IN THE HIGH COURT OF LESOTHO
(Exercising its Constitutional Jurisdiction)

Constitutional Case No.24/2018

In the matter between:

SEFIRI PHAILA	**APPLICANT**
And	
DIRECTOR OF PUBLIC PROSECUTIONS	**1ST RESPONDENT**
HER WORSHIP MAGISTRATE RANTARA	**2ND RESPONDENT**
DIRECTORATE ON CORRUPTION & ECONOMIC OFFENCES	**3RD RESPODNENT**
STANDARD LESOTHO BANK	**4TH RESPODNENT**
MINISTER OF LOCAL GOVERNMENT	**5TH RESPODNENT**
ATTORNEY GENERAL	**6TH RESPODNENT**

JUDGMENT

Neutral Citation: Phaila v Director of Public Prosecutions and Others (Constitutional Case No.24/2018) [2020] LSHC Const 32 (March 2021)

Coram : Hon. SP Sakoane, CJ
Hon. MA Mokhesi, J
Hon. KL Moahloli, J

Dates heard : 25 September, 1 October, 3 June and 10 September 2020

Date delivered : 18 March 2021

SUMMARY

Constitutional litigation – Request to Subordinate Court for reference of a substantial question of law as to the interpretation of the constitution to the High Court – Section 128

of the Constitution – Request to Subordinate Court for reference of a question as to the contravening of the provisions of section 4 to 21 (inclusive) of the Constitution to the High Court pursuant to section 22(3) - Whether our Constitutional Court has jurisdiction to review refusal of such requests – Grounds for review of decisions and/or proceedings of subordinate courts - Whether provisions of the Prevention of Corruption and Economic Offences Act creating new statutory offences and regulating their prosecution oust the Director of Public Prosecution's constitutional competence to prosecute said offences without the involvement of the Directorate on Corruption and Economic Offences – Whether the Prevention of Corruption and Economic Offences Act gives the Directorate on Corruption and Economic Offences exclusive authority to investigate offences created by the said Act and takes away the constitutional authority of the police to initiate and conduct such investigations.

ANNOTATIONS

Cases:

Bagadu v The Federal Republic of Nigeria & Others (2003) LCN 1440(CA)
Ellis v Morgan; Ellis v Desai 1909 TS 576
Goldfields Investments Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551
Ifegwu v Federal Republic of Nigeria (2001)13 NWLR (Pt.729)103(CA)
Khali v Khali [2019] LSCA 47 (03 June 2019)
Khasipe v Director of Public Prosecutions and Others [2018] LSHC …… (……February 2018)
Letuka v Abubaker NO and Others [2012] LSCA 42 (19 October 2012)
Leuta v Senior Resident Magistrate Berea and Others [2017] LSCA 13 (12 May 2017)
Machacha v Mpheu, LAC (2009-2010) 519
Makhetha v Rex 1974-75 LLR 431
Moetsana v Tsikoane 1981(2) LLR 378
Mokhethi v Matlole, LAC (2011-2012) 410
Moonlite Taxis v Seboka, LAC (2007-2008) 132
Motloheloa v Commissioner of Police and Others [2019] LSHC 31 (21 March 2019)
Mpemu and Others v Nqasala 26 SC 531
Notsi v MacPherson (1981)2 LLR 268
Paper Printing Wood & Allied Workers Union v Pienaar NO & Others (1993) 14 ILJ 1187 (A)
Phaila v Principal Secretary Ministry of Local Government [2014] LSHC 58 (2 October 2014)
Okeke v Securities and Exchange Commission & Others (2013) LPELR – 20355 (CA)
Teaching Service Commission and Others v Judge of the Labour Appeal Court and Others, LAC (2007-2008) 284
Telcordia Technologies Inc v Telkom SA Ltd, 2007(3) SA 266 (SCA)

Statutes:

Constitution of Lesotho 1993
Criminal Procedure and Evidence Act 7 of 1981
High Court Act 5 of 1978
Police Service Act 7 of 1998
Prevention of Corruption and Economic Offences Act 5 of 1999
Prevention of Corruption and Economic Offences (Amendment) Act 8 of 2006
Books:

A. *Myburgh & C. Bosch (2016) <u>Reviews in the Labour Courts</u> Lexis Nexis*

Moahloli J (Sakoane CJ and Mokhesi J concurring)

INTRODUCTION

[1] This is a constitutional application brought on an urgent basis, wherein the applicant **Mr Sefiri Phaila ("Phaila")** seeks the following reliefs:

> *"1. A rule nisi be issued and made returnable on the time and date to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why the orders sought herein shall not be granted.*
>
> *2. The rules relating to the modes of service and time limits provided for in the Rules are dispensed with due to urgency of this matter.*
>
> *(a) [Her Worship Magistrate Rantara] is interdicted, prohibited and restrained from:*
>
> *2.1 Proceeding with the hearing of the CR/340/11 involving [Sefiri Phaila] on the 24th September 2018 or other dates pending finalization hereof;*
>
> *2.2. Taking any steps in relation to the criminal trial being conducted and summoning witnesses pending finalization hereof;*
>
> *2.3 [Her Worship Rantara] and anybody responsible for keeping the records of proceedings in the trial in issue are ordered to dispatch the record of proceedings involving [Phaila] to this Honourable Court seven days after the service of this order.*
>
> *4. That pending the determination in terms of sections 128 and 22(3) of the constitution, the decision of [the Director of Public Prosecutions (DPP)] to prosecute the criminal trial be suspended to enable this Honourable Court to determine the matter in terms of section 129(2) of the constitution.*
>
> *5. An order interdicting [the DPP] from discharging the prosecutorial functions in relation to corruption charges*

absent the involvement of [the Directorate on Corruption & Economic Offences] pending finalization of this matter.

6. An order reviewing and setting aside the decision of [Her Worship Rantara] to agree with the crown (sic) that it can prosecute the criminal trial in issue without the consent and or participation of the [Directorate on Corruption and Economic Offences (DCEO)] as irregular and of no legal effect.

7. An order reviewing, correcting and setting aside as irregular, null and void and of no legal force and effect the decision of [Her Worship Rantara] to refuse an application to refer a substantial question of law of this Court pursuant to section 128 of the constitution.

8. An order declaring the investigations foreshadowed in RCI:1058/01/12 conducted by the Thaba-Tseka Police in view of contravention of section 21(3) (b) of Prevention of Corruption and Economic Offences Act, 1999 as amended by section 13(3) (b) of Amendment Act No.8 of 2006 as invalid in that that they usurped the special investigative functions bestowed to the Director General under section 7(1) of the Prevention of Corruption and Economic Offences Act 1999 as amended.

9. An order declaring the invalidity of the decision of [Standard Lesotho Bank] in releasing the information, bank statements and other materials involving Account Numbers 0140024259401 and 0140550461801 otherwise than pursuant to section 8(1) of the Prevention of Corruption and Economic Offences Act 1999 as amended.

10. An order reviewing and setting aside the Court Order of Thaba-Tseka Magistrate Court dated 6th January 2012 as irregular".

[2] The respondents (excluding 4th Respondent) are opposing the application. On 25 September 2018 Adv Lephuthing moved application for the grant of the interim reliefs, but the Court only granted Prayer 2.3 (dispatch) and gave directions as to the filing of further pleadings and heads of argument. The learned Magistrate Mrs

Palesa Rantara (who is 2nd Respondent) has filed an answering affidavit in her capacity as presiding officer in the criminal case the subject of this application [CR 340/2011], where Phaila is one of the three accused persons. Mr Samuel Letuka, who is Public Prosecutor in the said CR340/2011 held at Thaba-Tseka Magistrate Court, filed a supporting affidavit. And Phaila has filed a replying affidavit.

[3] The parties' counsel have filed written heads of argument. On 3 June 2020 counsel, by agreement, requested the Court to decide the matter on the papers. To this end, Applicant's counsel undertook to furnish the court with a bundle of the foreign judgments and other references cited in his heads of argument by 9 June. Unfortunately to date he has not done so, despite reminders, thus seriously inconveniencing and handicapping this Court. At the Court's instance, the court *a quo* dispatched the record of proceedings in the trial (untranscribed).

FACTUAL BACKGROUND

[4] Following investigations by the Thaba-Tseka police, the Crown charged the applicant and two others with the following offences:

Count I : Contravening section 21 of the Prevention of Corruption and Economic Offences Act 1999 ("the PC&EO Act") by embezzling, misappropriating or diverting public funds (M31957.88) to their own benefit

Count II : Theft of government monies (M11541.94)
Alternatively
Contravening section 21 of the PC&EO Act (embezzlement, misappropriation or diversion of public funds) [My summary]

[5] The accused pleaded not guilty. After several interlocutory interventions and postponements, the Crown started leading evidence. After the first witness completed his evidence-in-chief, and the defence was expected to begin cross-examination, Adv. Lephuthing (counsel for Phaila) informed the court he had instructions not to proceed with cross-examination because the case ought to have been initiated by the DCEO since the offences his client was charged with were statutory offences, under the PC&EO Act and thus fell under the prosecutorial competence of the DCEO and not the Director of Public Prosecutions. He argued that this was stipulated unequivocally in section 6 of the PC&EO Act. Adv. Ntšoereng, counsel for the other two accused, fully agreed.

