** whereby persons of **one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description** (Court's emphasis).

[77] An initial diagnosis of this part of the section is that the Legislature in its commitment to exclude *discrimination* among mankind, found it wise to specify the key grounds for *discrimination* and then the secondary ones termed *analogous grounds*. Hence, once a litigant who complains about *discrimination* establishes that it is based upon a listed ground, *discrimination* is presumed. Therefore, the one who alleges otherwise, immediately assumes a burden to justify it by showing that it is in the national interest, proportional towards that and least violate rights. And, on the contrary, there is no such a presumption where an analogous ground is relied upon.

[78] A subsequent analysis of this last and complementary part of the section is that the words, "or other status" denotes that other than the listed main grounds for discrimination, there are other *status* related standings of persons that can be established to demonstrate *discrimination* amongst those holding similar position. The direction detailed in **National Insurance Company v Bofihla Nkoebe**[36] that the proper approach to interpretation of a bill of rights is a purposive and generous one rather than legalistic. In that logic, **all the beneficiaries** of the loan scheme

[36] *Supra*

who at the moment of a change in the political fortunes owed money to the banks that gave them loans, assumed the *status* of borrowers or *debtors* for the purpose of their relationship with the banks. This is also their common *description.* Thus, their classification and the subsequent preferential treatment of those in class A and a non preferential one for those in class B, has a telling effect that there has been a *discrimination* amongst people of the same *status.*This is suggestive that the Applicant has also satisfied the alternative ground for *discrimination* by advancing a comparative ground for the notion.

[79] The Court understands the Applicant to complain he has in comparison with others with whom he holds the same ***status*** been adversely *discriminated* against. This refers to the classification of the borrowers of moneys in accordance with the Government policy and its said consequent decision which overwhelmingly advantaged their colleagues in class A and strikingly disadvantaged him and others in class B. It is found that there is merit in the charge because within the context of this case, a material description of people in both classes is that they are borrowers of moneys from the concerned banks and subject to similar terms and conditions. This resulted from contracts that each concluded with the individual bank. The Government only features as a guarantor for the payments of the borrowed moneys and must execute that task equally and similarly to all the borrowers. The rest of the status held by each borrower in other spheres of life, would be irrelevant for the

purpose of the established relationship between an individual concerned and a bank.

[80] A mere indication that the borrowers were unequally treated despite bearing the same *status* and *description,* is self explanatory that the Applicant has further made a case for *discrimination* under the analogous dimension of the grounds for *discrimination.* This lends support from a common law recognized exposition by Laurence Tribe, esteemed American legal scholar who is reported to have postulated:

> The core value of this principle is thatall people have equal worth. When thelegal order that both shapes and mirrorsour society treats some people as *outsidersas though they were worth less than others*, those people have been denied theequal protection of the laws------. Mediated by anti subjugation principle, the equal protection asks whether the particularconditions complained of, examined in theirsocial andhistorical context, areand/or legacy of officialoppression[37].

[81] It must be projected that in tune with the criterion for a determination of a *discrimination* which offends *equality right* under section 18 (3) and 19, that unfair discrimination is not *per se* unconstitutional. Instead, it is the one which cannot be justified that it is in consequence of a measure introduced to achieve societal or national interest and that it is calculated to best mitigate the invasion of the affected rights.

[82] The Court is mindful that there is no general provision in the Constitution which is specifically dedicated to the limitation of the chapter II rights except through the *claw back clauses* inbuilt into relevant provisions. This notwithstanding, it

[37]Extract from Chaskalson et al Series – The Constitutional Law of South Africa ,1999 vol; Chapter 14 pp 27 - 33

conceptualises that such a clause is unavoidably readable therein because it contemplates pragmatic scenarios where a right has to be limited in the best interest of the nation provided it would be proven that this was the only avenue and that it least infringes the affected rights. This would be justified with reference to the key values of a democratic constitution.

[83] A fundamental obstacle confronting the Respondents is that they have failed to contradict a factual picture presented by the Applicant that the classification of the debtors is not *mere differentiation* but *discrimination* based upon political expediency and/or analogous ground. To worsen their case, in seeking to justify that the *discrimination* is constitutionally justifiable, they advanced an illogical and contradictory account both factually and legally. To ease the reading, it is reiterated that they explained that the classification and its resultant imbalances in settling the debts between MPs and holders of political offices were intended to induce the former to freely check and balance the Executive from possible abuse of power and authority. This is certainly ridiculous for the reasons that when the policy was formulated and operationalized :

(a) Some of the MPs in the 9th Parliament were ministers in the 10th Parliament and there is no way they could execute that constitutional role;
(b) A considerable number of the MPs in the 9th Parliament are not members of the 10th Parliament and there is no way they can also execute the same task;

[84] Besides, the credibility of the Respondents in seeking to justify the policy intervention along the *letter, spirit* and *purport* of a democratic constitution, is undermined by its failure to have

assessed the current status and the financial capacity of an individual borrower in particular those in class A. This would have let to a discovery that some of the MPs in the 9th Parliament became MPs in the 10th one with some even elevated to the status of Ministers and, therefore, continued to be financially empowered to continue servicing their loans. An odd number of them, who could not return to parliament, were compensated by being appointed to hold some of the well-meaning offices in Government which indicates that they also continued to be able to progressively pay the loan.

