LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO. 0006/2020

In the matter between:

ALL BASOTHO CONVENTION (A.B.C.)	**1ST APPLICANT**
BASOTHO NATIONAL PARTY (B.N.P.)	**2ND APPLICANT**
DR. NTHABISENG MAKOAE M.P.	**3RD APPLICANT**
'MATŠEPO MOLISE-RAMAKOAE M.P.	**4TH APPLICANT**
'MATEBATSO DOTI M.P.	**5TH APPLICANT**
LEPOTA SEKOLA M.P.	**6TH APPLICANT**
HON. KEMISO MOSENENE	**7TH APPLICANT**

And

THE PRIME MINISTER	**1ST RESPONDENT**
THE DEPUTY PRIME MINISTER	**2ND RESPONDENT**
HIS MAJESTY THE KING	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

CORAM: S.P. SAKOANE, M. MOKHESI JJ
and P. BANYANE AJ

HEARD: 3, 6 and 7th APRIL, 2020

DELIVERED: 17 APRIL, 2020

SUMMARY

Constitutional Law-prorogation of parliament by the Prime Minister-whether compliant with the provisions of section 91(3) of the Constitution
Locus standi of political parties and members of the national assembly to challenge prorogation
Rationality-the requirements for review of an executive decision restated and applied

ANNOTATIONS:

CASES CITED:

Attorney-General And Another v. Swissbourgh Diamond Mines (Pty) Ltd And Others (No.2) LAC (1995-99)214

Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).

Makenete v. Major General Lekhanya and Others CIV/APN/74/90 (6

Mokhothu and Others v. The Speaker and Others CC 20/17

Pharmaceutical Manufacturers Association of South Africa: In re; Ex parte Attorney-General v. Dumas 2017 UKPC 12 para 34

President of the Republic of South Africa 2000(2) SA 674 (CC) paras [82]-

Judicial Service Commissioner and another v. Cape Bar Council and another 2013(1) SA 170 (SCA) para [12] November, 1990):

R (on the application of Miller v. The Prime Minister and others [2019] UKSC 4(24the September 2019):

State of Rajasthan v. Union of India AIR [1977] SC 1361

Pharmaceutical Manufacturer Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and others 2000(2) SA 674

Walele v. City of Cape Town And Others 2008(6) SA 129 (CC)

United States v. Nixon 418 US 683 (1974):

R v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617 at 644:

R v. Secretary of State for Trade and Industry, ex p. Lonrho Plc [1989]1 W.L.R 525 at 536:

of Democratic Alliance v. President of the Republic of South Africa (2013) (1) SA 248 (CC)

Democratic Alliance v. Minister of International Relations and Cooperation 2017(3) SA 212 (GP)

South African Football Association v Mangope (JA 13/11) [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC)

National Director of Public Prosecutions v Zuma 2009 (2) SA 227 (SCA

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and others (CCT 7/98) [1998] ZACC17: 1999 (1) SA 374

President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 (1) SA 1 (SARFU)

Albutt v Centre for the Study of Violence and Reconciliation, and others [2010] ZACC; 2010 (3) SA 293 (CC)

Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and 1988 (3) SA 132 (A)

Democratic Alliance v President of South Africa and others 2013 (1) SA 248 (CC)

Attorney-General v. His Majesty & Others [2015] LSCA 1 (12 June, 2015):

Barkhuizen v. Napier 2007 (5) SA 323 (CC)

STATUTES:

Constitution of Lesotho 1993

Public Health (COVID-19) Regulations, 2020

Prorogation of Parliament Legal Notice No.21 of 2020

BOOKS;

De Smith, Woolf & Jowell (1999) Principles of Judicial Review (London: Sweet & Maxwell) pp.50-51.

Fowkes, J Oxford Constitutional Law: Prorogation of the Legislative Body 2017 (Max Plank Encyclopedia of Constitutional Law)

Lord T. Bingham (2010):**The Rule of Law** (London: Allen Lane) Chapter 6; (House of Commons Library).

ARTICLES AND JOURNALS:

Foundation for International Peace and the Rule of Law

Newman, Warrant J. "Of Dissolution, Prorogation and Constitutional Law, Principal and Convention: Maintaining Fundamental Distinctions during Parliamentary Crisis" in

Cowie, Graeme Prorogation of Parliament Briefing Paper No.8589, 11 June 2019

National Journal of Constitutional Law Vol.27 (2009-2010) p.217
Fowkes, J. "Prorogation of the Legislative Body" the 20 (Max Plank Encyclopedia of Constitutional Law) para 20.

JUDGMENT

THE COURT:

I. INTRODUCTION

[1] On the night of Friday, 20th March 2020, the Prime Minister issued the following Legal Notice:

> "**Prorogation of Parliament Notice, 2020**
> Pursuant to section 91(3) of the Constitution of Lesotho 1993, I, **MOTSOAHAE THOMAS THABANE**
> Prime Minister of Lesotho, proclaim that the Tenth Parliament of Lesotho shall stand prorogated (sic) with effect from 20th March to 19th June, 2020.
> **DATED: 20TH MARCH, 2020**
> **MOTSOAHAE THOMAS THABANE**
> **PRIME MINISTER OF LESOTHO**"

[2] There is no dispute that the Parliament was in session when the Prime Minister prorogued it. The undisputed averments in the founding affidavit are that:

2.1 There was a Bill before Parliament **The Ninth Amendment to the Constitution Act 2019** which had been passed by the National Assembly and was currently in the Senate for consideration and approval.

2.2 Parliament was scheduled to approve the Appropriation Bill "that facilitates the distribution and allocation of the national fiscus".

2.3 There was a pending motion of no confidence against the Prime Minister.

[3] On Monday 23rd March the Members of Parliament went to Parliament to transact their business. On arrival there they were expelled by a police officer. Aggrieved by this, some Members of Parliament belonging to two parties in the Coalition Government (the All Basotho Convention (ABC) and the Basotho National Party (BNP) and one Senator are before this court to challenge the Gazette proclaiming the prorogation of Parliament. The majority party in the opposition (the Democratic Congress (DC) and two of its members in Parliament have applied to intervene on the side of the applicants. The application to intervene is not opposed by the applicants and the respondents. It is thus allowed.

Reliefs

[4] The applicants seek the following final reliefs:

2.3 The decision to prorogue parliament pursuant to the provision of section 91(3) of the Constitution of Lesotho 1993 (as amended) be reviewed, corrected and or set aside.

2.4 That it be declared that Government Gazette, **Legal Notice No.21 of 2020** issued by the 1st respondent purporting to be acting pursuant to section 91(3) of the **Constitution of Lesotho 1993 (as amended)** is a nullity.

2.5 The outgoing Prime Minister (1st respondent) is hereby interdicted from advising and or recommending prorogation of parliament to His Majesty the King (3rd respondent) at the time and duration prescribed by law or for the duration chosen.

2.6 That it be declared that the collusion of 1st and 2nd respondents leading up to the advice to prorogue parliament and actual publication of the decision in Government Gazette, **Legal Notice No.21 of 2020** without the unanimous consent of the other coalition partners is unconstitutional and or unlawful.

2.7 That it be declared that 1st and 2nd respondents have put the office of His Majesty the King (Head of State) into disrepute and lowered its esteem.

2.8 That it be declared that the outgoing Prime Minister (1st respondent) does not have the constitutional authority to advise and or recommend to His Majesty the King and Head of State (3rd respondent) that parliament should be prorogued at the time and duration prescribed by law or for the duration chosen without (singly or collectively):

(a) Engagement and consultation with the coalition partners.

(b) Engagement and endorsement of the executive (cabinet).

(c) Consultation with his own political party (1st applicant).

3. It be declared that the outgoing Prime Minister (1st respondent) is no longer fit and proper to hold the office of the Prime Minister of the Kingdom of Lesotho.

4. That His Majesty the King and Head of State cause for the dismissal of the outgoing Prime Minister (1st respondent) and a new Prime Minister be appointed in line with the prescripts of the **Constitution of the Kingdom of Lesotho 1993** (as amended).

5. That costs consequent upon the engagement of two counsel be awarded in favour of the applicants.

6. Further and alternative relief."

Preliminaries:
Locus Standi

[5] The respondents challenge the participation of the three political parties (ABC, BNP and DC) in these proceedings. Their objection is that political parties do not have legal interest in the proceedings. Their interest is political and not legal. Prorogation affects their Members in Parliament who are before Court and not them.