[6] Adv. Lephuthing added that in the circumstances, now that a misdirection had occurred, the case had to be referred to the Constitutional Court as there was evidence already led. He contended that the effect of section 6 of the PC&EO Act was to nullify the proceedings ongoing before the Magistrates' Court.

[7] The Public Prosecutor, Mr Letuka, opposed Adv Lephuthing's submission and proposal. He submitted "that there was no section of the law presented before the court that the DPP has no *locus standi* to institute the case". He said that "the DPP is *dominus litis* in terms of section 99 of the Constitution, which provides that the DPP has power to institute proceedings under any offence." And "there is no other law that *deprives* the DPP" of these powers conferred upon him/her by the Constitution." He contended that section 6 of the PC&EO Act was only intended to confer certain powers and duties on the DCEO, and not to curtail the prosecutorial powers of the DPP. And that if the said provision indeed purports to deprive the DPP of his/her power to prosecute PC&EO Act offences, then it contradicts the Constitution and is thus invalid.

[8] The learned Magistrate, after considering the parties' submissions handed down the following **Ruling**:

> *"Having heard both Defence Counsels and the Prosecutor and having read the cited section of the Constitution as well as the Act under which the accused are charged, the accused's application to declare these proceedings invalid is dismissed as unfounded in that the accused failed to cite a section that prevents or limit the dominus litis position of the DPP as provided by the constitution. The said Section 6 cited by Adv. Lephuthing does not in no way limit such DPP powers, all it does is to give powers and duties to the DCEO. As rightly, submitted by the Prosecution even if that section has such provision, it would be inconsistent with the constitution and to be declared as such by the Constitutional Court. These proceedings are therefore valid under the circumstances."*

[9] Whereupon Adv Lephuthing submitted that in their "opinion the ruling raises constitutional issues better to be dealt with by the Constitutional Court." He argued that since the learned Magistrate in her Ruling had opined that section 6 of the PC&EO Act was unconstitutional, the accused should be granted leave to refer the matter to the Constitutional Court. He asserted that his "application for leave should be understood in the context of requiring guidance or answer to a question arising from what [was] discussed under the Ruling itself as it will be necessary for the disposal of this trial." He contended that "none of [the parties would] suffer prejudice as the High Court [would] give instruction on future conduct of this case."

[10] Mr Letuka, in response, vehemently maintained that "in this case [they saw] no constitutional issue that requires the intervention of the Constitutional Court." And that they "thus opposed the application for leave for referral to the Constitutional Court."

[11] The learned Magistrate then **ruled** as follows:

> *"Having heard both Defence Counsels and P.P. Letuka for prosecution and having gone through the court's previous ruling on lack of locus standi to institute this case by DPPand that there are no constitutional issues raised in the ruling, the application for leave for referral to the Constitutional Court is dismissed and if Defence is not satisfied with the ruling, they can proceed by way of appeal or review."*[1]

[12] It was in these circumstances that the present application was lodged.

POINT IN LIMINE

Absence of Jurisdiction

[13] In her answering affidavit the learned Magistrate avers that the High Court sitting as a constitutional panel, does not have jurisdiction to hear and determine prayers 4, 5, 6, 7, 8, 9, 10 and 11 in the notice of motion as these are not constitutional matters, but issues which may adequately be addressed by the High Court sitting in its ordinary jurisdiction[2]. She refers the court to several cases in which was held that where it is possible to decide a case without reaching a constitutional issue, that is the course that should be followed.

[14] In response, Phaila argues that the prayers referred to are merely ancillary to, and consequential upon, the granting of his primary cause of action (prayer 4) namely, that his right to a fair criminal trial was violated in the proceedings at the *court a quo*.

[15] In my view, the main problem is that the whole question of jurisdiction is pleaded very inadequately in the applicant`s founding affidavit, without following accepted principles. It is trite law that the jurisdiction of a court is concerned with

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[1] A full account of what transpired at the court a quo, which culminated in the two rulings reproduced herein maybe found at pages 63 to 70 of the Magistrate's handwritten record of proceedings.

[2] Record : 33-34, para 4

the power of the particular court to hear a matter or dispute between the particular parties, and/or to make a particular type of order. It is therefore incumbent upon an applicant to establish that the court before which it has brought an application has jurisdiction. Hence it is a requisite of any founding affidavit that it must disclose and specify the necessary facts to show that the court has jurisdiction. In other words the court's jurisdiction must be satisfactorily established *ex facie* the founding affidavit.