[85] It does not seem that in the meanwhile there was any meaningful attention given to the borrowers in class B. So, the debt forgiveness was from the beginning intended to be an exclusive wind fall for politicians. No wonder MPs in successive parliaments have not questioned a justification for debt clearance bonanza for MPs whenever government collapses as a result of a passing of a vote of no confidence against the Prime Minister. They have hitherto not demonstrated a concern over the *discriminatory* nature of the policy and the fact that it allows individual MPs to perpetually benefit from it *ad infinitum*.

[86] So far the presented factual and legal posture is indicative that the Respondents have not sustained their main defence that the classification of the beneficiaries of the Government policy scheme and its consequential unequal differences in settling their debts remains *mere differentiation*. On the contrary it emerges to amounts to unconstitutionally *unfair discrimination.* In the face of

that revelation, they failed to demonstrate that the measure is, nonetheless, constitutionally justified in a free and democratic state since it would serve the interest of the nation, is proportional to the desired goal and least intrusive on the affected rights. In this regard, the Court recognizes that its analysis and conclusions over the matter are in rhythm with the exhaustively propounded jurisprudence in a locus classicus case of **Attorney-General v Mopa**[38] where Gauntlett JA writing for the Full Bench of the Court of Appeal pronounced the applicable principles thus:

> The Constitutiondoes not provide (as some constitutional instruments do) expressly for the justificationof an infringement of a Chapter 2 right, but itis apparent from the scheme of the Constitution that a limitation of a right is authorised where, in accordance with the broad test articulated by Dickson CJC in the Canadian Supreme Court inthe well-known matter of R v Oakes (1986) 26 DLR(4th) 200 (SCC) at 226-7, the limitation of the right is reasonable and "demonstrably justified in a freeand democratic society." The first aspect [reasonableness] relates to the objective or purposeof a limitation, and the second to the aspect of proportionality. The objective must be sufficiently substantial and important so as to warrant overriding a constitutionally protected right, whilethe proportionality test requires that the means chosen to limit the right are appropriate[39].

[87] At this juncture, the Court turns to the polemics it initiated having taken judicial notice of sections 18 (4) (d) and 151 of the Constitution and the addresses made by the counsel thereon. The relevancy of the former section is that it creates one of the exceptions from the principle provision under 18 (1) (2) and (3) in that it excludes a right for any person to sue Government on the basis of a *discriminatory* treatment concerning appropriation of public funds.

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[38] LAC (2000-2004)
[39] Supra at page 18

[88] The Court finds that since the Applicant was a public officer at the relevant time. So, the exception under Section 18 (4) (d), did not dispense with a procedural requirement for the Respondents to have sought for the concurrence of the Public Service Commission before unilaterally using his gratuity to pay for his debt. The procedure is prescribed under Section 151 as follows:

> (1) Where under any law any person or authority has a discretion –
>
> (a) .....
>
> (b) To withhold, reduce in amount or suspend any such benefit that have been granted;

Those benefits shall be granted and may not be withheld, reduced in amount or suspended **unless** the Public Service Commission concurs in the refusal to grant the benefits or, as the case may be, in relation to the decision to withhold them, reduce them in amount or suspend them.

[89] And, (5) *defines pension benefits to inter alia include any pensions compensation,* **gratuities**, *or other like allowances* for public servants or their dependants.

[89] A rationale in the section is to entrust the Commission with the power to endorse a decision which could adversely affect a pension benefit of a public officer. The understanding is that it would use the goodness of its standing and neutrality to intervene against possible arbitrary, unilateral and *discriminatory* decisions.

[90] The omission by the Respondents to adhere to the procedural imperative under Section 151 *per se* suffices to have a fatal blow over their case.