[6] Mr. *Ndebele* and Mr. *Lephuthing,* for the political parties, submitted that because they have members in Parliament, the political parties' interest in these proceedings is legal and not political. Reliance is reposed in the case of **Mokhothu And Others v. The Speaker And Others** Constitutional Case N. 20/2017 (21 February 2018) where this Court held that political parties in Parliament have the freedom to associate and choose the Prime Minister and the official Leader of Opposition.

[7] The distinguishing facts in this case and **Mokhothu** is that here the prorogation affects Parliament and its members as the second arm of Government. It does not implicate the freedom of political parties to associate in order to discharge a constitutionally defined role in Parliament.

[8] Parliamentary business and processes that do not require political parties to perform any function in Parliament foreclose any legal interest in the proceedings of Parliament. Any interest the political parties would have is that their members in Parliament vote to deliver on their manifestos. And the duty to ensure that they do so lies with the party Whips and not the executive committees of the political parties.

[9] The *locus standi* of the political parties is based on what they describe as the contravention of section 20 of the Bill of Rights. This is stated merely to be rejected because prorogation of Parliament is not a human rights issue but a constitutionally sanctioned Royal power. Its exercise affects Parliament and not the rights guaranteed in the Bill of Rights. Faced with this hurdle, Messrs. *Lephuthing* and *Ndebele* changed tack by relying on what they submitted is the duty of a Prime Minister who heads a coalition government to consult the other coalition parties before advising the Head of State to prorogue Parliament.

[10] This cause of action is pleaded in para 5.7 of the founding affidavit. It is suggested that unilateral decision-making affects the interests of the other coalition partners who co-govern with the Prime Minister. For this reason, the coalition agreement that birthed the Government imposes on the Prime Minister a legal obligation to consult the political parties. Failure to consult prejudices their legal interest in co-governing.

[11] The Court is of the view that construed this way, the cause of action raises a novel but important constitutional complaint. The complaint is not of mere academic interest. Viewed objectively, it has implications for the stability and smooth operation of coalition governments which voters have a huge interest in. For this reason, the Court accepts that the political parties have *locus standi*: De Smith, Woolf & Jowell (1999) **Principles of Judicial Review** (London: Sweet & Maxwell) pp.50-51.

[12] The respondents' objection to the *locus standi* of the ABC and the BNP is, therefore, dismissed. As regard the DC, it is not a signatory to any coalition agreement. Its leader is the shadow Prime Minister functioning in opposition to the coalition government of which the ABC and BNP are a part. Thus, its interest in these proceedings is political and not legal. It does then not have *locus standi*.

Non-joinder of the Speaker

[13] The second preliminary objection that is raised is that of failure to join the Speaker of the National Assembly. Nothing is said about the President of the Senate. The Court assumes that since prorogation affects both Houses of Parliament, the objection covers the President as well.

[14] The rights to demand joinder is limited to the category of parties who have a direct and substantial interest in the order sought in the case. Such an order should be one that would directly affect a party's rights or interest. The question to ask is "What right or direct and substantial interest do the presiding officers in Parliament have in these proceedings?" In answering this question the operative legal test is this:

> "It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest **which may be affected prejudicially by the judgment** of the Court in the proceedings concerned..." [Emphasis added]: **Judicial Service Commission and another v. Cape Bar Council and another** 2013(1) SA 170 (SCA) para [12]

[15] The mere fact that a party has a substantial interest in the outcome of the proceedings does not suffice for purposes of joinder as a matter of necessity. The party seeking joinder must also show that such interest may be prejudicially affected by the order being sought. The relief that is being sought in respect of Parliament is that the impugned prorogation must be

reviewed and set. To this extent the presiding officers may have an interest in the outcome of this litigation. But there is nothing more that can be said about any prejudicial effect that the success or failure of the litigation will have on their interest. There is no order that the applicants are seeking that can perejudicially affect them. Their joinder of the Speaker and President is, therefore, required as a matter of convenience. For this reason, their joinder is not necessary. The point of non-joinder is rejected.

[16] The decks are now cleared for the Court to judge the titanic battle between Members of Parliament and the Senator against the Prime Minister.

II. MERITS

Factual matrix

[17] The following facts are common cause:

17.1 On 18th March the Cabinet met and decided that COVID-19 be declared a national emergency. A containment strategy of restricting gatherings to no more than 50 people was adopted as policy. Public institutions were to adopt workplace safety measures. Sectoral measures were to be put in place by heads of these institutions in implementing the policy.

17.2 On 20th March the four leaders of the political parties in Government attended a meeting at the Royal Palace at 1800hrs whereat the Prime Minister proffered the advice to the King to prorogue Parliament. Two Members of the quartet did not buy into the proffering of the advice. The two are Chief *'Maseribane* who is the Minister of Communications and Miss *Rantšo* the Minister of Labour.

17.3 The meeting ended because (to quote the Prime Minister) "It had become apparent that both Ministers 'Maseribane and Rantšo were dead against the idea of prorogation".

17.4 Later on in the same night of 20th March, the Prime Minister tendered his advice in a written letter to the King. The King was given notice to act as advised by 2100hrs (9.pm). It is clear that the King failed to act because the Prime Minister issued a Gazette the same night proclaiming prorogation of Parliament.

17.5 The reason for the advice to prorogue Parliament was that "due to prevalence of Corona Virus (Covid-19) which has been declared a pandemic by the World Health Organization

(WHO) it is advisable not to have large gatherings of people in order to avoid the spread of the virus".

[18] The dispute between the parties are in the following areas:

18.1 The constitutional permissibility of the Prime Minister to advice the King without first consulting his coalition partners and the Cabinet.

18.2 The legal justification of the reasons for proroguing Parliament.

18.3 The failure by the Prime Minister to satisfy the requirements to prorogue Parliament in terms of section 91(3).

Prorogation: Meaning, History and Effects

[19] Prorogation means the end of a Parliamentary session brought otherwise than by dissolution. It should not be confused with adjournment by Parliament itself. Its origins and purpose is this:

> *"Prorogation originates (sic) from Britain at a time when parliament met according to the will of the English Monarch. It was a means for a monarch who did not currently wish to have a parliament in session to achieve this result without dissolving parliament and thus incurring the expense of a new election when she desired parliament to re-convene. This usage eroded along with the other powers of the monarchy, and today royal involvement in prorogation in the UK is purely ceremonial (Halsbury vol. 78 s 1018; Erskine May 144, 145-46). Prorogation was*

*also historically justified as providing a check on parliament sitting indefinitely (Blackstone Bk 1 Ch 2, 180). This concern is much weaker today, given fixed parliamentary terms and regular elections cycles": **Oxford Constitutional** Fowkes J. (2017) **Oxford Constitutional Law: Prorogation of the Legislative Body** (Max Plank Encyclopedia of Constitutional Law) (Reserved date 08 April 2010) para 5*

[20] Prorogation is therefore, an act which the monarch does on the advice of a Prime Minster. It has these immediate and wider effects:

20.1 It stops proceedings in both Houses of Parliament and none of the business and processes currently in motion are carried over into the next session.

20.2 It reduces the influence of Parliament over the way a country is governed. Government departments and ministries cannot be scrutinized.

20.3 The Executive cannot pass primary legislation (Bills and secure approval of further supply (i.e. access public money for government spending).

20.4 Long prorogations give rise to questions of whether the Government still commands the confidence of the National Assembly and, therefore, the legitimacy of Cabinet to continue in office: Cowie, Graeme **Prorogation of**

Parliament Briefing Paper No.8589, 11 June 2019 (House of Commons Library).

The Constitutional Landscape

[21] Prorogation of Parliament is provided for in two sections. These are sections 83 and 91(3). Section 83 provides as follows:

> "(1) The King may at any time prorogue or dissolve Parliament.
>
> (2) .....
>
> (3) .....
>
> (4) In the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister..."

Section 91(3) reads thus:

> "Where the King is required by this Constitution to do any act in accordance with the advice of any person or authority other than the Council of State, and the Prime Minister is satisfied that the King has not done that act, the Prime Minister may inform the King that is the intention of the Prime Minister to do that act himself after the expiration of a period to be specified by the Prime Minister, and if at the expiration of that period the King has not done that act the Prime Minister may do that act himself and shall, at the earliest opportunity thereafter, report the matter to Parliament; and any act so done by the Prime Minister shall be deemed to have been done by the King and to be his act."

