IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CONST. CC NO: 19/2019**

In the Matter Between:-

LESOTHO MEDICAL ASSOCIATION	**1ST APPLICANT**
DOCTOR MAKHELE MOSEME	**2ND APPLICANT**

AND

THE MINISTER OF HEALTH	**1ST RESPONDENT**
THE PRINCIPAL SECRETARY-HEALTH	**2ND RESPONDENT**
THE MINISTER FINANCE	**3RD RESPONDENT**
THE MINISTER OF PUBLIC SERVICE	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

JUDGMENT

CORAM: **T.E MONAPATHI J**

S.N PEETE J

MOKHESI J

DATE OF HEARING : 16TH APRIL 2020

DATE OF JUDGMENT : 24TH JUNE 2020

SUMMARY:

Constitutional law- *Constitution of Lesotho 1993- Chapter II and Chapter III rights- enforceability of Chapter III rights- The applicants seeking a directly enforcement of the right to just and favourable conditions of work which is located under the Directive Principles of State Policy (Chapter III)- Direct enforcement of DPSPs prohibited by s.25 of the Constitution- Power of the court to decline jurisdiction in terms of s.22(2) where adequate remedies are available to the applicant in another forum- the 2ND applicant suing for setting aside of his suspension in the Constitutional Court, impermissible where adequate redress available in other forums- whether the enforcement of Chapter II is restricted to natural persons- Enforcement of Chapter II rights not restricted to natural persons at juristic persons to a certain extent have rights protected under the same Chapter-freedom from arbitrary seizure of property- Freedom from arbitrary seizure of property , the role and status of s. 4 of the Constitution- S. 4 of the Constitution is an enacting section and should be read together with s.17 as the two are complimentary- S.17 covers instances of formal property interferences which are instigated at the behest of the State for public purposes and which would require compensation, while other property interferences not covered under s.17 should be invoked under s.4- The right to life and the State's substantive obligations- the State is obliged in terms of s.5 of the Constitution in fulfilment of its substantive obligation to provide protective equipment to the doctors.*

ANNOTATIONS:

STATUTES:

Public Service Act 2005

Constitution of Lesotho 1993

BOOKS:

Frans Viljoen, ***International Human Rights Law in Africa 2nd Edition (Oxford University Press)***

Ian Currie and Johan De Waal, ***The Bill of Rights Handbook 6th Ed.*** **(Juta)**

Ian Currie et al ***The New Constitutional and Administrative Law (Vol. 1 Constitutional Law, 2001 Juta)***

A.J Van der Walt, ***The Constitutional Property Clauses: A Comparative Analysis*** **Juta: Kenwyn, 1999**

CASES:

Khathang Tema Bait'sokoli & Another v Maseru City Council and Others LAC (2005 – 2006) 85

FNB v Commissioner SARS 2002 (4) SA 768

United Parties v Minister of Justice, Legal and Parliamentary Affairs 1998 (2) BCLR 224 (ZS).

Sole v Cullinan NO and Others LAC (2000-2004) 572

(Roseberg v South African Pharmacy Board 1981 (1) SA 22 (A)

Prinsloo v Van der Linde and Another 1997 (3) SA 1012(CC)

Ferreira v Levin NO and Others 1996 (1) SA 984 (CC)

R v Oakes [1986] 1 SCR 103

Attorney General of Lesotho v 'Mopa LAC (2000 – 2004) 421

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Osman v United Kingdom (23452/94) [1998] ECHR 101 (28 Oct. 1998

Oneryildiz v Turkey (48939/99) [2004] ECHR

R (Gentle) v Prime Minister [2008] AC 1356

Susan Smith and Others v The Ministry of Defence [2013] 3 WLR 69

Stoyanovi v Bulgaria (42980/04) [2010] ECHR (09 Feb. 2011)

Smith and Others v The Ministry of Defence [2013] 3 WLR 69

Hewlett v Minister of Finance 1982 (1) SA 490(ZS)

National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60

Attorney General v Antigua Times [1976] A.C 16

Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC) [1979] 3 ALLER 21

Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005(1) SA 530 (CC)

Olivier v Buttigieg [1967] A.C 115

Societe United Docks and Others v The Government of Mauritius [1985] A.C 585

La Compagnie Sucriere de Bel Ombre Ltee and Others v The Government of Mauritius [1995] UKPC 53; [1995] 3 L.R.C 494 (PC)

Biowatch Trust v Registrar Genetic Resources and Others 2009(6) SA 232(CC)

MOKHESI J

[1] The 1st applicant is an association of medical practitioners plying their trade in Government medical facilities /institutions, and duly registered as such in terms of the Societies Act NO. 20 0f 1966. The 2nd applicant is a medical practitioner who is employed in Government medical facilities prior to his suspension. The applicants' grievance gleaned from their prayers and founding affidavits stem from an alleged poor working conditions, lack of provision of safety and other equipment, and a host of other issues, in particular relating to their allowances. It must however be made plain that this application is not a model of constitutional draftsmanship, the prayers and the supposed facts upon which the application is based are diffuse, unintelligible and a result, largely difficult to understand.

[2] The applicants are seeking reliefs framed as follows:

a) Dispensing with the Rules of Court relating to service and time frames in relation thereto on account of urgency hereof, and/or;

b) The Honourable Court to issue directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure as to promote expeditions and cheap hearing of the matter.

c) That the Respondents co exercise approach to have Applicants members working under working environment absent the requisite working and safety equipment be declared unconstitutional for violation and/or threat to applicants;

i) rights to just and favourable conditions of work;

ii) freedom from forced labour and slavery;

iii) right to physical, mental and emotional life, and;

iv) freedom from inhuman and humiliating treatment, both 'personal' and 'professional' (indignity).

d) That the respondents be directed to provide the basic working and safety equipment in order to render the working conditions just and favourable and to remedy the incidental violation of Chapter II rights.

e) That Respondents' arbitrary withdrawal of the "call allowance" of M7.50 per hour)M600.00 per month) be reviewed and set aside for violating Applicants' constitutional rights to dignity and property.

f) That the Respondents be jointly/or severally directed to pay Applicants M150.00 "call allowance" per hour (and /or even more depending on the number of calls done) as a fair and reasonable pecuniary return in line with constitutional rights to 'equality' ie equal pay for work of equal value and/or;

i) A declaratory that Respondents' pecuniary return or benefit of 7.50 per hour (M600.00) "call allowance" and is "inconsiderate" to the value of "call work" in violation to!

a) Applicants' dignity and the principle of equal pay for work of equal value" and "unjust enrichment";

b) Right to property, equality before the law and equal protection and benefit of the law.

ii) Respondents be directed to "consider" Applicants' proposed one hundred and fifty Maloti (M150.00) "call allowance" per hour, forthwith (as soon as reasonably possible);

iii) Respondents be restrained and interdicted from threatening and co-exercising Applicants to attend "calls" without pay and/or reasonable and fair pay in line with the Constitution, ILO principles and the reverse effect of the principle of "No pay no work."

g) That the Respondents be jointly and/or severally directed to paythe applicants members "housing allowance" of M10,000.00 and/or to "consider" same, forthwith.

h) That the Respondents be jointly and/or severally directed to pay Applicants' members M10,000.00 "responsibility or managerial allowance", and (m) That Respondents be directed to pay costs of this Application."

i) That the Respondents attitude of co-exercising Intern Doctors to work unsupervised including doing "calls" without pay and any contracts of service be declared a threat to life, unfair and discriminatory against Intern Doctors.

j) That the intern Doctors be given a temporary preferential treatment of being absorbed into the Public Service, with full pay and benefits so as to equalize them with their counterparts.

k) That the Respondents' supervision of 2nd Applicant be reviewed and set aside as unfair and discriminatory, and that;

a) Respondents be jointly and/or severally directed to reinstate and/or facilitate 2nd Applicant's reinstatement to his position of District Medical Officer (DMO) with full pay and benefits, forthwith;

b) Respondents be restrained and interdicted from further intimidating, suspending and/or discriminating 2nd Applicant and/or any member of the 1st Applicant without due process of the law.

