IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/010/2020**

In the matter between:

HOLOMO MOLIBELI **APPLICANT**

AND

THE PRIME MINISTER **1ST RESPONDENT**

THE POLICE AUTHORITY **2ND RESPONDENT**

THE MINISTER OF POLICE **3RD RESPONDENT**

THE ATTORNEY GENERAL **4TH RESPONDENT**

HIS MAJESTY THE KING **5TH RESPONDENT**

JUDGMENT

Coram : **Hon. Mr. Justice E.F.M.Makara**

Date of Hearing : **20th February, 2020.**

Date of Judgement : **10th March, 2020.**

SUMMARY

The Applicant brought a common law based review application before this court primarily asking it to interdict the 1st Respondent from to retiring him as a Commissioner of Police purporting to be acting so in terms of Section 5 (3) of the Police Act which admittedly empowers him to advise the 5th Respondent to do so for the sake of efficiency and effectiveness in the Police Service. The court interdicted the 1st Respondent from purporting to invoke Section 91 (3) of the Constitution which gives him the authority to endorse the advice he made to the 5th Respondent if he decides otherwise. In addition, it interdicted the 5th Respondent from considering the advice and in the event he had accepted it, to have the effectuating instruments stayed in abeyance pending finalization of this case. However, the 5th Respondent explored other avenues to have the Applicant replaced by his deputy. To achieve that he

misinformed the 5th Respondent that the former has already retired. A foundation of the application was that the 5th Respondent acted so against him because he had addressed a letter in which he requested him to account for the involvement of cell phone in the logistics that facilitated for the assassination of his former wife Lipolelo Thabane. in the meanwhile, his incumbent wife has been charged with a commission of a similar offence. in that background, the Applicant counter charged that the process and the decision of the 1st Respondent was illegal, irrational and so unlawful.

held:

1. The timing of the action that the 5th Respondent takes against the Applicant, is unwisely timed since it miraculously coincides with the letter through the Applicant requests him to explain the involvement of his cell phone in the development leading towards the killing of his late former wife;
2. There is no background history in the papers before the court which presents evidence that the 5th Respondent had ever complained about the inefficiency and/ or ineffectiveness of the Applicant in managing the affairs of the police. To complement that, there is no indication of any charge ever preferred against him by the relevant authority including any Minister of Police over such managerial limitations including any indication of action taken by any one of his ministers regarding the alleged limitations which runs counter the Section 5 (3) objective;
3. A misrepresentation made to HMK that the Applicant has retired and, therefore, that he should be replaced by Deputy Commissioner Hlaahla, seriously taints the process;
4. Consequently, both the process and the decision to recommend to HMK that the Applicant be retired, are found to be illegal, irrational and, therefore, unlawful.

ANNOTATIONS

CITED CASES

1. Setlogelo v Setlogelo 1914 AD 221
2. Masefatsana Moloi v Comissioner of Police & Another 1982-84 LLR
3. Johannesburg Consolidated Investment Company v Johannesburg Town Council1903 TS 111
4. Democratic Alliance v President of South Africa2019(11) BCLR 1403 (CC)
5. Albutt v Center for Study of Violence and Reconciliation2010(3) SA 293 (CC
6. Phamaceutical Manufactures v Association of SA2000 (2) SA 1 (CC)
7. PRESIDENT OF REPUBLIC OF SOUTH AFRICA v SARFU 2000 (1) SA 1 (CC
8. Lebohang Sehlabi v Kobeli Molemohi CIV/T/518/2007
9. Ramphielo & Others v Compol & Others Civ/ Apn/93/2018
10. Democratic Alliance v President of RSA2013(1) SA 248 (CC)

STATUTES & SUBSIDIARY LEGISLATION

1. The Constitution of Lesotho
2. the Police Service Act 1998
3. The Internal Security Act Act No. 24 of 1984
4. Legal Notice No. 9 of 1980
5. The Constitutional Litigation Rules L/N No. 194 of 2000
6. The Rules of this Court L/N. No. 9 of 1980

MAKARA J.

Introduction

[1] The Applicant who is a Commissioner of Police in the Kingdom, initiated urgent motion proceedings seeking for an order in these terms:

1. There be a dispensation with the ordinary Rules of Court pertaining to modes of service and notice on account of the urgency of this matter.

2. A rule nisi be issued, returnable on such date and time to be determined by the Honourable Court, calling upon the Respondents to show cause, if any, why:

   (a) The 1st Respondent shall not be interdicted and restrained forthwith from advising His Majesty the King (5th Respondent) to require the Applicant to retire from the Office of the Commissioner of Police, pending the final determination of this application.

   (b) 5th Respondent shall not be interdicted and restrained forthwith from considering and/or accepting the advice by the 1st Respondent to retire the Applicant from the Office of the Commissioner of Police, pending the final determination of this application.

(c) 1st Respondent shall not be interdicted and restrained forthwith, from purporting to act on the basis of Section 91 (3) of the Constitution of Lesotho[1] to retire the Applicant from the Office of the Commissioner of Police, pending the final determination of this application.

(d) In the event of the 5th Respondent having already acted on the advice by the 1st Respondent to retire the Applicant from the Office of the Commissioner of Police on the institution of these proceedings, the legal instrument and/or document to that effect, shall not be suspended, held in abeyance and inoperative, pending the final determination of this application.

(e) In the event of the 1st Respondent having acted on the basis of section 91(3) of the Constitution of Lesotho purporting to retire the Applicant from the office of the Commissioner of Police on the institution of these proceedings, the legal instrument and/or document to that effect shall not be suspended, held in abeyance and inoperative, pending the final determination of this application.

[1] 1993

(f) The advice of the 1st Respondent to His Majesty the King to require the Applicant to retire from the Office of the Commissioner of Police shall not be reviewed, corrected and set aside for the reason that it is irrational and illegal, and therefore unlawful and of no force and effect in law.

(g) The purported exercise by the 1st Respondent of any power under section 91(3) of the Constitution of Lesotho to retire the Applicant from the office of the Commissioner of Police shall not be reviewed, corrected and set aside for the reason that it is illegal, and therefore unlawful and of no force and effect in law.