[22] In so far as the role of Cabinet is concerned in matters of prorogation, section 88 decrees that:

> "(1) .....
>
> (2)The functions of the Cabinet shall be to advise the King in the government of Lesotho and the Cabinet shall be collectively responsible to the two Houses of Parliament for any advice given to the King by or

under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.

(3) The provisions of subsection (2) shall not apply in relation to –

(a) .....

(b) *the dissolution or prorogation of Parliament.*" (Italics added)

[23] Subsection (3) is dispositive of the issue whether the Prime Minister is obliged to consult Cabinet and get its approval before advising the King to prorogue Parliament. Prayer 2.8(b) will be dismissed on this account.

[24] Section 87 provides for the appointment and dismissal processes of a sitting Prime Minister in the following manner:

"(1) There shall be a Prime Minister who shall be appointed by the King acting in accordance with the advice of the Council of State.

(2) .....

(3) .....

(4) .....

(5) The King may, acting in accordance with the advice of the Council of State, remove the Prime Minister from office –

(a) if a resolution of no confidence in the Government of Lesotho is passed by the National Assembly and the Prime Minister does not within three days thereafter, either resign from office or advise a dissolution of Parliament.

(6) .....

(7) .....

(8) A resolution of no confidence in the Government of Lesotho shall not be effective ..... unless it ..... proposes the name of a

member of the National Assembly for the King to appoint in the place of the Prime Minister."

[25] The applicants seek the removal of the Prime Minister by a court order. A coercive order (*mandamus*) is sought against the King to do so. There is no relief sought for the Council of State to interpose in the removal process. There is also no resolution of the National Assembly placed before the Court evidencing the National Assembly's loss of confidence in the Prime Minister.

[26] The applicants have not pleaded compliance with the necessary steps preparatory to the removal of the Prime Minister. Instead, they have pleaded what they term the unfitness of the Prime Minister to remain in office because he "has the propensity and has persistently displayed some modus operandi to damage critical arms of government" and demonstrated a "persistent behaviour of indulging in unconstitutional decisions compromising the KINGDOM OF LESOTHO."

[27] Granted all this may be true, (and the Court express no opinion), it does not meet the constitutional requirements for the removal of a sitting Prime Minister. It is not for this Court to pass judgment on the allegations. They are matters for political judgment by the National Assembly (and not its individual members) through a resolution of no confidence placed before

the Council of State to advice the King. Absent a resolution of no confidence and advice to the King by the Council of State to dismiss the Prime Minister, the reliefs in paragraphs 2.7 (b), 3 and 4 are dead on arrival. This is apart from the legal position that courts of law have no jurisdiction in matters of appointing or removing Prime Ministers. It was, therefore, a wise move by Mr. *Rasekoai* to abandon these prayers during oral argument.

The Interpretative Exercise: Texts And Context

[28] Section 1 of the Constitution declares Lesotho as "a sovereign democratic Kingdom." The Constitution proceeds in section 2 to declare its supremacy over all laws and voids such laws and necessarily acts to enforce them if they are inconsistent with the Constitution.

[29] As the organic law for the governance of the Kingdom in which the King is a constitutional monarch but the Prime Minister wields executive authority, the Constitution still guarantees the King rights in section 92 as follows:

> "The King shall have the right to be consulted by the Prime Minister and the other Ministers on all matters relating to the government of Lesotho and the Prime Minister shall keep him fully informed concerning the general conduct of the government of Lesotho and shall furnish him with such information as he may request in respect of any particular matter relating to the government of Lesotho."

[30] This Court, in the exercise of its ordinary jurisdiction, had the occasion to pronounce itself on what this right entails even in a situation where the Constitution had been supplanted by a military junta. The Court said the following in **Makenete v. Major General Lekhanya and Others** CIV/APN/74/90 (6 November, 1990):

> pp.43-44 "Suffice it to say however, that I consider that either expressly or impliedly there has always been vested in the King, 'the right to be consulted, the right to encourage, the right to warn'. That, being the case, in the exercise of his function in appointing or removing from office a Military Councillor, on the advice of the Chairman, he must surely have the right to be advised as to the reasons for the proposed measures and indeed to make counter proposals in the matter. Ultimately however, the discretion is that of the Chairman and the King 'is obliged in the last resort to accept the formal advice tendered' to him."
>
> p.58 "I could well imagine some temporizing by the King in asserting 'the right to be consulted, the right to encourage, the right to warn'. To what extent those rights should be pressed, is not for my judgment but necessarily that of His Majesty. Only he could judge the pressure of the situation, and I would imagine that with the actions of the R.L.D.F. in the matter, with half of the ruling body, the Military Council, in detention, the matter was in the least, of national urgency. Ultimately, sooner or later, the King was obliged to accept the Chairman's advice. Ultimately, failure to do so could only result in a constitutional impasse."

[31] This *dictum* applies with equal force in this case for purposes of answering the reasonableness of the time the Prime Minister gave to the King to act within a space of less than three hours during the night and the resultant overreaching the King. Section 91(3) is there to unlock any constitutional impasse that ensues if the King fails to act as advised.

Prorogation procedure

[32] Section 83 provides for prorogation by Royal Commission. The British practice in the matter is that prorogation is made several sitting days in advance of the prorogation coming into force. A range of days are identified within which Parliament may be prorogued and the proclamation specifies the date on which the prorogation would end. This is followed by a prorogation ceremony in Parliament where the Royal Commission is read by the Clerk. If any Bills await Royal Assent, the Clerk announces the name of each Bill that is to assent to. As each Bill is announced, the Clerk turns to face Members declaring 'The Queen wishes it'. This signifies Royal Assent to each Bill and its passing by Royal Assent. The end of this ceremony marks the coming into effect of the official prorogation: **Cowie** (supra).

[33] This shows that prorogation is not done suddenly and haphazardly, let alone in a matter of hours during the night. It is an orderly and transparent process which unfolds in a responsible manner right before the eyes of Members of Parliament. If there are Bills awaiting Royal Assent, it makes eminent sense that the King should first signify assent before prorogation takes effect. Proroguing parliament with immediate effect the prime minister's accountability to Parliament, affects in the following manner:

> "...the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's (sic) being held accountable by Parliament until after a new session of parliament had commenced, by which time, the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament can do would amount to closing the stable door after the horse had bolted..." **R (on the application of Miller v. The Prime Minister and others [2019] UKSC 4** At para 33 (24the September 2019).

[34] Although the effect of prorogation is to quash ongoing parliamentary proceedings, Bills can be carried over or reviewed in the next session if a relevant carry-over motion is approved by the Chamber in which the Bills are being considered. What prorogation does not quash, but only suspends, are Committee proceedings including inquiries and reports by Select Committees as well as impeachment proceedings: **Cowie** (supra).

[35] The fact that the King is obliged to act whenever advised so to act does not mean that the Prime Minister is entitled to be lackadaisical and to force the hand of the King to make decisions of great moment in haste, within a short time and at night in respect of matter which the Prime Minister has had the time to know about long in advance. We say this because on the papers, it is clear that the threat of COVID-19 was not known for the first time by the Cabinet on 18th March when it deliberated on the matter. The need to make decisions to contain it must have been known by the Cabinet months ago because of its existential threat to mankind as a global pandemic was

announced by the World Health Organization months before the sudden prorogation of Parliament.

[36] Mr. *Rasekoai* submits that the Prime Minister's conduct in the matter deserves to be described as irresponsible the Prime Minister's conduct constitutes a threat to democratic governance. We can only say that the short time within which the King was to act shows that the Prime Minister's approach to the King might have the intended or unintended consequence of setting up the King for failure. We say this because no reason is given, apart from an unexplained urgency for the King to have acted before he went to sleep.

[37] There is a school of thought among legal scholars which supports the thesis of an irresponsible Prime Minister in line with Mr. *Rasekoai's* proposition. The line of thinking is that the exercise of the power of prorogation is bound by the constitutional values of democratic accountability, legality and legitimacy. These constitutional values inform the principle that powers of the State must be exercised in accordance with the respect for the wishes of the electorate. A Prime Minister who uses prorogation to undermine, rather than to uphold and protect the voice of the electorate through Members of Parliament violates the Constitution: Newman, Warren J. "Of Dissolution, Prorogation and Constitutional Law, Principle

and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis in **National Journal of Constitutional Law** Vol.27 (2009-2010) p.217 at 221

[38] The Court earlier referred to the first section in the Constitution that proclaims Lesotho as a democratic Kingdom. The principles of participation in government and accountability of the Executive to Parliament are basic features of the Constitution. These principles of accountability and representative government shape the character of a responsible democratic government. A Prime Minister is bound by them not to use his advisory powers to frustrate their practical operationalization. Any advice he tenders for the doing of any act would be illegal if such advice causes the King to undermine the basic features of a democratic Constitution.

