IN THE HIGH COURT OF LESOTHO
(Exercising Constitutional Jurisdiction)

Constitutional Case No.16/2020

In the matter between:

WHITE HORSE PARTY	**APPLICANT**
And	
JUDICIAL SERVICE COMMISSION	**1ST RESPONDENT**
MINISTER OF JUSTICE AND LAW	**2ND RESPONDENT**
HIS MAJESTY KING LETSIE 111	**3RD RESPONDENT**
HIGH COURT REGISTRAR	**4TH RESPONDENT**
NATIONAL REFORMS AUTHORITY	**5TH RESPONDENT**
THE LAW SOCIETY	**6TH RESPONDENT**
LESOTHO LAWYERS FOR HUMAN RIGHTS	**7TH RESPONDENT**
ATTORNEY GENERAL	**8TH RESPONDENT**

JUDGMENT

Neutral Citation: White Horse Party v. Judicial Service Commission and Others (Constitutional Case No. 16/2020) [2020] LSHC22

Coram : Hon. T. Monapathi J

Hon. M. Mokhesi J

Hon. K.L. Moahloli J

Dates heard : 14, 30 September; 16, 22 October; 6, 19 and 26 November 2020

Date delivered : 11 December 2020

SUMMARY

Constitutional Law – Locus standi in judicio of a political party to institute a constitutional application in respect of the appointment of Judges of the High Court – When is a decision of the Judicial Service Commission made in the absence of any member valid – Interpretation of section 132(10) of Constitution and rule 5(2) of the JSC Rules

ANNOTATIONS

Cases:

Acting Chairperson, Judicial Service Commission and Others v Premier of the Western Cape Province, 2011 (3) SA 538 (SCA)

Dr Mosito and Others v Letsika and Others, [2018] LSCA 1 (26 October 2018)

Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others, [2012] ZACC 28

Grusd v Herman's Administrator 1945 (2) PH G42

O'Halloran v Haynes 1930 NPD 35

Judicial Service Commission and Another v Cape Bar Council and Another, 2013(1) SA170 (SCA)

Lawyers for Human Rights and Another v Minister of Home Affairs and Another, 2004 (4) SA 125 (CC)

Lesotho Human Rights Alert Group v Minister of Justice and Human Rights and Others, LAC (1990-1994) 652

Mofomobe and Another v Minister of Finance and Another; Phoofolo KC and Another v The Rt Hon. Prime Minister and Others, [2017] LSCA 8 (12 May2017)

South African Liquor Traders Association v Chairperson, Gauteng Liquor Board, 2006(8) BCLR 901(CC)

Statutes:

Constitution of Lesotho 1993

Interpretation Act No. 19 of 1977

The Judicial Service Commission Rules 1994 [Legal Notice No.102 of 1994]

Moahloli J

Introduction

[1] White Horse Party (WHP), a political party in Lesotho, has instituted urgent constitutional motion proceedings against the Judicial Service Commission ("the JSC"), the Minister of Justice and Law ("the Minister"), His Majesty King Letsie III ("His Majesty"), the High Court Registrar ("the Registrar"), the National Reforms Authority ("the NRA"), The Law Society, Lesotho Lawyers for Human Rights ("LLHR") and the Attorney General ("the AG").

[2] The party, amongst other things, claims an order declaring that His Majesty's failure to appoint the persons it claims have been recommended as puisne judges unconstitutional as it violates section 120(2) of the Constitution. WHP further seeks an order directing His Majesty to appoint and publish the names of the selected Judges in terms of the constitution. Furthermore, it claims an order interdicting the Minister from interfering with the process and/or procedure for the nomination and appointment of Judges.

[3] In response, the Minister and the LLHR filed answering affidavits, and the WHP replied to each. The Minister raises two points *in limine*. Firstly, that WHP does not have the requisite standing in law to initiate and prosecute this application[1]. And secondly, that the High Court, sitting as a constitutional panel, does not have jurisdiction to entertain this application because it does not raise any constitutional question (s) justiciable in this Court[2].

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[1] Record of Proceedings ("Record"), page 41 and 42, paragraph ("para") 2.2 and 3

[2] Record; 4 para 3

[4] I wish to emphasise at the outset that this judgment has nothing to do with the eligibility and suitability of the candidates who were recommended for appointment as puisne judges. Neither is it concerned with the various peripheral issues raised or alluded to by the parties. The judgment is solely about whether the procedure followed leading up to their recommendation was in conformity with the law.

Standing /locus standi in judicio

[5] When this issue came up for debate, Applicant's counsel, Adv Makara tried to evade defending his client's slippery position by claiming that the Minister could not rely on this issue because it was merely mentioned in passing in the Minister's answering affidavit, and never raised as a point of law. The Court firmly rejected this, pointing out that apart from it being a threshold requirement/issue/question, the point had been raised squarely in paragraphs 3, 8.4, 9.1 and 10.1 of the answering affidavit[3] where the Minister unequivocally avers that WHP does not have any legal capacity to stage this litigation.