(h) Any legal instrument and/or document proclaiming the retirement or purporting to have the effect of retiring the Applicant from the Office of the Commissioner of Police, published under the authority of the 5th Respondent or published pursuant to the 1st Respondent's purported exercise of powers under section 91(3) of the Constitution of Lesotho, shall not be declared to be unlawful and of no force and effect in law.

(i) The retirement of the Applicant by the 5th Respondent, acting on the advice of the 1st Respondent, and/or by the 1st Respondent, purporting to act on the basis of section 91 (3) of the Constitution of Lesotho, shall not be declared to be unlawful and of no force and effect in law.

3. Prayers 1. 2., 2.1., 2.2., 2.3., 2.4. and 2.5 to operate with immediate effect as interim relief.

4. Costs of this application against the 1st Respondent (Inclusive), of the costs consequent upon the employment of two counsel, on attorney and client scale.

5. Further and/or alternative relief this Honourable Court deems fit.

[2] Appreciably, some of the relieves prayed for, have by operation of the subsequent developments, been rendered irrelevant and this would, *mutatis mutandis* consequently affect the final judgment.

[3] It should be brought on board that though the Applicant brought the matter on urgent basis, the Respondents acting contrary to the Rules of this Court[2], filed their intention to oppose after the expiry of

[2] Legal Notice No. 9 of 1980

the days provided for the purpose. Subsequently, the 1st Respondent filed his answering affidavit also after the time limit for doing so. This was after the Court had intervened by *inter alia* calling the 4th Respondent in the presence of the counsel for the Applicant to work towards the ascertainment of progress in the matter. The scenario was more complicated by the uncertainty of the counsel whom the Attorney General had instructed to represent the Respondents.

[4] The initiative was mainly triggered by the insistence of the counsel for the Applicant that in the circumstances, the Applicant deserves to be awarded a default judgment as he has prayed. It secondarily emanated from a realization that the case was of a high profile nature and, therefore, the Court would need meaningful assistance from the counsel featuring for the parties to advise it accordingly. Moreover, the Court conjectured from the significance of the matter, that should it enter a default judgment against the Respondents, there would be an application for its rescission and that this would occasion protracted delays towards its finalisation. Consequently, time limits for the filling of the requisite papers by both parties was designed and the matter was finally heard as accordingly planned.

COMMON CAUSE FACTS

[5] A synopsis of the material facts which precipitated this case and subscribed to by the lawyers representing the parties commence

from a letter which the Applicant, acting in his capacity as a current Commissioner of Police, addressed to the 1st Respondent (The Prime Minister) on the 23rd December 2019. Its subject matter was a request to the addressee to provide him with certain information regarding the death of the late Lipolelo Thabane. The information sought for was based upon an allegation by the Applicant that police investigations revealed that a cell-phone number of the 1st Respondent was used in the communication that culminated in the murder of the deceased Lipolelo Thabane.

[6] On the 2nd January 2020 which was 10 days after the Applicant had sent the letter requesting the said information from the 1st Respondent, the latter send him to a forced indefinite leave. This was through the instrumentality of a letter written by the Acting Government Secretary. It is headed, " Instruction To Proceed On Leave". Its contents detailed that during his absence from office, he is requested to hand over the duties and responsibilities of the office to Mr. Janki Hlaahla. The Court was made to understand that the latter is a junior Assistant Commissioner in the Police Service.

[7] Subsequently, the Applicant responded to the letter instructing him to proceed on an indefinite leave, by seeking for protection from this Court through *inter ala* issuance of its order interdicting the 1st Respondent from forcing him to go on the contemplated leave pending a final determination of the matter by this Court. Thus, on

the 3rd January 2020, my senior brother Peete J granted an interim interdict against the 1st Respondent.

[8] A strikingly intriguing dimension is that notwithstanding the interim order made, on the 3rd January 2020, the Acting Government Secretary acting at the behest of the 1st Respondent, directed a second letter to the Applicant. It is headed, " **Suspension** or **Retirement** from the office of Commissioner of Police". (Court's highlight) The correspondence directed the Applicant to show cause why the 1st Respondent cannot advise His Majesty the King (HMK) cited herein as the 5th Respondent, to retire the Applicant from the office of Commissioner of Police. In rhythm with its heading, the Applicant was suspended from the office with immediate effect.

[9] On the same 6th January 2020, the 1st Respondent appointed Deputy Commissioner Sera Makharilele who is described as a junior most Deputy to act as a Commissioner of Police.

[10] In another startling development on 9th January 2020, the 1st Respondent withdrew the suspension of the Applicant and consequently by the consent of the lawyers for parties, my other senior brother Monapathi J made a final order inscribed in these terms:

1. The letter of suspension of the Applicant from the office of the Commissioner of Police by the 1St Respondent , dated 3rd January 2020, is hereby withdrawn, to the extent that it deals with the issue of suspension.

2. The Letter of Appointment dated the 6th January 2020 appointing Mr. Sera Makharirele to act as the Commissioner of Police is hereby withdrawn.

3. Respondents to pay costs of the application to the Applicant, including wasted costs for two days.

[11] The chronology of the events took yet another mind testing turn in that notwithstanding the order of the Court reflected in the preceding paragraph, on the 10th January 2020, the 1st Respondent forwarded a letter to His Majesty the King advising him to appoint Assistant Commissioner Janki Hlaahla as a Commissioner of Police. The advice to His Majesty was described as having been authored in terms of Section 147 (3) of the Constitution of Lesotho[3] read together with Section 5 (2) of the Police Service Act[4] 1998. The advice was said to be sequel to **the retirement of the Applicant**. To illustrate the point, the Applicant was even referred to as a former Commissioner. The intended commissionership of Janki Hlaahla was to be effective from the same date. On account of the significance of the letter under consideration, it is for the sake of a

[3] 1993
[4] 1998

comprehensive appreciation of the case, worthwhile to project it hereunder. It stands thus:

GS/MIN/11/1/2 10th January, 2020

His Majesty King Letsie III
Royal Palace
MASERU

Your Majesty,

APPOINTMENT OF COMMISSIONER OF POLICE

Pursuant to Section 147 (3) of the Constitution of Lesotho, 1993 read together with Section 5 (2) of the Police Service Act, 1998, I wish to advise Your Majesty to appoint Mr. Jankie Hlaahla as the Commissioner of Police with effect from 10 January, 2020.

