IN THE CONSTITUTIONAL COURT OF LESOTHO
(Sitting in its Constitutional Jurisdiction)

CONSTITUTIONAL CASE NO/27& 28/2018

In the matter between: -

MOTHETJOA METSING	**1ST APPLICANT**
SELIBE MOCHOBOROANE	**2ND APPLICANT**

AND

THE DIRECOTR OF PUBLIC PROSECUTIONS	**1ST RESPONDENT**
THE MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	**2ND RESPONDENT**
THE MINISTER OF JUSTICE	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**
DIRECTOR OF THE DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCE	**5TH RESPONDENT**
THABO KHETHENG	**6TH RESPONDENT**
'MAMPHANYA MAHAO	**7TH RESPONDENT**
'MAMONAHENG RAMAHLOKO	**8TH RESPONDENT**
'MALEHLOHONOLO NTESO	**9TH RESPONDENT**
TEBELLO SENATLA	**10TH RESPONDENT**
HON. MONYANE MOLELEKI MP DEPUTY PRIME MINISTER OF LESOTHO	**11TH RESPONDENT**
HON. MATHIBELI MOKHOTHU MP OFFICIAL LEADER OF OPPOSITION	**12TH RESPONDENT**
REGISTRAR OF THE HIGH COURT	**13TH RESPONDENT**

JUDGMENT

CORAM	:	Honourable Mr. Justice E.F.M. Makara Honourable Mrs Acting Chief Justice M. Mahase Honourable Mr. Justice S.N. Peete
HEARD	:	23, 25, 29, 30 June 2020, 13 - 14 July 2020, and 10 -12 August 2020
DELIVERED	:	12 November 2020

Summary

Constitution of Lesotho 1993 - Supremacy of – under its section 2 – Lesotho is a dualist state under international law. Any treaty, protocol or any political *inter partes* agreement in order to be enforceable in Lesotho must be consistent with the provisions of the Constitution of Lesotho – Noble motives are not relevant in considering enactment, a treaty, protocol or *inter partes*

agreement cannot be elevated to a status of law without emasculating the authority and supremacy of the Constitution.

Where political leaders sign a Memorandum of understanding (MOU) without enactment of such by parliament of Lesotho, such MOU cannot be elevated to a status of law. It rests solely on good faith of the parties to the agreement.

Where Clause 10 of MOU signed by a Representative of Government of Lesotho and a Leader of the Opposition has a salutary effect of restraining or hamstringing the powers and discretion of the Director of Public Prosecutions (DPP) under Section 99 (1) (a) and (b) of the Constitution to institute criminal proceedings against any person, such clause 10 of the MOU – its noble motive to facilitate the ongoing reform process in Lesotho notwithstanding – it must pass the muster of consistency as provided by Sections 2 (The Supremacy of the Constitution clause) and 99 of the Constitution.

All International Instruments are founded on good faith and honesty. Courts cannot, while noting their essential importance, enforce good faith as if it is a law. Courts are Courts of law and not of equity or political expediency. It would fail to make a judicial sense to declare clause 10 (inelegantly drafted as it is) as being consistent with the stated provisions of the Constitution. Coined by a French jurist Montesquieu "The Spirit of the Law" in the 18th Century, the doctrine of Separation of Powers restrains or insulates the Court of law from entering the "turf" of state policy or influencing matters of importance such as the ongoing Reform process so vital to the peace and stability of our Kingdom. This Court's decision should not be interpreted as "breaking" or dislocating the reform process now on going in Lesotho.

As a unitary state, all three main organs of state – Legislature, Executive and Judiciary must operate in unison and never at cross-purposes. Finally, the Court held as follows:

1. The Applicants had a direct and substantial interest in the matter and ought to have been joined and consequently the relief for their intervention is granted;
2. The MOU is not a SADC Agreement or Treaty with Lesotho and international law is not applicable over it;
3. Assuming that the MOU was a Treaty, it would not spontaneously create enforceable rights and obligations in a dualistic Lesotho where this could only be so upon the domestication of any instrument of international law through an Act of Parliament;
4. Clause 10 of the MOU, remains unconstitutional as it has already pronounced itself in the previous consolidated cases since it undermines the powers of the DPP under Section 99 of the Constitution, Section 1 (1) of same which makes Lesotho a sovereign democratic State and Section 2 which renders the Constitution to be the supreme law of the Kingdom.

ANNOTATIONS

CITED CASES

1. **Tebello Senatla** CC/27/2018
2. **Thabo Khetheng and 4 Others v Minister of Law and Constitutional Affairs and Others** CC/28/2018
3. **Retšlisitsoe Khetsi v Rex** CRI/T/0079/2014
4. **REX v Kennedy Tlali Kamoli and 5 Others** CRI/T/0001/2018
5. **Attorney General v His Majesty the King and Others** (CONS) / CASE 2 [2015]
6. **Matime & Others V Moruthane & Anor 1955 – 89 LAC**
7. **Masopha V Mota 1985 – 1989 LAC 55;**
8. **BCP & Others V Directory Elections & Others 1995 – 1999 LAC 587**
9. **Lesotho Olympic Committee & Others V Morolong 2000 – 2004 LAC 449**
10. **NIP & Others V Manyeli & others 2007-2008 LAC 10.**
11. **Phaila v Minister of Defence and others 2013 – 2014 LAC 401 (CA)**
12. **Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe(2/2007) [2008] SADCT 2**
13. **Sheonadan v Bihar**[1983] 2 SCR 61
14. **Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others**2011 (2) NR 726 (SC)
15. **Thabang Khauoe v Attorney General** [1995] LSHC 100
16. **National Executive Committee of the BCP and Another v Mbuli and Others** CIV/APN/80/2001
17. **Lebabo and Another v Thibeli and Others**(CIV/APN/54/2011) [2011] LSHC
18. **Florio v Minister of Interior And Chieftainship Affairs and Another**((CIV) NO. 2 OF 1992 (CIV) NO. 29 OF 1991)
19. **Samuel Gatri and Another V Badumelleng Brady Melk** [2007] ZAFSHC 110
20. **Neville Lewis v Attorney General of Jamaica** 2000 57WIR;257 [2001] 2 AC 50
21. **Attorney General of Barbados v Jeffrey Joseph CCJ** Appeal No CV 2 of 2005
22. **R V Croydon Ex Parte Dean**1993 (93) All ER 129 QB
23. **Joseph Salli Poonyane Molefi v The Government of Lesotho and Others** (1967 – 1970) L.L.R
24. **Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea & 10 Others** C of A (Civ 29/2013
25. **The Attorney General and 2 Others v Jeffrey Joseph** CCJ Appeal No CV 2 of 2005
26. **Glenister v President of the Republic of South Africa and Others**(CCT 48/10) [2011] ZACC 6; 2011 (3) SA

STATUTES & SUBSIDIARY LEGISLATION

1. **The Constitution of Lesotho 1993**
2. **High Court Rules, 1981**
3. **Prevention of Corruption and Economic Offences Act No. 5 of 1999**
4. **Criminal Procedure and Evidence Act (CPEA) No, 9 of 1981**
5. **Vienna Convention on the Law of Treaties** 1969
6. **Southern African Development Community (SADC) of 1992**

7. **Article 1 of Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986**

BOOKS & ARTICLES

1. **John Dugard International Law: A South African Perceptive 4th ed**
2. **Implications of the Parol Evidence Rule on the Interpretation and Drafting of Contracts in South Africa**
3. **Namibia Law Reform and Development Commission: LRDC 27; Locus Standi Discussion Paper, March 2014, Windhoek**
4. **The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law**

MAKARA J

Background

[1] This is a rescission application precipitated by a judgment of this Court over the consolidated cases of **Tebello Senatla[1] and Thabo Khetheng and 4 Others v Minister of Law and Constitutional Affairs and Others.**[2] The two constitute an *imprimatur* of the present case. It is on that account that it is premised upon an interim order made by this Court on 7th November 2018 on the question of the constitutionality or otherwise of the impugned Clause 10 of the Memorandum of Understanding (MOU) concluded between the Government of Lesotho & the Coalition of Opposition Parties. For the sake of the appreciation of the facts which occasioned the polemics involved, it reads:

> The Government of the Kingdom of Lesotho shall ensure the safety of all citizens in exile and must provide adequate security for Mr. Metsing and other similarly placed exiled. Mr. Metsing and similarly placed persons will not be subjected to any pending criminal proceedings during the dialogue and reform process. The Coalition of Opposition Parties undertakes to convey the Government of the Kingdom of Lesotho's undertaking to Mr. Metsing and other persons in exile. They further

[1] CC/27/2018
[2] CC/28/2018

undertake to persuade Mr. Metsing to return to the Kingdom of Lesotho no later than the commencement of the National Dialogue. Should Mr. Metsing not return as envisaged, the National Reform Process will nonetheless continue.

[2] For ease of reference, the parties shall *mutandis mutatis* be referred to as designated in each case concerned. This would consequently necessitate a clear distinction of the applicable Applicant or Respondent. Fortunately, there is only one Applicant in one of the consolidated applications.

[3] The 5th Respondent (DCEO) opposed the application only to the extent that the relief related to invalidation of the Provisions of the Criminal Procedure and Evidence Act (CPEA) on search and seizure. This was because the DCEO had relied upon the provision when effecting a search upon the applicant in CC/ 28/ 18.

[4] Blessedly, on the very first day of the hearing of the preliminary issues, the counsel for the parties advised that it would be of national interest for the question on the constitutionality of Clause 10 to be expeditiously determined first. In the same vein, they suggested that in the meanwhile, the one on the constitutionality of sections 12 (2) of Prevention of Corruption and Economic Offences Act[3] and 46 of the Criminal Procedure and Evidence Act (CPEA)[4] be stayed in abeyance.