[16] Phaila's founding affidavit falls short of this. At paragraph 3, where he pleads jurisdiction, he merely states: "The Honorable (sic) court has jurisdiction to entertain this matter much as it arises within its jurisdiction." This is meaningless. He then proceeds, to state in paragraph 4 that "the purpose of [the] application is to recognize and protect [his] constitutional right to fair hearing of the criminal trial seized with (*sic*) Thaba-Tseka Magistrate Court". And that he "accordingly seeks interdictory protection against further unlawful conduct of proceeding with trial that is unconstitutional as violating the principle of legality, and irrational, unfair and arbitrary as [he] set out in detail hereinafter."

[17] He does not specifically tell the court on what grounds, and under which provisions of the Constitution and/or Constitutional Litigation Rules it has jurisdiction. He seems to expect the court to figure out for itself which allegations in his affidavit show that it has jurisdiction. Surely this should not be.

[18] Despite these shortcomings, however, it can be deciphered from a close reading of the record of proceedings in the *court a quo* and applicant's affidavits before this court that the primary complaint the applicant is placing before this Court is his dissatisfaction with the refusal of the Magistrate to refer his alleged questions of law to the High Court (pursuant to sections 128 (1) and 22(3) of the Constitution).

He is asking us to review the learned Magistrate's decision, as well as the legality of the ancillary issues he has raised in his papers.

LEGAL FRAMEWORK

[19] Although the Constitution and the Constitutional Litigation Rules themselves do not specify to which court and under what guise such a challenge lies, this Court has in the past entertained such requests, for review, presumably because they entail the answering of a constitutional question or questions [for instance, in Thabo Khasipe v Director of Public Prosecutions and Others [2018] LSHC February 2018); Sefiri Phaila v Principal Secretary Ministry of Local Government [2014] LSHC 58 (2 October 2014); Tšeliso Motloheloa v Commissioner of Police and Others [2019] LSHC 31 (21 March 2019)].

[20] It is well-established that a party in Phaila's position has two routes it can use to try to set aside the ruling of the court *a quo*. If the party is dissatisfied with the ruling of the court because he thinks that the court got the law or the facts wrong when coming to its decision, then that party may lodge an appeal to a higher court. Where a party is dissatisfied with the method or procedure used by the court in arriving at its decision, then the party may take the case on review. In other words, whereas in the case of an appeal the aggrieved party alleges that the court made a wrong ruling on the facts or the law and therefore attacks the result of the application, in a review the party wants the ruling set aside because of the process used by the court in coming to its decision[3]. In *casu* Phaila elected to approach this Court by way of review, presumably because he is only challenging the procedure, not the outcome.

[3] Leuta v Senior Resident Magistrate Berea and Others [2017] LSCA 13 (12 May 2017); Teaching Service Commission and Others v Judge of the Labour Appeal Court and Others, LAC(2007-2008)284; Moonlite Taxis v Seboka, LAC (2007-2008)132

Grounds For Review Of Magistrates

[21] Section 119(1) of the Constitution, read together with section 7(1) of the High Court Act 1978, confers upon the High Court full power, jurisdiction and authority to review the decisions or proceedings of any subordinate or inferior court, and if necessary to set aside or correct the same. However, our legislation, unlike, for instance, section 22(1) of the South African Superior Courts Act 2013, does not specify the grounds of review. We therefore have to resort to the common law for guidance.

[22] The ground most often relied upon for review is gross irregularity[4]. And the following dicta are regarded as *locus classici* for determining whether an alleged irregularity constitutes gross irregularity:

(i) The general principle was laid down in **Ellis v Morgan; Ellis v Desai 1909 TS 576 at 581** as follows:

> *"an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."*

(ii) This was qualified by the following, in **Goldfields Investments Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551:**

(a) "a mistake of law per se is not an irregularity, but through its consequence it may create an irregularity, for instance, where a magistrate, through mis-reading a section, refuses to the aggrieved party a hearing to which he is

[4] E.g. Machacha v Mpheu, LAC (2009-2010)519; Mokhethi v Matlole, LAC(2011-2012)410; Letuka v Abubaker NO and Others [2012] LSCA 42 (19 October 2012); Khali v Khali [2019] LSCA 47 (03 June 2019) where the court, at para 39-41, endorsed the rule that for an irregularity to qualify as a ground for setting aside the decision of the magistrate on review, it must be of such a nature that it is calculated to cause prejudice.

entitled. Initially the error arises from a mistake of law, but before relief by way of review is granted one has to consider the consequences" [per Greenberg, JP]

