IN THE HIGH COURT OF LESOTHO

HELD AT MASERU	**CIV/APN/463/2020**
In the matter between	
MAHLOMOLA MOSES MANYOKOLE	**1st APPLICANT**
DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES	**2nd APPLICANT**
AND	
THE PRIME MINISTER	**1st RESPONDENT**
THE MINISTER OF JUSTICE AND LAW	**2nd RESPONDENT**
THE CHIEF JUSTICE	**3rd RESPONDENT**
THE ATTORNEY GENERAL	**4th RESPONDENT**
TRIBUNAL ON THE REMOVAL OF DIRECTOR GENERAL OF THE DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES	**5th RESPONDENT**
JUSTICE TEBOHO MOILOA	**6th RESPONDENT**
JUSTICE SEMAPO PEETE	**7th RESPONDENT**
JUSTICE POLO BANYANE	**8th RESPONDENT**

Neutral Citation: Mahlomola Manyokole & 1 v The Prime Minister & 7 Others (CIV/APN/463/2020) [2021] LSHC 02

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **14TH JANUARY 2021**

DATE OF JUDGMENT: **18TH FEBRUARY 2021**

SUMMARY

AMINISTRATIVE LAW: *Whether the Director General of the DCEO should have been heard before the Tribunal is appointed to probe his fitness to hold office- Held that that he was entitled to be heard, however the application failing of the basis that on the circumstances of the case he was treated fairly- Independence of the DCEO- Held, that the independence and autonomy of the DCEO is not undermined by following a statutory procedure meant to determine DG's probity to hold office-Disqualification of the tribunal's chairperson, whether it should be sought before this court-Held, that disqualification of the chairperson should be sought before the same chairperson and only in the event the chairperson unmeritoriously refusing to recuse himself can resort be made to the court.*

ANNOTATIONS

Legislation:

Prevention of Corruption and Economic Offences Act 1999 as amended by Act No.8 of 2006

Books:

Loots C "Ripeness and Mootness" in *S Moolman, M Bishop (ed) Constitutional Law of South Africa*

Cases:

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1); 1999 (10) BCLR 1059

In re: Certification of the Constitution of the Republic of South Africa [1996] ZACC 26; 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) at paras. 108 – 109

Motata v Minister of Justice and Correctional Service and Another (52010/2016) [2016] ZAGPP HC 1063; [2017] 1 All SA 924 (30th December 2016)

Economic Freedom Fighters v Godhan and Others; Public Protector and Another v Godhan and Others 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) (29 May 2020)

Henri Viljoen (PTY) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O)

Justice Kananelo Mosito v The Government of Lesotho and 4 Others CIV/APN/193/2016 (unreported)

Wahlhaus and Others v Additional Magistrate Johannesburg and Others 1959 (3) SA 113 (A)

Liyanage v The Queen ('Liyanage') [1967] 1 AC 259

Swissborough Diamond Mines (PTY) Ltd and 5 Others v The Military Council of Lesotho and 8 Others LLR (1991 – 1996) Vol. 2, 1481
Setlogelo v Setlogelo 1914 AD 221

Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) 685 (A)

Gool v Minister of Justice and Another; 1955 (2) SA 682 (C)

Ferreira v Levin NO; Vryenhoek v Powell NO 1995 (2) SA 813 (W).
Spur Steak Ranches Ltd v Saddles Steak Ranch 1996 (3) SA 706

National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012)

Matebesi v Director of Immigration and Others (C of A (CIV) 2/96) [1998] LSCA 83 (31 July 1998
Secretary of State for Education and Science v Tameside Metropolitan Borough Council (1977) AC 1014

National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 227 (SCA)
The Law Association of Trinidad and Tobago v The Honourable the Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie Civil Appeal No. P075 of 2018

Reese v Crane [1994] 2AC 173 PC

President of the Court of Appeal v The Prime Minister (C of A (CIV) No.62/2013) [2014] LSCA 1 (04 April 2014)
Brigadier Mareka and 22 Others v Commander Lesotho Defence Force (C of A (CIV) 52/2016) 2016] LSCA 9 (29 April 2016)

The Republic v Chief Justice of Kenya and 6 Others Ex parte Moijo Mataiya Ole Keiwua [2010] eKLR

Mofoka v Lihanela LAC (1985 – 1989) 326

Articles:

K. O'Regan "CHECKS AND BALANCES Reflections on the Development of the doctrine of separation of powers under the South African Constitution" ***PER/PELJ 2005 8 (1).***

Gerangelos, Peter "The separation of powers legislative interference with judicial functions in pending cases" ***[2002] 30(1) Federal Law Review 1*** (accessed on classic.austlii.edu.au on 10th January 2021)

G. Geyh *"Rescuing Judicial Accountability from the Realm of Political Rhetoric" (2006)* available at core.ac.uk

MOKHESI J

[1] **INTRODUCTION**

The 1st Applicant is a Director General (D.G.) of the Directorate on Corruption and economic Offences (DCEO). The DCEO was established in terms of the **Prevention of Corruption and Economic Offences Act 1999** as amended by Act No.8 of 2006(hereinafter 'the Corruption Act'). This application was lodged on an urgent basis seeking interim and substantive reliefs in the main. He is seeking a review of the 1st respondent's decision to appoint a Tribunal to probe his incapacity and/or misconduct in terms Sections 4(3) – (6) of the Corruption Act. I revert to the grounds of review advanced by the applicant in due course.

[2] **BACKGROUND FACTS**

Although this matter is heavily laden with sensationalism, factual fire and fury which are totally ungermane to its determination, its factual background is, however, largely common cause. On the 10th December 2020, the 2nd respondent (Minister of Justice) authored a correspondence to the 1st applicant in terms of which he sought representations(first show-cause letter) from the latter why he could not be suspended from office pending recommendation by the former to the 1st respondent (Prime Minister) to establish a Tribunal to investigate "Your Fitness of Hold Office in terms of **Section 4(5) of the Prevention of Corruption and Economic Offences Act No.5 of 1999** (as Amended)." Aggrieved by this move on the part of the 2nd respondent, the 1st applicant launched a review application challenging that decision, in CIV/APN/451/2020. In the wake of this challenge the 2nd respondent withdrew the show-cause letter presumably upon realization that he had committed fatal procedural missteps. Even though CIV/APN/451/2020 still pends before the court, in

essence, the withdrawal of that show-cause letter had effectively gouged the matter of its substratum.