[3] No. 5 of 1999
[4] No, 9 of 1981

[5] The rationale behind the consolidation of the two cases was that they were both founded upon a common denominator in that they were respectively *inter alia* based upon the question of the consistency of the impugned Clause 10 with sections 18 and 19 of the Constitution. Section 18 (1) creates a right of freedom from discrimination in these words:

> Subject to the provisions of subsection (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

18 (2) complements 18 (1) in these wording:

> Subject to the provisions of subsection 6 no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of any public office or any public authority.

[6] The relevance of the *discriminatory* provisions in the Constitution is attributable to a charge that the effect of Clause 10 is to treat the present Applicants in a preferential manner in contrast to other criminal suspects yet they are similarly circumstanced. To illustrate the point the Applicant[5] had referred to the fact that at the material time he stood to be arraigned for money laundering and that in pursuit of same, some of his properties had already been seized in consequence of a search and seizure warrant.

[7] In conclusion, he projected a picture that analogously to all the ordinary subjects within the realm, he has submitted himself under the due process of the law and that the Clause should not undermine the rule of law by purporting to exempt the present

[5] CC/27/2018

Applicants from same. Added to this is that the Applicant did not recognize the rationale underlying the Clause to be valid and justifiable under the Constitution. The proposition was in particular relied upon its Equality provisions read in conjunction with its supremacy section[6].

[8] Incidentally, the Court inspired by a relatively similar decision in **Retšlisitsoe Khetsi v Rex**[7] *mero muto* introduced an issue on the consistency of the Clause 10 with Section 99 of the Constitution. The relevancy of the case was that it addressed a scenario where similarly to the present one the Applicant therein complained about a violation of his constitutional right to equality and to equal protection under the law. The charge was based upon the fact that the Government had concluded a Deed of Settlement with a private international company that a corruption case pending against it would not be prosecuted. Resultantly, it was only the Applicant who faced the prosecution. Section 2 of the Constitution was determinative in the dismissal of the application for permanent stay of the prosecution.

[9] It should suffice to conclude this preliminary part of the judgment by stating that from the onset, the Attorney General did not appear to be belligerently resisting the application. Instead, he seemed to be interested in seeking for a common understanding

[6] Section 2 of the Constitution of Lesotho 1993
[7] CRI/T/0079/2014 (unreported)

between the parties in order for them to reach a justifiable settlement. Resultantly, they agreed that the application was urgent and that it should be treated as such. In the process, they both suggested that it would be in the best interest of the country to have the matter heard expeditiously and the judgment immediately thereafter, be delivered *ex tempore*. It was not surprising that at the commencement of the hearing, the counsel reached a compromise that the operation of Clause 10 be held in abeyance pending finalization of both consolidated matters.

[10] Due to the perceived urgency in the matter and a recognition by the counsel that its resolution centered purely on legal issues, they suggested that the return date be on the 28th November 2019 which would also be the hearing date. On the same date, they unequivocally agreed that the Clause was unconstitutional since it pertinently transgressed sections 18 and 19 of the Constitution and emphatically persuaded the court to immediately pronounce itself on that point for certainty of the law and a way forward for the country.

[11] Consequently, the Court held that the Clause was in disharmony with sections 18, 19 of the Constitution, which provides for the *right to equality of all under the law and its protection.* The same was found so in relation to Section 99 (2) and (3) of the Constitution, which *inter alia* gives the Director of Public

Prosecutions (DPP) exclusive authority to institute criminal proceedings and to discontinue them.

[12] In simple terms, the court interpreted the Clause to be discriminatory since it purported to treat the specified criminal suspects in a preferential manner in contrast to other such suspects. This obtained under the circumstances in which there was no constitutionally justifiable ground for such dispensation. Moreover, the Clause had a technical effect of undermining and/or circumventing the powers of the DPP by discontinuing the processes leading towards the possible prosecution of some of the criminal suspects.

[13] Nevertheless, the court found it imperative to make an *obiter dictum* for the parties to explore possible political avenues towards resolving the impasse in the best interest of Lesotho and Basotho. In the same spirit, it strongly cautioned that at the end of the day, the solution should come from us the Basotho and that litigation may not be the precise answer. In the final analysis, Clause 10 was held unconstitutional. This being a constitutional case, there was no reason found for the awarding of costs.

Transition to the Present Application for Intervention and Rescission

[14] It appears necessary that this judgment should prior to traversing the merits of the application, record briefly, who the parties were in the original consolidated cases in relation to those featuring in the instant matter. The imperativeness of that is to

generate a logical appreciation of the developments and the interrelationship between the consolidated cases and the current one. This would further project the evolvement of the issues up to now in terms of their present form, content and changes of the parties.

[15] The Applicants in the main were Respondents numbers 6-10 whilst here they are 'judgment creditors' in the original matters. On the other hand, the 1st, 2nd, 4th, 5th, 11th and 12th Respondents were still Respondents in the main application, and are as such 'judgment debtors'. The Applicants in the present case had not been joined to the proceedings.

Application for Intervention and Rescission of the Original Judgment

[16] On the 25th February 2020, which is approximately 2 years and 7 months after the court had delivered its judgment on the unconstitutionality of Clause 10, the case took a perhaps, uncontemplated dimensional turn. This came by way of a Notice of Motion in which in a summarized version, the Applicants sought for leave to intervene in the said consolidated cases and consequently for a rescission of a judgment in which it pronounced Clause 10 to be unconstitutional. The move was taken in terms of Rule 45[8]. It was precisely in that background that the Applicants sought for shelter underneath the tree of the justice of this Court seeking for an interim order in the following terms:

[8] High Court Rules, 1981

1. Dispensing with the rules relating to notice and service of process owing to the urgency of this application;
2. That this Honourable Court gives such directions as to time and procedure regarding how this matter may be dealt with;
3. The notice of trial served upon the applicants to attend CRI/T/0001/2018 on the 25th day of February 2020 shall not be suspended or stayed pending the outcome of these applications;
4. Applicants be and are hereby granted leave to intervene as Respondents in the consolidated application CC/27 and 28 of 2018 pending before this Court, specifically before Her Ladyship the Acting Chief Justice Mahase, His Lordship Justice Peete and His Lordship Justice Makara.

[17] The Applicants proceeded further to pray for a final relief in the following terms:

5. The Order of this Honourable Court dated 21st Day of November 2018 declaring Unconstitutional Clause 10 of Memorandum of Understanding between the Government of Lesotho and the Coalition of Opposition parties, be and is hereby rescinded.
6. The Applicants be given leave to file opposing affidavits and file legal submissions in opposition to the prayer seeking to nullify clause 10 of the Memorandum of Understanding annexed herewith and marked annexure M2.
7. The service of notice of trial and indictment upon applicants in CRI/T/0001/2018 requiring them to appear in a criminal court before completion of the national reform process shall be declared an abuse of Court process and unlawful.
8. The Respondents be directed to pay costs in the event of opposition.
9. Applicants be granted any further and/or alternative relief.

[18] Unlike in the previous occasion, this time the Attorney General (AG) and the DPP vigorously opposed the application for intervention in the initial litigation so that they could not apply for a rescission of judgment. They accordingly filed all the counter papers and the hearing dates were identified.

[19] At the commencement of the hearing of the preliminary issues, a consensus was finally reached between the counsel for the parties respectively, that the matter warrants urgent hearing. This was after some exchange of legal views on same and several interventions by the Court on the question of the appropriateness of the dispensation with the normal rules particularly compliance with the forms and the applicable time schedules.

[20] The Court disclosed to the counsel that in its view, it would be wise and strategic to hear the matter holistically for its comprehensiveness and ease of determination. They embraced the idea. This was attributable to the fact that all the issues involved are interlinked and materially founded upon the same factual landscape. It emerged to them that the approach would facilitate for a simultaneous hearing and determination of prayers 4, 5 and 6 in the notice of motion. Resultantly, all the material controversies were addressed in *seriatim* for a resolution on each of them.

[21] It should be realized that in consequence of this application, my brother Lebothse J suspended a criminal case hearing in **REX v**

Kennedy Tlali Kamoli and 5 Others[9] pending the outcome of this application. This resulted from an application launched by the Applicants as a reaction to a move by the DPP to have the Applicants joined as the co-accused in the same criminal proceedings. The indictment against the already arraigned accused reveals that they are charged with murder, treason, Sedition, etc.

[22] The significance of Clause 10 over the matter constitutes of the polemics on whether it could, from a constitutional perspective, protect and/or prevent the Applicants and those in their category, from a criminal charge pending a completion of the constitution reforms. Its materiality is augmented in prayer 7 since it denotes a dimensional suggestion that a charge preferred by the DPP against the Applicants amounts to an abuse of the criminal process. This was stated with a convictional understanding that the Clause explicitly forbids any such move against the Applicants and those with whom they are circumstanced.

The Submissions of the Applicants on the Merits

[23] It should be appreciated that the Applicants approached this Court for it to allow them an indulgence to intervene as Respondents in the consolidated applications[10] and for a rescission of the judgment *per* Makara J with the concurrence of the Acting Chief Justice Mahase and Justice Peete. A material aspect of the

[9] CRI/T/0001/2018
[10] CC/27 & 28/ 2018

cases targeted for revocation relates in the main, to its declaratory order that the Clause is unconstitutional since it violates *the Equality of all persons under the Constitution and the equal protection of all under the law*. Moreover, it was identified to have undermined the constitutional powers of the DPP under Section 99 of the Constitution.

[24] A substratum of the application for the Applicants to intervene in the original case is premised upon a trite principle of law that whoever, institutes proceedings must appropriately cite individuals who would contextually have a direct and substantial interest over the matter. Resultantly, they maintained that the applicants in the initial litigation ought to have foreseen that the Clause rendered the present 1st Applicant to have such credentials especially when he is a key reference for its beneficiaries.

