REPORTABLE

LESOTHO

# IN THE HIGH COURT OF LESOTHO

**Held at Maseru**

**CONSTITUTIONAL CASE NO. 10/2022**

In the matter between:

**DEMOCRATIC CONGRESS** **1ST APPLICANT**

**SELIBE MOCHOBOROANE** **2ND APPLICANT**

And

**INDEPENDENT ELECTORAL COMMISSION AND 52 OTHERS** **RESPONDENTS**

Neutral Citation: Democratic Congress and another v. Independent Electoral Commission and 52 Others [2022] LSHC … Const (8th August 2022)

**CORAM:** **S.P. SAKOANE CJ, A.R. MATHABA J, J.M. MAKHETHA J**

**HEARD:** **20-21 JULY 2022**

**DELIVERED:** **8 AUGUST 2022**

## SUMMARY

*Constitutional law – delimitation of constituency boundaries – review of constituency boundaries – whether the review made within the prescribed period – whether elections should be held when constituency boundaries have not been*

*reviewed and altered according to the provisions of the Constitution – Constitution, ss.67 and 84; National Assembly Electoral Act No.14 of 2011, sections 142 and 153; Interpretation Act No. 19 of 1977.*

**ANNOTATIONS:**

**LESOTHO**

R v Phoofolo LAC (1990-94) 1

Sekoati And Others v. President of the Court-Martial And Others LAC (1995-99) 812

**CANADA**

Reference re Prov. Electoral Boundaries (Sask) [1991]2 S.C.R. 158

**INDIA**

Delhi Metro Rail Corporation Ltd v Tarun Pal Singh Civil Appeal No.19356 of 2017

**IRELAND**

O'Donavan v Attorney General [1961] IR 114

O'Malley v And Taoiseach [1990] ILRM 461

**SOUTH AFRICA**

Democratic Alliance and others v. Acting NDPP and others 2012(6) BCLR 613 (SCA)

Mazibuko v. City of Johannesburg 2010 (4) SA 1 (CC)

Mphosi v Central Board for Cooperative Insurance Ltd 1974 (4) SA 633

NEHAWU v. Minister of Public Service 2022 (6) BCLR 673 (CC)

Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] (3) 623

**UNITED KINGDOM**

Russell v The Attorney General for the State of Saint Vincent & The Grenadines and Others [1997] UKPC 23 (15th May 1997)

**STATUTES:**

Constitution of Lesotho of 1993

2nd Amendment to the Constitution Act No. 7 of 1997

4th Amendment to the Constitution Act No. 4 of 2001

Delimitation Order 2010

Delimitation Order 2022

Interpretation Act No. 19 of 1977

Legal Notice No. 108 of 2010

Legal Notice No. 109 of 2021

Legal Notice No. 140 of 2021

Legal Notice No. 37 of 2022

National Assembly Electoral Act No. 14 of 2011

National Assembly Election Order of 1992

# JUDGMENT

**THE COURT:**

## I. INTRODUCTION

[1] This case is a constitutional review of the act of the Independent Electoral Commission (IEC) in reviewing and delimiting constituency boundaries in

terms of section 67 (2) and (3) of the Constitution of Lesotho, 1993. These sub-sections read as follows:

> "(2) All constituencies shall contain as nearly equal numbers of inhabitants of or above the age of eighteen years as appears to the Commission to be reasonably practicable, but the Commission may depart from this principle to such extent as it considers expedient in order to take account of –
>
> (a) the density of population, and in particular the need to ensure adequate representation of sparsely populated rural areas;
>
> (b) the means of communication;
>
> (c) geographical features;
>
> (d) community of interest; and
>
> (e) the boundaries of existing administrative areas.
>
> Provided that the number of inhabitants, of or above the age of eighteen years, of any constituency shall not exceed or fall short of the population quota by more than ten per cent.
>
> (3) The Commission shall review the boundaries of the constituencies into which Lesotho is divided in the case of any review after the review of boundaries referred to in Section 159(3), not less than eight nor more than ten years from the date of completing its last review, and may, by order, alter the boundaries in accordance with the provisions of this section to such extent as it considers desirable in the light of the review:
>
> > Provided that whenever a census of the population has been held in pursuance of any law the Commission may carry out such a review and make such an alteration to the extent which it considers desirable in consequence of that census."[1]