(l) That Applicants be granted further and/or alternative relief.

(m) That Respondents be directed to pay costs of this Application."

[3] This application is opposed. In his Answering affidavit, the Principal Secretary of the Ministry of Health, Mr. Thebe Mokoatle raised two points in *limine*, before pleading over; namely:

a) Lack of jurisdiction

b) *Locus standi* of the 1st Applicant to seek constitutional review

[4] Jurisdiction:

It is the respondents' argument that the applicants' case is based on the enforcement of the Principles of State Policy which are non-justiciable in terms of the Constitution. It will be observed that this depiction is inaccurate only prayer 1(c) deals with the Principles of State policy violation, the rest of the prayers make reference to violation of Chapter II rights (Bill of Rights). I deal with these issues in due course.

[5] *Locus Standi* of the 1st Applicant.

It is the respondents' that the 1st applicant being an association and not a human being cannot in law claim violation of the Bill of Rights, which can only be violated in relation to human beings. The argument goes further to say Public Servants Associations are not allowed by the **Public Service Act** to sue Government.

Issues for determination:

a) Jurisdiction in relation to prayer 1(c) (i)

b) *Locus standi* of the 1st Applicant.

c) The merits of the application.

[6] Jurisdiction in relation to Prayer 1(c) (i)

The starting point is the Constitution itself. In terms of section 25 of the Constitution:

"25. The principles contained in this chapter shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progress, rely, by legislation or otherwise, the full realization of these principles."

The **Constitution**, further under section 30 provides for just and favourable conditions of work. It states:

"30. Lesotho shall adopt policies aimed at securing just and favourable conditions of work and in particular policies directed to achieving –

a) Recommendation which provides all workers, as a minimum with –

i) Fair wages and equal remuneration for work of equal value without distinction of any kind, and in particular, women being guaranteed conditions of work, including pension or retirement benefits, not inferior to those enjoyed by men, with equal pay for equal work; and

ii) A decent living for themselves and their families;

b) Safe and healthy working conditions;

c) Equal opportunity for men and women to be promoted in their employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

d) The protection of women who are in employment during a reasonable period before and after childbirth; and

e) Test, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

[7] It was Mr. Moshoeshoe's argument (for the respondents) that the applicants' case stumbles at this first hurdle as this court lacks jurisdiction in matters which are covered under Chapter III. His argument was that because the applicants are seeking to enforce Chapter III rights, this court should dismiss the case on this point as section 25 of the Constitution provides that Directive Principles of State Policy (DPSP) are judicially unenforceable. On the other hand Mr. Sehapi, for the applicants argued that reliance by the respondents on the case of ***Khathang Tema Bait'sokoli & Another v Maseru City Council and Others LAC (2005 – 2006) 85(****hereinafter* ***Bait'sokoli)*** that DPSP are not justiciable was misplaced as the issue in that case was whether the provision of an alternative trading spot by the City Council constituted violation of the applicants' right to livelihood and whether the right to life can be interpreted to be inclusive of the right to livelihood. Mr. Sehapi argued that the ***Bait'sokoli*** case had nothing to do with the justifiability of Chapter III rights. He argued that "Authority is legion in Africa, India and elsewhere that violation of a right to protection of health incidentally violates and/or imposes a threat of violation to the right to life, hence justiciable. Put differently, right to health is an integral of right to life." For this proposition he cited the cases of ***Dr. Ashok v Union of India (1997) 5 SCC 10; Consumer Education & Research Centres & Others v Union of India (1995) 3 SCC 42; State of Punjab & Others v Ram Lubhaya Bagga & Others (1998) 4 SCC.***

[8] To the extent that in this case in terms of prayer 1 (c) (1) the applicants are challenging the constitutionality of the Executive conduct in not providing the medical doctors with protective equipment, contrary to section 30, one of the DPSP, is clearly distinguishable. In the ***Bait'sokoli*** case the courts had to grapple with the constitutionality of the exercise of discretion by the City Council to relocate street vendors in terms of section 37 of the Urban Government Act 1983. The street vendors had argued that their relocation to

a place not conducive for business violated their right to life as that right was inclusive of the right to livelihood which is located under DPSP. The apex court hold that the application had to fail as it was based on a challenge which alleged violation of a "justiciable right" located under Chapter II, that the right to life does not include the right to livelihood as the applicants sought to persuade it.

[9] In this case the applicants are challenging the constitutionality of the executive conduct not to provide them with protective equipment and they are basing this challenge directly on the provisions of section 30, that their right to just and favourable conditions of work (DPSP) have been violated by this conduct. They are emphatically saying this right is justiciable. This court is bound by precedent, in fact what the applicants are urging this court to is what was emphatically rejected in the ***Bait'sokoli*** case, that the only justiciable rights are those appearing under Chapter II of the Constitution. While I agree that the DPSP are not justiciable, this should be taken to mean that they are worthless. The DPSPs are not merely decorative of the paper on which they have been crafted, they are relevant as a constitutional guide to the State in formulating policies and, with regard to the courts, as a constitutional interpretative guide in interpreting legislation. In this case this court is being asked to directly enforce s.25 contrary to a clear language of this section and the authority of ***Bait'sokoli.*** Professor Frans Viljoen in his book, ***International Human Rights Law in Africa 2nd Edition (Oxford University Press),*** critiquing the ***Bait'sokoli*** case at pp. 552 – 553, correctly articulated the legal position and the practical implications engendered by that case, as follows:

> "In its judgment, the court itself remarked that recourse may be heard to the courts to ensure that the principles [DPSP] 'find implementation' in 'appropriate ways'. The court therefore seems to leave the door open for instances where the substantive content of the principle is not already

contained in the Bill of Rights, in which case a 'socio-economic right' in the DPSP may be successfully invoked before the courts'.

Would an 'appropriate circumstance' for example be the invocation of the right to health, which is explicitly contained in the DPSP, but which is not mentioned in the Bill of Rights? It seems not to be case, because the principle would, on the court's reasoning, still be non-justiciable, on the following three-step reasoning:

(1) Only the rights in the Bill of Rights are justiciable.

(2) For the non-justiciable 'principle' concerning health to be justiciable, it has to be invoked as an *element* of a justiciable right such as 'life' or 'dignity' (and not the 'right to health' as much).

(3) However, invoking the relevant DPSP as the basis of a right already assumes that the particular right 'contains' the right to health. Such interpretation is therefore once again open to the court's criticism that the right to health would, in effect, be provided for twice, once implicitly (for example in the right to life) and another time explicitly (in the DPSP). But surely the court's statement that the DPSP may sometimes 'find application' must have some meaning, and surely the inclusion of the DPSP must serve some purpose? At the very least, they should serve as guides to the interpretation of a Constitution and of ordinary legislation.....The court's logic would therefore never allow any of the DPSP to 'find application' as a justiciable right, because socio-economic rights are set out only in the DPSP and will always depend for their justifiability on that of the civil and political right in which they are subsumed."