[25] The Applicants accused the Respondents for resisting prayer 7 yet it simply asks for an interim intervention that would stay in abeyance issuance of processes that would facilitate for the commencement of a criminal trial against them pending the end of the constitutional reforms. According to them, it was both unlawful and an abuse of the legal process to summon them to Court before that time.

[26] The Applicants then directly interrogated the reliefs they sought under prayers 4, 5 and 6 which represent the centrality of the

reasons for which they approached this Court. For ease of recollection, these are:

- A plea for the indulgence for intervention in the consolidated two cases;
- A pronouncement by this Court made on the 21st November 2019 that the Clause is unconstitutional be rescinded; and consequently,
- The Applicants be accorded their right to file counter papers;

[27] The Applicants contested the *locus standi* of the AG and the DPP by charging that they indirectly purport to defend and/or advance the chapter II rights of the 'judgment debtors'. In support of the assertion, they cautioned this was denounced in **Attorney General v His Majesty the King and Others**[11] where it was specifically ruled that the AG is not constitutionally mandated to feature in litigation over a violation of the rights of individuals. In this context, the 6th to the 10th Respondents. This was concluded with an irony that the two officials had not filed their opposing affidavit in the original proceedings yet they seek to react so in the rescission application. Moreover, it was argued that there were no jurisdictional grounds established for the DPP in particular to use the opportunity for the protection of her authority under Section 99 (2) of the Constitution.

[28] On a dimensional though relevant point, the Applicants complained that the Court had erroneously factored its decision upon Section 99 (2) yet the DPP had never, in the original papers filed

[11] (CONS) / CASE 2 [2015]

an affidavit showing that she was never consulted before the Clause was concluded between the concerned parties. On that note, they submitted that the judgment should be rescinded.

[29] The Applicants gave the impression that there was never a need to litigate on the constitutionality or otherwise of the Clause because it had not been effected and, therefore, rendered the exercise moot. They emphasized that the Clause is an agreement between the parties concerned and did not necessarily need a consent of the DPP. In their view, the fact that the DPP is a stranger to the Clause, nullifies it. They for that proposition, relied upon a decision of this Court in **Retselisitsoe Khetsi V Rex**[12]. It was however, stated that the DPP retained his powers under Section 99. A centrality of their point is that unlike in the consolidated cases, a cause of action had arisen since an Agreement signed between the Government and a multinational company NipNikuv indemnified the latter from criminal prosecution leaving the applicant alone to be subjected under the process. So, the applicant lodged a constitutional case complaining about a transgression of his equality rights under sections 18 and 19 of the Constitution. The Court found that the Applicant has made a case for discrimination and that there was no constitutional justification for it. However, the application for permanent stay of the prosecution was dismissed on the basis that granting it would be usurping the powers of the DPP under section 99 of the Constitution.

[12] CRI/T/0079 /2014 (unreported)

[30] According to the Applicants, at the time the constitutionality of the Clause was challenged, the DPP still possessed her Section 99 powers and they had not been violated. All that obtained was an undertaking which is indicative that the measure was taken before there could be any practical action warranting it.

[31] The Applicants challenged the jurisdiction of the Court to interfere with a decision of the Executive Arm of Government to have included Clause 10 in the memorandum of understanding that is subscribed to by the other relevant parties. They described that as a prerogative of the Executive and submitted that actually this Court did not have the authority to preside over the question of the constitutionality of the Clause to avoid undermining the constitutional principle of *separation of powers*.

[32] A controversy was raised concerning whether this Court is not *fuctus officio* over the matter since it has already decided upon it. The DPP even submitted that the matter is resultantly, *res judicata.* In those exchanges of views, the Applicants maintained otherwise and in support, cited a plethora of cases where it is directed that a final decision is rescindable if whosoever seeks for it, satisfies its requirements.

[33] The Applicants further raised a question concerning a legal effect of the omission by the applicants in the main, to have cited them as the Respondents therein. This emerged against the background that in their reading of the Clause, it clearly qualified

them to have a direct and substantial interest over the matter. According to them, their exclusion from that litigation amounted to a mistrial and that the identified procedural right renders the judgment to be rescinded. The submission was sustained by citing a catalogue of case law, which propounds a principle that failure to join a party who has a direct and substantial interest in the outcome of a case; renders a court not to allow a judgment to stand against such a party[13].

[34] Incidentally, there is no disagreement between the parties that the Applicants were not served with the papers that initiated the original case. This explains their prayer for intervention and for a rescission of the consequent judgment. The Applicants reinforced their argument by citing the wording of the Clause. The interpretation that they assign to it represents a bedrock of the relief they are seeking for, particularly that it has the effect of suspending all the criminal processes against the 1st Applicant and those contemplated therein. They submitted that in the circumstances of this case, the 2nd Applicant is one of the latter – hence they brought this application when the criminal instruments were issued for them to be joined as some of the accused in the already explained pending case.

[13] (See Matime & Others V Moruthane & Anor 1955 – 89 LAC Masopha V Mota 1985 – 1989 LAC 55; BCP & Others V Directory Elections & Others 1995 – 1999 LAC 587 Lesotho Olympic Committee & Others V Morolong 2000 – 2004 LAC 449 NIP & Others V Manyeli & others 2007-2008 LAC 10.

[35] To this end, the Applicants submitted that they have made a case for them to be allowed to intervene in the consolidated cases in order for them to subsequently prosecute their application for rescission. In the same breath, they associated themselves with the approach adopted by the court by *inter alia* testing the validity of the Clause against sections 18, 19 and 99 of the Constitution.

[36] In motivating the case further, the Applicants cautioned that in the main case, the court misconstrued the law regarding the authority and parameters of the Executive to conclude agreements with other parties in the national interest. In that perspective, they maintained that the power extends to even asking the DPP to stay prosecution of a case for the said objective and cited **Phaila v Minister of Defence and others**[14] as what they termed a leading case on the subject. They then disclosed that in that case, the Court of Appeal held that prosecution of a man contrary to a promise made by the Executive, even though it was not the prosecutor or prosecuting authority, was an abuse of court process and set aside the proceedings. In addition, they appealed to this Court to give effect to the fact that the Government is a client of the DPP. This is, perhaps, suggestive that in that relationship, the DPP **must** take the instructions detailed to her by the Government.

[37] It would be remiss not to mention that according to the Applicants, the main application was prematurely launched since at the material time, there was no violation of any of the rights

[14] 2013 – 2014 LAC 401 (CA)

under consideration. Instead, all that existed was the Clause. The irony is, however, that they have stated that the developments were simply at an inchoate stage.

[38] In concluding this part of the representations for the Applicants, they emphatically suggested that the Clause must be interpreted contextually and purposively for its comprehension and translation into action.

The Submissions of the Applicants on the Application of International Law

[39] The Applicants introduced this aspect of the law through a lengthy supplementary Heads of Augment filed almost two weeks after the main ones. This was intended to indicate that international law should be factored into the picture in the determination of the issues pertaining to the Clause itself. They traced its origin back to the historical phases of the SADC interventions in the Kingdom. The most significant is for the purpose of this case, the one administered through the instrumentality of the Phumaphi Commission[15] that culminated into its brokered resolution that Lesotho should undergo Constitutional Reforms. This explains the submission tendered by the Applicants that the Memorandum of Understanding (MOU) annexed to the application as M2, is its implementing tool.

[40] According to the Applicants, the signing of the MOU by the representatives of the Government of the Kingdom, the opposition

[15] The Commission was constituted by the Prime Minister acting in terms of Section 3 of the Public Inquiries Act No. 1 of 1994. This was in response to the killing of Lt. Gen. M. Mahao by members of the LDF.

parties and of SADC demonstrates an international character of the document. Also, they described it as a testimony of a local commitment and international commitment towards the envisaged constitutional reforms. The impression that they gave was that this is further attested to by the solemn manner in which it is written. In the same context, they view Clause 10 as one of the key undertakings that facilitate for the commencement of the reform process in collaboration with SADC and other international organizations specified in the document. Thus, they conjecture that the Government subscribed to the Clause in fulfillment of its international law obligation.

[41] It must be highlighted that for the purpose of this case, the Applicants notably the 2nd one, attached significance to the part of the Clause that reads:

> ..... Mr. Metsing and similarly placed persons **in exile** will not be subjected to any pending criminal proceedings during the dialogue and reform process[16].

[42] The Applicants sought to persuade the court to appreciate that the 1st Applicant and other similarly situated individuals returned back into the jurisdiction because the Clause assured them of safety and freedom from criminal prosecution pending conclusion of the constitutional reforms. They seem to have placed their trust upon the understanding that the MOU is an international instrument and that as such, it dispenses with the application of the

[16]Line 2 to 5 from the bottom of Clause 10

domestic laws to the extent of their inconsistency with a characteristically international document. In precise terms, the Applicants assigned primacy to international law over municipal law in matters which assumed an international law trajectory.

[43] In their endeavour to elucidate the implication of international law in the matter, the Applicants cited clause 4 Treaty of the **Southern African Development Community (SADC)**[17]**.** It details the mandate of SADC and its members to act in accordance with the following principles:

a) Sovereign equality of all member states
b) Solidarity, Peace and Security
c) Human Rights, democracy, and the rule of law
d) Equity, balance and mutual benefit.
e) Peaceful settlement of disputes

[44] Thus, the Applicants submitted that SADC, acting principally pursuant to Article 6 (6) of its founding Treaty and secondarily to the afore listed principles, established the Judge Phumaphi Commission and superintended over the deliberations conducted before it. These culminated into a resolution that there be constitutional reforms. Resultantly, a National Reforms Authority was legislatively created to drive the process. In the light of the narratives, the Applicants maintained that Article 6 (6) read in conjunction with the principles already referred to, is indicative that Lesotho as a

[17] Done at Windhoek on the 17th day of August, 1992

member of SADC, is bound by Clause 10. In support of this proposition, they cited **Max Sorensen**[18]. They, accordingly, described it as a product of international law of the region and, therefore, binding over the country. They lamented that it would be sad if this Court declines to allow international law to prevail over domestic laws.