[3] On the 18th December 2020, unrelenting in his efforts to have the 1st applicant dealt with in terms of the law, the 2nd authored another show-cause letter (second show-cause letter). This time the 1st applicant was informed that the Tribunal had been established to investigate his fitness to hold office, and that, pending that investigative exercise by the tribunal, the 1st applicant was requested to make representation as to why he could not be suspended from exercising the functions of his office pending the disciplinary inquiry by the tribunal. The said tribunal was established in terms of Legal Notice No.139 of 2020 (hereinafter "Legal Notice"). The tribunal's terms of reference were provided in section 2 of the Legal Notice as follows:

> *"Terms of reference*
> *2. The terms of reference of the tribunal are –*
>
> *(a) To investigate and determine the questions of removing the Director-General of the Directorate on Corruption and Economic Offences Advocate Mahlomola Manyokole; and*
>
> *(b) Make recommendations to the Prime Minister as to whether or not Advocate Mahlomola Manyokole ought to be removed, from office."*

[4] It is common ground that when the 2nd respondent made representations to the 1st respondent and the latter deciding to establish the said tribunal, the 1st applicant was not afforded a pre-decision hearing. In a written representation to the 1st respondent, the 2nd respondent detailed what he terms the incidences of misconduct and/or incompetence which he alleged ought to be investigated by the tribunal. The reasons which were posited are materially the same as those contained in the first show-cause

the letter the subject matter of CIV/APN/451/2020 which is yet to be heard save for one allegation appearing in the second show-cause letter to the effect that the 1st applicant should be probed for using 'gratuitous and intemperate language in the affidavits filed of record' against both the 1st and 2nd respondents..

[5] In respect of the second show-cause letter, the 1st applicant did not respond but instead launched the current application on the 31st December 2020. In terms of this show-cause letter which was served on the 29th December 2020, the 1st applicant was given three (days) within which to make written representations, failing which the 2nd respondent would advise the Prime Minister to suspend him. As already said, instead of responding to the show-cause letter, the applicants launched this review application in terms of which they sought interim interdicts against the 2nd respondent advising the 1st respondent to suspend the 1st applicant, pendent lite.

[6] In the main, the applicants sought to assail the decision of the 1st respondent appointing the tribunal variously on the grounds that there was no jurisdictional fact for establishing same and that the decision to appoint the tribunal was made without observing the *audi alteram partem* rule, and therefore constituted an incursion into the independence of the DCEO; that the Legal Notice is void for intelligibility, vagueness and over-breadth and in violation of the Corruption Act; that the decision by the 3rd respondent (Chief Justice) to appoint Justice J.T. Moiloa was irrational as he is the subject of DCEO investigations for transgressions relating to money laundering.

[7] In the interim, the 1st applicant sought an interdict pendent lite against the 2nd respondent advising the 1st respondent to suspend him, and

interim interdict against the 1st respondent suspending the 1st applicant, and further, suspension of his suspension in the event the decision to suspend him being already made by the 1st respondent.

[8] An interim order was made by a Duty-Judge and directives as to the filing of subsequent papers was made, and that parties were directed to appear before court on the 4th January 2021. On that date, the respondents had not yet filed their answering affidavits and the period given to the 1st applicant to respond to the show-cause letter had accordingly lapsed. On that date I was allocated the matter even though I was on duty and I gave directives for filing of the answering affidavits and set down the date for hearing of the matter on the 07th January 2021 for arguments on the interim reliefs. On that date the matter was not ready to be heard as the respondents had not yet again failed to file their answering affidavit. The matter was again set down for hearing on the 14th January 2021. In the meantime, the 2nd respondent had advised the Prime Minister to suspend the 1st applicant from exercising the functions of the office, and on the 07th January 2021 the 1st respondent suspended the 1st applicant as contemplated by the.

[9] In response, the respondents raised two points in *limine*, *viz*, misjoinder of the 2nd applicant (DCEO), and (b) delayed jurisdiction of this court as regards prayer 2.6 of the Notice of Motion: The said prayer reads:

> *"2.6 The decision of the Chief Justice to select JUSTICE TEBOHO MOILOA as a member and chairperson of the tribunal on the Removal of the Director General of the DCEO shall not be reviewed, corrected and set aside."*

[10] After hearing arguments on the 14th January 2021 I determined that the decision of the 2nd applicant seeking representations on suspension of the 1st applicant pending the determination of the main matter cannot be

assailed. Before I deal with this aspect of the case, I wish to deal with the points in *limine* raised by the respondents.

[11] **MISJOINDER**

It is common cause that the DCEO (2nd applicant) is not seeking any relief from the respondents. It is not apparent why it was joined by the 1st applicant in these proceedings nor has it been shown to have any "legal interest in the subject matter of the action… which could be prejudicially affected by the judgment." (**Henri Viljoen (PTY) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 167H).** The present matter concerns the 1st applicant solely and entirely and has nothing to do with the DCEO. I therefore, find that there has been a misjoinder.

[11] **DISQUALIFICATION OF MOILOA J TO CHAIR THE TRIBUNAL: (DELAYED JURISICTION)**

It is the 1st applicant's case that the DCEO is investigating a case of money laundering which involves the learned Judge for acts supposedly done during his tenure as a partner in the firm of attorneys, Webber Newdigate. The Applicant submits that the case involves Government monies illicitly deposited into the bank accounts of Webber Newdigate as legal fees for his personal benefit by a former Principal Secretary in the Ministry of Finance, one Khethisa. The other case involves the former Chief Executive Officer of Standard Lesotho Bank concerning a house bought by its former Chief Executive with the approval of the Board in which Moiloa J was then its chairman. It is the respondents' argument that jurisdiction of this court is delayed to hear the question whether Moiloa J is disqualified to chair the Tribunal and in support of this contention, this court was referred to the case of **Justice Kananelo Mosito v The Government of Lesotho and 4 Others CIV/APN/193/2016 (unreported)** wherein the decision of

Wahlhaus and Others v Additional Magistrate Johannesburg and Others 1959 (3) SA 113 (A) at 120. The ***Wahlhaus*** decision espouses a principle that the superior courts should be slow to interfere with unterminated proceedings of the lower courts or tribunals. But as I understand the applicant's thrust, it appears to be that he is not seeking relief from this court to interfere with unterminated proceedings, because those proceedings have not even begun. He is rather seeking relief which seeks to disqualify the learned Judge on account of his likelihood of bias and/ or possibly conflict of interest. The question to be probed is whether the route chosen by the applicant in this matter is tenable.

[12] An application to seek disqualification of a Judge or a presiding officer to hear a particular matter as a matter of convention and practice is tenable before the same Judge or presiding officer whose disqualification is being sought, and not from any other forum. The matter of disqualification will only be before the higher courts either by way of review or appeal where the recusal was merited but was refused (review or appeal will lie depending in which forum the presiding officer's disqualification was ought). Dealing with the matter in which the recusal five Judges of the South African Constitutional Court was sought as a constitutional relief before the same court, the Court agreed that it was indeed a constitutional relief, however important to our case, the following apposite remarks were made at paras 31 – 32:

> *"[31] Judges have jurisdiction to determine applications for their own recusal. If a Judge of first instance refuses an application for recusal and the decision is wrong, it can be corrected on appeal…..*
>
> *[32]If one Judge in the opinion of the other members of the Court, incorrectly refuses to recuse herself or himself, that decision could fatally contaminate the ultimate decision of the*

> *court, and the other members may well have a duty to refuse to sit with that Judge….*
>
> *Thus, in In re Pinochet the decision of a panel of a panel of the House of Lords was set aside because one of its five members should have recused himself having regard to his interest in the decision. If follows that if a judge incorrectly refuses to recuse herself or himself the remaining members of a panel should not sit with that Judge as the proceedings would be irregular."* **(President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1); 1999 (10) BCLR 1059).**

[13] It needs to be stated that whether the allegations about the learned Judge are true or not is beside the point, the issue of his recusal or disqualification should be dealt with firstly by him, it is only when he has made decision not to recuse himself and grounds for his recusal exist, that this court can be approached to exercise its review powers. In fact, as the above dicta indicates, other panelists who are also Judges of this court are enjoined to step aside if the learned Judge incorrectly refuses to disqualify himself. In my considered view the issue of disqualification of Moiloa J is prematurely before this court.