The applicants' argument that the right to just and favourable conditions of work is justiciable is therefore, rejected.

[10] *Locus standi* of the 1st Applicant:

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[10] *Locus standi* of the 1st Applicant:

Mr. Moshoeshoe, for the respondents, argued that the 1st applicant does not have *locus standi* to sue as the Association is not a human being and therefore cannot in law claim violation of constitutional rights which by nature accrue only to human beings, and that, the individuals constituting the Association should have sued individually. He further sought to augment by citing the provisions of section 22 **of Public Service Act 2005** which he says does not allow public officers associations to sue on behalf of their members. He argued that the purpose of forming these associations is for collective bargaining and ethical conduct of its members. Section 22 (1) of the **Public Service Act** provides:

> "22(1) In pursuance of section 21, public officers may form a public officers' association under the provisions of the Societies Act 1966 for the purpose of collective bargaining and ethical conduct of its members."

[11] The starting point to resolving this issue are the provisions of section 22(1) of the Constitution which provides categories of persons who may seek enforcement of the protective provisions in the Bill of Rights (Chapter II). It provides:

> "22(1) If any person alleges that any of the provisions of section 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained if any other person alleges such a contravention in relation to the detained), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person), may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction –
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

And may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution;

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

[12] This section makes it clear that only two categories of persons can sue for violation of rights; persons against which the violation of rights is alleged can sue, in the second category any person who alleges violation of rights of a detained person. In this jurisdiction the categories of persons who may sue for violation of rights is circumscribed by section 22(1). The question remains whether an association of persons can have a standing to sue despite this clear language in section 22 (1), because it is clear that an association is not a human being but a juristic person. In the Republic of South Africa this situation is catered by section 38(e) which grants standing to an association to sue acting on the interests of its members. This not the first time this issue has exercised the minds of judiciaries in countries with provisions similar to section 22(1) of the Constitution. The same issues arose in the Zimbabwean case of ***United Parties v Minister of Justice, Legal and Parliamentary Affairs 1998 (2) BCLR 224 (ZS).*** This case concerned a constitutional challenge by a political party of various sections of the Electoral Act and the Political Parties (Finance) Act. A challenge in respect of sections 25(1) and 26(5) of the Electoral Act demonstrated without doubt that the applicant was challenging provisions which did not concern political parties but individual

voters. Significantly section 24(1) of the Constitution (enforcement provision) provided:

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him....then, without prejudice to any other action with respect to the same matter which is lawfully available, that person ....may... apply to the Supreme Court for redress."

Section 113 of the same Constitution defined "person" to mean:

"any individual or any body of persons, whether corporate or unincorporated."

In that matter the court denied the applicant a standing to sue as it was held it could not sue for the claimants and voters generally. It was held that "...the reach of sections 25(1) and 26(5) of the Electoral Act may affect the applicant, in the sense of those claimants or voters who are its members, the question then is whether these provisions have been, are being or are likely to be contravened in relation to such members." What the court was referring to here was *sufficiency of interest* of the members of the political party applicant in the remedy it was seeking, because a political party may comprise of members who may not necessarily be voters, and therefore, it was held that;

> "The applicant is not entitled under section 24(1) of the Constitution to carry the torch for claimants and voters generally. It has to show that absence of action by the constituency registrar is likely to affect those of its members who qualify under sections 25(1) and (26) (5) of the Electoral Act."

[13] The long and short of this approach is that an association suing in the interest of its members must demonstrate *sufficient interest* of those members in the relief sought. The learned authors Ian Currie and Johan De Waal, ***The Bill of Rights Handbook 6th Ed.*** **(Juta)** at pp. 78 – 79 said the following about the 'sufficiency of interest' of an association which sues on behalf of its members;

"**Sufficient Interest and the Categories of Persons.**

No test has been laid down to determine when an interest will be regarded as 'sufficient'. In our view, the applicant (or the person or group whose interest they rely on) must at least be directly affected by a law or conduct before he or she will have standing to challenge it."

[14] Reverting to the circumstances of this case, under our Constitution the word "person" has not been defined, but I am not prepared to accept that it should be restricted to natural persons. While it is correct that our Constitution has not defined the word "person", my view is that, the fact that this word has not been defined should not present any problem. This word should not be so restrictively interpreted, it must be given a generous and purposive interpretation. Juristic persons to a certain extent do have fundamental rights applicable to them, for example a company which is facing criminal charges is entitled to a right to a fair trial; media companies do have a right to free speech, and so to say the word *person* should is restricted to natural persons cannot be correct. The views expressed in ***FNB v Commissioner SARS 2002 (4) SA 768***, although, expressed within the South African context are applicable with equal force in this jurisdiction. At para. 42 Ackerman J said:

"[42] In the *First Certification* case an objection was raised that, inconsistently with constitutional Principle II, the extension of the rights guaranteed by the Bill of Right to juristic persons would diminish the rights of natural persons. This court rejected the objection in the following terms: -

"...[M]any 'Universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned and controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT 8(4) specifically recognises this. The text recognizes that the nature of a

juristic person may be taken into account by a court in determining whether a particular right is available to such or not."

In *Hyundai* case this court held that although juristic persons are not the bearers of dignity they are entitled to the right to privacy although their privacy rights "can never be as intense as those of human beings."

Exclusion of juristic persons from the right to privacy –

> "....would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organization or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons." (see also the opinion of Lord Fraser in **Attorney General v Antigua Times [1976] A.C 16**)

In *casu* all the applicant association had to show was a sufficient interest of its members in the relief sought and that its members were directly affected by the impugned conduct. In my considered view the 1st applicant has a *locus standi* to sue in the interests of its members.

[15] Whether this court should decline jurisdiction in respect of the 2nd Applicant

The 2nd applicant is a party in this case to seek the review of his suspension. This court declines jurisdiction in terms of the provision to section 22 (2) of the Constitution. This section provide that the High Court may decline jurisdiction if it is satisfied that adequate means of redress for the alleged wrong are available under "any other law." "Any other law" includes the common law. As this court is sitting as a Constitutional Court, it declines to

deal with a review of the 2nd applicant's suspension, a relief which is available under common law, and which is commonly sought on a daily basis in the High Court sitting in its ordinary jurisdiction. The common law remedy of review of administrative decisions offers "adequate means of redress." This conclusion covers all the prayers which do not implicate the Constitution but are rather labour complaints which can be ventilated adequately elsewhere. This approach was confirmed in ***Sole v Cullinan NO and Others LAC (2000-2004) 572, at 594 E – I, para. [38]*** Gauntlett JA (as he then was) said:

> "The Constitution of Lesotho...specifically authorises the use of the particular constitutional remedy for which section 22 provides. Notwithstanding this, the proviso to s. 22 (2) expressly accords the High Court the discretion to decline to exercise its powers in this regard if satisfied that "adequate means of redress for the contravention" alleged "are available". In my view, they undoubtedly were so available in the present case....In these circumstances, and given the interest undesirability involved in the duplication of proceedings, the incurrence of unnecessary costs (both for litigants and the state) and the use of scarse judicial resources, it is not at all clear why the court *a quo* in this matter did not at least consider the exercise of its power in terms of section 22, the High Court should give careful consideration to its powers under that provision."