[45] The Applicants over emphasized that the MOU is a consequence of the SADC Treaty and that the intervention under consideration was sanctioned by a relevant governing structure under Article 9 (1) which are:

a) The Summit of Heads of State or Government;
b) The Council of Ministers;
c) Commissions;
d) The Standing committee of officials;
e) The Secretariat and the Tribunal; or

Through Article 9(2) that refers to other institutions which may be established as necessary.

[46] The Applicants raised an intriguing idea that the international MOU should by virtue of its being a creation of international law, be accorded prevalence over the laws of the land inclusive of the Constitution. In that understanding, they vehemently maintained that even the Parliament had no jurisdiction to enact the Agreement into law. In simple terms, this is suggestive that

[18] Manual of Public International Law Macmillan P. 1968

international law automatically becomes a binding law of the Kingdom and operational as such.

[47] In support of the analysis and the thesis that the Applicants configured about the effect of international law over Lesotho, they primarily relied upon a common course fact that international law is *prima facie* one source of law for the country. This notwithstanding, it appeared to have escaped their wisdom that the matter is subject to the terms and conditions prescribed *inter alia* within the fabric of international law itself. On the home front, they reasoned from the comfort of Section 154 (1) of the Constitution that defines law to include:

> a. Any instrument having the force of law made in the exercise of the power conferred by law; and
> b. The customary law of Lesotho or any other **unwritten** rule of law. (Court emphasis).

The words "or any other unwritten rule of law" were conjectured by the Applicants to embrace international law particularly in the absence of anything written in the contrary. In an endeavour to give credence to the submission, the Applicants referred to a historical incidence traceable from the 22nd March 1967 which was hardly five months after the country got independence. This appears from the case of **Joseph Salli Poonyane Molefi v The Government of Lesotho and Others**[19] where it is revealed that the late Prime Minister Chief Leabua Jonathan addressed a letter to the United Nations informing it that **he** adopts the Nyerere doctrine. The latter

[19] (1967 – 1970) L.L.R

accepted the application of international law in the Republic of Tanzania. It was then suggested that the correspondence similarly marked the acceptance of customary international law in the Kingdom and that this has ever since remained the case[20].

[48] A thesis derived from the factual and jurisprudential landscape presented by the Applicants was simply that Lesotho cannot use municipal law to avoid its international law obligations. In support of that proposition, they cited the case of **Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe[21].** In this case, white Zimbabwean farmers filed a case in the SADC Tribunal lamenting about a violation of their right to freedom from discrimination by the Respondent by introducing a selective policy of expropriating their farms without compensation. What is of significance in the matter is that actually, the Tribunal reviewed the Zimbabwean newly enacted constitutional provision that sought to exclude from jurisdiction of the courts of the Republic, any litigation intended to challenge it. The Tribunal found the impugned provision incompatible with the SADC Treaty and that consequently, the Treaty should prevail[22].

[49] The Applicants asked the Court to acknowledge that in international law, an undertaking represents a significant aspect and, therefore, be inclined towards its enforcement. This was stated within the context of a revelation that the parties to Clause

[20]Sorensen p. 169
[21] (2/2007) [2008] SADCT 2 p. 25-26
[22] Sorenson 170 - 171

10 have, acting in collaboration with SADC, promised to protect the 1st Applicant and those analogous to their situation from any criminal prosecutorial process pending conclusion of constitutional reforms. To bring the point home, they cited a Court of Appeal decision in **Phaila v Minister of Defence and Others**[23]. A specific principle referred to here was that it would be an abuse of a criminal process for the Government to simply ignore its promise that an individual would not be prosecuted and then suddenly behave otherwise. A philosophy behind is that the Court must ascertain that the Government act with consistency and reliability. Thus, the Applicants maintain that in the instant cases the Court must commit the Government to honour its undertaking in Clause 10 in the MOU.

[50] In articulating the international law dimension further, the Applicants advised the Court that the limitations in the manner in which the MOU is written, does not *per se* disqualify it from being recognized as a SADC official document and admissible as such. This was in response to a charge advanced by the Respondents seeking to nullify the document. In the main, they anchored their reasoning upon the fact that the Agreement was not written on a paper bearing a letter head of the organization. The other identifiable defect is that it does not have an endorsement by any official of SADC. Instead, it has only been attested to by the former Deputy Prime Minister Moleleki featuring for the Government and the then Leader of the Opposition now Deputy Prime Minister

[23] 2013 – 2014 LAC 401 (CA)

Mokhothu representing the then Opposition. Resultantly, the Respondents questioned the authenticity and accuracy in the describing of the document to be that of SADC. This explains the objection against its admissibility as such.

Additional Heads Filed by the Applicants

[51] Back again into the merits, the Applicants critiqued the decision of the Court in **Retselisitsoe Khetsi V Rex**[24] that the Agreement therein was concluded with a multinational company due to the dictates of the circumstances, violated Section 99 (1) and (2) of the Constitution. This was attributable to the fact that in terms of the section, the DPP is an exclusive repository of the authority to terminate or suspend prosecution of a criminal case. It is upon that basis that the Applicants complained that a wrong precedent was established in the **Khetsi case** *supra* and subsequently, followed in the decision sought to be rescinded in the present case. They maintained that the submission by the Respondents that Section 99 (2) is relevant here, results from the original decision of this court that was made despite the fact that the DPP was not a party to the proceedings.

[52] Towards the end of their submissions, the Applicants in summarized terms, appealed to the Court to pay a special attention to the fact that the Clause that constitutes a main cause in the matter, is merely a provisional undertaking and, so at an

[24] CRI/T/0079/2014

inchoate stage to occasion any violation of rights. Secondly, that the 6th – the 10th Respondents had not passed the test that they are similarly situated with the Applicants to demonstrate that they are both comparable for the purpose of a determination on the violation of Section 18 (3).

[53] The Applicants noted that there is a distinction between postponing of a matter pending exploration of a diplomatic solution and seizing to prosecute it. They submitted that the MOU simply envisaged postponement for the stated diplomatic objective and conclusion of the reforms process. According to them, it is normal for a criminal matter to be postponed subject to circumstances[25] and, thereafter, could be prosecuted. In their analysis, there is no indication in the case that the Clause authored any violation of Sections 18 and 19 against anyone.

[54] During the deliberations, the Applicants raised concerns that bordered on the *bona fides,* professionalism and ethical conduct of the AG and the DPP respectively. The initial reservation he expressed about them was that they seem to operate on their own without obtaining instructions from the Executive which is their client. To illustrate the point, they charged that in the original cases premised upon the same cause of action, they did not oppose the matter yet now they are acting otherwise. They reiterated their stand point that the Agreement which forms the base of the legal

[25]Section 174 of the Criminal Procedure and Evidence Act No.9 of 1981

controversies is a product of the Executive and has nothing to do with the DPP as none of her powers have been compromised.

[55] Once again, they protested that the DPP appears to be unmindful that matters of safety, security and stability are primarily responsibilities of the Executive arm of Government. On that note, they cautioned that under justifiable circumstances, the Executive could be at large to ask the DPP to hold a criminal process or prosecution of particular matter in the interest of the State.

[56] To demonstrate that the AG and the DPP should maintain a client – lawyer relationship and loyalty to the Executive, reference was *inter alia* made to a decision per Mahural Islam J in **Sheonadan v Bihar** [26] that:

> There is a relationship of counsel and client, between the public prosecutor and the government. A Public Prosecutor cannot conduct a case on his own, or contrary to the instructions of his client, namely the Government[27].

Points of Law Raised by the Respondents and their Submissions

[57] The Respondents commenced with their counter representation by raising some points of law. In the initial one, they argued that the matter is *res judicata* and complemented that by suggesting that reintroducing it into the Court eleven months thereafter, is an abuse of the Court process. These were questioned against the understanding by the Respondents that the core

[26] [1983] 2 SCR 61

[27] *Ibid* at page 119).

concern in the consolidated cases was on the interpretation of Clause 10 of the MOU.

[58] The Court was alerted that it finally resolved the interpretation impasse in their favour and that this notwithstanding, the Applicants have now resuscitated the same issue before the same Court. However, it should suffice to be indicated that in the circumstances stated, the Respondents submit that their counterparts do not have the qualifications to intervene in a judiciously determined matter. As the addresses unfolded, the Respondents did not sound elaborate on one of the requirements for res judicata concerning similarity or dissimilarity of the parties involved in the original case in comparison with the current one.

[59] In addressing the merits, the Respondents advanced a key position that actually, the Applicants are seeking for a judgment that would undermine the doctrine of Supremacy of the Constitution[28] (The Constitution) in the Kingdom, contrary to its provision under Section 2 that anchors our democratic governance, rule of law and principles of legality. Most significantly, they over emphasized a point that the section designates the foundation for the democratic governance and its parameters. The implication is that the signatories of the MOU acted *ultra vires* the Constitution by ignoring the *Supremacy of the*

[28] Constitution of Lesotho, 1993

Constitutional provision and, instead, purporting to assign that status to international law.

[60] On a different subject, the Respondents questioned the *bona fides* of the application itself. They explained that this is exposed by the 11 months duration which the Applicants took after the judgment before introducing this litigation, yet the 1st Respondent even held a press conference about the subject matter. In their view, there was no iota of merit in the application. On the contrary, they accused the Applicants to have merely brought it as an obstructive and delaying tactics to frustrate the criminal course of justice. In the process, it was repetitively stressed that it is urgent for the Applicants to be indicted before the Court for the criminal offences they have to answer.