[14] I turn now to deal with the interim reliefs sought by the applicant. It is common ground that when the applicant launched these proceedings there was a pending show-cause letter initiating the process of his suspension from exercising his duties and functions as the DG – DCEO. A specific prayer was sought interdicting the 2nd respondent from advising the 1st respondent that the 1st applicant be suspended, and that in the event that the 1st respondent acts on the basis of the 2nd respondent's advice to suspend the applicant, that such suspension be suspended pending the final determination of this matter. It is common ground that pending the hearing of this matter, the 2nd respondent advised the 1st respondent to suspend the applicant, and indeed he was accordingly suspended. This suspension was

effectuated although the issue of the interdict against 2nd respondent advising the 1st respondent not to suspend the applicant was yet to be argued and determined by this court.

[15] After hearing argument I made the ruling that the interim reliefs should not be granted and promised to provide reasons for that decision. The following are those reasons. The applicant had sought suspension of the decision of the Prime Minister to suspend him on just and equitable considerations on the strength of the authority of **Economic Freedom Fighters v Godhan and Others; Public Protector and Another v** G**odhan and Others 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) (29 May 2020)** at paras 113 – 115) (hereinafter "EFF case").

[16] On the other hand, Mr. Rasekoai for the respondents (1st – 4th) argued that the 2nd respondents was well within his right to advice the Prime Minister to suspend the applicant because the latter had ignored the show-cause letter but instead launched a collateral challenge to it before this court. He argued further that there being no order prohibiting the Minister from advising the Prime Minister to suspend the applicant, the former was well within his rights to proceed in the manner he did.

[17] In view of the position I take of this issue it is not necessary to determine whether the just and equitable considerations apply as per the applicant's contention. The ensuing discussion will highlight the fallaciousness and untenability of Mr. Rasekoai's argument that the Minister of Justice was entitled to disregard the fact that the issue of him advising the Prime Minister to suspend the applicant was pending before this court. Given that the Minister of Justice disregarded the fact that the applicant's suspension was *sub judice* but instead went ahead and recommended suspension, takes the discussion in a different direction from the ones

articulated by counsel on both sides. None of the counsel appreciated that what the 2nd respondent did was a naked usurpation of judicial power and a breach of a hallowed doctrine of separation of powers.

[18] Our constitution assigns specific powers to each three arms of government. Many a treatise have been penned on the separation of powers and nothing more can be said in this judgment; see, for example, K. O'Regan "CHECKS AND BALANCES Reflections on the Development of the doctrine of separation of powers under the South African Constitution" ***PER/PELJ 2005 8 (1).*** Although there is no universal model of separation of powers, what remains unquestionable is that in-built into the doctrine is that the three arms must have functional institutional independence, and that there must be a system of checks and balances in case of intrusion/usurpation. (**In re: Certification of the Constitution of the Republic of South Africa [1996] ZACC 26; 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (C**C) **at paras. 108 – 109).** The interaction between these three arms "is dialectical, at times tense and agonistic, and at other times cooperative and consensual. In this context judicial independence and supremacy are crucial in maintaining the separation of powers. The separation of powers assigns the court their absolutely unique 'function' as the independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislature and executive action measured against the Bill of Rights and other provisions of the constitution…."(**Motata v Minister of Justice and Correctional Service and Another (52010/2016) [2016] ZAGPP HC 1063; [2017] 1 All SA 924 (**30th December 2016) at para. 28:

[19] For present purposes, it needs to be appreciated what judicial power is. Judicial power is a unique power allotted only to the courts of law by the

Constitution to decide cases and live controversies between litigants. The courts do not act as advisors in matters of abstraction but perform that unique function of deciding live controversies between the parties. The court's power is to resolve "an existing or live controversy or prejudice, or threat of prejudice," to the applicant or plaintiff **(**Loots C **"Ripeness and Mootness**" in **S Moolman, M Bishop (ed) Constitutional Law of South Africa p. 7 – 19".**

[20] If judicial power only ensures to the courts, it is apposite to determine how to spot the tell-tail signs of its usurpation by the other two arms of government. The indicia for helping identifying usurpation of judicial function was articulated in the famous case of **Liyanage v The Queen ('Liyanage') [1967] 1 AC 259.** Although the facts of this case relate to legislative usurpation of judicial power, in my considered view it is applicable in this case as far as it provides the indicia for usurpation of judicial power. In ***Liyanage*** the legislative enactment to the Ceylonese Criminal Procedure Code was effected specifically to cater for the situation of people accused of an abortive coup. The substance and thrust of these amendments was to secure the convictions and to enhance sentences of these particular individuals who were already before court. The court stated the indicia (non-exhaustive) which will depend on the factual scenario attendant on any given case that, judicial function was usurped inconsistent with the constitutional doctrine of separation of powers, because; (i) the legislative maneuvers interfered with the specific pending cases of particular individuals who stood arraigned before the court, (ii) these maneuvers interfered with the proceedings and issues which had to be decided in that case, (iii) the legislation further interfered with the court's discretion, judgment and generally, with the purview of the exercise of the court's authority and jurisdiction (at pp 289 – 90) (for discussion of

this case as regards usurpation of judicial function, see: Gerangelos, Peter "The separation of powers legislative interference with judicial functions in pending cases" ***[2002] 30(1) Federal Law Review 1*** (accessed on classic.austlii.edu.au on 10th January 2021).

[21] In this jurisdiction in the case of **Swissborough Diamond Mines (PTY) Ltd and 5 Others v The Military Council of Lesotho and 8 Others LLR (1991 – 1996) Vol. 2, 1481** Cullinan CJ was confronted with an egregious form of executive cum legislative usurpation of judicial functions where the Military Council had enacted the Revocation Order cancelling mining leases of the applicant even though the matter regarding those leases was pending before the court. The learned CJ declared that the Revocation Order did not comply with the law. He proceeded to brand the Military Council's conduct as usurpation of judicial power. The said Order was declared void the *ab initio*, and in developing the point that there was usurpation of judicial power, the learned CJ at p. 1637, said:

> *"There are cases of course where the legislature passes legislation to counter a judgment given by the courts. That regrettably is sometimes the case, but there is no usurpation of the judicial power: the court gives its decision and the legislature has full freedom of reaction thereto. It is altogether a different matter when the legislature itself exercises the judicial power or prevents the court from doing so.*
>
> *In his paper, The Rules Behind the Rule of Law (Edgar Brookes Lecture, University of Natal, 1965) (Acta Juridica) 1965/1966, p. 135) Professor Donald Molteno quoted the following words of James Burham (The Struggle for the World, 1947, p.211):*
>
> > *'At whatever level of social life, from a small community to the world at large, a balance of a power is the only sure protection of individual or group liberties…. If one power outweighs all the rest, there is no effective guarantee against the abuse of that power by the group which wields it … Liberty, always precarious, arises out of the unstable equilibrium that results from the conflict of competing powers.'*