Power is disciplined by the Rule of law

[39] The Supremacy Clause of the Constitution in section 2 embodies the doctrine of the rule of law whose constituent element is the principle legality and accountability. This principle is also a basic feature of the Constitution.

[40] The doctrine of the rule of law serves the role of checking unlawfulness and disciplines the exercise of power. It dictates that:

40.1 Legal powers should be exercised in food faith and honestly. The presumption is that the Constitution intends nothing less.

40.2 Power must be exercised in a manner that is fair in all circumstances. This is because the Constitution does not allow public functionaries to treat citizens unfairly. This encapsulates the requirement to observe the rules of natural justice.

40.3 Power must always be exercised so as to advance the policy and objects of the law and not to frustrate them or to advance other unstated objects. This refers to the principle that the law must not be used to achieve indirectly what cannot be achieved directly. The principle is stated thus, because power that is conferred for public purposes is conferred on public trust and not absolutely. Therefore, its use is only valid if it is used in the right and proper way the Constitution or Parliament is presumed to have intended.

40.4 Any purported exercise of constitutional and statutory power must be within the limits of the power conferred. This expresses the principle of legality.

40.5 Power must be exercised in good faith (*bona fide*) and be rationally related to the purpose for which it is given.

40.6 Failure to fulfil a constitutional obligation or to refuse to perform a constitutional duty constitutes a violation of the Constitution. (See Lord T. Bingham (2010) **The Rule of Law** (London: Allen Lane) Chapter 6; **Pharmaceutical Manufacturers Association of South Africa: In re; Ex parte President of the Republic of South Africa** 2000(2) SA 674 (CC) paras [82]-[84]; **Attorney-General And Another v. Swissbourgh Diamond Mines (Pty) Ltd And Others** (No.2) LAC (1995-99)214

[41] Extrapolating from the above, the Court's view is that prorogation is not a blunt instrument available to a Prime Minister to resort to its use to fight political battles or to frustrate Parliament in the performance of its constitutional roles such as the passing of the Budget, the passing laws to

amend other laws and the Constitution or even to scupper a motion of no confidence in the Prime Minister.

[42] The King is put in a difficult position where a Prime Minister advises prorogation when the Government is facing an imminent loss of confidence by the National Assembly. The status of an advice to prorogue may be questioned especially if by acting in accordance with it would have a direct bearing on the ability of Parliament to conduct important or essential business and determine questions of confidence: **Cowie** (supra).

Permissibility of the Prime Minister's Conduct to overreach the King

[43] In conducting the enquiry on the permissibility of the Prime Minister's exercise of his power to overreach the King in the matter of prorogation, we operate on the basis of the principle that any advice to prorogue Parliament that has the intended purpose of thwarting the performance of its constitutional functions would be unlawful. The King has the discretion or even the obligation not to accede to such an advice precisely because the King's advisors are constitutionally obliged to advise the King to act only for lawful purposes: Fowkes, J. "**Prorogation of the Legislative Body**" (Max Plank Encyclopedia of Constitutional Law) para 20.

[44] Mr. *Teele* submitted that the Court has no jurisdiction to make this enquiry because section 91(5) provides that:

> "...where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into by any court."

[45] A similar ouster clause in the Constitution of Trinidad and Tobago was held by the Privy Council not to be an absolute deprivation of the court's jurisdiction. The section reads as follows:

> "Subject to section 36, the President shall not be answerable to any Court for the performance of the functions of his office or for any act done by him in the performance of those functions."

[46] The Privy Council stated that:

> "The protection which the subsection gives to the President does not prevent the courts from examining the validity of his act. It has long been recognized that a statutory ouster clause, which provides that a determination shall not be called upon into question in any court of law, will not protect a purported determination from a legal challenge that it is ultra vires and therefore a nullity: *Anisminic Ltd v. Foreign Compensation Commission* [1969]2 AC 147. Thus in *Attorney-General of Trinidad and Tobago v. Phillips* [1995]1. AC 396 the Board considered the validity of a pardon which the President had purported to grant during the armed insurrection in July 1990. Lord Woolf, who delivered the Board's judgment, stated (412 E-G);
>
> > 'Where the head of state has made a formal decision which in normal circumstances would constitute a pardon, it is important that the state should not be able to resile from the terms of that pardon except in the most limited of circumstances.... The Constitution of Trinidad and Tobago supports this approach by providing in section 38(1) that the President shall not be answerable to any court for the performance of the functions of his office or for any act done by him in the performance of those functions. However section 38(1) does not go so far as to prevent the courts from examining, as did courts below, the validity of the pardon": **Attorney-General v. Dumas** 2017 UKPC 12 para 34.

[47] We do not have reason to disagree with the principle stated in this dictum. This Court does have jurisdiction to entertain a legal challenge to the constitutional validity of prorogation under sections 83 and 91(3). This is not a claimed jurisdiction but a jurisdiction that arises *ex lege* because of the imperatives of the rule of law and the principle of legality, which as we have earlier said, are a part of the basic features of our Constitution.

[48] It falls on this Court to assert this jurisdiction. We are enamoured to do so by the Supreme Court of India in **State of Rajasthan v. Union of India** AIR [1977] SC 1361 para 143 where it said:

> "This Court is the ultimate interpreter (ours is the original interpreter) of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and, if so, whether any action of that branch transgresses its limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."

[49] The ouster clause preludes a judicial enquiry into the section 83 prorogation. The ouster clause is there to protect the King's alleged failure or non-failure to act from judicial scrutiny. It does not preclude an enquiry into the constitutional validity of the advice or the Prime Minister's act of overreaching the King.

[50] It is, however, the considered view of the Court that it is not even necessary to embark on the enquiry of the legal validity of an advice tendered in terms of section 83. This because firstly, there is no complaint that the advice was never received or acted in accordance therewith by the King. Secondly, it is accepted for purposes of impugning the Prime Minister's act to overreach the King that the attack is directed to the alleged non-compliance with section 91(3) by the Prime Minister.

[51] The steps that the Constitution requires the Prime Minister to take for his act to overreach the King to "be deemed to have been done by the King and to be his act" are the following:

51.1 The existence of an advice to the King to prorogue Parliament.

51.2 Failure by the King to prorogue.

51.3 Satisfaction on the part of the Prime Minister that the King has failed to prorogue.

51.4 Notice to the King to act within a certain period accompanied by the Prime Minister's declaration of intent to act after expiry of the stated period.

51.5 Issuing of the Proclamation of prorogation by the Prime Minister after the expiry of the notice to the King.

51.6 Reporting of the prorogation to Parliament at the earliest opportunity thereafter.

[52] The parties are on common ground that the Prime Minister did advise prorogation and the King failed to prorogue Parliament. Where it is disputed that the Prime Minister had satisfied himself of the failure of His Majesty to prorogue, the onus is on the Prime Minister to show that he was satisfied and that his satisfaction is based on reasonable grounds: **Walele v. City of Cape Town And Others** 2008(6) SA 129 (CC) para 60.

[53] The *dramatis personae* in the meeting at the Royal Palace are the quartet of leaders in the coalition Government. They are agreed that the train of events that culminated in the Prime Minister's act of overreaching the King and proroguing Parliament started in a meeting at the Royal Palace from 18.00hrs. The advice of the Prime Minister was withdrawn by him after protestations by two members of the quartet and the meeting adjourned (it is not said at what time exactly).

[54] Chief '*Maseribane*, whose averments are supported by Minister *Rantšo*, says that His Majesty "echoed his misgivings about the tone expressing an ultimatum to the effect that he must make a decision by 2100hrs."

[55] Notwithstanding a dispute as to whether the letter containing the advice (annexure "ABC1") was handed to the King in the meeting or afterwards, the fact of the matter is that the expiry of the period given to the King to act was 2100hrs. So the Prime Minister took the first step to tender advice with a requisite notice to act. Thereafter, the Court is not told whether indeed the rest of the other steps were taken. This is because the Prime Minister asserts executive privilege. For this to pass legal muster, the Court has to be satisfied on the relevance of the basis of the claim for privilege, having regard to considerations that apply to contents of a particular document. The burden of satisfying the Court in the matter lies on the Prime Minister. As said by the Supreme Court of the United States in **United States v. Nixon** 418 US 683 (1974):

> "The President's need for complete candour and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide."