[2] The applicants' case is that in conducting the review and delimiting constituencies, the IEC failed to meet the following constitutional requirements:

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[1] The age to vote was brought down from twenty-one years to eighteen by section 2 of the Second Amendment to the Constitution (Act No.7 of 1997)

2.1 to conduct the review within the prescribed period of "not less than eight or more than ten years from the date of completing its last review";

2.2 to ensure that constituencies comply with the proviso to section 67(2) that "any constituency shall not exceed or fall short of the population quota by more than ten per cent"; and

2.3 in addition to the above, it confined constituency boundaries within the administrative boundaries of the Districts.

## II. JURISDICTION

[3] The IEC and the political parties which chose to join in these proceedings raised the preliminary objection to the jurisdiction of this Court. They contended that the applicants' case constitutes an objection to the review process which they ought to have lodged with the IEC and only approach this Court in its ordinary review jurisdiction in the event of the IEC dismissing the objection.

[4] For this proposition, reliance is reposed on section 153(1)-(4) of the **National Assembly Electoral Act No.14 of 2011** which reads as follows:

**"Procedures for changes to constituency boundaries**

153. (1) Before an order to change a boundary of a constituency is made under section 67 of the Constitution, the Commission shall –

(a) invite representations from any elector or a political party registered with the commission by notice in the Gazette in respect of any review of the boundaries of the constituencies conducted in terms of the Constitution;

(b) take the representations referred to under paragraph (a) into account in proposing any change to a boundary;

(c) publish any proposed change to a boundary in the Gazette and by notice prescribe the date within which an elector or a political party registered with the Commission may object to the proposed change;

(d) determine any objection; and

(e) await the final determination of any review brought in terms of subsection (4).

(2) An objection shall be made in the prescribed form setting out the grounds of the objection and lodged with the Director within the period prescribed in the notice.

(3) On receipt of an objection, the Commission –

(a) shall consider the objection;

(b) may uphold the objection and amend its proposed changes accordingly without republishing the new proposed changes in the Gazette;

(c) may reject the objection; and
(d) shall notify the objector of its decision and, if a refusal, the reasons for that refusal.

(4) An elector or a political party registered with the Commission who is dissatisfied with the Commission's decision under subsection (3) may, within a period of 7 days of the receipt of the notification, submit that decision to the High Court for review."

[5] The kernel of the objection to jurisdiction is that the applicants have failed to comply with sub-section (4) which provides for a review application in

the High Court within seven days of receipt of the decision rejecting an objection.

[6] During oral argument, counsel for the IEC and for the political parties who raised the point of jurisdiction retreated from their initial positions in their written submissions that this Court has no jurisdiction at all to entertain a constitutional complaint where Parliament has provided an internal remedy. They had no choice but to concede, as they all eventually conceded, that the applicants were impugning the IEC's conduct in relation to performance of its constitutional functions.

[7] Thus, applicants' case is in essence a rule of law review[2] and not an ordinary review that is governed by the principles of the common law. Failure by the IEC to perform its functions according to the prescripts of sections 67(2) and (3) is liable to be declared null and void in terms of section 2 of the Constitution. By elevating the Constitution above all laws and enjoining this Court to declare laws void and exercise of public power invalid, where inconsistent with it, section 2 encapsulates the doctrine of the rule of law which enjoins compliance with the Constitution.