> *It is not a matter of the supremacy of Parliament, nor of the Executive: Neither is it a matter of the supremacy of the judicature. None of them are supreme. It is the rule of law which is supreme, ensuring that each power is exercised within its proper limits. In the present case, the exercise by the Military Council of its powers, constituted not so much an incursion into the judicial sphere, as a deliberate act to prevent the Judiciary from exercising the judicial power within its own sphere. I cannot imagine a more deliberate and direct interference with the judicial power. It is simply not to be tolerated.*
>
> *….The whole Order, as I have said, constituted a legislative plan, the revocation of the leases, which under section 5, in itself preventing the court from determining that very issue, of which it was seized, section 6 and 8 but confirming the court's impotence in the matter. I am accordingly satisfied that the Revocation Order, in its entirety, is void ab initio."*

[22] Turning to the facts of the present matter, the applicant sought an interdict against the Minister of Justice against advising the Prime Minister to suspend him. It is common cause that there was no order prohibiting the Minister of Justice from going ahead to advice the Prime Minister, but for the Minister to go ahead in total disregard of the fact that the very act which he proceeded to effect was *sub judice*, can only be interpreted as a naked act of neutering this court's exercise of its powers to decide that issue. The argument that there was no order stopping him from doing so can at best be described as fallacious, given as I said, the issue was *sub judice*. One would have hoped that the Minister would have been alive to this, but alas that was not to be. In the result the suspension of the applicant is declared void *ab initio*.

[23] The above conclusion does not end the matter here as it leaves the interim reliefs open for determination by this court. The test in respect interim reliefs pendent lite, is trite, as was stated in **Setlogelo v Setlogelo 1914 AD 221 at 227:** The legal requirements are:

(i) Prima facie right for the relief sought even though it may be open to some doubt.

(ii) Well-grounded apprehension of irreparable harm if the interim relief is not granted and he ultimately succeeds in establishing a clear right for the relief sought.

(iii) That the balance of convenience favours the granting of the interim relief, and

(iv) That the applicant has no other satisfactory remedy (see: **Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) 685 (A) at 691 F; Gool v Minister of Justice and Another; 1955 (2) SA 682 (C) at 687 – 8; Ferreira v Levin NO; Vryenhoek v Powell NO 1995 (2) SA 813 (W) at 817 I – 818 B and 824 I – J.**

[24] In determining whether the above requirements have been fulfilled, the following approach must be followed:

> *"In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is prima facie established though open to some doubt.*
>
> *The proper approach is to take the facts set out by the applicants, with any facts set out by the respondents which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.*
>
> *It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms of whereof the court looks at the facts set up the respondent in contradiction of the applicants' case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."* ***(Spur Steak Ranches Ltd v Saddles Steak Ranch 1996 (3) SA 706 at 714 D – G)***

[28] A further important consideration is that since this involves an interdict against a statutory exercise of power by the Minister Justice and the Prime Minister, the temporary relief sought may not be readily granted unless there is a clear evidence of mala fide:

> *"The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict retraining the exercise of statutory power. In the absence of any allegation of mala fides, the Court does not readily grant such an interdict."* ***(Gool above at 688F)***

[29] This decision was followed in **National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012),** and at para. 44 the court said**:**

> *"44. The common law annotation to the* ***Setlogelo*** *test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself."*

[30] It is applicant's argument that he has a *prima facie* right to a temporary interdict in view of the fact that he is a substantive holder of the office of DG – DCEO and that he is entitled to "freedom of its managerial, administrative and operational exercise of functions and responsibility under the DCEO Act 1999". He avers that he will suffer an unstated irreparable harm if his anticipated suspension is effected. As already said the applicant is duty-bound to satisfy the requirements in ***Setlogelo*** before an interim interdict can be issued. On the issue of a *prima facie* right I did

not understand the respondents to be saying the applicant does not have *prima facie* right. The parties are in agreement that the applicant is a substantive holder of the office of the DG – DCEO. On the requirements of absence of satisfactory remedy, it will be recalled that the applicant is challenging the propriety of appointing the tribunal to probe his fitness to hold office and in my considered view, if that challenge succeeds, it will be a satisfactory remedy to all his lamentations.

[31] The applicant links irreparable harm to his debarment from exercising his managerial duties as head of the DCEO and to his security of tenure. As I understand it, the issue of the 1st applicant's debarment from entering business premises in the interim pending the determination of the main issues will possibly be reversed if this court in due course is to find that there is merit in the review of the 1st and 2nd respondents' decisions. Regarding the argument about the security of tenure, it is doubtless that the 1st applicant is still a substantive holder of the position of the DG-DCEO. The impending suspension will, as I understand it, be a precautionary one with full benefits. Given the seemingly toxic environment which prevails at the DCEO, one cannot help it but see the necessity of debarring the 1st applicant from excising his functions in the interim pending final determination of this case and determination of his fitness to hold office by the Tribunal. This conclusion stems from the fact of counteraccusations of dishonesty, backstabbing and collusive behavior in the affidavits between the 1st applicant and one of DCEO's lead investigators, Mr Tlokotsi; For example, the 1st applicant accuses the said Tlokotsi of conniving with the 1st respondent to plot his ouster, and in counter-response, Mr Tlokotsi accuses the 1st applicant of improperly influencing him to implicate the 1st respondent in the saga involving the leasing of Victoria Hotel even though there is no evidence justifying same. In view of these circumstances the

balance of convenience favours seeking the 1st applicant's suspension from office pending determination by the tribunal of his fitness to hold office, for purposes of good administration. In the result, upon the conspectus of all the above considerations the interim reliefs should be refused.

[32] There is also another hurdle which the applicant would have found difficult to clear, and it relates to the question of the 2nd respondent's *mala fide* in issuing a show-cause letter to him. The applicant's basis for accusation of *mala fide*, is that the 2nd respondent had issued him an initial show-cause letter which he withdrew only to re-issue it while the case in which it is challenged has not been finalised. The other reason is that the Tribunal was constituted without affording him a hearing. In my judgment, the issue of the 2nd respondent issuing a show-cause a letter and then withdrawing it cannot be read as malicious. To me it is merely a question of the 2nd respondent realizing that he had committed a fatal procedural misstep. It was well within his rights to retrace the steps and initiate a process which complies with the law. No doubt, the 2nd respondent had terribly misread the law and cannot be faulted when he surrendered in defeat by withdrawing a show-cause letter as he did. The 2nd respondent is empowered by the Corruption Act to suspend the DG – DCEO pending the determination into his fitness to hold office, though it must be stated that he is not bound, but instead ,endowed with a discretion which must be exercised sensitive to the facts of each situation. Apart from the above, all the allegations of *mala fides* against the 1st and 2nd respondents have been disputed. The 1st and 2nd respondents give a full explanation for their decisions which the applicant cannot rejected out of hand as being clearly untenable , far-fetched, uncreditworthy or palpably implausible **(National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 227 (SCA) para.26).** These being motion proceedings, the versions of the

respondents are to be preferred. It follows that the 1st applicant has failed to prove *mala fides* against the 1st and 2nd respondents.