[56] The Court is not persuaded that the assertion of executive privilege on the discussions at the Royal Palace in the matter of prorogation is well grounded in law. The Prime Minister voluntarily invited the quartet of the coalition government to the meeting. The Court will assume that the Prime Minister did this pursuant to the King's section 92 right to be consulted by His Government in all matters affecting Government business. The meeting was not a traditional one which by constitutional practice takes place between the Sovereign and the Prime Minister with no one present. To the extent that the assertion of executive privilege is based on meetings other than the Prime Minister's audience with the Sovereign, the assertion is misconceived.

[57] The meeting at the Royal Palace was not an audience between the Sovereign and his first Minister. Mr. *Teele* conceded in oral argument that the other leaders attended the meeting in their political capacity and ministerial capacity. To this extent, and as the Prime Minister concedes, the meeting was a consultative one in respect of which the other leaders were entitled to volubly air their misgivings about the Prime Minister's act to advice prorogation. After all, the subject matter of that meeting is not the business of Cabinet or any person except the Prime Minister under section 83 read with section 83(3) (b).

[58] Prime Minister is reticent on what Chief '*Maseribane* describes as the King's misgivings about the "ultimatum to the effect that he must make a decision in the matter." This reticence lies in the Prime Minister's assertion of executive privilege about going into details of the discussions that "I held with His Majesty in the presence of the coalition because that is confidential."

[59] The result is that there is nothing before this Court to show what steps the Prime Minister took in compliance with following jurisdictional requirements:

59.1 Notice to the King to act after he had failed to do after 2100hrs and expression of the Prime Minister of his intention to act if the King fails again.

59.2 The reporting of the Matter to Parliament thereafter at the earliest opportunity.

[60] What the Court knows is that the Prime Minister issued the Gazette proroguing Parliament on the very Friday night of 20th March, 2020. From that time up to now, the Prime Minister has not reported to Parliament.

[61] Mr. *Teele* submits that the Court must assume that the Prime Minister notified the Speaker, and that must be a sufficient fulfilment of the Prime Minister's reporting obligation. It cannot be that a notice to the presiding officer of Parliament would be what the drafters of the Constitution had in mind when they created the obligation to provide Parliament with a report on its prorogation.

[62] The Prime Minister is accountable to Parliament for the exercise of all Executive powers. The general powers he has under section 91(3) cover not only prorogation but all instances where the King is obliged to act in accordance with advice. The reporting obligation cannot be anything short of making an official statement before the two Houses about the advice he proffered to the King and what led him to overreach the King. This is after all, the only way in which the Nation at large may get to know the reasons. It is transparency by the executive in its obligations to account to a democratic Parliament. We, therefore, reject the submission that informing the Speaker alone suffices. It is to the peoples' representatives that the Prime Minister must report.

[63] Overreaching the King is a serious step to take by a responsible Prime Minister. He will think long and hard before taking this step. Equally, the constitutional duty to report the taking of this step to Parliament cannot be

a mere formality of informing Parliament about it through publication in Gazette. A gazette is a public notice. It cannot be a substitute to report to Parliament. That is why the drafters of the Constitution deliberately chose a reporting obligation instead of mere notification.

How soon must Parliament be reported to?

[64] The Constitution imposes the obligation to report "at the earliest opportunity". It is mandatory that this be done because of the use of word "shall". The word "opportunity" is defined in the Oxford Concise Dictionary 3rd edition to mean:

> "1 a good chance; a favourable occasion. 2 a chance or opening offered by circumstances. 3 good fortune."

[65] The meaning that accords with the imperative of giving a report to Parliament is that of a chance or opening offered by circumstances. This means that the Prime Minister must report at the first chance or opening offered by the circumstances. The Prime Minister cannot, therefore, create circumstances that will make it impossible for him to report at the first chance. The time to report is not of his own choosing but is dictated by and shaped by the circumstances not of his own creation.

[66] Where, as *in casu*, the Prime Minister prorogues Parliament in the middle of the night for three months, the earliest opportunity to report to

Parliament could have been over the weekend or on Monday 23rd when Members reported for duty. The allegation that the Members did not know about the prorogation at that point is not denied nor addressed by the Prime Minister in his answering affidavit.

[67] Absent any evidence that the Prime Minister gave the King notice that the (Prime Minister) would sign the instrument accompanying the written advice in "ABC 1" if the King failed to do so by 2100hrs, the Prime Minister failed to comply with one of the requirements of section 91 (3). Similarly, the failure by him to report to Parliament the act of proclaiming the prorogation in the impugned Gazette constitutes a failure to comply with another requirement.

[68] These failures disqualify the act of the Prime Minister from being "deemed to have been done by the King and to be his act". It follows that the Gazette proclaiming that Parliament "shall stand prorogated (sic) with effect from 20th March to 19th June, 2020" is invalid and must be reviewed and set aside.

[69] The result is that Parliament was never prorogued and can continue with its business and processes in its current session.

COVID-19 as the reason to prorogue Parliament

[70] It is not in dispute that the Prime Minister's reason for proroguing Parliament is COVID-19. Cabinet decided on 18th March that containment measures be taken in that regard. The Cabinet decision was communicated to Principal Secretaries by the Government Secretary on 19th March. These are the Principal Secretaries of Health, Home Affairs, Foreign Affairs, Justice and Correctional Services and Trade and Industry.

[71] Cabinet's decisions that are relevant for purposes of this are the following:

> "2(ii) (a) All gatherings attended by more than 50 people anywhere in Lesotho are restricted forthwith, and people are discouraged to gather in large numbers, this includes funerals, weddings, and any other social gatherings or festivities.
>
> .....
>
> v. (b) There shall be one official channel of communicating matters relating to COVID-19 to the public in Lesotho. This shall be the Office of the Minister of Health, in consultation with the office of the Prime Minister."

Justiciability of policy-choices

[72] Mr. *Teele* submitted that the Prime Minister's choice of means to achieve a purpose in a matter entrusted to him as the head of the Executive should be respected by the court. The court cannot dictate which route should be followed to achieve the purpose and he found support in **Bato Star Fishing**

(Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) para 48 where it is stated:

> "A court should be careful not to attribute to itself superior wisdom in relation to matters entrusted other branches of government. A court should thus give due weight of finding of fact and policy decisions made by those with special expertise and experience in the field.... a decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."

[73] Mr. *Teele* so submitted to counter the submission by Mr. *Rasekoai* that the advise to prorogue Parliament in order to prevent its Members gathering in mass in line with Cabinet's decision was animated by an ulterior motive because there was an alternative route to have Parliament postponed *sine die*.

[74] We agree with Mr. Teele that policy choices and how those choices are implemented are a matter for the Executive and not the Judiciary. The only time that courts will examine conduct engaged in implementing policy is if the implementation violates a right or contravenes a law. In other words, policy choices are for the Executive for which the Executive is not accountable to the Judiciary. But the Executive is accountable to the Judiciary where the implementation of policy implicates rights and the law. As said by Lord Diplock in **R v. Inland Revenue Commissioners, ex p.**

National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617 at 644:

> "It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

[75] As regards political decisions, Lord Keith said the following in **R v. Secretary of State for Trade and Industry, ex p. Lonrho Plc** [1989]1 W.L.R 525 at 536:

> "These provisions [that the Secretary of State may act against a proposed merger after a report by the Monopolies and Mergers Commission has so advised to Parliament and the Secretary of State acts by a draft order laid before Parliament] ensure that a decision which is essentially political in character will be brought to the attention of Parliament and subject to scrutiny and challenge therein, and the courts must be careful not to invade the political field and substitute their own judgment for that of the Minister. The courts judge the lawfulness not the wisdom of the decision."

Rationality of the Prime Minister's decision to prorogue Parliament

[76] Judicial review makes the courts auditors of the legality of the exercise of power and not anything less or more. This Court can, therefore, audit the legality of prorogation as a means to implement the Government's policy to contain COVID-19.

[77] During the debate on whether prorogation of Parliament was a rational means of containing COVID-19, Mr. *Teele* and Mr. *Molati* (for the interveners) made reference to the cases of **Democratic Alliance v. President of the Republic of South Africa** (2013) (1) SA 248 (CC) and **Democratic Alliance v. Minister of International Relations and Cooperation** 2017(3) SA 212 (GP) respectively.