This decision follows the retirement of the former Commissioner of Police.

If it pleases Your Majesty to accept this advice, I attach herewith Legal Instruments for Your Majesty's signature.

Due to the sensitivity of the current situation with The Police Service, may it please Your Majesty to treat this matter with utmost urgency that it deserves. Your Majesty is hereby advised to act in accordance with my advice on/or before 12:00 noon on the 10th January, 2020.

Your Majesty should take notice that if by 12:00 noon Your Majesty has not acted on the basis of the advice given, I shall invoke the provisions of Section 91 (3) of the Constitution of Lesotho.

Your Majesty's Most Obedient Servant.

DR. MOTSOAHAE THOMAS THABANE, MP
PRIME MINISTER

[12] A paradox is that it further emerged as common cause between the lawyers acting for both sides that despite a

representation by the 1st Respondent to HMK that the Applicant had retired from office, he had not done so as at the 10th January 2020 and hitherto remains Commissioner of Police.

[13] The presented narrative is self-explanatory on the totality of the catalogue of events and circumstances that occasioned the Applicant to seek shelter underneath the tree of justice of this Court for it to intervene as prayed in the successive phases of this litigation.

The Issues for Determination

[14] Understandably, the fact that the parties agreed on almost all the material facts that constitute a foundation of this case, logically resulted in the outstanding controversies to be on the questions of law simpliciter. So, this rendered the matter to be relatively easier to resolve.

[15] The key issue is on the jurisdiction of this Court sitting in its ordinary jurisdiction to have entertained the matter without declining its competency and, therefore, determined that it should by virtue of being a constitutional case, have been reserved for its sitting as a Constitutional Court. A complementary dimension is that as such, the application ought to have been instituted in accordance with

the Constitutional Litigation Rules[5]. It is specifically on that basis that the assumption of jurisdiction by Monapathi J and his granting of a *rule nisi* order is in the same vein contested.

[16] A rather independent question relates to the competency of this Court to review the decision of the Prime Minister on the grounds raised.

The Case of the Respondents

[17] Their case has to be presented first because they are the ones who, at the commencement of the case raised the points of law questions identified in the issues part of the judgment. It appears wise to be cautioned from the beginning that the Respondents did not dispute any one of the material aspects of the factual landscape presented by the Applicant and that the same occasioned this litigation.

[18] As it has already mentioned, a point of divergence between the parties is founded upon their irreconcilable perception of the relevant laws on the parameters of the High Court in constitutional matters in contradistinction to those it has while constituting itself as a Constitutional Court. A centrepiece of their case is simply that the case ought not to have been brought to this Court since right

[5] L/N No. 194 of 2000

from the onset, it did not have jurisdiction to entertain it, let alone to dispense justice. On that note, they specifically contended that Justice Monapati was not qualified to have confirmed the rule because he was sitting as a Judge of the High Court, which lacked jurisdiction over the matter.

[19] In support of the jurisdictional issue, the Respondents relied heavily upon the Constitutional Litigation Rules[6]. These were made by the Chief Justice in exercising the powers conferred upon [him] under Sections 22(6) and 69(5) of the Constitution. According to them, the Rules assigned constitutional cases to the Constitutional Court and, thereby, excluding the High Court from hearing such matters.

[20] Another technical legal point they advanced was that the Applicant ought not to have approached the Court *ex parte* asking for an interdict since he has not demonstrated that there would be an irreparable harm occasioned if he did not immediately obtain that remedy. They cautioned that this was resorted to under unwarranted circumstances because the 5th Respondent had not yet made a decision. According to them, they should have waited for that moment and then approached the Court for a reviewing of the decision in terms of Rule 50 of the Rules of this Court[7]. They cited the classical case of **Setlogelo v**

[6] L/N No. 194 of 2000
[7] L/N. No. 9 of 1980

Setlogelo[8] in support of their proposition that for the Applicant to have qualified to pray for an interdict, he ought to have demonstrated that at the time he sought for an interdict, he was left without any remedy or otherwise, he would suffer an irreparable harm.

[21] The Respondents further maintained consistently that the Applicant should have waited for the decision because his case is mainly based upon the developments relating to the exercise of the powers of the 1st Respondent under Section 91(3) of the Constitution. To illustrate the point, they pointed out that the Applicant mounted the application after the 1st Respondent had written an advice for HMK to retire him from the Police Service. The move was described as being intended for the enhancement of efficiency in the Police Service.

The case of the Applicants

[22] The Applicant counter argued that they did not *per se* bring the case under Section 91 (3) of the Constitution. Instead, they explained that it is simply an application for the Court to invoke its inherent power to review the decision of the 1st Respondent to advice HMK to retire him from the office of the Commissioner of

[8] 1914 AD 221

Police. On that note, he submitted that the High Court has natural jurisdiction to hear the mater and determine it.

[23] Besides, the Applicant drew to the attention of the Court that Sections 2, 22 and 69(5) of the Constitution establish a direct constitutional review and that constitutional issues may arise directly or indirectly. Moreover, he highlighted that Section 2, 119(1) and section 156(1) of the Constitution authorises the courts to determine the constitutionality of any other law or conduct that could be raised and where possible to bring it into conformity with the Constitution or declare it null and void to the extent of its inconsistency.

[24] He vehemently denied that his case is primarily based upon Section 91 (3) which the 1st Respondent relied upon in advising HMK to retire him from the Service. Instead, he argued that his main case rests upon the decision itself and that he has approached the Court to review same and explained that he has invoked the Section simply to justify the urgency for an interdict asked for. The indication being that he has brought a review case in which he asks the Court to interdict the 1st and the 5th Respondents from acting or making decisions which would lead towards his retirement pending a final determination of the matter.