[33] I now turn to deal with the substantive reliefs sought. In order to understand the thrust of the applicant's substantive reliefs it is apposite to reproduce them.

> *"**Substantive Relief***
>
> *2.4. The decision of the 1st respondent to appoint the Tribunal on the Removal of the Director General of the DCEO in terms of Legal Notice No. 139 of 2020 shall not be reviewed, corrected and set aside.*
>
> *2.5. The Legal Notice No. 139 of 2020 appointing the Tribunal on the Removal of the Director General of the DCEO shall not be declared as illegal, irregular, null and void and of no force or effect in law.*
>
> *2.6. The decision of the Chief Justice to select Justice Teboho Moiloa as a member and Chairperson of the Tribunal on the Removal of the Director General of the DCEO shall not be reviewed, corrected and set aside.*
>
> *2.7 it shall not be declared by this Honourable court that the establishment of the Tribunal on the Removal of the Director General of the DCEO by the 1st Respondent, the show-cause letter by the 2nd Respondent dated 29th December 2020 and any suspension of the 1st applicant from the exercise of the functions of the office of the Director General of the DCEO constitute, in the circumstances of the present case, an unlawful threat and violation of the INDEPENDENCE AND AUTONOMY of the DCEO enshrined by the **Prevention of Corruption and Economic Offences Act 1999** as amended.*
>
> *2.8. 2nd Respondent's decision to call upon the 1st Applicant to SHOW CAUSE WHY the 2nd respondent may not advise or recommend to the 1st Respondent to suspend the 1st Applicant from the exercise of the functions of the office of the Director General of the DCEO pursuant to the letter dated 29th December 2020 shall not be REVIEWED, CORRECTED AND SET ASIDE.*
>
> *2.9. 2nd Respondent's letter dated 29th December 2020 calling upon the 1st Applicant to show cause why the 2nd Respondent may*

not advise or recommend to the 1st Respondent to suspend the 1st Applicant from the exercise of functions of office of the Director General of the DCEO, shall not be set aside as illegal and unlawful, null and void and of no force or effect in law.

29.10. In the event of the 1st Respondent nonetheless proceeding to suspend the 1st Applicant from the exercise of the functions of the office of the Director General of the DCEO pursuant to the advice of the 2nd Respondent based on the letter dated 29th December 2020 notwithstanding service and institution of these present proceedings, such decision shall not be REVIEWED, CORRECTED AND SET ASIDE."

[34] **ISSUES FOR DETERMINATION**

(i) Whether the decision of the 1st Respondent to establish a Tribunal can be reviewed and set aside for failure to accord the applicant a pre-decision hearing.

(ii) Whether Legal Notice No. 139 of 2020 can be nullified for being unintelligible, vague and overboard.

(iii) Whether the decision to appoint the Tribunal to probe fitness of the applicant to hold office threatens the Independence and autonomy of the DCEO.

[35] Before I deal with the issues raised in this case it germane to give a legal framework within which the DG – DCEO can be removed from office. The procedure for appointment and removal of the DG – DCEO is provided under s.4 of the Corruption Act, and for present purposes, the said Act provides that:

"4(3) A person holding office of Director [Director General] may be removed from office only for inability to exercises the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be removed except in accordance with the provisions of this section.

(4) The Director [Director General] shall vacate the office if the question of his removal has been referred to a tribunal appointed by the Prime Minister under Subsection (5) and the tribunal has recommended to the Prime Minister that he ought to be removed for inability as aforesaid or for misbehaviour.

(5) If the Minister represents to the Prime Minister that the question of removing the Director under this section ought to be investigated, then –

(a) The Prime Minister shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Chief Justice from among persons who hold or have held high judicial office; and

(b) The tribunal shall enquire into the matter and report on the facts thereof to the Prime Minister and recommend to him whether the Director thereof to the Prime Minister and recommend to him whether the Director ought to be removed under this section.

(6) If the question of removing the Director has been referred to a tribunal under this section, the Prime Minister, acting in accordance with the advice of the Minister, may suspend the Director from the exercise of the functions of his office and any such suspension may at any time be revoked by the Prime Minister, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the Prime Minister that the Director should not be removed."

[36] (i) **Whether the 1st applicant should have been heard before the appointment of the Tribunal.**

In his heads of argument for the 1st to 4th respondents, Mr. Rasekoai, had argued that s.4 (5) excludes the operation of the *audi alteram partem,* and this is how he puts the argument at para. 5.2 of the same.

"5.2 The essential feature that led the courts to this conclusion [the conclusion that audi alteram is not applicable at an investigative stage] is the fact that the investigation is purely preliminary and that there will be a full chance adequate to deal with the complaint later. That the making of the enquiry without observing the audi alteram partem maxim is justified by urgency

> *or administrative necessity,* ***that no serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed exclude such a right to know and reply at the earlier stage." (emphasis added)***

[36] It is notable that during oral submissions, Mr. Rasekoai took an about turn on this position upon realizing that it is untenable and submitted that given the circumstances of this case the 1st and 2nd respondent acted fairly if the factual conspectus of the case is given cognizance to. I deal with this argument in due course. The duty to act fairly has taken root in our law to the extent that it can safely be taken as axiomatic. At the heart of this principle are two important rationale; the duty to act fairly recognizes and respects the person's self-worth and dignity in being treated with respect by requiring an administrator to notify the subject of the adverse allegations being made against him or her and the proposed remedial action intended to be taken against him or her, and secondly, the principle accords the administrator an opportunity to hear the side of the subject's story before making an adverse decision. The process hearing the subject's story aids the administrator in making a decision fully aware of all the facts surrounding the matter. Observed in this fashion this duty conduces to good administration (**Matebesi v Director of Immigration and Others (C of A (CIV) 2/96) [1998] LSCA 83 (31 July 1998).**

[37] Although not specifically stated in the Corruption Act, before the 2nd respondent can exercise his powers to recommend the establishment of a tribunal to probe the fitness of DG–DCEO he is enjoined to undertake an exercise to determine the veracity of the allegations against the DG–DCEO. He cannot merely recommend the establishment of a tribunal to investigate speculative allegations which have no factual and legal grounding, otherwise were this to be the case it would greatly and wantonly

tarnish the reputations of the incumbents of the office of DG – DCEO, and would adversely deal an immortal blow to the independence and autonomy of the DCEO as a white-collar crime-buster. The Minister is also duty-bound to act fairly when considering whether to recommend the establishment of the tribunal to probe the fitness to hold office of the DG – DCEO. These duties were developed by the courts in analogous legislative enactments concerning the removal of Judges from office. The first of those cases is **Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014** (***Tameside***) where the court referred to public functionaries as having "a general basic duty to sufficiently acquaint itself with relevant information before making a decision." (ibid 1065).