[16] Merits:

I turn to consider the merits of this application with the preliminaries now by the wayside. In effect this case is based on the infringement of the following rights:

a) freedom from forced labour
b) Right to life
c) Freedom from inhuman treatment
d) Freedom from arbitrary seizure of property
e) Discrimination and equality.

[17] Discrimination and Equality:

In order to under the context in which this claim is raised it is apposite to quote from the founding affidavit, para. 7.7 in which it is averred:

> "7.7 The preferential treatment of foreign non-intern Doctors unfairly discriminates the interns particularly Basotho since those Doctors were economically advantaged to further their studies and be absorbed into our Civil Service. And the equilibrium is attainable is attainable by a positive discrimination namely: by affording interns more temporary favoured treatment by absorbing them into the system with full pay and benefits. Another unsettled concern is that government hires some Doctors to the managerial positions without any written contracts with clear terms and conditions and without any pecuniary return."

This is about all the applicant says about discrimination. The Constitution provides discrimination specifically under section 18. In particular discrimination or differential treatment will be unconstitutional where different people are treated differently attributable for their race, colour, sex, language, religion, political, or social other opinion, national or other status where people of such description are subjected to disabilities or restrictions to which people of the same description are not subject. It is important to bear in mind that constitutional litigation has to conform to the set standards of pleading; Applications encompass pleadings and evidence combined into one, with the affidavit being required to contain pleadings and evidence upon which the applicant relies for his claim stated with lucidity, logic and intelligibly to enable the respondent to meet the applicant's case; it is important to recall that the pleadings also serve the purpose of drawing the battle lines between the litigants, or to put it simply, they must formulate issues between the litigants ***(Roseberg v South African Pharmacy Board 1981 (1) SA 22 (A) 30H – 31C***. In constitutional litigation where constitutionality of a statutory provision

or conduct is issue the applicant must scrupulously observe these principles of pleadings, most importantly, the respondents must place facts justifying the infringement of a right because conduct or provision of a statute is not invalid if it can be justified in terms of the Constitution(***National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 at para. 37***)

[18] In *casu*, as can be gleaned from the above excerpt, the case has not been made out for unconstitutional differential treatment between the applicant's members and foreign doctors attributable to any of the proscribed incidences of differential treatment in section 18(3). Without more I do not think that a case has been made out for the violation of section 18(3). It has to be borne in mind that not every differential treatment is unconstitutional. There are various legitimate reasons for treating people differently in a democratic society like ours *(**Prinsloo v Van der Linde and Another 1997 (3) SA 1012 at 1033 F – H**)*. The same conclusion should be reached in relation to a prayer that the government is guilty of inhuman and degrading treatment of the applicant's members. There is simply no evidence on the papers to found this allegation.

[19] Freedom from Forced Labour

A supposed case for this leg is made out in paras. 7.5 to 7.6 of the founding affidavit:

> "7.5... The legitimate working hours in the Public Service are eight (8) hours. However, Doctors are over belaboured to work far beyond that time i.e the minimum hours of "call" is 16 hours times 5 days which adds up to 80 hours. Thus, we do far beyond $^1/_4$ of our working hours without the equally valuable pecuniary return.

7.6 What is more enslaving and despairing is that whether one had worked far beyond the minimum "calls" period of 16 hours or not still earns the same amount ie M600.00. Being coerced to work under such conditions amounts to forced labour and modern slavery....."

In terms of section 9 of the Constitution

" Freedom from Slavery and Forced Labour

(1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

(3) For the purposes of this section, the expression forced labour does not include –

a) any labour required in consequence of the sentence or order of a court;

b) any labour required of any person while he is lawfully detained that, though not required in consequence of the sentence or order of a court, is reasonably required in the interests of hygiene or maintenance of the place at which he is detained;

c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a military or air force, any labour that that person is required by law to perform in place of such service;

d) any labour required during any period when Lesotho is at war or a declaration of emergency under section 23 of this Constitution is in force or in the event of any other emergency or calamity that threatens the life or well-being of the community, to the extent that the requiring of such labour is reasonably justifiable, in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation; or

e) any labour reasonably required by law as part of reasonable and normal community or other civic obligations."

From the provisions of section 9 above it is clear that what the applicant is complaining about does not evince slavery, servitude and forced labour. The applicant's members are free to disengage from the public service if they are dissatisfied with their conditions of work. The long working hours they are subjected may be undesirable but cannot be elevated to the level of the incidences proscribed by section 9. In describing slavery, servitude and forced labour, the learned authors, Ian Currie et al ***The New Constitutional and Administrative Law (Vol. 1 Constitutional Law, 2001 Juta)*** at p. 367 said:

> "Slavery essentially means ownership of another person. Servitude is a broader concept which includes the practices of debt bondage and serfdom. The former refers to the status of a debtor who pledges personal services as security for debt if the length and nature of the work is not defined. Serfdom refers to a tenant who is bound to live and work on the land belonging to another and who is not free to change his or her status.
>
> The key element in forced labour is that it is involuntary..."

[20] Freedom from arbitrary seizure of Property

The context in which this allegation arises is that the applicant's members prior to July 2018 used to be paid an amount of M600.00 for "calls". From the founding affidavit call allowance of M7.50 per hour (M600.00 per month) was introduced in the year 1993 and constituted $^1/_3$ of the salary. The said allowance was paid without fail until July 2018 when the Ministry of Health decided to stop it without affording the applicants a hearing. In his answer, Mr. Thebe Mokoatle, the Principal Secretary of the Ministry of Health, does not

deny that the doctors were not given a hearing prior to this decision, instead he avers that:

> "7.6... I must take this honourable court into my confidence and solemnly aver that due to financial budget and economic hiccups of Lesotho, the call allowance was only suspended until funds are available to pay the calls and Doctors are allowed to register their calls so that in future they could be paid once funds are available."

In terms of section 17 of the Constitution (in relevant parts)

> "**Freedom from arbitrary Seizure**
>
> 17(1) No property, movable or immovable, shall be taken possession of compulsorily, and no interest in or right over any such property shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –
>
> a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit; and
> b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
> c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation....."

[21] Interpretative Principles

When interpreting constitutional provisions of this nature; a) a generous and not a legalistic interpretation should be adopted bearing in mind the purpose of the section; (b) the language used in the section should be respected, taking into account the usage, traditions and legal history which give meaning to the provisions;

"The meaning of a right or freedom guaranteed by the charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept estimated, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the charter. The interpretation should be .....a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the charter's protection" ***R v Big M Drug Mart (1985) 18 DLR (4th) 395 – 6 (18 CCC (3d), per Dickson J: see also: Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC) [1979] 3 ALLER 21***

[22] In adjudicating fundamental rights a two-step approach is undertaken, which starts first with requiring the applicant to clearly establish the existence of an infringement of a right in regard to which he seeks a remedy, and secondly whether such an infringement is justified under section 17(1) (see; ***Ferreira v Levin NO and Others 1996 (1) SA 984 at para. 44***). The first question to be determined is whether the interest implicated in this case qualifies as property under section 17(1). The Constitution has not defined the concept of property apart from stating that it may be "movable or immovable." It is an undeniable fact that for decades government has been paying doctors a certain amount for doing "calls" but in July 2018 that established practice was abruptly stopped. We now know that the reason for doing is that the Government has budgetary problems. The Ministry says such "call allowances" were not stopped but "suspended until funds are available." In my view the right implicated in this case qualifies as property within the provisions of sections 4 and 17, even though it is a personal right. The idea of

property envisioned in these sections is wide enough to cover the situation of the applicants. I have deliberately strayed away from defining what is meant by *property* as it is practically impossible to do so.