RULINGS ON POINTS OF LAW

A Direct and Substantive Interest Requirement for the Applicants to Sue

[61] Now, it becomes advisable to recollect the scenario that in the main, the Court is seized with a case in which the Applicants are seeking for an order allowing them to intervene in the two consolidated matters that represents an *imprimatur* of the present application. This is pursued towards their attainment of a *locus standi* for them to prosecute a case for the rescission of the original judgment in which it was declared that Clause 10 is unconstitutional.

[62] The proceedings took an incidental dimension when the Respondents interjected by content wise, raising points of law already recorded at length. Due to the closeness of the interrelationship between the facts supporting the primary litigation and the incidental one, the Court and the counsel respectively agreed that it would be proper for the rulings on the points of law to be reserved until at the time of the final judgment. The Court should disclose that it had an apprehension that making of rulings immediately after points of law were discussed, could have easily been distorted by some of the politicians and the media houses.

[63] Resultantly, on account of the road map agreed upon, both the substantive and the procedural aspects of the case were thoroughly interrogated by both parties. The counsel for the Applicant even unequivocally confirmed that at the end of the deliberations.

[64] In the logical order of things, the Court now addresses the points of law as presented. The elementary one concerns a legal objection that the Applicants are disqualified from making the application since in the first place they were not parties in the foundational cases in which the Clause was pronounced unconstitutional. The Court accordingly takes judicial notice of that fact[29]. A resolution hereof would be instrumental towards a determination of the *locus standi* of the Applicants to have initiated the application and the last assignment would be to resolve

[29] Applicants are not parties in CC/27 and 28/2018

whether the matter is *res judicata* and, therefore, incapable of becoming resuscitated.

[65] The above narrated, the Applicants should satisfy a primary procedural principle which is that they would have to prove that they have a **direct and substantial interest** in the subject matter that occasioned the litigation. The rationale is simply to ascertain the exclusion of busy bodies. This applies at any moment the litigation is instituted, during the proceedings and even transcends into the post judgment phase of the encounter as it is a typical case in the matter. In the latter incidence, this applies where there is evidential prove that the applicant who is asking to be joined, was at all material times not aware that there was in court a pending case in which he had a direct and substantially vested interest. The reason advanced for the dispensation, must throughout demonstrate good faith.

[66] Namibian courts have interpreted "direct and substantial interest" to require an applicant to show a "legal interest" and not merely an indirect financial or commercial interest[30].

[67] It must be realized that the stated criterion for one to introduce litigation originates from common law and got bequeathed into our present-day jurisprudence albeit noticeable

[30] Namibia Law Reform and Development Commission: LRDC 27; *Locus Standi Discussion Paper,* March 2014, Windhoek para 2.1.1

gradual intrusion by statutory enactments and constitutional interpretations. In the main, this is attributable to the inclination of some judges to adopt legal constructions which in their wisdom will protect and advance human rights. Hence the emergence of concerns by the Executive and the conservatives about the parameters of the Judiciary. This may also explain a rising numbers of enactments that seem to be a reaction from Parliament. That the requirement originates from common law was acknowledged in the Namibian case of **Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others**[31].

[68] The directness and substantiveness essentials referred to, would have to be comprehended in the technical legal sense. In the same vein, a complementarity between the concept and the *locus standi* must be appreciated. However, for the moment, the focus is on the *directness and substantiveness of the interest* that justifies a litigant to attain a credential for being given a hearing to ventilate a case or for being joined as a party to a case. Expectantly, the common law orientation of the concept renders it narrowly and restrictively interpretable.

[69] Incidentally, we are blessed with a catalogue of case law authorities which provides guidance that the phenomena is a consequence of common law and hitherto continues to prevail.

[31] 2011 (2) NR 726 (SC) at para 16;

[70] A classic case which demonstrates the indispensability of a requirement for a litigant to evidentially show the *directness and substantiveness of interest* is the famous one of **Thabang Khauoe v Attorney General**[32]. This is a jurisprudentially intriguing case in which the Applicant who passed on as leading counsel in the kingdom, instituted proceedings challenging the constitutionality of the reinstatement of the late King Moshoeshoe II to the throne. At the very commencement of the hearing, the court *mero muto* confronted him with a legal question on the directness and substantiveness of his personal interest over the matter. Thereafter, the court upon being dissatisfied that the requirements were satisfied, immediately dismissed the application without going into the merits and, resultantly held that he failed to establish his standing before the court over the matter.

[71] The phenomenon was bequeathed into our jurisprudence by common law and generally continues to prevail. It should for over emphasis sake, be cautioned that the significance of citing the case is for the purpose of this matter, simply to highlight the importance of the two requirements for a litigant to be accorded a standing and hearing before a court of law.

[72] Another testimony for the requirement was presented in the case of **National Executive Committee of the BCP and Another v Mbuli and Others**[33]. Here the court explained:

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[32] [1995] LSHC 100 .
[33] CIV/APN/80/2001(Unreported).

> In this enquiry the court must be satisfied upon the papers that there exists a prima facie case that the applicants seeking to intervene have **a direct and substantial interest** in the subject matter of these proceedings which may be prejudiced by an order or judgement of the court[34].

[73] The same principle was maintained by Majara J (as she then was) in **Lebabo and Another v Thibeli and Others[35]** where similarly as in this application, the applicants applied to join as parties in the proceedings in which, according to them, they had a *prima facie* direct and substantial interest, although they were not cited as parties. The learned Judge eventually pontificated thus:

> It is therefore my finding that the applicants have not successfully made out their case that they have the *locus standi* to be joined and/or to intervene either as individual members or as office bearers within the party structures because they and indeed every other member and/or office bearer, are duly represented in the 3 respondents in the main in those respective capacities and that the point *in limine* was one well taken by the 1st to 5th respondents and I accordingly uphold it[36].

[74] It was on the basis of all the aforementioned reasons that her ladyship dismissed the application with costs.

A Standing of the Applicants in the Matter

[75] A question of a standing to sue equally originates from common law and as such, it is narrowly and strictly interpretable. This is because it is generally premised upon a traditional

[34] *Ibid* page 24
[35] (CIV/APN/54/2011) [2011] LSHC 34
[36] Last page of the judgment

perception that for one to sue, there has to be a demonstration of a *direct and substantial interest.* It is in that context that it basically recognizes a litigant as an individual person. The idea of a collectivity of them suing, became a new innovation introduced to cover entities like partnerships. It was later throughout the years that the statutes extended the right to the personified entities like companies, cooperatives, societies etc.

[76] In the instant matter, it would, in principle like in all similar cases, suffice for the Applicants to establish on a *prima facie* scale that they have a *direct and substantial interest* to plead for remedies for which they have come before the Court. It should be highlighted that *prima facie* does not mean that there has been any profound examination of the indications. Instead, it is a conclusion derived from a superficial point of view.

On Res Judicata

[77] A determination on this point is occasioned by the controversy introduced by the Respondents when charging that the application now before the court is *res judicata*. In an endeavour to demonstrate that, they stated that the impugned issues in this application were exhaustively interrogated in the consolidated cases and a final judgement was delivered thereon by a Court of competent jurisdiction. Therefore, according to them the same controversies based upon the same cause of action cannot subsequently be reinstituted in court for adjudication. Once again,

it is found amazing that the Respondents perhaps, on account of inadvertency did not mention one requirement that for special defence of *res judicata* to stand, the parties who featured in the previous case, must be the same with those in the later litigation where it is raised. Just for the sake of clarity, the decision in **Florio v Minister of Interior And Chieftainship Affairs and Another**[37] is instructive that where the party pleads the defence of *res judicata* Court he must show that:

1. there has already been a prior judgement;
2. by a competent Court;
3. in which the parties were the same; and
4. the same point was in issue

[78] To prepare for a ruling on this phase of the proceedings, it becomes necessary to place on record the exact contents of Clause 10 since the Respondents also rely upon it in motivating their case that they primarily have a *direct* and *substantial interest* in the matter, have a standing in it and satisfy the rest of the procedural concomitants. The document stands:

> The government of the Kingdom of Lesotho shall ensure the safety of all its citizens in exile and must provide adequate security for Mr. Metsing and similarly placed exiled. Mr Metsing and similarly placed persons in exile will be subjected to pending criminal proceedings after the dialogue and reform process…….

[37] ((CIV) NO, 2 OF 1992 (CIV) NO. 29 OF 1991) page 27

Actual Ruling on Each Point of Law

[79] Here, it would rhyme well to firstly decide on the objection that the present matter is *res judicata*. A mere fact that the parties in the consolidated original cases are different from the present one, renders the objection totally misplaced. To worsen the situation, the remedies sought for are different save for the commonness of the one calling upon the Court to declare the Clause unconstitutional for its infringement of the constitution. The Applicants have relied upon a clearly written undertaking by the Government and the Opposition Parties seemingly acting at the behest of SADC, that the 1st Applicant and those in his category, would not be subjected under criminal processes pending conclusion of the reforms. This is found to constitute a *prima facie* evidence that he had a legitimate expectation not to be prosecuted in the meanwhile. An undertaking made by a Government is a serious deal which must be honoured except where it is *ultra vires* the law as it was so in the case of Khetsi *supra*.

[80] The case of the 2nd Applicant deserves to be addressed in its own kind because unlike his co-Applicant, he was not in exile at all material times and his name is not mentioned in the MOU. This introduces a challenge of interpretation as to whether notwithstanding this element of dissimilarity the two remain similarly circumstanced and the Clause covers them together. The understanding of the Court is that MOU, specifically the Clause, must be interpreted holistically within the context of the political crisis

sought to be resolved. It emerges that when the Clause was constructed, it was realized that the participation of the 1st Applicant in the reforms deliberations is desirable and, therefore, that it would be strategic to assure him safety and security if he returns home. In the meanwhile, the 2nd Applicant was already participating in the preliminary discussions.