[38] The ***Tameside*** duty is an obverse side of public functionaries - in this case the 2nd respondent - acting as "mere conduits, mindlessly and irresponsibly representing that a Chief Justice [DG –DCEO] should be investigated with the possible view to suspension and/or removal" (**The Law Association of Trinidad and Tobago v The Honourable the Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie Civil Appeal No. P075 of 2018** at para. 47 of Jamadar J. A's judgment). And further at para. 48 the learned Judge (ibid) says:

> *"47…… The CJ's argument implies that neither has any public law "Tameside" duty, to fairly and adequately consider and assess relevant materials before making the decision to represent to the President that there is a question of removal.*
>
> *48. In fact, the case law suggests otherwise. In Reese v Crane, at the the pre-section 137(3)(b) and (c) inquiry stage, the Privy Council suggested in the case of a Judge that: (i) the JLSC has a responsibility to evaluate the merits of a complaint before making any representation to the President, and (ii) the Judge ought also to be given notice of the allegations against him/her and a fair opportunity to respond at that stage of the process (i.e prior to the representations to the President). What is being*

contemplated here is an inquiry, even an investigation. Indeed, the evidence in Reese v Crane demonstrates that this is exactly what took place, albeit belatedly."

[39] The decision of **Reese v Crane [1994] 2AC 173 PC,** relied upon in the above decision was also followed in this jurisdiction in the matter of the **President of the Court of Appeal v The Prime Minister (C of A (CIV) No.62/2013) [2014] LSCA 1 (04 April 2014)** (hereinafter "The President of the CA"). This matter dealt with the s.125 of the Constitution regarding the removal of the President of CA. The provisions of s.125 are analogous to the provisions of s.4 of the Corruption Act regarding the removal of the DG –DCEO. It was recognized in the **President of the CA** that the decision to recommend the establishment of the tribunal to inquire into the fitness President of the Court Appeal to hold office has a potential to tarnish the incumbent's reputation and so before the decision to recommend its establishment the incumbent must be afforded a pre-decision hearing.

[40] Inasmuch as the invocation s. 4 on the removal of the DG – DCEO does not specifically require the application of the *audi alteram partem* rule, implicit in its potential to injure the incumbent's reputation is the requirement that the latter be given a hearing before the decision can be made. However, it must be recalled that the duty to act fairly is not cast in granite , and so, to determine whether or not the applicant was treated fairly requires taking into account the facts of each case: In **R v Secretary of State for the Home Department, Ex P. Doody [1994] 1 AC 531, 560** Lord Mustill summed up the principles as follows:

"(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the

passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to ma representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

[41] The above decision was followed in the **Matebesi** case above. It is the applicant's contention that given that the first show-cause letter which was withdrawn, related only to the suspension and not the decision to advice the appointment of the tribunal and that those reasons cannot be held to provide the basis for the establishment of the tribunal. The reasons which animated the initial show-cause letter are materially the same as the ones which predicated the 2nd respondent's representation to the 1st respondent to appoint the tribunal: The letter of representation (annexure "NLM1") alleged incompetence and misconduct on the part of the DG–DCEO which can be summarized as follows:

(i) The DG–DCEO failed to implement sound management system contrary to Regulation 4(1) (c)

(ii) The DG – DCEO unilaterally endeavoured to (without concurrence of the Director of Public Prosecutions) withdraw a criminal case against Ms. 'Mamphono Khaketla or alternatively conducted the

case against Ms. Khaketla incompletely to the point that it is on the brink of it being dismissed.

(iii) Contrary to the directives of the DPP the DG – DCEO despite a directive to the contrary in the case no. D.C.E.O. R.C.U.I. 04/02/19 Rex v Teboho Tlokotsi and five Others: in a charge of bribery conducted a selective prosecution leaving out public officers.

(iv) The DG mishandled criminal cases CRI/T/2/2012 and CRI/T/517/20 with the result that it was its prosecution was permanently stayed.

(v) Failure to complete criminal cases and to submit a comprehensive plan to execute key mandate of prosecuting "the classified crimes both in subordinate courts and superior courts" and therefore negligent in the performance of his duties.

(vi) Allegations of obstructions of Justice against the DG – DCEO in failing to prosecute persons aligned to him.

[42] The above accusations are in material respects the same as the ones provided for soliciting representation from the applicant as to why he could not be suspended pending the advice to appoint the tribunal (the initial show-cause letter). The initial show-cause letter which is the subject of CIV/APN/451/2020 was widely reported on in the media. In fact, it is the applicant who brought the contents of that show-cause letter to the public glare by challenging it in CIV/APN/451/2020. It is true that the applicant was not afforded a hearing before the decision to advice the appointment of the tribunal was made but that alone does not spell the end of the matter because given the non-immutability of the *audi* principle it is still

incumbent upon the applicant to satisfy the court that in the circumstances of this case, the 1st and 2nd respondents did not treat him act fairly.

[43] My considered view is that the decision to recommend appointment of the tribunal without pre-decision hearing was unfair, but as the authorities command, the requirement of a duty to act fairly does not admit of heavy-handedness in its application. The determination of the question whether the applicant was treated fairly must be facts-sensitive. As already said, the contents of the initial show-cause letter which is in *pari materia* with the 2nd show-cause letter for suspension pending finalization of the tribunal's enquiry, was brought into the public view by the applicant by challenging it before court in CIV/APN/451/2020. That matter was widely reported on, and so, the reputational damage will have been caused at that stage leaving the applicant with the choice to clear his name before the tribunal. The appointment of the tribunal is not a death warrant to the applicant's career as the tribunal can possibly find him fit to hold office.

[44] The facts of the **President of CA** are analogous to the facts of the present matter. In that matter, the Prime Minister had recommended the establishment of a tribunal to probe fitness of the President of the Court of Appeal to hold office and had invited the President to make representations why he could not be suspended with full salary pending the enquiry by the tribunal. Like in this case the President did not respond to the show-cause letter but instead launched the proceedings challenging it. On the question whether the Prime Minister had acted fairly towards the applicant, the Court of Appeal, contrary to the conclusion of the High Court (sitting as the Constitutional Court), held that s.125 of the Constitution which is analogous to s.4 of the Corruption Act, enjoined the Prime Minister to afford the President a hearing before recommending the constitution of the

Tribunal to probe his fitness to hold office. The Court of Appeal reasoned as follows (the reasoning which I fully embrace as being applicable to the present matter);