(b) *"The law, as stated in Ellis v Morgan….. has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits or the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or mis-understanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial." [per Schreiner, J]*

[23] Myburgh and Bosch[5] very aptly summarise the guiding principles for determining whether a gross irregularity has occurred or not thus:

> *"Firstly, there are two types of gross irregularity – patent irregularities (equating to acts of procedural unfairness which take place openly as part of the trial) and latent irregularities (which occur in the mind of the decision-maker and appear from his or her reasons). Secondly, both irregularities refer not to the result, but to the method of trial. Thirdly, in order for an error of law (a latent irregularity) to constitute a gross irregularity, it must have caused the decision-maker to misconceive the whole nature of the inquiry or his or her duties in connection therewith, with errors falling short of this not being reviewable. Fourthly, the crucial question is whether the conduct of the decision-maker prevented a fair trial of the issues; if it did, then it will amount to a gross irregularity. Many patent irregularities have this effect."*

[24] Paper Printing Wood & Allied Workers Union v Pienaar NO & Others[6], the meaning of gross irregularity adopted in the Goldfields Investment case was confirmed by the Appellate Division (per Botha JA) in the following words:

> *"That expression is not confined to defects in the procedure as such. It covers the case where the decision-maker through an error of law misconceives the nature of his functions and thus fails to apply his mind to the true issues in the manner required by the statute, with the result that the aggrieved party is in that respect denied a fair hearing…."*

[25] Then in the well-known judgment in **Telcordi**a[7], Harms JA found:

> *"Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the*

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[5] Reviews in the Labour Courts (2016) Lexis Nexis at p.69

[6] (1993) 14 ILJ 1187 (A) at 1194J – 1195A.

[7] Telcordia Technologies Inc v Telkom SA Ltd, 2007(3) SA 266 (SCA) at para 69

> *reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith"*

[26] The other grounds for review laid down by the Courts are the admission of illegal evidence and the rejection of legal evidence[8]; prejudice or bias[9] or *mala fides*[10].

APPLICANT'S CASE

[27] In the present case Phaila, in prayers 6, 7 and 10 of the Notice of Motion is asking us to review and correct or set aside the specified decisions and orders of the learned Magistrate. These prayers are the central pillars of Phaila's substantive case.

[28] In his prayer 6, Phaila is asking the Court to review the decision of the Magistrate to allow the Crown to prosecute the criminal case against him "without the consent and/or participation of the DCEO", and declare this "as irregular and of no legal effect".

[29] Phaila avers that the decision is wrong and irregular because : (i) he could only have been charged legitimately if the decision to charge him had been the culmination of investigations by the DCEO, not of investigations by the police[11]; (ii) "the Magistrates' Court of Thaba-Tseka and the Thaba-Tseka police assisted each other in the investigation of the criminal case in that" the police investigating officer was the one who applied for a court order which enabled the release of certain

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[8] Per De Villiers CJ in Mpemvu and Others v Nqasala 26 SC 531 at 534

[9] Letuka v Abubaker NO (supra, fn4)

[10] Notsi v MacPherson (1981)2 LLR 268; 'Matau Makhetha v rex 1974-75 LLR 431 at 432; Moetsana v Tsikoane 1981(2) LLR 378

[11] Record : 10; para 6.2

banking information in the Thaba-Tseka branch of the Standard Lesotho Bank[12]; (iii) the banking information in question ought to have been sought and obtained by the DCEO pursuant to sections 7(1) (c) or 8(1) (d) of the PC&EO Act rather than through the legislation utilized by the Police[13]; (iv) only the DCEO, exclusively, and not the Police, was legally authorised to charge and prosecute individuals for committing the statutory offences in section 21 of the PC&EO Act[14]; (V) Only the DCEO exclusively had the authority and competence to investigate statutory offences created by Part IV of the PC&EO Act.

[30] In his prayer 7, Phaila is asking this Court to review the learned Magistrate's refusal to grant his request for reference of his alleged substantial question of law as to the interpretation the constitution to the High Court, pursuant to section 128 (1) of the Constitution.