[23] It is critical to observe that section 17(1) prohibits "*taking*" of property compulsorily, and "*acquiring* "property compulsorily(expropriation). In constitutional jurisprudence there is a difference between these two concepts: '*Acquiring'* refers to expropriation while the *'taking'* refers to a wider spectrum of incidences which include expropriation, but they are both formal seizures of property by the State for public benefit. The learned author A.J Van der Walt, ***The Constitutional Property Clauses: A Comparative Analysis*** **Juta: Kenwyn, 1999 at 423** explained the difference between the 'taking' clause and 'compulsory acquisition' as they appear in the Fifth Amendment to the United States of America constitution, in this manner, which I consider to be the same idea behind s.17, thus:

> "The crucial feature that sets US takings law apart from the position in most other jurisdictions is the distinction between 'taking' and expropriation. 'Taking' as referred to in the Fifth Amendment, is a wide term that includes the narrower, more widely known category of formal expropriations or compulsory acquisitions in terms of the power of eminent domain, but also extends to a further category of State actions that have the form of police power regulations of property but in effect amount to takings because they go too far." (*for a discussion on 'compulsory acquisition'*, see; **Hewlett v Minister of Finance 1982 (1) SA 490(ZS))**

The regulatory power of the State is known as the 'police power', while the power of 'eminent domain' is the State's power to expropriate. What is clear is that the medical doctors' 'call allowances' were no taken compulsorily nor were they compulsorily acquired, which, therefore means that their case falls outside the parameters of s.17. within the context of s.17. The taking and

acquisition in the context of s.17, refers to the formal interference with property at the instance of Government, and which of necessity require compensation for assuage, while other interferences which do not necessarily attract compensation are not catered for thereunder. However, the fact that the applicant's case is not covered by s.17 does not spell an end to its case as resort must be made to s.4 of the Constitution. But before I resort to s.4, I think its status and the role it plays in incidences of interference with property not covered by s.17 needs to be ascertained and understood.

[24] Status of Section 4

This case raises a novel but important question of the significance of section 4 of the Constitution. A pertinent question may be posed whether this section is an enacting provision or merely explanatory or introductory of subsequent provisions of Chapter II. The significance of this issue is accentuated by the fact section 17 of the Constitution convers specific forms of interferences with property. Section 17 deals with deprivations which involve formal compulsory taking and acquisition by Government for public purposes.

Section 4 (1) provides:

> "(1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following –
>
> (a) the right to life;
>
> (b) the right to personal liberty;
>
> (c) freedom of movement and residence;

(d) Freedom from inhuman treatment;

(e) Freedom from slavery and forced labour;

(f) Freedom from arbitrary search and entry;

(g) The right to respect for private and family life;

(h) The right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations;

(i) Freedom of conscience;

(j) Freedom of expression;

(k) Freedom of peaceful assembly;

(l) Freedom of association;

(m) Freedom from arbitrary seizure of property;

(n) Freedom from discrimination;

(o) The right to equality before the law and the equal protection of the law; and

(p) The right to participate in government;

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

(2) For the avoidance of doubt and without prejudice to any other provision of this Constitution it is hereby declared that the provisions of this chapter shall, except where the context otherwise requires, apply as well in relation to things done or omitted to be done by persons acting in a private capacity (whether law virtue of any written law or otherwise) as in relation to things done or omitted to be done by or on behalf of the Government of Lesotho or

by any person acting in the performance of the functions of any public office or any public authority."

Although the provisions of this section especially when section 4(1) begins with the words "whereas" might give an impression that the section is a preamble, it merely introduces and explains subsequent provision of chapter II. Putting form aside and focusing on the substance, my considered view is that s.4 is an enacting provision. It is telling that section 4(1) (m), although framed in positive terms, makes no mention of compensation, and this is very crucial as will later become clearer. A literalist reading of this section would have the effect of having unconstitutional seizures of property not falling within the purview of section 17(1) being inexplicably constitutionally uncounted for. Section 4(1) (m) must be read together with section 17(1) as the two sections are complimentary of each. At the risk of being repetitious, s.17 covers more formal taking and acquisitions by Government for public purposes, while s. 4(1) (m) covers other forms of seizures not covered under s.17.

[25] In some jurisdictions the approach to constitutional provisions of the nature of s.4 have been held to be introductory of subsequent protective provisions. A contrast between s.4 in issue, and s.5 of the Constitution of Malta is apposite, to highlight this approach. The Privy Council held that s. 5 of the Maltese Constitution was explanatory and introductory of subsequent provisions. The Maltese Constitution of 1961 provides:

"Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all the following, namely –

a) Life, liberty, security of the person, the enjoyment of property and protection of the law;

b) Freedom of conscience, of expression and of peaceful assembly and association; and

c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Part of the Order shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of the protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms of others or the public interest."

In ***Olivier v Buttigieg [1967] A.C 115*** Lord Morris described this section as "an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow.... The section appears to proceed by way of explanation of the scheme of the succeeding sections." Lord Templeman in ***Societe United Docks and Others v The Government of Mauritius [1985] A.C*** 585, dealing with section 3 of the Constitution of Mauritius which is similarly worded as **ours** without the words "whereas", held that, in contrasting s.5 of the Constitution of Malta with s. 3 of the Constitution of Mauritius, held that "Section 3 of the Constitution of Mauritius ..... is not a preamble in form or in substance but an enacting provision." Formalism when interpreting constitutional provisions should be shunned, the approach in ***Societe United Docks*** (ibid) commends itself to me as the correct one, as it enjoins a substantive approach.

[26] Although, section 4(1) begins with the words "whereas," at face value it might give an impression that it is introductory and explanatory of the

subsequent provisions of Chapter II. It specifically provides that the provisions of Chapter II shall have the effect of protecting those fundamental rights and freedoms subject to limitations provided in specific sections. Section 4 is not excluded from the protective provisions. To argument this perspective, s. 4(2) declares that the provisions of Chapter II shall apply, subject to the context, whether one is acting in his private capacity or on behalf of Government or acting in terms of the law or whether acting in the performance of public office. It is significant, furthermore, to observe that s.4 is not excluded when the Constitution declares that the provisions of Chapter II shall be applicable to those enumerated incidences. The position I take of section 4 in relation to property is that when looked at substantively, it is an enactment not a preamble. Although not in issue, a similar approach which recognizes s.4 as an enacting section was adopted in ***Attorney General v 'Mopa***(supra) wherein Gauntlet JA said that the right to fair trial was 'conferred upon every person' by s.4(1)(h) and 'expanded upon' in s.12(p.432 at para.18).