> *"[21] In having regard to all the circumstances of the case. It must firstly be borne in mind that inherent to the impugned decision is the fact that it is a preliminary step aimed at causing an enquiry by an independent body, where the appellant shall be afforded ample opportunity to refute the allegations against him. This means that the Prime Minister's decision has no immediate effect on the appellant's tenure as President of the Court of Appeal. Nor could it in this case have led to the appellant's suspension without him being heard, since he was expressly invited to make representations as to why he should not be suspended. The potentially adverse effect of the decision was therefore limited to the appellant's reputation only. In this regard the adverse effect to the appellant's reputation shall, in the event of the tribunal finding the allegations against him to be impeachable, in all likelihood not be permanent.*
>
> *[22] The fact that the adverse effect of the impugned decision will be confined to the appellant's reputation leads me to a further consideration. It is this. At the time of the appointment of the Tribunal most of the allegations of misconduct against the appellant were already in the public domain. I say that in the light of the following:*
>
> *(a) The unseemingly incident flowing from the protracted conflict between the appellant and the Chief Justice had been widely published,*
>
> *(b) ....*
>
> *(c) ....*
>
> *(d) .....*
>
> *(e) Finally there was the litigation between the appellant and the Prime Minister where virtually all the allegations of misconduct relied upon by the Prime Minister were ventilated in the papers before the High Court.*
>
> *[23]The upshot of all this, as I see it, is that the appellant's reputation was already tarnished before the request for appointment of a Tribunal by the Prime Minister. On the face of it, it seems to me that the only way to salvage his reputation*

is for the allegation before the Tribunal. The case is therefore distinguishable from the situation that arose as in Rees (supra) where the harm to the judge's reputation arose solely to the appointment of the Tribunal itself. The feature of wide prior publication also rendered the case distinguishable from situations such as Rees in another respect…."

[45] The requirement that the Minister must first hear the DG–DCEO before recommending the establishment of the tribunal is meant to protect the latter's reputation by allowing him to deal with the allegations levelled against him behind the walls of the echelons of administration, thereby obviating what may at times be sensitive issues being brought before the public view and consequently being subjected to its potentially damaging opinion. It is only after the representations will have been made and such failing to convince the Minister that he may not recommend the establishment of the tribunal that the Minister may proceed to advice the Prime Minister to establish the tribunal. In the circumstances of this case, the Minister acted fairly because even though he did not invite the applicant to make representations before recommending the establishment of the tribunal, because once the tribunal was established the Minister invited the applicant to make representations on why he should not be suspended pending finalization of business of the tribunal. Even though the applicant complained about the absence of jurisdictional facts in the letter of representation by the 2nd respondent to the 1st respondent recommending the establishment of the tribunal, it is clear that the said letter traverses issues of incompetence and discipline which were already in the public glare owing to the initial curial challenge of the first show-cause letter. It was accepted by counsel that the allegations contained in this letter were widely circulated in the local newspapers, and the allegations traversed therein could have already tarnished the 1st applicant's reputation leaving him with the option to clear his name before the tribunal. I therefore, find

that in the circumstances of this case the 1st applicant was treated fairly when his representations were sought pertaining to his suspension pending the enquiry by the tribunal.

[46] <u>IRRATIONALITY OF SELECTING MOILOA J AS A MEMBER OF THE TRIBUNAL</u>

The applicant attacks the Chief Justice's decision to select Moiloa J as a member and chairperson of the tribunal to enquire into his fitness to hold office. His main complaint it is that the DCEO as an institution is currently investigating the Judge for money laundering. The question to be answered is whether the administrative decision of the Chief Justice to appoint the learned Judge is impugnable on the basis of its irrationality. The test for irrationality of an administrative decision was stated in **Council of Civil Service Union and Others v Minister for the Civil Service [1984] 3 W.L.R 1174 (HL) at 1196 D – E** wherein Lord Diplock equating "irrationality" with *"Wednesbury unreasonableness"*, had this to say:

> *"By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (see* ***Associated Provincial Picture House Ltd v Wednesbury Corporation [1947] 2 All ER 680, [1948] 1 KB 223).*** *It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."* (this decision was followed in **Brigadier Mareka and 22 Others v Commander Lesotho Defence Force (C of A (CIV) 52/2016) 2016] LSCA 9 (29 April 2016)** at para 20 and is therefore part of our law).

[47] One is left wondering how the CJ would have known that Moiloa J is under investigation. The CJ's decision was based on the material placed before

him, which material depicts the judge as fit and proper. The CJ could not have reasonably been expected to have known what was happening within the DCEO regarding the affairs of the learned judge. In fact, it is not the applicant's case that the CJ was well aware of the investigations. To paint the CJ's decision with irrationality in the circumstances of this case is problematic. I do not understand how the investigations by the institution is now made an issue personal to its head such as to disqualify a judge from determining the head's fitness to hold office, because as I see it, even if it were to come to a point where Mr Manyokole is removed, that would not *ipso facto* translate into the dropping of investigations that are underway with regard to the judge. It is not the 1st applicant's case that he has had a personal encounter with Moiloa J in the performance of his investigative powers under s.9 of Corruption (Amendment) Act of 2006. Even if he had been in contact with the Judge, that does not cure the anomaly and untenability of challenging the CJ's decision in these circumstances, when the course open to him is to seek Moiloa J's disqualification before him in the tribunal, not through indirectly impugning the decision to appoint him in review proceedings. I therefore find that the CJ's decision cannot be assailed on the basis of irrationality.

[48] **VIOLATION OF THE INDEPENDENCE AND AUTONOMY OF THE DCEO**

It is the applicant's contention that because the tribunal was established without affording him a hearing and the fact of the threatened suspension, constitute a violation of the independence and autonomy of the DCEO. White-collar-crime busting institutions such as the DCEO perform a very important task of ridding the society of corruption and all its concomitant ills. While doing so, the DCEO must have the institutional and decisional

independence to firewall it from political influence. The criteria for independence of specialized bodies like the DCEO is spelled out in the **Organization for Economic Co-operation and Development (OECD), Specialized Anti-Corruption Institutions: Review of Models (2008) (OECD) report) (available at www.oecd.org)** at 10.

"Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the ***structural*** *and* ***operationa****l autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures* ***for appointment and removal of the director*** *together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to lack* ***of accountability****; specialized services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work."*

[49] While the above report highlights the importance of independence, it recognizes that the equally important reverse side of this independence is accountability. It is generally accepted that there are three genera of accountability; institutional accountability, decisional accountability and behavioral accountability. The importance of accountability cannot be over-emphasized: It promotes public confidence in the institution and its head: It promotes the rule of law by proscribing conduct which has the potential to erode and even tarnish the institution's independence, such as for example proscription against accepting bribes in the performance of duties; it is boon to institutional responsibility for the way it carries out its core mandate (for exposition on independence and accountability, see G.

Geyh *" Rescuing Judicial Accountability from the Realm of Political Rhetoric" (2006)* available at core.ac.uk (visited on 05/01/2021). The aim which is sought to be achieved by the procedure for removal of the DG– DCEO under s.4 of the Corruption Act is to ensure accountability on his part. Built into the schematic arrangements of the section is the need to ensure that political erosion of the institution's independence is guarded against. The Minister responsible for the DCEO is not empowered to remove the DG himself. The 1st and 2nd respondents are following the procedure laid out in the Corruption Act which is aimed at ensuring that the independence and autonomy of the DCEO is not eroded, by entrusting an enquiry into the fitness of the 1st applicant to hold office to a panel of judges who may find nothing wrong with his probity to hold such office. I am unpersuaded that the independence of the DCEO is being undermined in this case.