[81] Thus, the adoption of a literal canon of construction that the word *exile* in the Clause excludes the 2nd Applicant, who was already involved in the preparatory stages of the deliberations, would create absurdity. This is because such interpretation leads to a conclusion that only the presence of the 1st Applicant is desirable in the reforms process and not that of the 2nd Applicant. A purposive interpretation would be ideal since it would facilitate towards the securing the attendance of the political leaders, national representatives and all those who matter in the reforms processes.

[82] It is found worthwhile to state in a word that the legal points raised were individually found without substance and to have unnecessarily wasted a lot of time. The proceedings should, from the onset, have been dedicated on the merits of the case and curtailed their duration and expenses.

[83] The analysis leads to a ruling that:

1. The individual legal points raised by the Respondents though well-argued, are without legal substance and have unfortunately wasted a lot of time. It would have expedited the proceedings and costs if they had immediately in the light of the abundance of guiding decisions, conceded that the merits be addressed. This could have saved almost half of the eight (8) days spent in arguing the case.
2. The Applicants have evidentially proven that they qualify to intervene in the consolidated cases in order to prosecute their case for the rescission of the judgment in the same cases.

The Analysis and Determination of the Status of the MOU in Law

[84] A decision on the subject is foundationally rooted upon the protestation by the Applicants that the existing judgment be rescinded because this Court in determining the constitutionality of Clause 10, failed to realize the pre-eminence of International law over the laws of the Kingdom. Here, it should be recalled that according to them, the MOU is a Treaty and, consequently, a dimension of international law.

[85] The Court after analyzing the document finds that it is characteristically a written Agreement between the Government of Lesotho and the then Opposition Parties simpliciter. To attest to this, it is signed by the then Deputy Prime Minister M. Moleleki and

the then Leader of Opposition M. Mathibeli in Maseru on the 24th of August, 2018. This was a culmination of series of SADC diplomatic interventions commencing, with the Mr. Justice M Phumaphi Commission of Enquiry that laid down a foundation for further endeavours, Thereafter, came there came the SADC Facilitation Team led by Deputy Chief Justice D. Moseneke of the Republic of South Africa. It was under his able superintendence that the MOU was concluded.

[86] The historical role of SADC behind the MOU does not *per se* turn it into a Treaty without first satisfying its international law meaning inclusive of its inherent requisite elements. These should all be exhibited *ex facie* the form and content of the document concerned. Thus, the Court should in the main receive guidance from the international law definition of a Treaty which would automatically project its elements and whatever other requisites subject to its type.

[87] Amongst the many meanings assigned to the concept, it transpired that the one offered in the Duhaime's Law Dictionary read in conjunction with the 1969 Vienna Convention and the 1986 Vienna Convention complements each other. The trio synthesize into a comprehensive and holistic conception of the term both theoretically and practically. The dictionary defines it as:

> Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a

single instrument or in two or more related instruments and whatever its particular designation[38].

[88] Its related instruments are listed as *Rebus Sic Stantibus, Modi Vivendi, Addendum, Protocol, Memorandum of Understanding*[39]. This is said to be a position irrespective of whether a Treaty is termed an agreement convention, charter, covenant, statute, **or any other name so long as it is clear that the intention is to effect an agreement.**

[89] The 1969 Vienna Convention defines a Treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its designation. The 1986 Vienna Convention extends the definition of treaties to include international agreements involving international organizations as parties.

[90] The selected narratives concerning what constitutes a Treaty and its dimensions reiterate a trite principle of international law that treaties can only be concluded by the internationally personalized entities. Traditionally, these were States and subsequently the Vienna Convention of 1986[40] extended the standing to the international organizations such as our AU and SADC by providing that it applies to:

[38] www.duhaime.org/legal/dictionary
[39] www.duhaime.org/legal/dictionary
[40] Article 1 of Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986

(a) treaties between one or more States and one or more international organizations, and

(b) treaties between international organizations.

[91] It is against the background of the stated definitions of a Treaty and its nomenclatures that the MOU can be forensically tested for the ascertainment of its true classification. Resultantly, this would logically have a telling effect on whether it establishes a local relationship or an international one. Ultimately, there would be a revelation as to whether the applicable law would be the municipal law or its international counterpart.

[92] In synopsis terms, the selected definitions of a Treaty in the preceding few paragraphs, signify that it is an international law created and administered relationship intended for States and international organizations. In a simplified version, this could be between two or more States and so between a State and an international organization. Its second essentiality is that it must be **formally written and signed by the officials of the international organization concerned.** Once again, for the sake of emphasis, the relationship will create bilateral or multilateral obligations between the high contracting parties and be governed under international law.

A Status of the MOU

[93] Concerning this, the principal answer lies in the form and content of the Text itself when contrasted with the traversed international law meaning of a Treaty. It is clear from the MOU that

it is an Agreement between its signatories. SADC is obviously not one of them. To complete the picture, none of the signatories projected that he signed for it as well. So, the statement that the Organization is a party to the document remains just a claim without a concrete support if not just a mere conjecture. The use of a liberal purposive interpretation of the MOU inclusive of its background history cannot justify such a conclusion and it would translate into its abuse to find so.

[94] The Court is of the view that though an Agreement with SADC must be formally written, this may not necessarily be on a document bearing its letter head. Nevertheless, it would have to comply with basic formalities that would bear its official stamp and a signature of its designated official. These would clearly authenticate that the organization is a party to the Agreement.

[95] In principle, the form and content of the Agreement would have to be of a nature that it is sufficiently comprehensible within the framework of the paper on which it is inscribed and without a need of extrinsic evidence or conjectural conclusion. The rule against extrinsic evidence well captured by **Susanna Johanna Van Breda**[41] in these terms:

> The rule is applicable when a juristic act is incorporated (integrated) into a single written document. The document itself is then proof of the juristic act and no evidence may be submitted to proof the terms of the juristic act, except this document. Extrinsic evidence (parol or oral evidence

[41] Implications of the Parol Evidence Rule on the Interpretation and Drafting of Contracts in South Africa

> but also other written evidence) is inadmissible insofar as it tends to contradict or change the content of the document[42].

[96] It is of paramount importance to note that as a general rule, extrinsic evidence is inadmissible because it tends to alter the terms of the already written contract which may prejudice another party to the contract. This was well inscribed in **Samuel Gatri and Another V Badumelleng Brady Melk[43]** In these terms:

> The general rule is that a party to a contract which has been integrated into a single and complete written memorial may not contradict, add, amend or modify the contract by reference to extrinsic evidence and in that way redefine the terms of the contract[44].

[97] For the reasons advanced, the Agreement under consideration, is found to be simply one concluded between the Government of Lesotho and its Opposition in Parliament. Its international dimension remains confined strictly in its background.

[98] There is no evidence whatsoever for the support of a proposition that it is a Treaty between SADC and Lesotho. There are no jurisdictional facts established to justify application of international law over the matter, let alone according it predominance over domestic law. On the contrary, the Court holds that the issues involved, are resolvable through the municipal regimen of laws.

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[42] *Ibid* page 4
[43] [2007] ZAFSHC 110

[44] Ibid page 5

International Law Harmonization Theory

[99] A genesis of this school of thinking is traceable from the endeavour to reconcile the entrenched positions maintained by Monism against the ones belligerently held by Dualism. In the process, it seeks to initiate a practical solution which emphasise more on addressing the challenges of mankind internationally than from a perception of sovereign States.

[100] The assignment at hand does not necessitate an elaborative discussion over this new theory. The pertinently relevant ones are Monism and Dualism.

Relationship Between International Law and the MOU

[101] To traverse the subject, International Law concept must be initially ascertained since it has its own complexities. The Permanent Court of International Justice[45] pioneered the meaning of International law in the **SS Lotus case (France V Turkey)[46]** judgment delivered on the 7th September 1927 in these words:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own freewill as expressed in conventions or by usage generally accepted as expressing principles of law and established in order to regulate the relations between these co – existing independent communities or with

[45] The principal organ of the former League of Nations which is a predecessor of the ICJ of the UN

[46] 1927 PCIJ Reports, Series A, no 10

> a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed[47].

[102] Lack of a predominance of international law over the sovereignty of States especially over the superpower ones and its inability to enforce the same law, has ever since, occasioned a perpetually asked question as to whether international law is really law.

[103] It is trite that the main sources of international law are treaty law, international customary law and the general principles of law recognized by civilised nations. It must, however, be realized that the Vienna Convention on the Law of Treaties[48], provides for reservations, declarations and derogations on treaties by States. In addition, there are conceptual, practical and empirical challenges in the administration of international law. This has resulted in the emergence of in the main, *States* that follow *Monism Theory* in the adoption and enforcement of international law in contrast to those which follow the *dualism Theory* in executing the same task.

The Monist Theory

[104] This is by analogy likened to a notion introduced by a French philosopher Ren'e Descartes's teaching that mind and soul constitute one thing since they are intended for the same purpose. The theory has in the context of international law, been translated

[47] *Ibid* @ 18
[48] 1969

into a conception that international and municipal law are the same since they serve the same purpose.

[105] Hans Kelsen is renowned for being a leading scholar and a proponent of *Monism* postulated that this theory occupied a superior hierarchy over *dualism*. He attributes this to the view that *Monism* is designed to holistically address the issues of mankind across sovereignties, national and sociological demarcations. To reinforce the point, he stresses that the superiority of *Monism* over *Dualism* amalgamates both international law and the domestic laws into one single universal system of law.

[106] In the final analysis, *Monism* over emphasizes on the commonness of laws across international frontiers and the subservience of sovereign laws under international law for consistency and global similarity of its application.