[2] Democratic Alliance and others v. Acting NDPP and others 2012(6) BCLR 613 (SCA) paras [27]-[31]

[8] This proposition is self-evident and not a novelty. It has also been propounded by Mogoeng CJ of the Constitutional Court of South Africa, as he then was, in these terms[3]:

> "[123] The rule of law essentially requires of the IEC to act only in accordance with the law. And section 1(c) of the Constitution provides:
>
> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (c) Supremacy of the Constitution and the rule of law."
>
> And section 2 of the Constitution reads:
>
> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
>
> [124] Unlawful conduct in relation to the compilation of the national common voters' roll contemplated in section 1(d) of the Constitution, amounts to a breach of the rule of law that is embedded in our Constitution by section 1(c), as the nerve-centre of our constitutional democracy. The IEC acted in conflict with constitutionally compliant and unchallenged legislation. In so doing it acted inconsistently with the constitutional prescript of legality and the rule of law, which was necessarily imported to and rooted in our Constitution in terms of section 1(c).
>
> .....
>
> [129] When conduct is self-evidently inconsistent with a constitutional provision, section 2 of the Constitution, which reinforces its supremacy, declares in unequivocal terms that such conduct is invalid. A declaration of invalidity is thus a consequence of inconsistency of any conduct with our supreme law. It is in this context that the unlawfulness of the IEC's conduct in relation to the registration of voters and the compilation of the national common voters' roll must be viewed. This Court may not do anything to suggest, albeit inadvertently, that conduct that is inconsistent with a constitutional imperative might at times be exempted from being so declared, for fear of any future attempt to take unfair advantage of an otherwise correctly stated principle. This Court is well-empowered by section 173 of the Constitution to regulate its own process "taking into account the interests of justice." And that is how any illegitimate

[3] Electoral Commission v. Mhlope and others 2016 (8) BCLR 987 (CC)

> exploitation of the correct exposition of our constitutional jurisprudence would have to be dealt with.
>
> [130] The rule of law is one of the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in our constitutional design. To this end, no court should be loath to declare conduct that either has no legal basis or constitutes a disregard for the law, as inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so. To shy away from this duty would require a sound jurisprudential basis. Since none exists in this matter, it is only proper that we do the inevitable."

[9] Thus, the remedy for non-compliance with the Constitution in the exercise of public power and performance of constitutional functions fall within the exclusive jurisdiction of this Court as the sentinel on the *qui vive*. A declaration of constitutional invalidity is a remedy that citizens can get from this Court only. The mainstay of the respondents' contentions is that the scheme of section 153 is to lodge objections, and only, thereafter, take the decision on judicial review in accordance with the principles of subsidiary and constitutional avoidance.

[10] The respondents are wrong in their contentions that section 153 obliges the applicants to have first raised the alleged unconstitutional behaviour by the IEC before the IEC and only come to this Court if the IEC rejected the complaint. They are wrong for at least two reasons. Firstly, the type of objections provided for in section 153 do not include complaints that the IEC has violated the provisions of the Constitution or the law. The objection must be related to proposed changes of constituency boundaries and not the final changes. Secondly, in its letter dated 25th March 2022 rejecting the objections lodged by the first applicant, the IEC said that the

objections do not fall within the purview of section 153 thereby abjuring its competence to determine their validity.

[11] The principle of subsidiarity means that where Parliament has enacted a law to give effect to a right, a litigant should enforce the right through that law if he does not challenge it for being unconstitutional[4]. The principle of constitutional avoidance dictates that a court should not dispose of a case on the basis of the Constitution if it is possible to decide it on any other basis and that, by virtue of the presumption of constitutionality, a court will adopt an interpretation of a statute which saves it rather than one which nullifies it.[5]

[12] These principles do not speak to ouster of jurisdiction but the judicial method of disposing of a case. Section 153 provides for a statutory procedural right to lodge an objection to the IEC and to review its rejection. It does not debar a challenge even after passage of seven days of the rejection of an objection. This right to object and review pertains to a proposed change of the boundary of a constituency. It has nothing to do with a protectable substantive right to an unaltered constituency boundary as no such a right exists in the **Electoral Act, 2011** or the Constitution.