[25] The charge advanced for the interdict was that the intervention of the Court was urgent because the 1st Respondent has already appointed Assistant Commissioner Hlaahla as a Commissioner of Police and HMK might at any time accept a recommendation for him to be retired as contemplated. He reinforced his case by submitting that the circumstances in which the recommendation that he be retired from the Service and Hlaahla be made Commissioner, demonstrate irrationality and failure to justify a rationalised connection with a desire to facilitate for efficiency in the Police Service.

The legal Matrix and the Decision

[26] It is found logical for the issue on the jurisdiction of this Court to be determined first. Here, guidance would be provided by the relevant constitutional provisions as augmented by common law through case law authorities. To begin with, the High Court is alongside other courts established under Section 119 of the Constitution. Section 22 of the Constitution, empowers it to administer justice in relation to alleged violation of human rights and fundamental freedoms catalogued in section 4 to 21 (inclusive) of the Constitution or its likelihood. This is complemented by giving the Court power to determine such matters.

[27] Thus, the inherent common law authority of the High Court to review the same allegations has simply been perpetuated

constitutionally. A classical case where the innate jurisdiction of the Court to review matters concerning complains about human violations is **Masefatsana Moloi v Comissioner of Police & Another**[9] In that case, Rooney J in asserting the innate jurisdiction of the High Court to review matters concerning violation of human rights declared as *void ab initio* a provision in the Internal Security Act[10] that purported to exclude the power of the Court to automatically intervene accordingly. The Judge warned in certain terms that whenever human rights were at stake, the High Court naturally assumes jurisdiction and that otherwise the courts would be rendered meaningless. Understandably, that would be a recipe for dictatorship and rule by arbitrariness.

[28] It is trite law that jurisdiction assigned to any Court is done statutorily inclusive of the Constitution. The Constitutional Litigation Rules 2000 are simply intended to prescribe procedure in respect of the **practice and procedure** of the High Court in accordance with Section 22 (6) and 69 (5) of the Constitution. The Rules cannot exclude the authority of the High Court to hear and resolve constitutional matters regardless of whether they are brought before it directly or indirectly. An entrenched principle of interpretation is that a court of law should be inclined to a view that it has jurisdiction than otherwise. The construction is intended to

[9] 1982-84 LLR P 58
[10] Act No. 24 of 1984

facilitate for citizens to obtain justice except where the law provides otherwise in clear terms.

[29] Perhaps, it should be over emphasized that in Lesotho the High Court is the one that constitutes itself into a Constitutional Court which is presided over by a minimum of three judges whenever there is a constitutional matter. There is no statutorily creation of a Constitutional Court. The Constitutional Litigation Rules simply provides a procedure to be followed in constitutional litigation. This could be attributable to the fact that actually there are few cases for now strictly requiring the attention of a dedicated Constitutional Court as most of the cases filed for hearing by that Court do not pass the constitutional avoidance test[11] since the issues alleged could be resolved through other courts or ordinary judicial avenues. More often than not, the Constitutional Litigation Rules are abused.

[30] The imperativeness of Section 2 of the Constitution which subjects our democracy under Constitutional Supremacy as opposed to Parliamentary Supremacy, inherently provides for the Judiciary to ascertain that all laws are consistent with the Constitution and to declare them void to the extent of their inconsistency with it. Section 119 (1) of the Constitution enjoins the

[11] This is a criterion for determining if a case filed cannot be resolved in any court of competent jurisdiction besides the Constitutional Court. if so, it is dismissed.

High Court with the same jurisdiction over the administrative decisions or acts of state agencies and tribunals. It provides:

> "There shall be a High Court which shall have unlimited jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions of proceedings of any subordinate or inferior court, court martial, board, or officer exercising judicial, quasi–judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law."

[31] The Section 2 and 119 (1) constitution scheme is to empower the High Court to ascertain through the reviewing procedure that the laws passed by Parliament and the administrative decisions are made within the context of the *text, spirit and purport of the Constitution.*

[32] Constitutional democracy is *inter alia* characterized by *Separation of Powers* with an *Independent Judiciary* and good governance. It is only in that environment that human rights and fundamental freedoms could be realizable and consequently meaningful economic development. This is so well mindful that in some African jurisdictions economic development was experienced under benevolent dictatorship and met serious challenges or collapsed under a democratically elected leadership. This could be an attestation of an empirical testimony that **patriotism is an indispensable prerequisite in the leadership of any**

country. The rest of the credentials including educational qualifications may be secondary.

Determination of the Jurisdictional Question

[33] In principle, the Applicant brought an application in which he asked the Court **to review the rationality in the process and the decision of the 1st Respondent to advise HMK that he be retired from the office of a Commissioner of Police and that Assistant Commissioner Hlaahla be appointed the Commissioner.** The Applicant in an endeavour to preserve the *status quo,* prayed for an interdict against the 1st and 5th Respondents to proceed on with the legal transactions that would culminate into his retirement pending a finalization of the case by this Court. It is not disputed that the move was not taken in accordance with the Rule 50 format for a review application. Case law directs that use of the Rule is optional and that an Applicant for review could simply follow the ordinary common law format.

[34] The Court fully appreciates that the Applicant has in pleading his case for the interim interdict repetitively referred to Sections 2, 4 to 21, 22, 69(5) and in particular 91 (3) of the Constitution and laboriously advanced lengthy jurisprudence on those provisions. It is worthwhile to disclose that there were moments when the mind of the Court tilted towards mistaking the matter for a constitutional one. The Counsel for the Applicant who is incidentally a Law professor understandably pontificated extensively over constitutional jurisprudence.

[35] It would have been strategically save for the Counsel for the Applicant to lay more emphasis upon the fact that in the main, he is before the Court to ask for an interim interdict. In the same vein, he should have realized that the predominance of his constitutional references, could easily create a misdiagnosis that it is a constitutional matter. It is precisely on that account that the Respondents identified it as such and, understandably, challenged the jurisdiction of the Court and submitted that it should have been filed in the Constitutional Court. Resultantly, a lot of time was unnecessarily devoted on that point.