[31] Section 128 states:

> ***"Reference to High Court in cases in subordinate courts etc. involving interpretation of Constitution***
>
> *128 (1) Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court or tribunal and the court or tribunal is of the opinion that the question involves a substantial question of law, the court or tribunal may, and shall, if any party to the proceedings so requests, refer the question to the High Court.[My emphasis]*

[12] Record : 10-11, para 6.3 – 6.5
[13] Record : 11-12, para 6.6
[14] Record : 12, para 6.8

> *(2) Where any question is referred to the High Court in pursuance of this section, the High Court shall give its decision upon the question and the court or tribunal in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under section 129 of this Constitution, in accordance with the decision of the Court of Appeal."*

[32] Phaila states that he does "not agree with the legal conclusions that the Magistrates Court arrived at in dismissing [his] referral application"[15]. He argues that the learned Magistrate was wrong to conclude that the DPP had unlimited powers in terms of section 99 of the Constitution to institute and undertake criminal proceedings. And to further conclude that section 6 of the PC&EO Act did not in any way limit the aforesaid powers of the DPP. And also to opine that if section 6 indeed purported to limit the DPP's powers then it was inconsistent with the Constitution.

[33] Phaila further argues that the learned Magistrate's ruling on the above questions of prosecution powers, raised constitutional questions which she was obliged to refer to this Court terms of section 128(1) and/or section 22(3) of the Constitution. The latter section provides:

> *"**Enforcement of protective provisions***
>
> *22(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 4 to 21 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the*

[15] Record : 16, para 6.17

proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious. [My emphasis]

(4) Where any question is refereed to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under section 129 of this Constitution to the Court of Appeal, in accordance with the decisions of the Court of Appeal."

[34] Phaila, in addition, claims that the learned Magistrate and the police investigating officers colluded in bringing trumped-up charges against him. And they acted unlawfully and in bad faith to obtain his bank records whereas it was only the DCEO which was authorised to do so. He claims that by so investigating him outside the parameters of the law, they violated his constitutional right to a fair hearing.

RESPONDENTS' CASE

[35] Firstly, the respondents contend that the learned Magistrate acted within the bounds of the discretion conferred upon her when she dismissed the section 22(3) request for reference of a question of law to the High Court as frivolous and vexatious.

[36] Secondly, they flatly deny that there was any collusion at all between the police and the Magistrate when the bank was ordered to produce Phaila's banking records. They deny that the Magistrate's order violated any of Phaila's constitutional rights.

[37] Thirdly, they argue that Phaila is misinterpreting the law when he claims that the DCEO has exclusive powers to investigate and prosecute corruption and economic offences in terms of the PC&EO Act.

[38] Lastly, they maintain that the Magistrate exercised the powers conferred on her by section 128 properly and lawfully when she turned down Phaila's request for her to refer a so-called substantial question of law as to the interpretation of the Constitution to the High Court. They insist that this review application does not raise any genuine constitutional issues.

ANALYSIS OF ARGUMENT AND EVIDENCE

Refusal of section 22(3) and section 128(1) applications.

[39] Ideally, Phaila's requests for reference of questions of law to the High Court under sections 128(1) and 22(3) of the Constitution ought to have been made by way of substantive application, supported by affidavit. In this way the respondents would have had the opportunity to file proper opposing affidavits. And if necessary, the parties would have filed heads of argument. In those circumstances it would have become crystal clear from the papers what precisely the questions of law were, and what arguments were advanced for and against.

[40] As things stand, it is evident from the summary of the proceedings in the *court a quo* above that whatever submissions were made from the bar were recorded by hand by the learned Magistrate. The way the Magistrate's handwritten record differs dramatically in length and detail from what is contained in applicant's founding affidavit makes me sceptical whether what is said in the affidavit is not significantly more than what was said and argued during the actual hearing. Be that as it may, I

decided to accept what is contained in applicant's founding affidavit without question because the learned Magistrate did not contest its contents in her answering affidavit.

[41] In my view because of the importance of the sections 22(3) and 128(1) procedure to the trial proceedings, and because they have far-reaching consequences, they must be handled in the manner outlined in the afore-going paragraph by substantive interlocutory application. In any event, requests for referrals under section 128(1) must be for the purpose of answering a constitutional question arising in the proceedings and not to object to the jurisdiction of the trial court or review its decisions.

Does the DCEO have exclusive power to prosecute corruption cases?

[42] It is common cause that section 99 of the Constitution confers extensive powers to prosecute offences upon the DPP. The section, in relevant part, enacts:

> ***"Director of Public Prosecutions***
> *99. (1) There shall be a Director of Public Prosecutions whose office shall be an office in the public service.*
>
> *(2) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –*
>
> *(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person; [My emphasis]*
>
> *(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and*

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

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

(4) The powers conferred on the Director Public Prosecutions by subsections (2)(b) and (c) shall be vested in him to the exclusion of any other person or authority except the Attorney-General:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(5) ……

(6) Save as provided in section 98(2)(b) of this Constitution, in the exercise of the functions conferred on him by subsection (2) of this section or section 77 of this Constitution the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

[43] It is also not disputed that section 6(1) (e) of the PC&EO Act gives the DCEO the function to prosecute offences committed under the said Act. What is in serious dispute is whether, according to Phaila's interpretation, the DCEO has the exclusive power to prosecute such offences, to the exclusion of everyone else, including the DPP.