[78] Mr. *Teele* did so to support the submission that the test for rationality is a relationship between means and objectives in contradistinction between reasonables in which the court need not run with decision-makers' choices of means if, objectively speaking, it can be said the decision-maker must have taken leave of his senses in making the decision. Mr. *Molati* did so to support the submission that the Prime Minister acted irrationally by not reporting to Parliament his decision to prorogue before proclaiming it in the Gazette.

[79] The issue of rationality of the Prime minister's decision to prorogue Parliament, and the context in which it is raised in the applicants' founding affidavit are of critical importance in the determination of this matter. There are many bases upon which the attack to the Prime Minister's decision to prorogue Parliament is grounded, but crucial and germane to

the determination of this case is what is stated in paragraph 5.11(e) of the applicants' founding affidavit and the Prime Minister's concomitant answer to the allegations contained therein.

[80] At para. 5.11(e) the applicants make the following averments:

> "(e) there was no comprehensive report presented to His MAJESTY THE KING apart from the letter which outlines the extent to which the outbreak of Corona virus would affect the business of the Parliament. There is no justification therefore for the prorogation of Parliament. In any case, what is even outrageous to say the least is the fact that the worst-hit jurisdictions like CHINA, ITALY, SPAIN, IRAN and USA have not prorogued parliament or silenced the representatives of the ordinary masses(legislators) on account of this outbreak. What is actually happening is that parliaments in varying jurisdictions are busy legislating and allocating budget and resources are being mobilised to fight the source of this virus. There was clearly failure to apply the mind on the issue and let alone the fact that there was no rational basis for the decision."

[77] The essence of these averments is that the Prime Minister failed to apply his mind when deciding to prorogue Parliament by not taking into consideration a relevant material that once the Parliament stood prorogued it would not be able to exercise its constitutional role of allocating financial resources to deal with the real and present danger posed by COVID-19. In his answer the Prime Minister deals with this averment in the following fashion:

"AD PARAS 5.11 (d) AND (e)

49. I dispute that I had any obligation to consult Cabinet on the matter. I affirm that I acted in the best interests of the nation. The countries referred to compared to Lesotho are better off in terms of resources and capacity of their national health services. All the countries that are referred to are following one principle and physical distancing. China quarantined millions of its citizens in response to the virus and has gained significant ground against the virus. The challenges facing Lesotho are not the same as in those countries. I have already referred to the capacity of the kingdom to handle the pandemic as well the vulnerability of its population. The comparison with these countries therefore is most unfair."

[78] Further, at para.54 the Prime Minister makes the following averment when dealing with the alleged effects of prorogation, among which, is the allegation that prorogation frustrates the passing of the Appropriation Bill which was before Parliament when it was prorogued;

"54. I have considered the effects of prorogation and other matters incidental thereto. I have also considered the threat to the life of the nation posed by the Corona Virus. I have also considered that delaying putting in place preventative measures which we all know include social and physical distancing would be irresponsible. I therefore, after weighing all these matters, came to a painful yet necessary conclusion that prorogation was in the best interests of the nation. It is denied that prorogation effectively means a shutdown of government."

[79] It will be observed that the Prime Minister is not dealing issuably with the applicants' averment that he did not apply his mind to the issue of proroguing Parliament by not taking into account the role of Parliament to allocate resources to deal with the health emergency posed by COVID-19. In responding to the pointed attack of his decision-making, the Prime Minister merely contends himself with making use of generalisations and

cryptic terms such as that he acted in the "best interest" of the country, and that the health systems of the countries whose parliaments have not been suspended are far better than ours. Despite all these, the Prime Minister's answer has failed to address the averment that he failed to apply his mind by not taking into account or by ignoring the fact that by proroguing Parliament, its constitutional financial-resources-allocative capacity which is crucial to fighting the scourge of COVID-19,would be virtually crippled, and, therefore, render his decision irrational.

[80] It is trite that in application proceedings, the affidavits serve the purpose of pleadings and placing evidence in substantiation of one's case. This dual role of affidavits is salutary. The applicant must plead and place evidence on which he relies upon and to formulate the issues for determination by the court. In answering, the respondent must clearly set out which of the applicants' averments he admits or denies and posit his version of the facts. Failure by the respondent to deal with the applicants' factual averment amounts to an admission. **(South African Football Association v Mangope (JA 13/11) [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC)** at para.9)**.** We therefore, find that the Prime Minister's failure to deal with the allegation that he failed to take into account the importance of Parliament in fighting COVID-19 amounts to an admission.

[81] Assuming the above conclusion is wrong, we are nevertheless convinced that the Prime Minister's version should be rejected on the basis that it is palpably implausible, on the authority of **National Director of Public Prosecutions v Zuma 2009 (2) SA 227 (SCA)** where, at para.26, it was said;

> "[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, final order can be granted only if the facts averred in the applicant's(Mr Zuma's) affidavits, which have been admitted by the respondent(the NDPP), together with the facts alleged by the latter, justify such order. *It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on papers..." (emphasis added)*

[81] The conclusion that the Prime Minister's version is palpably implausible is borne out by the fact that it is hard to fathom why he would prorogue Parliament for three months at the time when it is mostly needed to authorise emergency funding to deal with the pandemic. A reasonable inference to be drawn from this is that the decision to prorogue was taken without considering or by ignoring the pivotal role played by Parliament in authorising expenditure. The ensuing discussion will highlight the constitutional importance of Parliament in this regard.

[82] We wish to deal briefly with the development of the principle of rationality and its place and parameters in the review of executive action. The Constitutional Court of South Africa in **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and others (CCT 7/98) [1998] ZACC17: 1999 (1) SA 374 (CC)** , was the first judgment to identify the principle of legality as forming part of the rule of law. This principle postulates that "the exercise of public power is only legitimate where lawful" (ibid para. 56). The principle was further developed in the **President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 (1) SA 1 (CC)** (hereinafter referred to as **(SARFU)** at para. 148, where the court explained that the fact that the President of the Republic exercised executive power does not mean that such power is unconstrained, as the

> "President is required to exercise the powers personally and any such exercise must be recorded in writing and signed;.....the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's powers."

[83] The principle of rationality as another facet of the principle of legality was added to its content by the judgment in **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of**

the Republic of South Africa and others 2000(2) SA 674 (CC) at para.85 where it was said:

> "It is the requirement of the rule of law that the exercise of the public power by the Executive and other functionaries should not be arbitrary. Decisions should be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

[84] All the above legal expositions, even though they were applied within the South African context, we cannot see any reason why they should not be applied in this jurisdiction. When the Prime Minister exercises his executive powers in terms of the Constitution, his exercise of those powers is constrained by the principles highlighted above and most significantly, for the purpose of this case, by the principle of rationality.

[85] In terms of the principle of rationality, it will be observed that the standard by which the executive exercise of power is reviewed is low, only requiring that the decision be rationally related to the purpose for which the power was given. The reason why this is so is that the doctrine of separation powers is respected by not allowing the courts to usurp the functions of the Executive in terms of determining the merits of the impugned decision. In Democratic Alliance (supra) it was said at para [42]:

> "It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this court as the 'minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries'. And the rationale for this test is 'to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other'".

[86] The limitations placed on the Courts when reviewing executive decisions on the basis of rationality were articulated in **Albutt v Centre for the Study of Violence and Reconciliation, and others [2010] ZACC; 2010 (3) SA 293 (CC)** at para.51;

> "The executive has a wide discretion in selecting the means to achieve its permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, Courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking, they are not, they fall short of the standard demanded by the constitution."

Failure by the Prime Minister to apply his mind and to take into account relevant considerations.

[87] Having considered the legal parameters of the applicants' challenge to the Prime Minister's decision, we now turn to consider whether by failing or ignoring to take into account a relevant consideration - a relevant consideration being that prorogation of Parliament would basically shut the door on it being able to allocate financial resources to fight COVID-19, 'coloured' the Prime Minister's decision. Failure to apply one's mind as

evidenced by failure to take into account relevant considerations, is a ground of review articulated by the judgment of **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and 1988 (3) SA 132 (A)** at 152A-E. However, this ground of review has been rejected as being not applicable to the review of executive power exercised in terms of the Constitution, as the constraints to those powers are the articulated in the preceding discussion.

