**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU** **CIV/APN/141/2020**

**In the Matter Between:-**

**DAVID MOCHOCHOKO** **APPLICANT**

**AND**

**THE PRIME MINISTER** **1ST RESPONDENT**
**MINISTER FOR DISASTER MANAGEMENT** **2ND RESPONDENT**
**MINISTER OF HEALTH** **3RD RESPONDENT**
**GOVERNMENT SECRETARY** **4TH RESPONDENT**
**ATTORNEY GENERAL** **5TH RESPONDENT**

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# JUDGMENT

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**CORAM : MOKHESI J**

**DATE OF HEARING : 04TH JUNE 2020**

**DATE OF JUDGMENT : 26TH JUNE 2020**

## Summary:

**CIVIL PRACTICE:** *Applicant, a village chief, challenges Government's decision to deal with the scourge of Covid-19*

*through other channels' than the vehicle of Disaster Management Authority- Applicant's locus standi challenged- Application dismissed on the basis of the applicant's lack of locus standi.*

**ANNOTATIONS:**

**STATUTES:**

*Disaster Management Act 1997*

**BOOKS:**

Van Loggerenberg**, *Erasmus Superior Court Practice 2nd Ed. (JUTA)***

**CASES:**

*Mars Incorporated v Candy World (PTY) Ltd [1990] ZASCA 149*

*Sandton Civil Precinct (PTY) Ltd v City of Johannesburg and Another (458/2007) [2008] ZASCA* 104

*Roodepoort – Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87*

*Mofomobe and Another v Minister of Finance and Another Const./07/2017 C of A (CIV) No. 17/2017) [2017] LSCA 8 (12 May 2017)*

*Dalrymple and Others v Colonial Treasurer 1910 T.S 372*

**Mokhesi J**

## [1] Introduction.

The applicant is a gazetted Chief of Monyahane Ha-Mochochoko in the district of Maseru. He says he is instituting these proceedings "to compel the Government of Lesotho to act lawfully in relation to the corona virus pandemic by acting within the law as opposed to acting outside the law." It is the applicant's further line of attack that the emergency funding which is being used at National Emergency Command Centre (NECC) was not approved by Parliament, contrary to the provisions of s.114 of the Constitution. He approached this court on an urgent basis seeking the following relief:

> "1. A rule nisi be issued returnable on the date and time to be determined by this honourable court calling upon the respondents to appear before court and show cause why an order in the following terms cannot be made final to wit: -
>
> 1.1 That the ordinary rules of court governing time periods, forms and service be dispensed with on account of the urgency of this matter.
>
> 1.2 That the respondents be put to terms as to filing of opposing papers.
>
> 1.3 That the court direct the parties as to the hearing date of this matter.

1.4 That the Committee, group, workshop, structure or body referred to as the Command Centre be disbanded.

1.5 That the respondents be ordered to address, deal with, manage and or administer the corona virus pandemic and all related issues in terms of the provisions of the Disaster Management Act 1997

1.6 That the proper and lawful organ of the Kingdom of Lesotho that has power and authority to deal with the management and administration of the corona virus pandemic is the Board established in terms of the sections 13 and 14 of the Disaster Management Act 1997

1.7 That the decision by Mr. Motsoahae Thomas Thabane, the Prime Minister of Lesotho to establish Command Centre be and is declared unlawful as it was not made on the basis of an act of Parliament or Constitution.

1.8 That the applicant be granted costs of suit consequent upon employment of two counsel.

1.9 That the applicants be granted such further and alternative relief."

This application is opposed. In his opposing papers Government Secretary deposed to answering affidavit on behalf of Government and raised a point in *limine* of *locus standi* of the applicant. I revert to this issue in due course.

## [2] Background Facts.

With the advent of the global corona virus pandemic, Lesotho, without exception to other countries, had set out to set up measures aimed at dealing with it. A raft of measures, including, but not limited to declaring a state of emergency and placing the whole country on a lockdown, were put in place. One of those measures, a subject of this litigation, was a move by Government to set up a National Emergency Command Centre (NECC) which is housed at the 'Manthabiseng Convention Centre. NECC is Government's multi-sectoral response to this health emergency.