[6] The Minister's attorney, Mr Rasekoai, in essence contends that WHP has no *locus standi* to invoke this court's constitutional jurisdiction in order to obtain legal redress because it has failed to establish that it has a substantial interest in the dispute. Adv Makara, on the other hand, argues that WHP has *locus standi* since it will suffer prejudice because justice cannot be delivered when new judges are not appointed.

[7] It must be noted from the onset that our constitutional rules of standing are very restrictive. In terms of section 22(1) of the Constitution a person seeking to

[3] Record: 4, 49, 50 and 51

vindicate a protected right or freedom needs to be the person whose right has been infringed. The section states that *"if any person alleges that any of the [fundamental human rights and freedoms protected by the] Constitution has been, is being or is likely to be contravened* <u>*in relation to him*</u>*,…,then, without prejudice to any other action with respect to the same matter which is lawfully available,* <u>*that person*</u>*… may apply to the High Court for redress".* [my emphasis]

[8] The celebrated Court of Appeal case of *Mofomobe v Minister of Finance*[4] has interpreted this provision as meaning that an applicant's "right to bring an application, and therefore his standing to do so, is circumscribed by s 22(1)"[5]. Such "applicant for relief must allege a violation of a right 'in relation to him' and thus demonstrate a direct and peculiar interest or 'an interest not too remote' or 'some grievance special to him'[6]. It is precisely on this requirement that WHP's case began to unravel. Its papers did not coherently and satisfactorily set out any averment of such an infringement. At best WHP could only claim that it represented the right of the general public: but we must remember that, with the exception of the *interdictum de libero home exhibendo*, our law no longer recognises the *actio popularis* whereby an individual not personally affected may vindicate the public interest by exposing an illegality[7]. WHP failed to demonstrate that it suffered any damage itself or that there was a breach of some duty owed to it or an infringement of some right vested in it.[8] It should be noted that the above-mentioned rules of standing were endorsed by the Court of Appeal in the subsequent case of *Dr Mosito v Letsika*.[9]

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4 Mofomobe v Minister of Finance; Phoofolo KC v The Rt Hon Prime Minister
5 at para 27
6 at para 29
7 Lesotho Human Rights Alert Group case at p657F-G; p658.I-J
8 Mofomobe, para 30
9 at para 30

[9] In summary then, the right or freedom of the applicant which is contravened or threatened must be personal as opposed to public. In other words, the applicant, if challenged, must be able to show that he/she has a sufficient, personal and direct interest in the case.

[10] The Applicant and its counsel devote the bulk of their pleadings and heads of argument, respectively, towards expressing discontent about the acts of some of the respondents. Strange though it may seem, it is not enough that an applicant is able to demonstrate that a public authority has been acting illegally or improperly.

[11] Similarly the interest required by law is not a subjective one: the court is not concerned with the intensity of the applicant's feelings of indignation at the alleged illegal or improper action, but with an objectively defined interest. The citizen's concern with the legality of governmental action is not the primary concern at this stage of the inquiry. For the purpose of establishing that it has *locus standi* the applicant/complainant must be able to point to something beyond a mere concern with legality, viz. that a fundamental human right or freedom has been, is being or is likely to be contravened <u>in relation to him</u>. That is to say, he must demonstrate that he has a sufficient personal and direct interest in the case.

[12] WHP's case is further weakened by the fact that it cannot even claim that its entitlement to participate in the selection of judges has been undermined.[10] Under our constitutional scheme of things, political parties do not play any role whatsoever in the processes for appointment of puisne judges. Neither does the general citizenry.

[10] cf the Transformation Resource Centre v Council of State case

[13] From the above discussion it is very clear that WHP has dismally failed to satisfy the threshold requirements of *locus standi in judicio* prescribed in section 22(1) of the Constitution. It has therefore not succeeded in discharging the onus upon it in this regard. And on this ground alone this Court would be justified to dismiss this application.

[14] Normally when an applicant is found to lack *locus standi* in *judicio* the case will be dismissed on that basis alone. However, in exceptional circumstances the interests of justice or the public interest or the need for certainly may compel a court to deal with the substance of the dispute.[11]

> *[34] "….the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."*

[15] We consider this to be a case where despite finding that the WHP does not have standing it would be prudent to deal with the substance of the dispute. It is common cause that the already under-staffed High Court bench has been severely affected by the recent demise of two Judges and resignation of a further two. In colloquial speak it has been in ICU for the past months and desperately requires resuscitation and replenishment. The crisp issue which has led to a constitutional impasse is whether the meeting of the JSC which led to the nomination and submission of candidates to His Majesty for appointment as puisne Judges was