[91] In the final analysis, the Court concludes that this is a typical case which bears testimony to the reality which led common law to describe *discrimination* in several expressions meaning exactly the same thing. The original version is that it applies where *the likes are treated unlike*[40] *or the equals are treated unequal*[41] later on it assumed semantics such as the similarly *circumstanced are treated* differently[42] and *the likes being treated in an unlike fashion*[43]. The descriptions are found to be applicable in the identified transgressions against the rights of the Applicant. The net effect is that the Respondents have violated the right of the Applicant to *freedom against discrimination, right to equality before the law, right of equal protection under the law, right of freedom from arbitrary seizure of property* and above all *right to human dignity.*

[92] The arbitrariness which the Respondents suddenly imposed upon the Applicant without any law authorizing them to do so and without reference to any constitutionally allowed justification for that obviously undermined the *principle of legality.* This is a pillar of the rule of law.One of its essential requirements is that there must be an existing law upon which the rights of a person

[40]Extract form Aristotle in his Nichmachan Ethics (OUP, Oxford 1980)Trans. WD Ross112 (Book V Chapter 3)
[41]Ibid
[42]Van der Walt v Metcash Trading Limited (CCT37/01) [2002] ZACC 4; 2002 (4) SA 317; 2002 (5) BCLR 454 para 49

[43]Michael Watson Criticism of Aristotle on his Abstract on Equality as Adopted by the European Court of Justice page 1

can be limited. In the instant case, the Respondents have not referred the Court to any law that sanctioned their arbitrarily made decision to seize the gratuity of the Applicant to settle his loan debt.

[93] En route towards a final pronouncement in the matter, the Court finds it contextually befitting to register in good faith, by way of *an obiter dictum,* its genuine observation over the escalation of cases brought before it on the basis of protestations against the lawfulness of regulation based policy decisions. The trend is, subject to correction, now relatively dominating the civil roll of this Court. This justifies scepticism that Parliament dedicatedly interrogates and censure delegated legislation before it accepts it as a law. This could be attributable to the composition of Parliament and the relationship between the majority of its members and the Executive.

[94] It appears that realism dictates that the moment has come for our constitution to be reformed in favour of a separation of the membership of Parliament from that of the Executive. This would enhance separation of powers as one of the key pillars in the rule of law, maintain good governance and strengthen checks and balances against possible excesses by the Executive and mitigate the subjectivity inherent in party line voting. The end benefit would be a perpetual prevalence of stability, peace and prosperity for generations and generations to come. Once again, a relative structural and systematic separation of parliamentarians from the Executive members would mark a mile

stone towards the enhancement of the rule of law and good governance in the Kingdom.

[95] Hitherto, it does not appear that Parliament dedicatedly studies regulations presented before it and critiques them accordingly before accepting them to become law. The expectation is that Parliament would equally censure regulation based policies which are pertinently *ultra vires* the law without necessarily usurping the powers of the Judiciary and not just act as a rubber stamp. It is sad that parliamentarians in this case, benefited from a tellingly unfair regulatory based discriminative policy which violates the rights of other citizens and attenuates a *prima facie* created opportunity for the unjust enrichment for parliamentarians.

[96] Possibly, it escaped the wisdom ofthe 10th Parliament to realize that in this regard, it ought not to have inherited the legacy bequeathed unto it by its predecessor and have its conscience somehow disturbed by having some members of Parliament benefiting more than once from the same scheme.

[97] Perhaps, the time has come for a constitution which would more meaningfully separate members of Parliament from those of the Executive. This would exclude party line voting in the House for the enhancement of objectivity in that respect, good governance with stability, peace and prosperity for generations and generations to come.

[98] The task of checking and balancing of the Executive against possible abuse of power and authority should not be left upon the courts alone. They also need reinforcement and reciprocity from Parliament. Ideally, Non Governmental formations and media houses should also intervene impartially and in good faith. Otherwise, courts though not relatively infallible shall remain victims of circumstances and sacrificial lambs at the altar of those who have politically inspired alien comprehension of law and justice. Incidentally, they enjoy and very short – lived `blessed` opportunity to mislead the public only to subsequently regret the consequences of the poison they brewed during their glorious times to denigrate judicial officers, capture the Judiciary and undermine its independence. The *status quo* would remain bound to prevail especially when experience has taught that there are very few individual professionals, academicians and civic organizations that can stand as apostles of truth.

[99] Back to the central consideration, the Court hopes that considering its findings on facts and law, the parties could consider negotiations towards reaching an expedient amicable and practical settlement over the matter.

[100] It should be recorded it is regrettable that counsel for the Respondents did not submit their heads of argument electronically to ease reading and writing of judgment. This obtained throughout despite repetitive calls for them to do so.

[101] In the premises, the Court finds that the Applicant has on the balance of probabilities proven his case. Accordingly, the application is granted as prayed.

[102] The parties have presented the Court with an opportunity for the development of our constitutional jurisprudence on an important subject of national interest. It is considered sufficient for the Court to accord them credit for that and, therefore, there is no order on costs.

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E.F.M. MAKARA
JUDGE

I concur:

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L. CHAKA-MAKHOOANE
JUDGE

I concur:

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K.L. MOAHLOLI
JUDGE

For Applicant: Attorney T. Makhethe of Makethe & Co Attorneys

For Respondents: Adv R. Sepiriti instructed by T Maieane & Co Attorneys