[50] **LEGALITY OF LEGAL NOTICE NO.139 OF 2020**

The applicant's discontent with this Legal notice is generated by the framing of its terms of reference. He seeks to assail it on the basis that it is unintelligible, vague and overbroad. In order to gain a clear understanding of the 1st applicant's argument it is apposite to quote verbatim from his founding affidavit;

"8.1.4.4 The Terms of Reference are clearly so vague, indefinite and no fixed limits and bounds, and they authorize the Tribunal to enquire into the question of removal in general terms which means that any prosecutor or initiator or Tribunal itself may present any subject-matter or incident which in his or its wide discretion might think or believes required to be investigated, even though it may not have anything to do with the prescribed grounds for removal under PCEO Act 1999."

[51] The impugned section of the Legal Notice is section 2 which provides that:

> *"2. The terms of Reference of the tribunal are:-*
>
> *(a) To investigate and determine the question of removing the Director General of the Directorate of Corruption and Economic Offences, Advocate Mahlomola Manyokole; and*
>
> *(b) Make recommendations to the Prime Minister as to whether or not advocate Mahlomola Manyokole ought to be removed from office."*

[52] I do not wish to undertake a definitional exercise of the terms, unintelligibility, vagueness and over breadth, because in my considered view the Legal Notice cannot be impugned on their basis: The terms of Legal Notice are clear; it is to make an investigation into whether Mr. Manyokole should be removed. The fact that it is not mentioned in the Legal Notice whether what is to be investigated is his incapacity occasioned by infirmly of body or mind or any other cause prohibiting him from discharging his function or misconduct, does not take the matter any further. The parameters of conduct or jurisdictional matters which can be send for investigation by the tribunal are circumscribed by s.4 of the Corruption Act: they are "inability to exercise the functions of his office (whether arising from infirmity of body and mind or any other cause) or for misbehavior and shall not be removed except in accordance with the provisions of this section." Put differently, whether the grounds for question referred for investigation are not stated in the constituting instrument is immaterial because the jurisdictional parameters have already been determined by the law. The Legal Notice constitutes the tribunal and cloaks it with jurisdiction to make an enquiry on the question referred. The charges and evidence to be adduced to prove them must be in step with the jurisdictional grounds already set by the law.

[53] Contrary to what the 1st applicant says, the tribunal is not at large to enquire into any issue which might possibly arise. It is not allowed to cast its net far and wide, nor is it tasked with making an investigation with the purpose of finding that the applicant should be removed: Its task is simply to enquire whether the material represented to the Prime Minister can possibly ground removal from office on the basis of the legislative circumscribed grounds. The incidences detailed out in the representation to the Prime Minister provides the parameters for matters which should be enquired into not anything extraneous thereto. Any other matter not contained in the representations to the Prime Minister would be *ultra vires* the mandate of the tribunal and therefore unlawful. This is so because the tribunal is established to probe whether the incidences tabulated in the representations to the Prime Minister justify removal of the DG. Mr. Maqakachane for the applicant referred this court a very interesting case and with which on this question I completely agree: It is the Kenyan matter of **The Republic v Chief Justice of Kenya and 6 Others Ex parte Moijo Mataiya Ole Keiwua [2010] eKLR.** This matter dealt with a lot of issues, but germane to the issue currently under discussion, I totally agree with the approach of that Court. The facts of this case are briefly that the applicant was a Judge and was being the investigated for all sorts of acts of misconduct. Crucially, the Gazette which appointed the tribunal to investigate these issues, it stated that the tribunal was *"to investigate the conduct of Judges of Appeal, Moijo M. Ole Keiwua and P. N. Waki, <u>including but not limited to,</u> the allegations that the said Judges of Appeal have been involved in corruption, unethical practices and absence of integrity in the performance of the functions of their office."*

[54] It appears that on the strength of the apparent cart blanche authorization that the tribunal's enquiry is "….not limited to…" acts of misconduct tabulated in the Gazette, carried out investigations and even went to the applicant's home district to investigate and gather evidence instead of conducting an enquiry into matters contained in the representations made by the Chief Justice to the President of Kenya to appoint it. Dealing with this issue the learned Judges of Appeal said (at pp. 50 – 51):

> *"….In our mind the jurisdiction and powers of the tribunal emanate from whether they were given legal and constitutional power by the President. In this case there was no representation that was shown to us to make us believe that the President had powers to appoint a tribunal. In the absence of a representation that was handed over to the President, the President had no powers to empower the tribunal to engage in an investigation and enquiry a tribunal. The role of the tribunal was to establish whether the issues and complaint that were contained in the representation made to the President, was enough or not to sustain the removal of the applicant under Section 62(4), (5) and (6) of the Constitution. We think that the tribunal misdirected itself by assuming that it had powers to carry out an investigation process and frame its own charges against the applicant. The powers of the tribunal was (sic) limited or conditioned upon the charges that were the subject of the representation that was made to the President. The representations arises(sic) from the Ringera Committee's recommendations. And anything that was outside the Ringera report and outside the representation made to the President by the Honourable the Chief Justice, could not be a basis for inquiry or investigation by the tribunal.*
>
> *The tribunal misconstrued the words in the gazette notice <u>but not limited to</u> by purporting to gather evidence and engaging investigators to the field to sustain what they were calling charges against the applicant. That power was ultra vires their mandate and therefore illegitimate and an illegality. We also made a finding that the President had no power to empower a tribunal to conduct an inquiry or investigation other than or outside the representations he received from the Honourable the Chief Justice…."*

[55] In conclusion, therefore, perhaps at the risk of being repetitions, the purpose of the Legal Notice is to constitute the tribunal, but the parameters

of the inquiry are set out by representatives the Minister of Justice made to the Prime Minister read with s.4 of jurisdictional grounds for removal of the DG -DCEO. Anything beyond this purview is not permitted and therefore unlawful. I need not say more on this issue because the charges are yet to be drawn and served upon the 1st applicant and for the tribunal to undertake the inquiry.

[56] **LEGALITY OF THE IMPENDING SUSPENSION**

The question of the legality of impending suspension being linked to legality of the Legal Notice and not on any other ground, I am of the view that once the legality of the Legal Notice is found to be unassailable, a challenge to the intended suspension falls with it.

[57] **COSTS**

It is trite that costs are matters within the discretion of the court, which discretion should be exercised judicially. It is also an established principle of our law that costs should follow the event. However, in the case of Adv. C. J. Lephuthing, for the Tribunal, I made it plain on the date of hearing that because he filed his heads of argument on the morning of the hearing, in the event the applicant is not successful, that he would be deprived of the costs as measure of censure for his conduct (see: **Mofoka v Lihanela LAC (1985 – 1989) 326 at 329D-E).**

[58] In the result the following order is made:

(a) The application is dismissed with costs, which costs must exclude costs for 5th to 8th respondents.

MOKHESI J

For the Applicant:	**Adv. T. Maqakachane Assisted by Adv. K. Nyabela** **Instructed by Clark Poopa Attorneys**
For the 1st and 2nd Respondents:	**Mr. M. Rasekoai**
For the 3rd and 4th Respondents:	**Mr. K. Ndebele**
For the 5th to 8th Respondents:	**Adv. C. J. Lephuthing**