Dualist Theory of International Law

[107] Dualism perceives national law as a distinctly separate phenomenon from international law. It is fundamentally premised upon a thinking that each State is sovereign and, in that regard, competent to make laws that are in tune with its realities and the wishes of its citizenry. On a profound thinking, this resonates the idea of a democratic notion of *vos populi vos dei.* The genesis of the expression is traceable from the classical era when the philosophers of the time preached that everyone within a realm

should have a say in matters of governance. The thinking was intended to operate within each sovereignty.

[108] The theory has throughout the ages gradually accommodated international law subject to the dictates of times. To illustrate the point, it changed to harmonize itself with the international regimen on trade and commerce during the medieval era. It did so further in response to the massive human and material destruction occasioned by the First World War in order to prevent such an occurrence from repeating itself in future. The League of Nations was in the main, established for that purpose. In principle, it still maintains the idea of a supremacy of municipal law but prescribed a methodology through which a Treaty could be transformed into municipal law through an Act of Parliament and then be enforced as such.

[109] A rationale behind a designed procedure for international law to be adopted by Parliament, is mainly to ascertain that a law concerned will be in accordance with the letter, spirit and purport of the Constitution. The understanding is that in the process, parliamentarians would have the opportunity to solicit the views of the electorate, make the necessary research and consultations for the purpose of ascertaining that the adoption would be in the best interest of the country.

A Position of Lesotho Towards International Law

[110] Lesotho is characteristically a dualist State. Tellingly, from the narrative made, about such a country, international law can only assume a status of law upon being domesticated through an Act of Parliament. The philosophy behind has already been stated. Understandably, a pre-condition is that the law concerned must be an international one and recognized as such.

[111] A complexity in the instant case is that the Court has already found that *ex facie* the MOU, there is no evidence that SADC or any State including an international organization is a party to it. Instead, it is only the representatives of the Government and the Leader of Opposition who have signed the instrument. It is not enough to demonstrate that SADC played a background role behind the MOU. What remains a matter of material significance is that it must, without any extrinsic evidence including circumstantial one, satisfy the requirements of an internationally concluded Agreement.

[112] A cardinally decisive factor in the matter is that assuming that the MOU is an international document executed and concluded by the Government with SADC, there would still be an obstacle in the form of lack of an Act of Parliament through which it was domesticated for creation of rights and its corresponding enforcement. This undermines a key methodological requirement for a domestication of international law in a dualistic jurisdiction like Lesotho.

[113] It ultimately emerges that the MOU remains simply an Agreement between the Government and the Opposition concerning assurance extended to the 1st Applicant and all those who are similarly situated that they would not be prosecuted pending conclusion of the deliberations on the constitutional reforms. As it has already been stated, there are no international characteristics in it. So, a view that it has such dimensions, is misconceived.

[114] Lesotho is a constitutional democracy in which the Constitution is a supreme law. This is attested to by Section 2 of the Constitution which provides:

> This constitution is the supreme law of Lesotho and if **any other law** is inconsistent with this constitution, that other law shall, to the extent of the inconsistency, be void. (Emphasis added).

[115] The last words that any law which is inconsistent with the Constitution, shall to that extent be void, illuminate the sovereignty and pre-eminence of the Constitution over any other law impliedly inclusive of international law. The drafters of the Constitution especially this supremacy clause knew about international law. This notwithstanding, they did not mention it, let alone to write that it commands primacy over the Constitution and other laws in the Kingdom. So, the only logical conclusion is simply that for any aspect of international law to be enforced in the country, it must be incorporated by an Act of Parliament.

[116] Interestingly, there is no novelty in the submission tendered by the Applicants that the primacy of international law prevails over municipal laws in both monist and dualist states. In a straightforward language this denotes the *supremacy of international law* in both legal environments. The same proposition of law was surprisingly propounded by the Committee of the Privy Council (The Board) in **Neville Lewis v Attorney General of Jamaica[49].** This, however, failed to stand the test of time as it was subsequently rejected for undermining the doctrine of separation of powers and the ages' long entrenched principle concerning the imperativeness of indigenization of international law by the Legislature in dualistic jurisdictions. The jurisprudence was expressed in this narrative:

> In what appeared to be a dramatic and remarkable reversal of historical understanding of dualism and the separation of powers principle, the board for all intends and purposes determined in **Neville Lewis (supra)** that ratified incorporated human rights treaties had direct determinative incidence on the Westminster type constitution of Common Wealth Caribbean states. The board made this determination despite the clarifying dicta of Lord Millette in Briggs v Baptiste quoted above where he confirmed that Thomas v Baptiste "did not overturn the constitutional principle that international conventions do not alter domestic law to the extent that they are incorporated into domestic law by legislation and authoritative common wealth case law to the contrary."[50]

[49] 2000 57WIR;257 [2001] 2 AC 50 @ p75 read from an Advance Copy of judgment delivered for the court by Duke EE Pollard.

[50] Attorney General of Barbados v Jeffrey Joseph CCJ Appeal No CV 2 of 2005 @ para 51

[117] A critical complication which arises in the present case, is that on the face of the papers filed by the Applicants, there is firstly no SADC Treaty. The diagnostic examination of the MOU premises upon the meaning of a Treaty revealed that it lacks the elements of Treaty. On top of that, it has never been domesticated by an Act of Parliament. It should, nonetheless, be made clear that the findings do not in any manner, whatsoever, bar Parliament from adopting the MOU as a point of reference towards transforming it into law.

[118] The supremacy Clause introduces a dimensional discourse in that it directs that all laws regardless of their sources, must be in consonance with all the provisions of the Constitution. Immediately, this recalls a polemical question on the consistency of Clause 10 with Section 99 (1) (2) and (3) of the Constitution that are configured as follows:

99 (1) There shall be a Director of Public Prosecutions whose office shall be an office in the public service.

(2) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do—

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

(c) **to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.** Court's Emphasis)

3. The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instruction.

[119] The materiality of Section 99 (1), (2) (a) to (e) and 3 is occasioned by the fact that the Counsel for the Applicants strongly contested its relevancy in the matter and with the same vehemence, submitted that the Court ought not to have taken judicial notice of its provisions in order to determine the constitutionality of Clause 10. The Court did so because upon reading of the Clause, it instinctively developed an apprehension that its authors had inadvertently intruded into the constitutional territory of the DPP. The most outstanding wording is where it is written that the criminal prosecution of the 1st Applicant and those with whom he is similarly situated, will be placed in abeyance pending completion of the deliberations on reforms and their implementation.

[120] After placing Clause 10 and the provisions of Section 99 under a microscope, it emerges that the Clause characterizes a usurpation of the exclusive powers of DPP by the Executive acting in collaboration with the Opposition. To be specific, the section entrusts the authority to institute criminal proceedings, prosecute them, withdraw them and discontinue them upon the DPP to the

exclusion of any other authority in the Kingdom. The limitation includes the Executive and/or any other Organ of the State. It would, however, be theoretical to visualize a scenario where the Executive may not in the best interest of the State, recommend to the DPP that a criminal matter be withdrawn or discontinued. The decision must, nonetheless, be seen to have been officially and procedurally made by the DPP exclusively.

[121] The Court cautions that it fully addressed its mind to the question of participation of the DPP in Clause 10. It should suffice to record that it considers it to have been ambivalent throughout. To use the language of the Applicants, it is found that what would be of the moment is a clear evidence that the DPP herself had applied her mind over the Clause and decided to procedurally discontinue the criminal process upon whatever reasoning she would advance. This would duly appear in the record of proceedings and serve as evidence of the transaction. The understanding is that the victims of the offences against which the accused are charged, would first be notified about the contemplated move. In principle, the Court would, on account of the *dominis litis* status of the DPP in the matter, be inclined to endorse the application unless it suspects something unconvincing. The onus of prove that the DPP supported the Clause, rests upon the party that relies upon the assertion to advance its case. This would have to be executed through a materially relevant evidence. It would be strange for the DPP to publicly denounce the Clause as evidence of her disassociation

from it. She would certainly in the context of our politics, risk descending into their arena.

[122] There is no evidence before the Court that the DPP has in this matter acted outside the instructions of the Government which it is her client. Hitherto, however, the Government has not officially distanced itself from the way she has instituted criminal proceedings against the Applicants or treated them. It has not even mounted any action against her for having been involved in the matter contrary to the instructions from her client. The so far prevailing tranquility and mutuality of trust between the Government and the DPP renders guidance for a presumption applicable mainly in Government bureaucracy that all is officially well. This would include the way she has been treating the criminal case that forms the sub stratum of the application. The presumption is normally expressed in Latin as *omnia praesumuntur rite esse acta*.

[123] To reinforce the relevance of the presumption referred to in the preceding paragraph, the Attorney General under whom the DPP serves and superintends has not distanced himself from her actions over the matter or taken any disciplinary action against her. To this end, the charge that the DPP has acted contrary to the wishes of the Government is found foundationless. Interestingly, the very Government which according to the Applicants is enthusiastic towards the attainment of the ideals contemplated in the Clause,

is keeping a low profile in the matter which is intrinsically political as opposed to being legal and needs a political solution.

[124] The Applicants have correctly stated that an Agreement concluded by the Government with anyone may create rights for the other parties and that these are enforceable by the State concerned. In the main, they cited the case of **Phaila V Minister of Defence and Others**[51] which had relied upon a decision in **R V Croydon Ex Parte Dean**[52]**.** These cases are, however, distinguishable from the present case since they were not based upon international law related issues. Instead, they were concerned with ordinary agreements which occasions rights, obligations and promises between the State and another party. In some incidences, this may transcend into a creation of benefits including a legitimate expectation for a third party.

The Sovereignty of Lesotho as a Member of SADC and International Law

[125] Section 1 (1) of the Constitution of the Kingdom of Lesotho introduces Lesotho as a sovereign democratic State and then proclaims under Section 2 that its Constitution is a supreme law of the realm. To complement its supremacy, it provides that other law shall, to the extent of the inconsistency, be void.