**[3]** In essence the applicant's challenge to the NECC is that the fight against covid-19 should be dealt with in terms of the Disaster Management Act 1997(hereinafter,' the Act'). That the Act was not invoked is not in dispute as NECC is not a structure which is provided for in it, and this conceded to by Mr. Mphaka in his answering affidavit when he says:

> " -13-
>
> AD PARA 28
>
> The Applicant experiences a great misconception here. It is the Applicant's opinion that only the Disaster Management Authority that can deal with the COVID – 19. This opinion is misconceived, and the applicant does not fully understand

provisions of the Disaster Management Act. In order to urgently but effectively deal with the situation, the Committee of Ministers found it benefitting to facilitate the establishment of a more appropriate structure which is inclusive of officers from various Government ministries including the Disaster Management Authority to respond to the situation. The court would readily realise that the situation at hand is one of a technical character demanding a corporation of multi-sectoral participation."

**[4]** The purpose of the Act is:-

> "to establish Disaster Management Authority; to regulate its powers and functions and to make provision with respect to emergencies arising out of disasters including prevention, mitigation, preparedness, response and recovery measures for the protection of life and property from the effects of disasters, and to vest responsibility for disaster management jointly and separately with the Disaster Management Authority and the District Secretaries; and for related matters."

It is clear that when Parliament enacted this Act, it envisaged a body which will be vested with exclusive powers to manage disasters and not any other body created on an *ad hoc* basis. The disaster under section 2 of the Act defined cover natural events like the Covid-19 pandemic.

**[5]** What is disquieting about Mr Mphaka's answer (above at para.3) is the fallacy that the NECC is broadly representative and expert-laden than the structures which are provided for in the Act; The Act provides for the establishment of a Disaster Management Authority (hereafter Authority) which is headed by a Chief Executive, any other staff which shall be engaged on a temporary basis as and when required. This temporary staff may be serving Lesotho Defence Force members, the Lesotho Mounted Police members or volunteers (s.11 of the Act). The Act further provides under s. 14 that the Authority shall be managed and controlled by a Board of Directors which shall consist of the Government Secretary and other Principal Secretaries from various Government ministries, members of Non-Governmental Organizations and representatives of the private sector who possesses requisite knowledge and experience in disaster management. One can hardly fathom any broadly representative formation like this. So, clearly when Government established NECC it circumvented the established mechanics of dealing with disasters and which has been exclusively vested with such a responsibility. Without a doubt, Government is in the wrong, but this notwithstanding, did it entitle the applicant to sue to force Government to act in terms of the Act? This relates to the issue of *locus standi* of the applicant to sue, the issue to which I now turn to consider.

**[6] Locus standi**.

A litigant who institutes legal proceedings must set out his or her *locus standi* and prove it. *Locus standi* is both procedural and substantive as the applicant must prove the directness of his interest to sue, and his interest in the relief sought. The *onus*, in a true sense, is upon him to prove his *locus standi* (***Mars Incorporated v Candy World (PTY) Ltd [1990] ZASCA 149: 1991 (1) SA 367 (A) at 575 H – I*****).**The interest must be actual and not abstract; (see: Van Loggerenberg, ***Erasmus Superior Court Practice 2nd Ed. D1 – 186).*** In ***Sandton Civil Precinct (PTY) Ltd v City of Johannesburg and Another (458/2007) [2008] ZASCA*** 104 at para. 19, Cameron JA (as he then was) said:

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

**[7]** In *casu*, the applicant is suing Executive Government for not using the structures provided for the in the Act (in short for acting outside the Act) and expending monies without being duly authorized by Parliament in terms of section 114 of the Constitution. He is merely suing as a concerned taxpayer. This, to my mind does not establish that the applicant has a sufficient interest in the relief sought; He may have an interest in seeing Covid -19 being dealt with in terms of the legal framework provided for in the Act, but that does not entitle him to sue to force Government to act in accordance with it. The interest is too remote. The applicant did not establish that he incurred damage, or that, the when the Government acted outside the Act, it infringed a right vested in him. The same goes for the argument that the Government is wastefully and unconstitutionally spending money through the NECC.