[88] The above notwithstanding, there are situations where the failure to take into account relevant considerations will have a bearing on the rationality of the decision where such failure to take into account relevant consideration would have constituted the means to achieve the purpose for which the power was bestowed on the executive functionary. This position was stated in the **Democratic Alliance case (supra)** at para.39, it was said:

> "[39] This Court in SARFU said that "the exercise of the President's Constitutional power to appoint a commission of enquiry is not directly governed by the principle in the *Johannesburg Stock Exchange* case. It follows that this principle would not directly govern the president's power to appoint the National Director either. That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of the case, there is failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts

> is of a kind that colours the entire process with irrationality and thus render the final decision irrational."

[89] It is common cause that the Minister of Finance had tabled an estimates of expenditure for the year 2020-2021, which were under consideration by parliament when it was abruptly prorogued on the 20th March 2020, and further, that, the said expenditure estimate was prepared under what one would call '*normal conditions*' as the threat of COVID-19 to the Kingdom would have perceptively been a distant if not an unrealistic possibility. It follows, therefore, that the passing of the Appropriation Bill is a relevant and necessary factor for the Prime Minister to have considered before proroguing Parliament on the basis of the threat of COVID-19. That the Appropriation Bill was prepared under normal conditions is borne out by Cabinet's decision taken on 19 March 2020 wherein, crucially among others, it resolved that:

> "3. That contingency budget be set aside for the implementation of these matters; and that emergency procurement regulations be used for the procurement of all items related to the national response to this pandemic."

[90] It was therefore, a relevant factor for the Prime Minister to consider that the shutting down of Parliament for three months would have a deleterious effects on the ability of government to have access to financial resources to deal with the threat of Corona Virus. The importance of Parliament in

allocating financial resources cannot be over-emphasised. It is particularly more pronounced where supplementary funding /budget is needed to deal with an emergency such as that posed by COVID-19. The powers of the Parliament in this regard are found in S.112 of the Constitution which provides:

> "(2) When the estimates of expenditure (other than expenditure charged upon the Consolidated Fund by this Constitution or by any Act of Parliament) have been approved by the National Assembly, a bill, to be known as an Appropriation bill, shall be introduced in the Assembly, providing for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and appropriation of those sums, under separate votes for several heads of expenditure approved, to the purposes specified therein.

(3) If in respect of any financial year it is found-

> "(a) that the amount appropriated by the Appropriation Act to any purpose is insufficient or that a need has arisen for expenditure for a purpose to which no amount has been appropriated by that Act; or
>
> (b).....
>
> a supplementary estimate or, as the case may be, a statement of excess showing the sums required or spent shall be laid before both houses of parliament and, when the supplementary estimate or statement of excess has been approved by the National Assembly, a supplementary Appropriation Bill shall be introduced in the Assembly, providing for the issue of such sums from the Consolidated Fund and appropriating them to the purposes specified therein."

[91] Even if the Minister of Finance has to resort to the use of funds from Contingencies Fund in terms of s.114 to meet the exigencies of "an urgent and unforeseen need for expenditure for which no other provision exists",

he is constitutionally obliged in terms of subsection (2) thereof to present before the National Assembly a supplementary estimate "as soon as possible for the purpose of replacing the amount so advanced."

[92] In the above discussion, we sought to show the relevance of Parliament in the fight against the outbreak of COVID-19. We now turn to consider the second stage of the enquiry, which is whether the failure to consider the role of Parliament in fighting COVID-19 is rationally related to the purpose for which the power to prorogue Parliament was conferred. As earlier stated power to prorogue parliament serves the purpose of bringing parliamentary sessions to an end.

[93] In the circumstances of this case, within the matrix of the Prime Minister's considerations, the role of Parliament to dispense emergency funding should have loomed large, and therefore, his failure to consider this factor is not rationally related to the purpose for which the power to prorogue Parliament is conferred.

[94] We turn, lastly, to consider whether the failure to take into account the role of Parliament to dispense emergency funding to fight COVID-19

'coloured' the decision with irrationality. Lest the Court be misunderstood to be saying that prorogation of Parliament in order to arrest the spread of COVID-19 cannot be rationally related, it needs to be recalled that the purpose of this enquiry in the circumstances of this case, is to determine whether the failure to take into account the constitutional role of Parliament in disbursing emergency funding, tainted the decision to prorogue with irrationality. Perhaps at the risk of being repetitious, when the Prime Minister prorogued Parliament for three months by ignoring the fact that the prorogation would prevent Parliament from discharging its ..... constitutional function, as articulated in the decision to prorogue parliament with irrationality.

[95] To buttress the point of discussion we are making above that Parliament has an indispensable role in the fight against COVID-19, on 27 March 2020 the Minister of Health gazetted the **Public Health (COVID-19) Regulations, 2020** in **Legal Notice No.27 of 2020**. In terms of these Regulations gazetted by the Minister of Health whose office and that of the Prime Minister work together in matter of COVID-19, it is expressly stated that Parliament is an essential service that is not affected by the lockdown. In so enacting, the Government which the Prime Minister heads, accept that closure of Parliament as a means to wards containing COVID-19 is

not what is needed because Parliament provides necessary essential service. The preamble thereof states, that "the regulations are in respect of the state of emergency declared by the Right Honourable the Prime Minister under section 23(1) of the Constitution of Lesotho against COVID-19 pandemic".

[96] The Regulations provide for a lockdown which is defined as:

> "...the restriction of movement of persons during the period for which these Regulations apply, being the period from mid-night the 29th March 2020 to midnight of 21st April, 2020".

[97]] Regulation 3 reads as follows:

> "(5) For the period of lockdown, every person shall be confined to his place of residence, unless the person has to leave the residence to provide or acquire an essential services (sic) or goods as set out in Schedule I.
>
> .....
>
> (7) All places and premises not involved in the provision of essential services or goods as set out in Schedule I shall remain closed to all persons for the duration of the lockdown.
>
> .....
>
> (11) During lockdown period a head of an institution, shall determine essential services to be performed by his institution, and shall determine the essential staff who shall perform those services.
>
> .....
>
> (14) No movement of persons is allowed beyond a place of residence or workplace, except in circumstances set out in these Regulations.
>
> (15) Notwithstanding sub-regulation (14), no person shall be allowed to hold a funeral service of more than fifty people."

[98] Essential services which are exempted from closure appear in Schedule I. They include "services rendered by the Executive and Parliament."

[99] The obvious question to ask is why Parliament was prorogued if the Government gazetted it as among institutions that are not affected by the lockdown because it provides essential services. The Court does not find any answer in the Prime Minister's affidavit. It must be accepted that the promulgation of the Regulations was done with the knowledge of the Prime Minister. We say this for two reasons. Firstly, Cabinet decided on 18th March that the office of the Minister of Health, in consultation with that of the Prime Minister is the official channel of communicating matter relating to COVID-19. Secondly, the Regulations are gazetted in pursuance of the state of emergency declared by the Prime Minister.

Is a coalition Prime Minister bound to consult political parties in matter of prorogation?

[100] Time has long come and gone in history when prorogation was a royal power of the monarch to exercise at his/her pleasure to dismiss Parliament without any reason. In a constitutional democracy, the exercise of all power is disciplined by the rule of law. An element of the rule of law is that power must be exercised reasonable and transparently. Conduct of

State affairs must not be shrouded in secrecy if no dangers to the welfare of citizens or security of the state is not at stake.

[101] Mr. *Teele* submitted that the Prime Minister must have informed the Speaker. That might as well be so. That, however, does not absolve the Prime Minister from his duty as the head of Government to take the Nation into his confidence and tell it, in the Gazette itself, why Parliament is being prorogued.

[102] If the reason was COVID-19 as the Court is told by the affidavit of the Prime Minister, this reason should have been disclosed in the Gazette for the benefit of Members of Parliament and the Nation at large. It is not right that Parliament was prorogued at night without any reasons being stated in the Gazette.

[103] Failure to publicly disclose the reasons has, understandably generated a lot of speculation and conspiracy theories on the real purpose of this prorogation. All manner of ulterior motives and bad-faith were suggested by Counsel for the applicants. The thrust of the submissions were that the real purpose for this prorogation was to kill the impending motion of no confidence in the Prime Minister as well as the Bill to amend the Constitution in a manner that would enjoin the Prime Minister to seek and

have the support of two thirds majority of Members for his request for dissolution to be accepted.