[27] The approach to interpreting sections 4 and 17

Section 4 should be read together with s. 17. as the two sections are complimentary of each other. The approach to sections of the nature of sections 4 and 17, was eloquently enunciated(which I respectfully consider to be applicable in *casu*) in ***La Compagnie Sucriere de Bel Ombre Ltee and Others v The Government of Mauritius [1995] UKPC 53; [1995] 3 L.R.C 494 (PC)*** where Lord Woolf dealing with the similarly–worded provisions of the Mauritius Constitution at pages 6 -8 said(I can do no better than quote extensively);

> "The correct approach is therefore to read section 8 [s. 17 in our case] together, with the relevant language of each section influencing the interpretation of the other. Section 3 (c) [s. 4(1) (m) in our case], however, remains at the same time both the more general and the more qualified provision: more general, as its protection applies to a wider range of situations

and a broader concept of property than does section 8 [S. 4 (1) (m)]; more qualified, because the protection it provides is restricted by broader limitations that to which the protection provided by section 8 [s. 17] is subject. Even when generously construed section 8 [s. 17] is limited to protecting property and property interests from interference which in a broader sense involves some formal compulsory taking of possession or acquisition of property or of what loosely corresponds to a right over property. The property or interest in property must be sufficiently identifiable to be capable of being taken possession of or acquired in this way. However once property to which section 8 [s. 17] applies is compulsorily taken or acquired, then the section is contravened unless all the requirements of section 8 (1) (a), (b) [s. 17 (1)(a), (b) and (c)] are fulfilled or one of other limited exceptions in section 8 [s. 17] applies. The qualification on the protection provided by section 3 [s. 4] is in much more general terms. There is therefore significant distinction between the protection provided by section 3 (c) [s. 4 (1) (m)] and section 8 [s.17], notwithstanding their close relationship.

An analogy can be drawn with Article 1 to the Protocol of the **European Convention of Human Rights**. Article 1 provides: -

> "Every natural person or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of institutional law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 1 comprises three distinct rules. As was stated by the European Court of Human Rights in **Sporrong and Lonnroth v Sweden (1982) E.H.R.R. 35 at page 50**:-

and a broader concept of property than does section 8 [S. 4 (1) (m)]; more qualified, because the protection it provides is restricted by broader limitations that to which the protection provided by section 8 [s. 17] is subject. Even when generously construed section 8 [s. 17] is limited to protecting property and property interests from interference which in a broader sense involves some formal compulsion taking of possession or acquisition of property or of what loosely corresponds to a right over property. The property or interest in property must be sufficiently identifiable to be capable of being taken possession of or acquired in this way. However once property to which section 8 [s. 17] applies is compulsorily taken or acquired, then the section is contravened unless all the requirements of section 8 (1) (a), (b) [s. 17 (1)(a), (b) and (c)] are fulfilled or one of other limited exceptions in section 8 [s. 17] applies. The qualification on the protection provided by section 3 [s. 4] is in much more general terms. There is therefore significant distinction between the protection provided by section 3 (c) [s. 4 (1) (m)] and section 8 [s.17], notwithstanding their close relationship.

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Article 1 comprises three distinct rules. As was stated by the European Court of Human Rights in **Sporrong and Lonnroth v Sweden (1982) E.H.R.R. 35 at page 50**:-

"The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph".

The first rule approximately corresponds to the protection provided by section 3(c) [S. 4(1) (m)], the second rule corresponds to the opening words of section 8 (1) [s. 17 (1)] to "the taking of possession"; and the third rule to the references to compulsory acquisition in the remainder of section 8 (1)". ....[I]n the **Sporrong** case ....interference did not contravene the second or third rule but it did contravene first rule of Article 1. The first rule required a proper balance to be maintained between the owner rights and the requirements of the public interest..... There was no taking of possession or acquisition of property. There was no more than interference with the ability of the owners to exercise a normal incident of ownership of property and a **threat** of expropriation. However, this was a sufficiently substantial interference that when continued for a disproportionate period of time amounted to what could be described as a constructive deprivation of the property rights of the owners."

It will be observed that seen in its proper light, s.17 offers no protection to property seizures not falling within the categories of seizures provided thereunder. But when Ss. 4 and 17 are read together as complimentary a true purpose of protecting persons against arbitrary seizures is realized.

[28] Meaning of "arbitrary" in S. 4(1) (m)

In trying to decipher the meaning of 'arbitrary seizure' within s.4 (1) (m) it needs to be recalled that this sections' rubric covers all species of property interference, with s.17 covering the more specific ones, and which of necessity attract compensation because they are instigated at the instance of Government for public benefit. The question to be answered is what is meant by 'arbitrary' within the meaning of s.4. This speaks to the level of curial scrutiny of the impugned conduct. 'Arbitrariness' of the decision to suspend payment of allowances should be determined with reference to the standard in ***R v Oakes [1986] 1 SCR 103.*** As it will be recalled this case is about constitutional review of the conduct of public functionaries in the Ministry of Health in suspending payment of doctors' 'call allowances'. The question to be firstly answered is whether the impugned conduct of suspending payment of "call" allowances constitute interference with (deprivation or seizure) with the doctors' enjoyment of property. The answer to this question should surely be in the affirmative. The next question to be answered is whether this interference is justified. The standard for determination of justification for infringement of a right is ***R v Oakes (ibid)***, as already said, a standard which is consistently applied in this jurisdiction; See: ***Attorney General of Lesotho v 'Mopa LAC (2000 – 2004) 421.*** This test seeks first to determine the objective or purpose of limitation of a right, and secondly, proportionality of limitation of the right. The purpose of limitation must be sufficiently important to justify overriding a constitutionally protected right or interest. Dickson CJ put the test thus (at para. 69):

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". *R v Big M Drug Mart Ltd.*, Supra at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic

society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Secondly, once a sufficiently significant objective is recognized, then the party invoking. S....must show that the means chosen are reasonable and demonstrably justified. This involves a "a form of proportionality test": *R v Big M Drug Mart LTD., Supra at p. 352.*

Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible the right or freedom in question: *R v Big M Drug Mart Ltd.*, Supra, at p. 352. Third, there must be a proportionality between the ***effects*** of the measures which are responsible for limiting the charter right or freedom, and the objective which has been identified as of "sufficient importance"."

[29] It is common cause that for decades the medical doctors were paid "call allowances" and this practice has become so entrenched only to be terminated without affording the said doctors a hearing. The Ministry's justification is budgetary constraints. The objective or purpose of suspending paying allowances was, apparently, to rein in spending and cut cost. As already said the practice of paying doctors for doing "calls" has been in existence for decades and this should have been known to the Ministry of Health as at the time it prepared its yearly budget. For the Ministry simply to turn off the tap on paying these allowances citing budgetary constraints, does not in my considered view count as of "sufficient importance" to override the doctors' property rights or interest. The allowances in question augmented the doctors'

monthly salaries and contributed towards sustaining their livelihoods and could reasonably been expected to continue as has always been the case. These important considerations ought to have loomed large when the decision was made to discontinue them. Even if I were to assume that 'budgetary constraints' considerations are sufficiently important, the conduct of the respondents fails to clear the first hurdle of proportionality test: that the measure must not be arbitrary, unfair or based on irrational considerations. In *casu* the Ministry 'suspended' paying 'call allowances' without affording doctors a hearing, and this is unfair and arbitrary. A procedurally unfair seizure (deprivation) of property is arbitrary ***(Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005(1) SA 530 (CC) at para.65)***. The inescapable conclusion is that the limitation of the doctors' property right is unconstitutional.

[30] Infringement of the doctors' right to life by not providing them with safety equipment.