**[8]** That the applicant is suing Executive Government as a citizen of this country to compel it to act in accordance with the Act is not enough to satisfy the requirement that he must have a direct and substantial interest in the outcome of this case. It is true that the Government acted outside the boundaries of the Act, but that does not entitle him to sue to compel Government to act within it. Parliament should have acted and exercised its oversight powers over the Executive, not the applicant. It would appear that the applicant is suing based on the interest of the general populace in

wanting to see Government act legally, but this is not enough for purposes of *locus standi*. The following remarks are apposite:

> "….(B)y our law any person can bring an action to vindicate a right which he possesses (*interesse*) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have. *Nemo enim privatorum populares persequitur actiones quoad interesse publicum. Pro suo autem interesse cuilibet sive per se sive per procuratorem agere licet – Groenewegen de Leg Abr ad* D 47.23*"* *(**Roodepoort–Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87 at 101**)*

Even if monies are being spent wastefully or illegally at the NECC, that does not entitle the taxpayer to sue, Parliament should carry the torch as part of its oversight role over the Executive. This was made clear in the ***Dalrymple and Others v Colonial Treasurer 1910 T.S 372*** at 385 where Innes CJ said: -

> "……I think that when an Act of Parliament creates a corporate council, provides for its election by ratepayers, empowers it to raise moneys in certain ways from the ratepayers, and to expend it only in channels and always for their benefit, then the council stands in a fiduciary relationship to the ratepayers, and the latter have an interest sufficiently direct to enable them to intervene when the statute has been violated. But in

any event, none of the reasons to which I have drawn attention apply in a case like the present. The ordinary taxpayer does not occupy the same position in relation to the Executive Government that a ratepayer occupies with regard to an incorporated council. He does not elect Ministers: they are appointed by the Crown and are responsible to the Crown as well as to Parliament. They can in no sense be taken as occupying positions analogous to those of directors of a company. Nor is it possible to regard the public revenue as in any legal sense raised only for certain purposes, and no other, and impressed with a trust in favour of taxpayers. It is raised for the general service of the Crown. Parliament votes supplies, and directs the manner in which the revenue shall be expended, but this power is circumscribed by the condition of the Constitution – that no tax may be imposed and no revenue may be appropriated save with the consent of the Governor, first had and signified. The control of Parliament and the concurrence of the Crown- these are the balancing forces of the Constitution which govern the expenditure of public money. Their operation leaves no room for the existence, as between the Executive and the taxpayer, of that direct fiduciary or mandatory relationship which has been held to obtain between a ratepayer and the incorporated council, which he elects. The provisions of the statutes dealing with the revenue should, of course be observed, and any departure

from them illegal. But the revenue being in no legal sense impressed with a trust in favour of a taxpayer such as would justify the institution of legal proceedings." This decision was followed in ***Mofomobe and Another v Minister of Finance and Another Const./07/2017 C of A (CIV) No. 17/2017) [2017] LSCA 8 (12 May 2017)***

**[9]** Mr. Molati, for the applicant, arguing for a broad conception of standing in this matter, relied on the following statement by Chaskalson P in ***Ferreira v Levin NO and Others 1996 (1) SA*** *984* at 1082 para. 165, wherein the learned judge said:

"[165] Whilst it is important that this court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled…"

It will readily be observed that ***Ferreira*** is distinguishable from this case as it was dealing with the issue of standing in constitutional challenges within the context of the South African Constitution.

The current case is not a constitutional review but an application for a *mandamus* (in the main) and a declaratory order, instituted in terms of the common law.

**[10]** In the result the following order is made:

a) The application is dismissed with costs.

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**MOKHESI J**

**FOR THE APPLICANT: MR. L. MOLATI INSTRUCTED BY MUKHAWANA ATTORNEYS**

**FOR THE RESPONDENTS:MS T. LEBAKENG ASSISTED BY MR. THAKALEKOALA FROM THE ATTORNEY GENERAL'S CHAMBERS**