A Synopsis of the Applicant's Case

[36] Briefly, the Applicant brought an application for an **interim interdict** against the 1st and 2nd Respondents. This was in consequence of a letter in terms of which the 1st Respondent advised HMK to retire him from the Service and then appoint Assistant Commissioner Hlaahla to replace him. The interim relieve was intended to allow the Court to finalize the matter by either confirming or discharging it. The Applicant reacted so with a hope that when the merits of the case are traversed, there would be a revelation that the contextual developments at the material times including the advice given to HMK, violated the *principle of legality* and were *irrational.* It is precisely on that basis that the Court is asked to review the acts and the decision *in casu*.

[37] The Court is fully aware that it was relatively inescapable for the Applicant to refer to the constitutional provisions and the corresponding jurisprudence. To illustrate that, it was relevant to project the significance of Section 2 to demonstrate supremacy of the Constitution and to the role it assigns to the High Court to superintend over as so empowered under Section 119 (1) to *inter alia* review the decisions taken within the corridors of power. This is typically a case of that nature. Moreover, it was pertinent to refer to 22 since it provides a mechanism through which a violation of the human rights listed from Section 4 to 21 could be judiciously addressed. Section 91 (3) upon which the counsel for the Applicant devoted a considerable amount of time, is appropriate because it is through its instrumentality that the 1st Respondent advised HMK to retire the Applicant and appoint his replacement.

[38] Notwithstanding the analysed relative value of the constitutional provisions referred to, they are not found to constitute the real basis of the application. Instead, they exist as incidental references for the purpose of a presentation of a holistic picture of the case and its implications on the rule of law, separation of powers, actual or potential violation of the rights of the Applicant. To illustrate the point the Applicant has specifically mentioned Section 91 (3) to support his fear that ultimately the 1st Respondent would use it to retire him from the Service. He is, in my understanding suggesting that there is a potential threat against his

right of employment to remain in office until he reaches a normal age of retirement or lawfully retired.

[39] It must be realized that it is normal for a civil or criminal case to incidentally assume a constitutional dimension without necessarily transforming itself into a constitutional matter. The present case is one such scenario. Resultantly, a proposition that the matter is intrinsically constitutional and should be heard before the Constitutional Court, is found to have no merit.

Has the Applicant Satisfied Requirements for Interim Interdict?

[40] To answer the Question guidance is provided in the classical case of **Setlogelo v Setlogelo**[12] that has decades to date been quoted with approval in South Africa, Lesotho and abroad as an outstanding authority of the subject. In that case, it was stated that an Applicant who claims an *interim interdict* must establish:

(a) a prima facie right even if it is open to some doubt;

(b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;

(c) The balance of convenience must favour the grant of the interdict and;

(d) The applicant must have no other remedy.

[12] 1914 AD 1914 221

[41] The Applicant has satisfied the requirements for an interdict. This is so, because he has established a *prima facie case* by projecting a picture that the 1st Respondent is irrationally taking measures to retire him and advanced documentary evidence to support that. This suffices for the purpose of presenting a *prima facie* case irrespective of whether that could be open to doubt. The letter to HMK is an indication that he may in the circumstances, act as advised. In the event that HMK declines to so act, the 1st Respondent may endorse the advice and *ex lege* the act would be deemed to be that of HMK. The High Court sitting in its ordinary jurisdiction has the original competency to review the acts and the decision complained about and to issue a temporary interdict pending the finality of the case. There is no other contemplatable remedy besides that interdict. In the circumstances, the balance of convenience justified the granting of the interdict sought for. Otherwise, an irreparable harm could have resulted.

[42] The interim interdict sought for in this matter, should be appreciated within the context of a *Separation of Powers.* This is because here the Applicant is asking the Court to review the exercise of power by the Executive with a view to determine its legality and rationality. In **Johannesburg Consolidated Investment Company v Johannesburg Town Council**,[13] the court held:

[13] 1903 TS 111; Marbury V Madison 5 US 137 (1803)

> "Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature; it is a right inherent in the Court."[14]

[43] Against the backdrop of the stated constitutional provisions which provide the Court with powers of review, relevant cases cited and the exposition in **Johannesburg Consolidated Investment Company (supra)**, it is found that the Applicant made a case for the relief sought.

Question of the Conduct and Rationality of the Decision of the Prime Minister

[44] The inquiry should be premised upon Sections 1 and 2 of the Constitution read together. The former declares Lesotho as a democratic Kingdom while the latter provides for the supremacy of the Constitution. The scheme naturally commits the country under the *rule of law* and democratic governance which is in the main characterized with good governance, separation of powers, respect for human rights, accountability and transparency.

[14] Ibid, 115.

[45] Thus, on the 16th June 2017, the 1st Respondent at his inaugural ceremony took a solemn oath of office in which he *inter alia* undertook to rule in accordance with the Constitution with outmost good faith. Then, he took an oath of allegiance in which he swore to bear true allegiance to HMK according to the Constitution and the laws of Lesotho. Interpretatively, this meant that he would lead a democratic governance that would comply with the doctrine of legality. The notion was described as an integral part of a constitutional democratic rule in **Democratic Alliance v President of South Africa**[15] and rationalization of its administrative acts and decisions. Equally, in **Albutt v Center for Study of Violence and Reconciliation[16],** it was warned that the Executive under a constitutional democracy must act rationally. These attributes were more comprehensively explained by Chaskalson CJ (as then was) in **Phamaceutical Manufactures v Association of SA – in Re Ex Parte President of the Republic of South Africa[17]** in these words:

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

[15] 2019(11) BCLR 1403 (CC) (Appointment of Similane)
[16] 2010(3) SA 293 (CC) (means adopted by President to pardon persons convicted of crime, not rationally connected/related to the purpose; victims and families not given opportunity to be heard)
[17] 2000 (2) SA 1 (CC) para 90

it does not, it falls short of the standards demanded by our Constitution for such action"[18].