It is the doctors' argument that:

> "8.2 we do not have requisite tools including among other safety kits and we from time to time work with our bare hands handling patients with open wounds and sometimes with highly communicable or infectious diseases. This imposes a threat to doctor's own physical integrity, life and renders it hard for them to practice their profession."

In answer Principal Secretary of the Ministry of Health says:

> "AD PARA 8 THEREOF
>
> 8.1 & 8.2 contents herein are denied and applicants are put to the proof thereof. Save to aver that government has hospital facilities in place and

> Doctors with experience are employed to execute the work. In essence, Doctors not the government are entrusted to exhibit their expertise and save lives in their hands and care. In furtherance thereof, it is our legal stance that the government has spent, procured and is more than willing to improve the health facilities but for lack of funds challenges are seriously experienced..."

It will be observed that the respondents are not answering issuably to the averment that due to lack of safety kits doctors often have to handle patient infected with highly communicable diseases with bare hands. Instead, the 2nd respondent resorts to making generalizations, denials and challenges to the applicants to prove their case. This response in application proceedings does not amount to a denial, it is simply a bare denial, and the 2nd respondent's failure to deal with specific averments amount to an admission of same: see ***SAFA v Mangope (2013) 34 ILJ 311 (LAC)*** where Murphy AJA said (at para.9)

> "In dealing with the applicant's allegations of fact, the respondent should bear in mind that the affidavit and that a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averments of the applicant. Likewise, failure to deal with an allegation by the applicant amounts to an admission..."

[31] The applicant's case implicates the State's constitutional obligations in terms of s.5 of the Constitution pertaining to the right to life. This section provides:

> "5(1) Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life.
>
> (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases s are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of

this section if he dies as a result of the use of force to such extent as is necessary in the circumstances of the case-

a) for the defence of any person violence or for the defence of property;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) for the purpose of suppressing a riot, insurrection or mutiny; or

d) in order to prevent the commission by that person of a criminal offence;

Or if he dies as the result of a lawful act of war or in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted."

[32] In human rights jurisprudence, each and every State is bestowed with positive and negative obligations. Human rights engender at least four categories of duties for any State, namely; the duties to respect, fulfil, promote and protect these rights. The duties may either be negative or positive. The duty to respect enjoins the State not to interfere with the enjoyment of a right; as regard the other three duties:

"46 . . . the state is obliged to protect rights – holders against other subject by legislation and provision of effective remedies. This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms. This corresponds to a large degree with the third obligation of the state to promote the enjoyment of all human rights. The

State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last obligation requires the state to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the state to move its machinery towards the actual realisation of the rights. This also corresponds to a large degree with the duty to promote mentioned in the preceding paragraph." ***(Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) at paras. 46 – 47)***.

[33] The State's obligations in terms of s.5 are both procedural and substantive. They are substantive in the sense that it is constitutionally decreed that every human being has an inherent right life which he/she should not be deprived of arbitrarily. At the most basic level, the State is impliedly required to have the legal framework and systems in place, to the extent reasonably practical in a free and democratic space, to protect life (***Susan Smith and Others v The Ministry of Defence [2013] 3 WLR 69 at para. 57***). The implied and substantive obligations were stated as follows in the following cases; R***(Middleton) v West Somerset Coroner [2004] UKHL 10*** at paras 2 and 3:

"The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. [citations omitted]"

And further at para.3 said:

"The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated. [citations omitted]"

Furthermore in ***(R (Gentle) v Prime Minister [2008] AC 1356*** at paras.4 to 5, Lord Bingham said:

> "This procedural duty does not derive from the express terms of article 2, but was no doubt implied in order to make sure that the substantive right was effective in practice."

[34] It is apposite to mention that the applicant's case is based on the violation by the State of its substantive obligation in terms of s.5 of the Constitution to the extent that they are not being provided with personal protective equipment. This has not been denied as already seen. In order to understand the content of the State's substantive obligations with regard to the right to life, I find it apposite to seek guidance from the European Court of Human Rights (hereinafter **'ECHR'**) and English jurisprudence on this issue.

[35] In the ***Osman v United Kingdom (23452/94) [1998] ECHR 101 (28 Oct. 1998*** the court had to grapple violation of Article 2 of the European Convention which guarantees the right to life. In that case applicant's husband was killed by her son's former teacher. Her son was also seriously injured in the attack. It emerged that the teacher had before the killing, threatened the applicant's family. A challenge in respect of violation of Art. 2 rested on the failure of the state to protect the applicant's right to life against the teacher.

The **ECHR** did not ultimately find a violation of Article 2, but it said that the State had a positive obligation in terms of Art. 2 "In certain well-defined circumstances . . . to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual." (para. 115). The court further held that due to difficulties in policing, unpredictability of human conduct and operational choices as regards resources and priorities, and that, this obligation should not be interpreted so as to place an onerous or disproportionate burden on the State. The court held further that, for violation of Art. 2's positive obligation to be found to exist the applicant will have to establish that the authorities ought to have known or knew of the threat to the individual's life. In this case that was not established hence the ruling.

[36] The State's positive obligation has been extended to cover a number of circumstances, for example it was invoked in ***Oneryildiz v Turkey (48939/99) [2004] ECHR***, a matter in which, relatives of people who had constructed dwellings next to municipal dump site, and who had perished as a result of methane gas explosion. Their houses were also destroyed by the resultant landslides. In this case the authorities knew of the illegal construction activities around the dump site, and contrary to expert evidence had allowed the construction to continue despite breaches of health and safety regulations. In this case the authorities had satisfied the test articulated in ***Osman*** (above) that where the authorities knew or ought to have known, breach positive or obligation will be found to exist. Significantly, at para. 71 the court said:

"71 . . . . Article 2 does not solely concern deaths resulting from use of force by agents of the state but, also in the first sentence of its first paragraph, lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction [citation omitted]

> The court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as operation of waste-collection site. . ."

[37] In ***Stoyanovi v Bulgaria (42980/04) [2010] ECHR (09 Feb. 2011)***, the applicants' son was died while doing a para chute jump from a helicopter during a training exercise. The authorities had initiated investigations to determine the reasons that to the fatal incident. The applicants had complained that the Bulgarian authorities had breached Art.2 of the Convention and were responsible for their son's deaths and that investigations into those deaths were ineffective. The applicants had received compensation under the Bulgarian authorities had violated Art.2. From paragraphs 59-61of the judgment, the court set out the principles upon which positive obligation may be invoked, but of importance to the present case is what was said in para.61:

> "61. Positive obligations will vary therefore in their application depending on the context. It is primarily the task of the domestic systems to investigate the cause of fatal accidents and to establish facts and responsibility. In the present case, which concerns an accident during a military training exercise, the court notes that while it may indeed be considered that the armed forces' activities pose a risk to life, this is a situation which differs from those "dangerous" situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards. The armed forces, just as doctors in the medical world, routinely engage in activities that potentially could cause harm; it is, in a manner of speaking, part of their essential functioning. Thus, in the present case, parachute training was inherently dangerous but an ordinary part of military duties. Whenever a state undertakes or organises dangerous activities, or authorises them, it must

ensure through a system of rules and through sufficient control that the risk is reduced to a minimum. It nevertheless damage arises, it will only amount to breach of the state's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events . . . . ."