[51] 2013 – 2014 LAC 401 (CA)
[52] 1993 (93) All ER 129 QB

[126] History attests to the fact that as early as the 22nd March 1967 which was hardly five months after Lesotho regained its independence from the British rule, it proclaimed in unequivocal terms its position concerning its membership to the United Nations Organization (UN), international organizations and regarding international law. These were articulated in a letter addressed to the Secretary General of the UN by the late Prime Minister Chief Leabua Jonathan on the 22nd March, 1967. Its extract from the reported case of **Joseph Salli Poonyane Molefi v The Government of Lesotho and Others**[53] reads:

> Your Excellency,
>
> The Government of the Kingdom of Lesotho is mindful of the desirability of maintenance, to the fullest extent compatible with the emergence into full independence of the Kingdom of Lesotho, legal continuity between Lesotho and the several States with which, through the action of the Government of the United Kingdom the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the Government of the Kingdom of Lesotho takes the present opportunity of making the following declaration:
>
> > As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the country formerly known as Basutoland, or validly applied or extended by the said Government to the country formerly known as Basutoland, the Government of the Kingdom of Lesotho is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of twenty four months from the date of independence (i.e until 4th October, 1968) unless abrogated or

[53] (1967 – 1970) L.L.R page 252 - 253

modified earlier by mutual consent. At the expiry of that period, the Government of the Kingdom of Lesotho will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

It is the earnest hope of the Government of the Kingdom of Lesotho that during the aforementioned period of twenty four months, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

The Government of the Kingdom of Lesotho is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument – whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has, prior to independence, been applied or extended to the country formerly known as Basutoland, may, on a basis of reciprocity, rely as against Lesotho on the terms of such treaty.

It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations.

Please accept, Sir
The assurance of my highest consideration,
LEABUA JONATHAN
Prime Minister.

[127] The Court interprets the correspondence to mark a transition towards a sovereignty of Lesotho, its right to self-determination, parameters of international relationship without compromising the independence of the Kingdom and choice of a dualistic system of interacting with international law. It must be projected that the centrality of the message conveyed to the world was emphatic on the preservation and perpetuation of the sovereignty of the country *ad infinitum*.

[128] An outstanding case in Lesotho that demonstrates its commitment to dualism, appears in Senate **Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea & 10 Others**[54]. the concern here was premised over the insistence by the Applicants that Lesotho is obliged by the international instruments it signed for the elimination of all forms of discrimination against women by allowing a daughter of a late chief to succeed her father in the office of a Principal Chief. The move appeared to conflict with the exception from the general rule against discrimination under Section 18 (c) of the Constitution which allows customary law-based discrimination. Ultimately, this introduced a controversy as to which one between the constitutionally

[54] C of A (Civ 29/2013

sanctioned discrimination and the international instruments. The Court of Appeal determined that it is clear that the instruments are aids to interpretation, **not the source of rights enforceable by Lesotho citizens.**

[129] SADC is *inter alia* founded upon a recognition and respect of sovereign equality of all member States. This is in accordance with one of its founding principles in terms of Clause 4 of the SADC Treaty. Thus, any thinking that Lesotho should automatically implement international law like a Monist jurisdiction, yet it has historically to-date been a dualist State, would violate Clause 4 of the founding principles of the Organization and undermine the sovereignty of Lesotho.

[130] The Court is sceptical that SADC subscribes to a view that it ever concluded the Treaty under consideration. Be that as it may, over -emphasis is once again made that by operation of the supremacy of the Constitutional provision, any international law which has not been domesticated by an Act passed by the Parliament of the Kingdom, is null and void simpliciter. It appears that in the loosely translated version from the Sesotho language, the founders of this nation would not rest because they could visualise this as an act of undermining the sacrifices they made to secure the sovereignty of the country and bequeathed it onto their successive generations. A testimony of that is a historic fact that Lesotho was never conquered. Its infrastructure consists mainly of indigenous initiatives.

[131] A corresponding reality is that Lesotho does not have enough resources to influence the making of international law. This is self-explanatory that by acceding to Monism, the financially compromised would indirectly become 'colonies' of the financially well-meaning States internationally. It would be unwise and a dereliction of a fundamental duty for any Government to forget even for a moment that in any collaborative effort amongst States, each understandably seeks to advance its best interests.

[132] One of the inherent dangers which could be detrimental to the economically compromised countries like ours, would be the adoption of a Monist approach towards international law. This lends support from the statement articulated by Pollard J in **The Attorney General and 2 Others v Jeffrey Joseph**[55] against the adoption of Monism which engenders automatic application of international law within the State. He expressed that in the following words of wisdom:

> This innovative determination inadvertently provided a convenient vehicle for third country interference in the domestic affairs of Caricom States with probable far-reaching negative implications for the national interest, given their lack of capabilities to ratify treaties with due diligence[56].

[133] Further afield, a legal scholasticism on the challenges and dynamics of Monism and Dualism has been authored in the legal

[55] CCJ Appeal No CV 2 of 2005
[56] *Ibid* para 52

article by Retselisitsoe Phooko[57]. He has sought therein to analytically demonstrate the dictating factors which compels the SADC States to be indispensably predominantly Monist and basically attributes this to the historical realities imposed by colonialism and their transcendence into the post-colonial era.

[134] In addressing the merits of the subject matter, Phooko largely relied upon the views postulated by my brother Tshosa J[58] on the same point. The latter seems to basically subscribe to a thinking that in principle, Dualism would, from a practical perspective be an ideal methodology to be followed by the SADC world towards the adoption and implementation of international law. He equally justifies that with reference to the historical background of each member State, its current challenges and the aspiration of the citizens. This resonates the profundity of degree to which the member States, value the importance of sovereignty and self-determination. In buttressing the point, he highlighted the fact that even countries that are dedicated to Monism, dispense with it under the deserving circumstances[59]. He further submits that the applicability of international law in the national sphere is "always conditioned by a rule of municipal law". In addition, the application of treaties in many legal systems is mainly "governed by domestic constitutional law[60].

[57] The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law
[58] A Judge of the High Court of the Republic of Botswana and presently Acting High Court Judge in the Kingdom, as quoted with approval by R Phooko in his work
[59] *Ibid* @ page 6
[60] *Ibid*

[135] Most members States of SADC if not all, subscribe to a dualistic approach towards application of international law within their respective jurisdictions. This is ascribed to their emphasis on the sovereignty of their individual States and the supremacy of their respective constitutions. Few cases which are cited herein are simply intended to illustrate the point. Reference has already been made about the historical and current position of Lesotho.

[136] In the South African legal scenario, Section 231 specifically deals with the application of international law. The most relevant provisions appear under Section 231 (2) and (4) which manifestly demonstrate that the Republic is a Dualist State. They create dual avenues through which international Agreements could be domesticated into law and enforceable as such. The first is that it must be approved by resolution in both the National Assembly and the National Council of Provinces. Alternatively, it might be enacted into law by national legislation. This was well elucidated by Ngcobo CJ in **Glenister v President of the Republic of South Africa and Others**[61] that:

> An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231 (2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An

[61] (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)

> international agreement that has not been incorporated in our law cannot be a source of rights and obligations[62].

[137] Thus, the above quotation demonstrates beyond any doubt that South Africa follows a dualist approach towards implementation of international law. Above all, its constitution entrenches that.

[138] The Zimbabwean case of **Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe** *supra* presents a typical situation where Municipal Law conflicted with international law and the underlying jurisprudence. This is reflected from the reading of the judgment of the SADC Tribunal and the subsequent one by the High Court of Zimbabwe. A summarized background and relationship behind both judgments is that initially the Applicants sought the intervention of the Tribunal over the legality of the Zimbabwe's agricultural land repossession measures. The Tribunal found for the Applicants mainly upon the reasoning that the effects of the implementation were felt only by farmers, and consequently constituted indirect discrimination or *de facto* or substantive inequality in violation of Article 6 (2) of the Treaty[63].

[139] Thereafter, the Applicants sought to register the judgment of the Tribunal in accordance with the municipal law. The Government challenged the registration upon the ground that the SADC protocol on the establishment of the Tribunal has not been

[62] Ibid para 92
[63] John Dugard International Law: A South African Perceptive 4th ed p 442

ratified. The High Court found that the Tribunal had jurisdiction over the matter brought before it by the Applicants. However, it declined to allow its registration on the basis that registering and enforcing foreign judgment in Zimbabwe would be contrary to public policy and the constitution of Zimbabwe[64].

[140] Against the backdrop of the analysis made with reference to the case law and written authorities, it would be legally justifiable to arrive at a conclusion that Clause 10 of the MOU, remains unconstitutional. However, we remain convinced that the sprit in the MOU appears to be a constructive way forward paving towards national healing, reconciliation and unity. We reiterate our earlier position that the problem is intrinsically political and needs a political solution rather than a legalistic one.

[141] In the premises, we find that:

1. The points of law raised in limine by the Respondents have no legal foundation and are, consequently, dismissed with costs;
2. The prayer for intervention is allowed;
3. The application for rescission is, for the reasons advanced, refused;
4. Clause 10 is pronounced unconstitutional.

[64] R Phooko op cit p 7 to 8

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E.F.M. MAKARA
JUSTICE OF THE HIGH COURT OF LESOTHO

I agree

_____
M. MAHASE
ACTING CHIEF JUSTICE

I agree

_____
S.N. PEETE
JUSTICE OF THE HIGH COURT OF LESOTHO

For the Applicants : Adv. Teele KC instructed by T Matooane & Co. Assisted by Adv. Mafaesa

For the Respondents: Adv. Lephuthing instructed by the Attorney General Assisted by Mr. Maieane