[46] So far, the Court appreciates the jurisprudence advanced by the Counsel for the Applicant that the Executive must author high-policy or broad direction-giving powers:[19] coordinate the formulation of policies, oversee the implementation of laws and policies. In addition, that these should be pursuit in accordance with the rule of law, the principle of legality[20] and accountability[21]. These are to be complemented with a newly developed requirement of rationality in the processes and the decision.

[47] Appreciably, the Applicant initiated these proceedings upon the said prerequisites by charging that the decision of the 1st Respondent to have him retired from the Service, is illegal, unlawful, irrational and fails the legality test.

[48] The crux of the reason that caused the Applicant to bring this review is that the 1st Respondent acted irrationally as it has already been extensively discussed. So, this occasions guidance from a

[18] Para 185

[19] Minister of Defence and Military Veterans v Motau 2014(5) SA 69 (CC), para [37]

[20] PRESIDENT OF REPUBLIC OF SOUTH AFRICA v SARFU 2000 (1) SA 1 (CC), para [148].

[21] SWISSBOROUGH, supra; RAIL COMMUTERS ACTION GROUP v TRANSNET LTD 2005(2) SA359 (CC), para [73] – [78]

legal definition of the concept of 'rationality'. Black's Law Dictionary definition is:

> "Mental state of mind of a person characterized by beliefs that are coherent, purposeful and overall decision making based on **cost versus benefit.** Rationality requires the person to maximise advantages and minimise the disadvantages."

[49] In the context of this case, this simply reiterates the notion that the Constitution demands that decision-making processes within public administration or in the exercise of power by any State authority, must be rationalized. As it has already been stated, this would be so provided there is a connection between the decision and the goal sought to be achieved in the best interest of the citizenry.

[50] Starting with a dimensional charge that the 1st Respondent violated the *principle of Legality,* it should suffice to be determined that the concept is found to be irrelevant in this case. It simply states that the law should be clear, ascertainable, non-retrospective and that no one shall be held guilty of any criminal offence which did not constitute a criminal offence at the time when it was committed. Though the subject was presented with vehemence, the Court never appreciated its relevance and still it does not. Simply put, it has no relevant bearing on the proceedings.

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0A Decision on the Illegality

[51] Though the 1st Respondent has in his letter advising HMK to retire the Applicant from office, stated that he was relying upon Section 5 (3) of the Police Service Act, it does not appear to the Court that he had followed its key requirement. The Section reads:

> The King, acting on the advice of the Prime Minister, may require the Commissioner to retire **in the interest of efficiency and effectiveness.**

[52] It is clear from the provision that the 1st Respondent has the authority to recommend to HMK that a Commissioner be retired **in the interest of efficiency and effectiveness in the Service.** The latter dimension automatically places onus upon him, as a repository of the power, to demonstrate that the methodology he followed and the decision itself would indeed serve that interest. This requires him to discharge an objective test through which it could be ascertained that his decision facilitated towards efficaciousness in the service and this must objectively be seen to be the case.

[53] For the 1st Respondent to prove that he acted on the strength of the objectivity provided for in the Section, he must demonstrate that there are no relevant and material circumstances, which would create a justifiable scepticism on his *bona fides* in the procedures followed and the decision itself.

[54] The undisputed history, the timing of the measures taken by the 1st Respondent, the circumstances surrounding the incidence and the decision for the Applicant to be retired, serves as a guide for determining the *bona fides* of the Prime Minister at all material times and if his decision was exclusively in pursuit of the law. There is further no contestation that the 1st Respondent took steps against the Applicant after the latter had addressed the main letter under consideration to the 1st Respondent. In that correspondence, the Applicant asked the 1st Respondent to provide him with some information relating to the assassination of the late Lipolelo Thabane. This constituted a genesis of the consequent developments thereafter. This is the immediate reason upon which he seeks to sustain his submission that the initiative mounted against him is not in pursuit of any desire to maintain any efficaciousness in the system as contemplated in the Section.

[55] The timing of the letter through which the 1st Respondent requested HMK to retire the Applicant from the Service is material in assessing if it was objectively intended to achieve the Section 5 (3) purpose. Conversely, it facilitates for a determination of a possibility suggested by the Applicant that it is contextually indicative of a manoeuvring by the 1st Respondent to remove him from the Service for his replacement by someone who would frustrate the obtaining criminal investigations against him and his wife. It must throughout the inquiry be borne in mind that it would suffice in a civil case such as this one, for the Applicant to present

a case which on the balance of probabilities could be true. This was stated in **Lebohang Sehlabi v Kobeli Molemohi**[22] that in a civil claim, the standard of proof is on a preponderance of probabilities.[23]

[56] It must be underscored that what is of central importance for analysis here is whether the 1st Respondent has in the circumstances demonstrated, exercised his powers under Section 5 (3) in good faith and in pursuit of the achievement of *efficiency* and *effectiveness* in the public service as envisaged therein.

[57] It is not in dispute in the instant case that at the time the advice was addressed to HMK, the Applicant had just served the 1st Respondent with a letter in which he requested the latter to provide him (The Applicant) with information pertaining to the assassination of the late Lipolelo Thabane. A supportive allegation was that his cell phone was used in what appears to be a coordination of the logistics leading to the murdering of the deceased. Simultaneously, the Court takes judicial notice that the police have recently summoned the wife of the 1st Respondent Maessiah Thabane to furnish them with some information about the incidence.

[58] The heading of the letter under consideration is, for the purposes of Section 5 (3), of vital significance because it provides its subject

[22] CIV/T/518/2007
[23] Ibid Para 7

matter, its purpose and parameters. Of paramount importance, it establishes basis for a determination of its compliance with the Section. It is headed, " **Suspension** or **Retirement** from the office of Commissioner of Police". (Court's highlight). There must be a realization that in clear terms, the Section sanctions the 1st Respondent to advise HMK to **retire** a Commissioner of Police in the interest of *efficiency* and *effectiveness* in the Police Service. It does not in any manner whatsoever, gives him the authority to *suspend* him from office pending the decision of HMK.