[38] In the United Kingdom, in the case of ***Smith and Others v The Ministry of Defence [2013] 3 WLR 69*** where the Supreme Court had to deal with an application by relatives of three servicemen who had perished while on duty in Iraq, from improvised Explosive Device (IED). This application was by the deceased's relatives who cried MOD's breach of Article 2 of the ***European Convention on Human Rights*** by failing to take reasonable measures within their powers to provide the soldiers with requisite equipment and taking operational measures, in the light of what was undeniably a real and immediate danger to the soldiers' lives posed by the situation in Iraq. At para 63, Lord Hope said:

> " . . . there is nothing that makes the Convention impossible or inappropriate of application to the relationship between the state and its armed forces as it exists in relation to overseas operations in matters such as, for example, the adequacy of equipment, planning or training . . . there have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the state, ranging from a failure to provide them with the equipment that was needed to protect life on the one hand to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced on the other. So, failures of that kind ought not to be immune from scrutiny in pursuance of the procedural obligation under article 2 of the Convention."

[39] Principles which can be distilled from the above decisions are the following, and in my view are applicable in this case despite that they were

developed within the military and policing context in Europe. The principles are the following:

a) At the basic level, protection of the right to life requires the state to fulfil its positive obligation of putting in place a legal framework backed up by law enforcement machinery to effectively deal with the breaches of that legal framework ***(Osman and Smith cases above)***

b) Violation of the right to life will be found to exist where the state knew or ought to have known about the threat to life, and the argument that limited resources made it impossible to counteract a threat would not avail the state ***(Osman above)***.

c) The state has a positive obligation "in certain well-defined circumstances.....to take preventive operational measures" to protect lives ***(Osman above)***

d) The State has a positive obligation to safeguard lives applies in "the context of any activity, whether public or not, in which the right to life – may be at stake....." ***(Oneryildiz)***

e) Systemic or operational failure on the part of the state to provide equipment to the soldiers which is necessary to protect life triggers curial scrutiny ***(Smith and others above)***

[40] Discussion

As the starting point, although s.5 of our Constitution is worded differently from Article 2 of the **European Convention on Human Rights**, in my view nothing much turns on this as regard the positive and negative obligations the two instruments impose on the respective States towards protection of lives. Furthermore, even though these foreign decisions do not deal with the plight of medical doctors who are not provided with safety equipment in their

workplace, jurisprudence garnered from them serve as a useful guide as to the approach to be adopted by this court in dealing with the present matter. This case implicates, as is abundantly clear, the State's substantive obligation to provide safety equipment to the medical doctors employed in public facilities.

[41] As it was observed in ***Stoyanovi,*** medical profession as well as military work, are inherently dangerous activities whose members join knowing fully well of these inherent dangers in the routine discharge their duties. They know fully well that a potential harm to life lurks and looms large everyday they set out to work; the question may be asked whether bearing in mind the potential threat to life attendant in the routine discharge of the duties by the doctors, whether that attracts the State's positive obligation in terms of s.5. The answer to this question should be in the affirmative. Were the Constitution only to declare the sanctity of life and to prohibit its arbitrary deprivation without more, this would not go far enough to protect and respect this right, and this is where it is implied into this substantive obligation of the State, an obligation to "establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life"(***Smith and Others v Ministry of Defence*** *supra*, at para.57), and to take preventive operational measures to safeguard lives. Medical doctors perform a very important public function which carries with it enormous risks. Although it is an individual decision whether to become a medical doctor, once a person undertakes this work, she or he is doing so at the behest of the public, he or she is not on a frolic of her own, deliberately endangering his or her life. Although the medical doctors' routine job is inherently risky and carries with it a potential for loss of life from infection with deadly diseases,however, they cannot, constitutionally, be left at their own devices by the State. I consider that this is one of those exceptional

cases where the State should take preventive operational measures to protect the lives that are potentially being endangered by the work environment, or to at least, minimise the occurrence of loss of life. From the papers filed of record it is clear that the Government is fully aware of the plight of doctors but has not addressed it meaningfully, but instead cries budgetary constraints. It should be noted that the threat posed to the doctors' lives is continuing and ever omnipresent. Given the nature of the doctors' work, potential loss of life looms ever so largely and waits for non-one. Procrastination' and apparent lack of political will on the part of Government in addressing these grave concerns is disturbing to say the least.

[42] Appropriate remedy

In terms of s.22 (2) (b) this court is enjoined, where breaches of the Bill of rights have been found to exist, to:

> " . . . make such orders, issue such process and give such directions as it may consider *appropriate* for the purpose of enforcing or securing the enforcement of any of the provisions of section 4 to 21 (inclusive) of this Constitution." *(emphasis added)*.

As to what is an appropriate measure means, the Constitution has not defined, but what is clear is that this subsection gives this court flexibility to fashion the remedy befitting the circumstances of each case. My considered view is that an order declaring as unconstitutional the 1st respondents failure to protect the doctors' lives in not providing them with safety equipment, coupled with an order of *mandamus* directing the 1st and 2nd respondents to provide the public health doctors with safety equipment in compliance with their constitutional obligations will meet the justice of this case.

[43] Costs

The 1ST applicant being successful, should be awarded costs of this application (***Biowatch Trust v Registrar Genetic Resources and Others 2009(6) SA 232(CC)***).

[44] In the result the following order is made;

(a) The failure by the 1st, 2ND and 3RD respondents to provide the doctors with personal protective equipment is declared unconstitutional for violating s.5 of the Constitution.

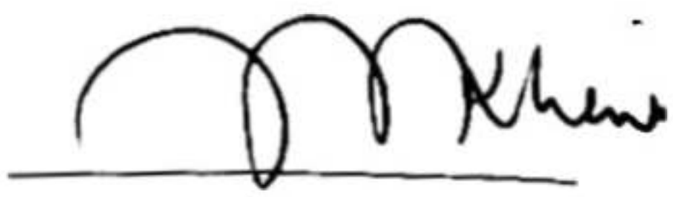
(b) As the result of the above declaration, the 1st and 2ND respondents, in collaboration with the 3RD respondent, are ordered to comply with their constitutional obligations in terms of s.5 of the Constitution, within a reasonable time, by providing medical doctors and other health professionals with personal protective equipment(PPE),

(c) The decision of the 1st and 2ND respondents to suspend payment of 'call allowances' is declared unconstitutional for violating s.4(1)(m) of the Constitution.

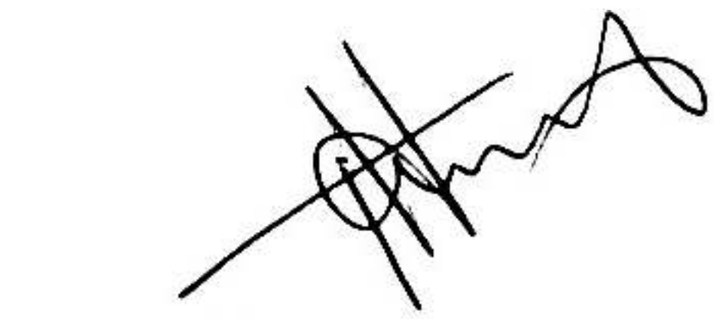
(d) The 1st applicant is awarded the costs of this application.

(e) There is no costs order against the 2nd applicant.

(f) The rest of the prayers are dismissed.



MOKHESI J



T.E MONAPATHI J

S.N PEETE J

For the Applicants: Mr Sehapi, instructed by NTHONTHO ATTORNEYS

For the Respondents: Mr L.P Moshoeshoe from ATTORNEY GENERAL'S CHAMBERS