IN THE HIGH COURT OF LESOTHO
(HELD AT MASERU)

CIV/APN/235/2018

In the matter between:-

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

AND

LIKELELI TAMPANE **RESPONDENT**

JUDGMENT

CORAM : Honourable Justice Makara
HEARD : 7 February, 2019
DELIVERED: 20 August, 2019

SUMMARY

Application for recusal - Court having stated that "a procedural right for one to be accorded rules of natural justice transcends pre-trial including pre-charge and trial phases in any judicial or quasi judicial processes. An impression gathered from the papers filed by the applicant is that her pre-charge trial right which is a dimension for of her pre-trial rights were transgressed in that the Speaker had not given her a hearing before referring the matter to the fourth Respondent for a disciplinary measure. "Court having expressed this as its *prima facie* impression when making a ruling on the points in *limine* – Applicants having equated it with indication of biasness on the part of the court.

Held:

1. Respondents have not satisfied any one of the elements of the application for recusal;
2. Application is dismissed with costs.

ANNOTATIONS

Cited Cases

1. All Basotho Convention and 2 Others v The Speaker of National Assembly and Another CIV/APN/406/2016
2. State v Shaheem Ismail & 6 Others www.saflii.org/za/cases/ZAWCHC/2003/9
3. President of the RSA and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC), 1999 (7) BCLR 725
4. South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886

Statutes & Subsidiary legislation

1. The Constitution of Lesotho 1993
2. The Parliamentary powers and Privileges Act No.8 of 1994
3. Judicial Review of Ouster Clause Provisions in the 1999 Constitution

MAKARA J

Introduction

[1] This is a case for recusal. It is the 4th incidental case from the original one in which the Applicant who is a Member of Parliament for Senqu constituency brought an urgent application before this Court seeking for its intervention against what she described as a violation of her *procedural rights* by Respondents. Consequently, she asked the Court to order in *rule nisi* terms that:

> 1. Dispensing with the rules relating to the modes of service and time limits provided for in the Rules due to the urgency hereof and disposing of the matter at such time and place and in such a manner and accordance with such procedures as this Honourable court may deem fit;
>
> 2. That a Rule Nisi issue returnable on a date and time to be determined by the honourable Court calling upon the Respondent to show cause, if any, why:
>
> 2.1. The proceedings of the fourth respondent scheduled for 26 July 2018, or other dates involving the applicant shall not

be stayed and suspended pending finalisation of this matter;

2.2. The summoning of the applicant and her appearance before the fourth respondent shall not be suspended pending finalisation of this matter;

3. The decision of the respondents to find the respondents guilty of:
   3.1. participating in undermining the Deputy Speaker's authority;
   3.2. participating in the disruption of the House proceedings;
   3.3. defying the Speaker's orders;
   3.4. being involved in impeding the proceedings of the House;

   is reviewed, corrected and set aside as irregular, null and void and of no force and effect.

4. It is declared that the applicant was entitled to a hearing before the summons in the form of annexure "**A**" could be issued to her.
5. The first respondent is ordered to dispatch a record of proceedings pertaining to the applicant's disciplinary hearing that led to the finding reflected in annexure "**A**" within fourteen (14) days after service hereof.

6. That prayers **1, 2.1, 2.2 and 5** operate with immediate effect as an Interim Court Order.

7. That the Respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

8. Further and/or alternative relief.

[2] The Respondents vigorously resisted the application and the matter was finally set down for hearing on the 4th September 2018. On that day, when the matter was supposed to proceed, the Respondents suddenly interjected by introducing what the Court comprehended as a point of law though it was never termed as

such. In substance, the point raised was that there has been a factual development which has rendered the intended hearing of the merits of the main case an academic exercise. To substitute the point it was explained to the Court that the 4th Respondent had already proceeded with the disciplinary action against the Applicant to its finality. A clearly articulated message was that the development had taken place irrespective of the fact that the subject matter of the merits of the case was still *sub judice.*

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

[4] For a comprehensiveness of a case as a whole, it should be brought into perspective that the interjection which occasioned a dimensional turn under consideration, was sequel to a ruling made by the Court over a challenge mounted by the Respondents on the jurisdiction of the Court to hear the matter. The attack was

based upon Section 24 of the Parliamentary powers and Privileges Act[1] which provides that:

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

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

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

[1] No.8 of 1994

[7] The Court having had the parties ruled that it has jurisdiction over the matter. It premised its reasoning upon recognition that in principle, the Court should be reluctant to interfere in the affairs of Parliament which would be well in harmony with the theory of *Separation of Powers.* This is, however, qualified with an underwriter that the separation is not absolute since the arrangement is elementarily intended to institutionalize checks and balances against abuse of power or authority by any of the three arms of State. It was stated that it is for that reason that the Judiciary has a constitutional authority to *inter alia*ensure that Parliament exercises its authority within the Constitution. To illustrate the point, it was, thus, overemphasized that the classical idea of *Parliamentary Supremacy* does not exist under a democratic constitution. Instead, what obtains is *constitutional supremacy*. It is for the same reason that any legislation irrespective of its origin is subject to a challenge before this Court for its compliance with *the letter, spirit and purport* of the Constitution. This is further provided for through the Section 119 of the Constitution[2], review powers entrusted upon this Court by inscribing that:

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

[2]The Constitution of Lesotho 1993

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

[9] It was also reasoned that at common law a legal provision which excludes intervention of the courts must be strictly interpreted in favour of a presumption that this was never the intention of the Legislature. This was well articulated by Olayinka[3] these terms:

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

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

> enjoy independence in its composition and in discharging its activities.[4]

[10] Moreover, an ouster provision would further have to be scrutinized for its constitutionality. Furthermore, this Court has already propounded that any legislation which seeks to curb its jurisdiction has to be interpreted strictly. This was cautioned in **All Basotho Convention and 2 Others v The Speaker of National Assembly and Another**[5]that:

> There is merit in the proposition by Counsel for the respondents that the Court should interpret provisions of the Constitution purposively….In the understanding of the Court, the express dedication of the determination powers unto the High Court primarily through the Constitution and the National Assembly Electoral Act, dictates that purposive interpretation should under a democratic rule, be geared towards the protection of Parliament and parliamentarians. The philosophy behind is a recognition of the representativeness of the different spheres of the electorate by members of the Parliament particularly in the National Assembly. **Thus, any legislation which could be relied upon by any authority to cause a member to vacate a seat in Parliament would have to be strictly interpreted so that the representative *status quo* is not easily adversely disturbed**. (Highlighted for emphasis).

Regarding the issues traversed, the Court ruled that:

1. It had jurisdiction over the matter irrespective of the purported hearing of the disciplinary proceedings by the 4th Respondent;
2. The purported hearing had not rendered the case pending before it academic;
3. The purported appeal had no merit but simply intended to delay the proceedings.

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[4] *Ibid*

[5] CIV/APN/406/2016 @ page 36-37

4. A move to hand in the record of proceedings contrary to Rules 8 (12) or (15) was refused.

[11] After the ruling was made on the stated issues of law, the hearing of the merits of the original application was accordingly set down for three days namely, the 13th, 19th and the 20th December, 2019 Annoyingly to the Court and the counsel for the Applicants, all the counsel for the Respondents did not attend Court without having had the audacity to make any excuse for their absence. Nevertheless, the Court acting *mero muto* postponed the hearing to 5th and 7th February, 2019. Paradoxically and again annoyingly, the counsel for the Respondents did not without any explanation feature before Court. Then counsel for the Applicant applied for a default judgment on the basis of the continued absence of the counsel for the Respondents to prosecute their defence. At that juncture, the dictates of justice demanded that the default judgment sought for be granted as prayed and it was accordingly so granted.

[12] 5 days after default judgment was entered, the Respondents lodged another incidental application. This time they applied for rescission of judgment in the main. Interestingly, counsel for the Applicant conceded that the judgment be rescinded. He explained that the concession was intended to facilitate for expediency towards a conclusion of the case. The Court appreciated merit in his attitude and accordingly rescinded the judgment.

[13] After the judgment was rescinded, the Respondents brought yet another application. This was an application in terms of which they called upon me as a presiding judge to recues myself from hearing. A synopsis of the basis of the move was that in arriving at the rulings I demonstrated bias. The Applicants counter argued that there is no merit in the application since it is simply suggestive that the Court by interpreting the law against their version is indicative of judicial bias.

[14] The Court has considered the grounds upon which the recusal application is founded. It finds that this application like its previous incidental ones lacks the requisite elements for recusal.

[15] In **State v Shaheem Ismail & 6 Others**[6] H.J. ERASMUS J quoted the requisite grounds of application for recusal with approval from the judgment of the full bench in **President of the RSA and Others v South African Rugby Football Union and Others**[7] that:

> It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judge to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their

[66] www.saflii.org/za/cases/ZAWCHC/2003/9 page 3

[7] 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 para 48

> minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial**.**

[16] Therefore, not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable[8]. So the test is double reasonableness in that the person must be a reasonable one and the apprehension must also be reasonable.

[17] As Cameron AJ pointed out in **South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)[9]** that:

> The twofold emphasis on the aspect of reasonableness serves to underscore the weight of the burden resting upon the applicant for recusal who bears the *onus* of rebutting the weighty presumption of judicial impartiality.

[18] In the instant case, the Court finds that the Respondents have not satisfied any one of the prescribed elements. It, therefore, finds that this application, similarly to those that preceded it, lacks substance in both facts and law. Moreover, it is straightforwardly intended to delay the finality of the main case.

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[8] *Ibid* at page 4

[9] 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 para 15

[19] In the premises, the application is dismissed with costs.

[20] It is regrettable that the counsel respectively failed to cooperate with the Court to facilitate for an expeditious delivery of the judgment despite its intention to do so. It was even a challenge to secure their attendance.

E.F.M. MAKARA
JUDGE

For Applicants	**:**	**Adv. Thoahloane from Attorney General's Chambers**
For Respondents	**:**	**Mr. Letsika of Mei & Mei Attorneys**