[44] The following provisions of the Act will assist us determine whether Phaila's interpretation is correct or not:

"Establishment of Directorate

3. (1) There shall continue in existence the Directorate on Corruption and Economic Offences which-

(a) shall be a juristic person, having perpetual succession, capable of suing and being sued in its own name and of performing acts as are necessary for, or incidental to, the execution of its functions ; and

(b) shall not be subject to the direction or control of any person or authority in the exercise of its functions except in accordance with this Act."

*"**Functions of Directorate***

6(1) The functions of the Directorate shall be-

(a) to receive and investigate any complaints alleging corruption in any public or private body.

(b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;

(c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of Lesotho;

(d) investigate any conduct of any person, which in opinion of the Director, may be connected with or conducive to corruption;

(e) to prosecute, subject to section 43, any offence committed under this Act;

(f) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;

"(2) In the performance of its operational or investigative functions, the Directorate shall not be subject

to the direction or control of any person except in accordance with this Act."

*"**Powers of the Director-General***

"7. (1) For the performance of the functions of the Directorate, the Director-General may-

(a) authorise an officer of the Directorate to conduct an inquiry or investigation into an alleged or suspected offence under this Act;

(b) require a person, in writing, to produce, within a specified time, books, records, returns, reports, data stored electronically in a computer or otherwise and any other documents relating to the functions of a public or private body;

(c) require a person, within a specified time, to provide any information or to answer any question which the Director-General considers necessary in connection with an inquiry or investigation which the Director-General is empowered to conduct under this Act;

(d) require a private person to make a full declaration of his or her assets and resources of income in accordance with a prescribed form."

*"**Prosecution of offences***

43. (1) If, after investigation of any person under this Act, it appears to the Director that an offence under Part IV or V has been committed by that person, the Director shall refer the matter to the Director of Public Prosecutions for his decision.

(2) No prosecution for an offence under Part IV or V shall be instituted except by or with the written consent of the Director of Public Prosecutions."

[45] A proper consideration of section 99 of the Constitution, and the above-quoted provisions of the PC&EO Act leaves one in no doubt that whereas the legislature has seen fit to give some prosecutorial powers to the DCEO in section 6(1)(e), the

DCEO may only exercise these powers subject to what is provided in section 43. And according to section 43(1), after the investigation of any person for an offence, even if it appears to the Director of the DCEO that the person has committed an offence, the Director cannot just unilaterally go ahead and prosecute if the offence falls under parts IV and V of the PC&EO Act. He must first get the permission of the DPP to do so. Moreover, section 43(2) states unequivocally that no prosecution for an offence shall take place except by the DPP herself (or her subordinates) or with her written consent. So, Phaila's contention that the DPP's powers to prosecute PC&EO Act offences such as the one's with which he is presently charged and falling under Part IV has been ousted, is totally without foundation. Small wonder the learned Magistrate had no hesitation to dismiss his argument to this effect. The DCEO might have been created as an alternative, and maybe even specialist, agency to prosecute corruption and other specified economic offences, but its very constituent Act does not supplant the DPP. On the contrary it leaves the DPP with overall control over all such prosecutions.

Did the police have no right to investigate Phaila?

[46] In prayer 8, Phaila is seeking a declarator that the investigations conducted by the Thaba-Tseka police leading to his being criminally charged are invalid in that the police usurped the special investigative functions bestowed upon the Director General of the DCEO under the PC & EO Act. As can be seen from paragraph [43] above, sections 6(1)(a) – (d) of this Act list investigation of offences under the Act as some of the functions of the Directorate, and section 7 (1) gives the Director-General the power to authorise inquiries investigations into offences under the Act and to require the production of books, records and various forms of information.