[104] Be that as it may, the law says that the Court must disregard conspiracy theories and motives when testing the legal justification of the prorogation and concentrate on the search for its reasons and test them on the anvil rationality law: See Miller judgment and DA judgment.

Has the Prime Minister followed all the necessary steps?

[105] The Counsel took a lot of time locking horns on the failure of the Prime Minister to report to Parliament that he has prorogued it. Because of this failure, so the argument went, the Prime Minister had failed to fulfil his constitutional duty. For this reason, this reason alone, the prorogation is invalid. Approaching the matter from this ankle, it is implicitly conceded that the Prime Minister did take all the other necessary steps during the decision-making process to overreach the King but missed the last one of reporting to Parliament.

[106] As we understood the point being made here, the decision to prorogue before reporting to Parliament tainted the whole process with irrationality. Thus, the prorogation itself is irrational. There is merit in this proposition. Parliament is entitled to be informed about its prorogation before it takes

effect and not after. If it were otherwise, Members and the National at large would never know why and how the Prime Minister arrived at the decision to overreach the King.

[107] The Prime Minister is not entitled to keep any or all reasons to himself. Neither is he entitled to choose the earliest opportunity as to when Parliament can received a report in the matter. Any report that may come after prorogation has run its course would not serve constitutional imperative of taking the interests of Parliament into account during the decision-making process. The merits and de-merits of prorogation versus adjournments *sine die* would be lost in the process.

[108] For these reasons, the Court finds merit in Counsel's proposition that it was irrational for the Prime Minister to decide to prorogue and implement it before reporting the matter to Parliament.

Is a coalition Prime Minister bound to consult political parties in matters of prorogation?

[109] The question is posed in this way in order to test the proposition advanced by political parties that being a signatory to the coalition agreement, the Prime Minister accepted in advance that he would always consult his partners before taking major decisions. Failure to consult before advising

the King to prorogue Parliament and overreaching the King, constitute a breach of a constitutionally cognizable contract.

[110] A somewhat similar proposition that the Prime Minister must always Cabinet before advising in matter of appointment of judges was rejected by the Court of Appeal in **Attorney-General v. His Majesty & Others** [2015] LSCA 1 (12 June, 2015): The Court of Appeal said:

> "This view of the role of the Prime Minister is consistent with the view of latter's role in the Westminster system on which many of Lesotho's constitutional institutions are modelled. Writing in 1957, nine years before Lesotho's independence, Sir Ivor Jennings said of the Prime Minister of Britain:
>
> > 'In the Cabinet and, still more, **out of it**, the most important person is the Prime Minister. It is he who is primarily concerned with the formation of a Cabinet, *with the subjects which the Cabinet* discusses, with the relation between the Queen and the Cabinet and between Cabinet and Parliament and with the coordination of the machinery of government subject to the control of the Cabinet'.
>
> With the substitution of the King for the Queen in that passage it aptly summarizes the role that the Prime Minister is expected to play under the Constitution of Lesotho."

[111] This constitutional position survives coalition governments in Britain. The Court was not made aware and is not aware of any change in practice from any Commonwealth jurisdiction to support the attenuation of the Prime Minister's role. It is significant that even the Cabinet, as earlier indicated, has no role to play in matters of dissolution and prorogation of Parliament: Vide section 88(3) (b).

[112] The Court finds the proposition advanced by the political parties devoid of any constitutional basis and therefore, must be rejected. The coalition agreement does not have any constitutional status. Its status is political and not legal. It is an agreement *res inter alios acta*. By signing such an agreement, the Prime Minister does not thereby contract out his executive powers. But even if he purports to do so, the agreement would be unenforceable: **Barkhuizen v. Napier** 2007(5) SA 323 (CC). In any case, it is common cause that the Prime Minister and his coalition partners did discus prorogation and disagreed among themselves. That must answer the complaint that the Prime Minister breached his *inter pates* obligation to consult in the matter.

[113] Where the Prime Minister has consulted his coalition partners (which in law he is not obliged to do), it remains for his partners to brief the executive committees of their respective political parties. Failure to consult does not attract a legal risk but a political risk of ultimate collapse of the Government.

Template on prorogation of Parliament

[114] In **R (on the application of Miller) v. The Prime Minister And Others** [2019] UKSC 41 (24 September 2019) the Supreme Court of the United Kingdom made the following points:

"114.1 In advising the Queen to prorogue Parliament, the Prime Minister has the constitutional responsibility, as the only person with power to advice in the matter, to have regard to the interests of Parliament.

114.2 The effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. If Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances the most that Parliament could do would amount to closing the stable after the horse has bolted.

114.3 In modern practice, Parliament is normally prorogued for only a short time. The principle of Parliamentary accountability is not placed in jeopardy if Parliament stands prorogued for a short time. But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model.

114.4 In his reasons to advice prorogation, the Prime Minister must address the competing merits of going into recess versus prorogation and its length.

[115] The Court find these points a relevant and useful legal template to be used by any Prime Minister in advising the King to prorogue Parliament and even in those instances where the Prime Minister decides to overreach the King.

III. DISPOSITION

[116] To summarize, the Court holds as follows:

116.1 In advising the King to prorogue Parliament the Prime Minister is not bound in law to first consult Cabinet, his coalition partners or his political party. Any consultations are matter of political expediency and not law.

116.2 When the Prime Minister advises the King to prorogue Parliament, the King's rights in section 92 must be respected. The Prime Minister must consult and furnish the King with all information/reasons inclusive of their constitutional propriety. The King must be accorded the space and reasonable time to consider acting constitutionally. It is not right to approach the King on the basis of a self-created urgency and request for the King's action. In short, the King must not be set-up for failure so that the Prime Minister can overreach the King. This is important because the King cannot answer the Prime Minister's assertion that he overreached the King because the King failed to act as advised unjustifiably.

116.3 The Prime Minister is politically accountable to Parliament for overreaching the King. He is legally accountable to the

Judiciary for non-compliance with the steps to follow in the decision-making process to overreach.

116.4 In advising prorogation or overreaching the King in the matter, the Prime Minister must take into account the interests of Parliament. Bills that are awaiting Royal assent must not be caught by prorogation because they are business that Parliament has finished and is not pending at the time of prorogation.

116.5 Prorogation must not operate with immediate effect so that the Prime Minister can report to Parliament which is entitled to hold him accountable. The Prime Minister failed to discharge this obligation.

116.6 Prorogation must only be for a short time so that it does not jeopardize the principles of accountability to Parliament and the right of people to participate in government through their freely chosen representatives.

116.7 The Prime Minister exercised his advisory power in an arbitrary and irrational manner. There is no good reason for

him not to have recalled the purported prorogation at the earliest on 27 March when Government conceded in the **Public Health (COVID-19) Regulations 2020**, that Parliament is an essential service.

116.8 This Court does not have jurisdiction to judge the Prime Minister's fitness to remain in office nor to order his dismissal.

Costs

[117] The political parties have not succeeded in any of their claims. Their claims are dismissed with costs. The rest of the applicants' case only succeeds to the extent that they have proved the claim that the Prime Minister acted irrationally in proroguing Parliament and thereafter failing to report the matter to Parliament. They, therefore, deserve to be awarded 50% of their costs. As for the 1st and 2nd interveners their case was confined the failure by the Prime Minister to report to Parliament. They have succeeded and, are therefore, entitled to their costs.

Order

[118] In the result, the following order is made:

1. The prorogation of Parliament proclaimed by the Prime Minister in Prorogation of Parliament Legal Notice No.21 of 2020 is reviewed and set aside as null and void and of no legal force and effect.

2. It is declared that

   Parliament can continue with the business and processes that were interrupted by the purported prorogation;

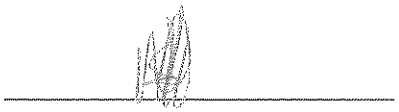
3. The rest of the prayers are dismissed.

4. 50% costs are awarded to the 3rd, 4th, 5th, 6th and 7th applicants.

5. The 1st and 2nd interveners must be paid their full costs

S.P. SAKOANE
JUDGE

M. MOKHESI
JUDGE



P. BANYANE
ACTING JUDGE

For the 1st Applicant:	K. Ndebele
For the 2nd and 3rd Applicants:	C.J. Lephuthing
For the 4th-7th Applicants:	M. Rasekoai
For the interveners:	L. Molati
For the Respondents:	M.E. Teele KC