[59] Parliament certainly knew about *suspension* as a substantive term and even its procedural requirements. It has, nonetheless, in its wisdom only empowered the 1st Respondent to advice HMK to retire the Commissioner in favour of the stated objective envisaged therein. The advice to HMK to ***suspend*** *or* ***retire*** the Applicant creates uncertainty. On the other hand, the word *suspend* is *ultra vires* the Section since, as it has already been cautioned, there is no provision for that interim intervention. In terms of Section 5 (3), a Commissioner can only be retired from office after HMK upholds a recommendation that it be so. In the alternative, this could be so where HMK withholds his approval and then the Prime Minister endorses the instrument retiring the concerned Commissioner. It is in that exigency that the endorsement shall be deemed to have been done by HMK.

[60] It is found inconceivable in law that the 1st Respondent had the authority to forthwith *suspend* the Applicant from office pending a resolution of the advice by HMK. Instead, the latter should be accorded due time to consider the recommendation since he is entitled to ask for its elucidation before making a decision thereon. The fact that he is a Constitutional Monarch does not deprive him of a human right to thoughtfully consider any advice that he is requested to endorse by placing his signature and royal seal thereon. His judgement and conscience as a human being should be recognized.

[61] HMK is analogously to all State Officials, entitled to a presumption of law that he always acts correctly, timeously, and in good faith *Omnia praesumuntur rite esse acta.* It sounds unorthodox for the Prime Minister to give HMK an ultimatum for him to act as requested. Equally, the Applicant must accord the 1st Respondent the protocols and privileges he deserves as a sitting Prime Minister. There must be reciprocity of respect amongst high-ranking State officials to set a good example that would transcend throughout the public service and the nation.

[62] A methodology followed towards the achievement of the objective in the Section must be seen to originate from *bona fide,* accurate and sufficient basis. In the instant case, the parties have agreed that the foundational reason advanced by the 1st

Respondent that the Applicant be retired from the Service, was not true. This constituted of a misrepresentation to HMK that the Applicant be retired because he had already retired himself. It is not conceivable that a State Official of the status of the 1st Respondent and his duration on earth could deliberately mislead HMK. The Court instead believes that he was for whatever reason intentionally or inadvertently misled by his advisers. Perhaps, he should in future detail the Director – General of the National Intelligence Service to verify the information given to him by other sources on matters concerning high profile State Officials.

[63] The Court has dedicatedly addressed its mind to a catalogue of a history of disciplinary, unprofessional and administrative offences that the 1st Respondent has cited against the Applicant. A resultant picture is in a summarized version that he is unfit to continue holding the office of a Commissioner of Police and that he is landing police institution into disrepute. Thus, the 1st Respondent has deposed that he resolved that it would be a dereliction of duty on his part if he does not initiate a process towards retiring the Applicant.

[64] The 1st Respondent illustrated his case against the Applicant by making reference to a number of incidences where he undermined rules of State protocol by failing to observe them. In that respect, it was indicated that sometime in 2015, he did not accord the now

retired Deputy Prime Minister Mothejoa Metsing the complements and verbally boasted about that. The most worrisome charge cited by the 1st Respondent against the Applicant concerns what is described as an unprecedented rising statistics of criminal suspects who die in police hands. It was nevertheless, stated that he has never acted against such acts of brutalities by police. The Court is also concerned with the charge that the Applicant has committed an act which borders on contempt of Court in that notwithstanding its order for the promotion of the applicants in **Ramphielo & Others v Compol & Others**[24]; he has hitherto not complied with it.

[65] There must be recognition that the Court well appreciates the series of narratives regarding disciplinary, unprofessional and administrative accusations, which the Prime Minister has deposed to against the Applicant. The same applies to the illustrative revelations through which he sought to elucidate the basis of his decision to move towards his retirement from office. This notwithstanding, there must be a corresponding acknowledgment of the technical legal limitations for the Court to conclusively pronounce itself over this dimensional subject matter. The complexity arises primarily from the fact that the parties did not complete their pleadings over it. This is so because the Applicant responded to the allegations by requesting the 1st Respondent to provide him with a number of further particulars[25] so that he could

[24] Civ/ Apn/93/2018

[25] This procedure originates from common law though now provided for under Rule 25 (1) to provide a party requesting same to be furnished with some information to enable him to answer the relevant averments

plead over them. It should suffice to be mentioned that the 1st Respondent simply ignored that and proceeded on to advise HMK to retire the Applicant from the Service. Consequently, the story remained unfinished.

[66] Assuming without reaching any finding on the merits of the accusations, the Court finds it perplexing that there is no indication of corrective, disciplinary or in the worst scenario, criminal action mounted against the Applicant at the material times. It was incumbent upon the authorities concerned to have done so at the appropriate moments to demonstrate good faith and enthusiasm to maintain efficiency in the police administration as expected under Section 5 (3). The narrated alleged transgressions committed by the Applicant against the spirit of the Section, rendered it incumbent for the Minister of Police to have initiated the appropriate action against him. It for incidence, makes no sense why nothing was done after he had contemptuously failed to salute the Deputy Prime Minister. All that the Court can do without necessarily making any finding thereon, is to caution against such a behaviour for whatever expediency it may have been intended.

[67] The deposition made by the 1st Respondent relating to a demeaning and unprofessional attitude which the Applicant is said to have shown to the Deputy Prime Minister before he became a

containing the charges. A party from whom the request is sought could apply for its dismissal upon the basis that there is no need for those particulars since the answer could be given without them.

Commissioner, is watered down by the fact that after the incidence, he found him fit to be appointed Commissioner of Police. This also compromises the credibility of his evidence on that point.

[68] Above all, it remains puzzling that *ex facie* the papers before the Court, there is further no indication that any action was taken against the Applicant for seemingly condoning the killings of a considerable number of criminal suspects by the police. The Court takes judicial notice of the outcry raised by the public about that. Surely, the Government ought to have explicitly intervened by seeing to it that action was taken against whoever was directly or indirectly a culprit.