[47] I agree with the respondents' counsel that this argument cannot be sustained because section 147(1) of the Constitution gives the Police Service overall responsibility for the maintenance of law and order in Lesotho. And section 147(5) provides that an Act of Parliament shall make provision for the organisation and administration of the Police Service. The Police Service Act spells out the functions of the police as follows:-

> *"**General functions of police service***
> *4. The police service maintained under section 3 shall be called the Lesotho Mounted Police Service, and it shall be deployed in and throughout Lesotho to uphold the law, to preserve the peace, protect life and property, to detect and prevent crime, to apprehend offenders, bring offenders to justice, and for associated purposes."[My Emphasis]*
>
> *"**General duties of police officers***
> *24. (1) It shall be the duty of every person attested as a police officer to serve the people of Lesotho in that office, diligently, impartially and, with due regard to the Constitution to:*
>
> *(a) preserve the peace and maintain law and order;*
> *(b) prevent all offences against persons or property;*
> *(c) **detect offences, apprehend offenders and bring them to justice**; and, while he holds that office, to the best of his skill and knowledge, discharge all the duties of that office faithfully according to the law." [My emphasis]*

[48] In my view our Constitution (read together with the implementing legislation above) specifically grants our police overall powers to detect (investigate) crimes and bring perpetrators to justice. Phaila cannot be heard to say that these powers of the police, as an institution created by the Constitution, have been taken away or whittled down in favour of a creature of Parliament. This is because according to

the doctrine of supremacy of the constitution, specifically enshrined in our Constitution by section 2 thereof, the "Constitution is the supreme law of Lesotho and if any law is inconsistent with [the] Constitution, that other law shall, to the extent of the inconsistency be void."

[49] In the present case, as the learned Magistrate correctly noted, if section 6(1) and 7(1) of the PC&EO Act was construed as devolving the power and authority to investigate criminal offences created by that Act exclusively to the DCEO and as taking away the investigative power and authority of the police with respect to such offences, then that would be inconsistent with the Constitution.

[50] Section 2 of the Constitution enshrines the constitution's supremacy in the unadorned, norm-trumping sense. This doctrine has been interpreted to mean that constitutional powers falling within the exclusive sphere of a particular person or institution cannot be whittled down or taken away by an Act of Parliament and exclusively conferred on another body.[16] In the well known case of **Bagadu v the Federal Republic of Nigeria & Others**[17], the Court of Appeal held that the doctrine of constitutional supremacy meant that the Attorney General cannot be stopped from exercising powers conferred on him by the Constitution by a provision of legislation which is in terms of the hierarchy of legislations, below the Constitution. Because such legislations where they stand in conflict with the Constitution, a more superior legislation, are negative to the extent of such inconsistency. Similarly, in **Ifegwu v Federal Republic of Nigeria**[18], the Court of Appeal held that:

> *"In any democratic setting which upholds the rule of law, the provisions of the Constitution which is the grundnorm always override those of other laws and rules are inconsistent with*

[16] Okeke v Securities and Exchange Commission & Others (2013) LPELR – 20355 (CA)
[17] (2003) LCN 1440(CA)
[18] (2001)13 NWLR (Pt.729)103(CA)

> *those of the Constitution those provisions, to the extent of inconsistency with the provisions of the Constitution are null and void"*

[51] For the avoidance of any misunderstanding, I must emphasise that in Lesotho our supreme constitution is the highest law (*lex fundamentalis*) in the land. Although Parliament remains the highest legislative body in our system of government, any legislation or act of any government body (including Parliament) which is in conflict with the constitution will be invalid. However, constitutional supremacy does not imply judicial supremacy. The courts are also subject to the constitution and merely act as the final guardians of values and principles embodied in the constitution. Hence they are able to exercise their powers to test and invalidate legislation, in order to ensure that it is compatible with the letter and spirit of the constitution.

[52] The last issue to look at very briefly is prayer 9, wherein Phaila is asking the court to declare the decision of Standard Bank Lesotho to release his bank account information otherwise than pursuant to section 8(1) of the PC&EO Act, invalid. As we have already decided that the police were competent to investigate the criminal charges against Phaila, they were entitled to seek, as they did, court orders compelling the production of these banker's books [section 247 of the Criminal Procedure and Evidence Act No.7 of 1981]. Prayer 8 cannot therefore be sustained.

DISPOSITION

[53] After the aforegoing detailed, point by point analysis of applicant's arguments for reviewing and setting aside the decisions, rulings and proceedings of the court *a quo*, we are constrained to dismiss each one of them because most are founded on misconceptions and misinterpretation of the true legal position. They therefore do

not constitute reviewable gross irregularities as alleged. The applicant has failed to demonstrate any violation of his right to a fair trial. In some cases applicant simply does not agree with the legal conclusion of that court; therefore in those instances applicant's argument constitute appeals clothed as reviews.

ORDER

[54] In the result the application is dismissed.

.....
K.L. MOAHLOLI
JUDGE

.....
I agree **S.P. SAKOANE**
CHIEF JUSTICE

.....
I agree **M.A. MOKHESI**
JUDGE

Appearances:

For Applicant : Adv C.J. Lephuthing with Adv K. Monate
For Respondents : Adv L.P. Moshoeshoe