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[11] Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others, at para 34; Lawyers for Human Rights and Another v Minister of Home Affairs and Another at para 24; South African Liquor Traders Association v Chairperson, Gauteng Liquor Board at para 6

properly constituted or not. The answer is crucial because the JSC can only make valid decisions if it is properly constituted.[12]

The Pertinent Factual Matrix

[16] It can be garnered from the pleadings[13] that on 20 August 2020 a meeting of the JSC was convened to discuss nomination of puisne judges. Only the Acting Chief Justice/Chairperson and the Attorney General attended and participated. The two other members of the Commission did not attend or participate. Five candidates were selected and their names were submitted to His Majesty pursuant to section 120 (2) of the Constitution. To date no appointments have been made, hence the present application. One of the reasons for the stalemate is the questioned validity of the nominations.

Analysis of The Facts and The Law

[17] The procedure for the appointment of judges is set out in the Constitution as follows:-

> ***Appointment of judges of High Court***
>
> *120. (1) The Chief Justice shall be appointed by the King acting in accordance with the advice of the Prime Minister.*
>
> *(2) The puisne judges shall be appointed by the King, acting in accordance with the advice of the Judicial Service Commission.*

[18] And the composition, organisation and functioning of the JSC itself, is spelt out thus in the Constitution and JSC Rules:

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[12] Judicial Service Commission and Another v Cape Bar Council and Another at para 36

[13] Read, where appropriate, in accordance with the Plascon-Evans rule

CONSTITUTION

Judicial Service Commission

132. (1) There shall be a Judicial Service Commission which shall consist of –

(a) the Chief Justice, as Chairman;

(b) the Attorney-General;

(c) the Chairman of the Public Service Commission or some other member of that Commission designated by the Chairman thereof; and

(d) a member appointed from amongst persons who hold or have held high judicial office who shall be appointed by the King acting in accordance with the advice of the Chief Justice and is hereinafter referred to as the appointed member.

……..

……

(9) The Commission may by regulation or otherwise regulate its own procedure and, with the consent of the Prime Minister, may confer powers or impose duties on any public officer or on any authority of the Government of Lesotho for the purpose of the discharge of its functions.

(10) The Commission may, subject to its rules of procedure, act notwithstanding any vacancy in its membership or the absence of any member, and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings:

***Provided that** any decision of the Commission shall require the concurrence of a majority of all the members thereof. [My emphasis]"*

JSC RULES

*"**Meetings of the Commission***

5. (1) The Chairman shall preside over a meeting of the Commission, and if the Chairman is for any reason unable to preside, the remaining members of the Commission present at the meeting shall, from among them, elect a person to preside over that meeting.

> *(2) In urgent matters and if it is impossible or impracticable to secure the attendance of all the members, a meeting of the Commission may properly be constituted by two members only, and in such case any decision made shall require the concurrence of both such members.*
>
> *(3) The Commission may make a decision, without a meeting, by circulation of relevant papers among the members, but any member shall be entitled to require that any such decision be deferred until the subject matter can be considered at a meeting of the Commission.*
>
> *(4) A member who dissents from a decision from a decision made by the Commission shall be entitled to have his dissent and reasons of his dissent set out in the records of the Commission.*

[19] It is not disputed that the meeting of the JSC was only attended by two of its full complement of four members. And it cannot be denied that in terms of section 132 (10), whereas the Commission may act notwithstanding the absence of <u>any member</u>, any resolution of such meeting <u>requires *the concurrence of a majority of all the members*</u>. The words ***"Provided that"*** in s 132 (10) mean ***But*** *(as an exception to the main rule); With the proviso that; With the understanding that;* [The phrase here imports a limitation/qualification/restraint to something which precedes] see Grusd v Herman's Administrator. In O'Halloran v Haynes it was held that they mean *"notwithstanding anything in this subsection contained".* So, for a decision to qualify as a valid decision of the Commission it must have the agreement/assent/approval/accession of the majority of the four members. This applies to all decisions of the JSC meeting of 20 August 2020. There is no evidence before us that the nominations which were forwarded to His Majesty met muster in terms of the above proviso.

[20] Lastly, I must mention that although rule 5 (2) of the *JSC Rules* seems to permit a meeting of two members only to make a valid decision by concurrence, this rule is undoubtedly inconsistent with section 132(10) of the Constitution because such decision would not have the concurrence of the majority of members. To this extent, the rule is also invalid because in terms of section 23 (b) of the *Interpretation Act* no subsidiary legislation shall be inconsistent with the provisions of the principal legislation.

[21] In the result, the application is dismissed.

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K.L. MOAHLOLI
JUDGE

I agree

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T. MONAPATHI
JUDGE

I agree

.....
M. MOKHESI
JUDGE

Appearances:

Adv RG Makara for Applicant
Mr MS Rasekoai for 2nd, 3rd and 8th Respondents