[69] It is not found necessary to address a counter charge made by the Applicant that the 1st Respondent had instigated the police to brutally treat criminal suspects. The understanding of the Court is that irrespective of public statement made by a politician, be it lawful or otherwise, a policeman remains duty bound to adhere to the law and act professionally. In any event, the prevailing political dynamisms and uncertainties, dictate that strong and professional institutions which committedly operates within the legal and ethical framework, represents the last salvation in our African countries. Otherwise, there would be a disaster for the continent.

[70] On the controversy concerning whether or not the 1st Respondent had in the circumstances, acted rationally both procedurally and in the merits, the Court receives guidance from the case of **Democratic Alliance v President of RSA**[26] where it was enunciated that for a decision to be rational, a process leading to it must also be rational.

[71] The process dimension in this case, commenced from the moment the Applicant wrote a letter to the 1st Respondent requesting him to explain the involvement of his cell-phone in the assassination of Lipolelo Thabane. In response, the latter send him to a forced leave. It does not emerge that the 1st Respondent had previously lodged any complaint against the Applicant or initiated any measure for his inefficiency or ineffectiveness as contemplated in Section 5 (3) of the Police Act.

[72] The 1st Respondent ought to have taken into consideration that it would compromise a legal requirement of rationality in the process aimed at advising HMK to retire him from the office of the Commissioner of Police. Moreover, it became obligatory for him to have realized that the timing of his subsequent actions would create scepticism on his *bona fides* and rationality. These are the material factors that he ought to have taken into consideration before commencing with the process so that he would not be

[26]2013(1) SA 248 (CC) Para 34

misinterpreted for having exploited the Section to rescue himself from the predicament.

[73] The rationality in the process, was subsequently undermined by the fact that the 1st Respondent pursued his mission to remove the Applicant from the office even after the Court had interdicted him from doing so pending finalization of the application. This borders on a contempt of Court which sets a bad example for a Prime Minister to do. There is a wise expression that *we must all be slaves of the law to be free*.[27]

[74] It was certainly a misrepresentation by the 1st Respondent to have advised HMK that the Applicant has retired from the Service and, therefore, he is at liberty to endorse that. It sounds impossible that the Prime Minister could deliberately misinform HMK contrary to the oath of allegiance in terms of which he undertook to be loyal to him. This is most likely attributable to some inadvertence by a less careful official in the Service of the Government of HMK. This notwithstanding, the process is by operation of the law, tainted with irrationality because he ought to have verified the correctness of the information before advising HMK to act upon it.

[27] Marcus Tullius Cicero in the Spirit of the Law

[75] A fatal aspect in the case presented for the 1st Respondent is that he has not established jurisdictional facts to justify his initiation of the processes intended to culminate in the retirement of the Applicant. This is demonstrated by lack of any background evidence that he had before the incidence, charged the Applicant for inefficiency and/or ineffectiveness in the administration of police affairs in accordance with Section 5 (3). The view is attested to by a plethora of the complaints that he now levels against the Applicant.

[76] A penultimate interjection which in the circumstances of these proceedings is found indispensable to avoid a misinterpretation of the judgment is to emphatically caution that the word **'purporting'** used in the prayers and so, consequently, in the final order of the Court, should be comprehended in its **legal and technical sense.** Otherwise, there could be a confusion that the orders involving that technical word, denotes that the repositories of the powers in terms of the Constitution, are estopped from exercising them. Instead, the underlying jurisprudence is simply that such powers should be exercised legally including constitutionally, in good faith, demonstratively rationally and lawfully.

[77] In the premises, it is found that the Applicant has on the balance of probabilities proven that the 1st Respondent acted illegally,

irrationally and, consequently, unlawfully. Resultantly, it is finally ordered as follows:

1. The 1st Respondent is interdicted and restrained forthwith from advising His Majesty the King (5th Respondent) to require the Applicant to retire from the Office of the Commissioner of Police, pending the final determination of this application;
2. 1st Respondent is interdicted and restrained forthwith, from **purporting** to act on the basis of Section 91 (3) of the Constitution of Lesotho to retire the Applicant from the Office of the Commissioner of Police, pending the final determination of this application.
3. The 1st Respondent is interdicted and restrained forthwith, from **purporting** to act on the basis of Section 91 (3) of the Constitution of Lesotho to retire the Applicant from the Office of the Commissioner of Police;
4. In the event of the 5th Respondent having already acted on the advice by the 1st Respondent to retire the Applicant from the Office of the Commissioner of Police on the institution of these proceedings, the legal instrument and/or document to that effect, is held inoperative;

5. In the event of the 1st Respondent having acted on the basis of section 91(3) of the Constitution of Lesotho **purporting** to retire the Applicant from the office of the Commissioner of Police on the institution of these

proceedings, the legal instrument and/or document to that effect, is held inoperative;

6. The advice of the 1st Respondent to His Majesty the King to require the Applicant to retire from the Office of the Commissioner of Police is reviewed, corrected and set aside for the reason that it is irrational and illegal, and therefore unlawful and of no force and effect in law;

7. The **purported** exercise by the 1st Respondent of any power under section 91(3) of the Constitution of Lesotho to retire the Applicant from the office of the Commissioner of Police is reviewed, corrected and set aside for the reason that it is illegal, and therefore unlawful and of no force and effect in law.

8. Any legal instrument and/or document proclaiming the retirement or **purporting** to have the effect of retiring the Applicant from the Office of the Commissioner of Police, published under the authority of the 5th Respondent or published pursuant 1st Respondent's **purported** exercise of powers under section 91(3) of the Constitution of Lesotho, is declared to be unlawful and of no force and effect in law;

9. The retirement of the Applicant by 5th Respondent, acting on the advice of the 1st Respondent, and/or by the 1st Respondent, **purporting** to act on the basis of section 91 (3)

of the Constitution of Lesotho, is declared to be unlawful and of no force and effect in law.

10. Costs of this application are awarded against the 1st Respondent (Inclusive), including the costs consequent upon the employment of two counsel, on the ordinary scale.

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EFM MAKARA
JUDGE

For Applicant : Adv. S. T. Maqakachane assisted by Adv. K. Nyabela

For Respondents : Mr. Cronje Appearing with Attorney General Adv. H. E. Phoofolo KC