[13] The section 67 constitutional complaints are about failure of the IEC to comply with the prescripts of the Constitution when altering constituency

[4] Mazibuko v. City of Johannesburg 2010 (4) SA 1 (CC) para 73
[5] Sekoati And Others v. President of the Court-Martial And Others LAC (1995-99) 812 at 820 E-G

boundaries and not the rejection of a section 153 objection. Differently put, the section 67 complaint is an assertion of the rule of law whereas a review of a decision to reject an objection in terms of section 153 entails invocation of common law remedies. Each process has its own purpose and is animated by different legal considerations.

[14] The section 153 procedure of hearing objections imposes a duty on the objector to defer access to judicial remedies until the IEC has pronounced itself on the fate of the objection. A rule of law review affords direct and immediate access to judicial remedies to uphold the rule of law by protecting and upholding the Constitution. Thus, the proposition that the section 153 procedure blocks the pathway to review of unconstitutional conduct is unsound and must be rejected.

[15] It is for these reasons that the Court dismissed the respondents' preliminary objection to the assumption of jurisdiction by this Court.

## III. MERITS

### The Facts

[16] In 2018, the IEC commenced a review of constituency boundaries. It is common cause that it did the following:

16.1 It initiated the review on the basis of a 2016 census report which was published in February 2018[6].

16.2 It produced a document titled 'Review of constituency boundaries 2018' as inception document for the review process[7]. The formula used to determine the number of voters per constituency in that document reflects the voter population quota as 15,507. The ten per cent more and less of this quota is 17,058 as the upper limit and 13,956 as the lower limit[8].

16.3 It held discussion sessions with registered political parties and members of the community[9]. Issues raised in the sessions were the following:

a) the IEC should consider the geographical features of some parts of Lesotho which would discourage voters to turn up for elections;

b) in some constituencies, the inhabitants petitioned the IEC to move their villages from one constituency to another citing various community interests making it clear to the IEC that if their requests are not adhered to, they will not turnout for elections;

[6] IEC's Answering Affidavit para 9.2
[7] Ibid
[8] Answering Affidavit para 19.3
[9] Ibid. See also Replying Affidavit para 13

c) the IEC should take into account that the census statistics reflect the population numbers of areas based on residence and not based on where the particular elector is registered for elections;

d) in some parts of Lesotho inhabitants of neighbouring villages have long standing rivalries, which if forced to fall under the same constituencies, would affect voter turnout; and

e) the density of the population in urban areas and the need to ensure adequate representation of sparsely populated rural areas and the need not to cut off some areas from the easily accessible communication channels.

16.4 It authorised the continuation of the review process; a road map was drawn and presented to "stakeholders". Some of the registered political parties raised issues similar to those, in 16.3 above[10].

16.5 It issued **Legal Notice No.109 of 2021** inviting registered political parties and voters to make representations. This served the purpose of giving stakeholders a second chance to raise issues that might

[10] Footnote 5 para 9.4

have cropped up during the period the review process was delayed by absence of Commissioners[11].

16.6 It issued another **Legal Notice No.140 of 2021** in terms of section 153 (1)(c) of the **Electoral Act, 2011** for voters and political parties to raise objections to proposed constituency boundaries. The period for objections ran from 4th to 28th January 2022[12].

16.7 It received the first applicant's objection dated 27th January 2022. Two months passed without the first applicant getting a response from the IEC on the determination of the objection[13]. The IEC only responded two months later on 25th March 2022 dismissing the objection on the ground that they do not fall within the scope of section 153(1)(c) and lack specificity[14].

16.8 It finalised the alteration of constituency boundaries by publication of the **Constituency Delimitation Order** in **Legal Notice No.37 of 2022**[15] in the Gazette.

[17] It is important to mention that the following additional facts are also common cause:

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[11] Ibid
[12] Footnote 5 para 9.5
[13] Founding Affidavit para 29
[14] Annexures A7 and 8 to the Founding Affidavit
[15] Answering Affidavit para 9.9

17.1 On 1 June 2019, the Commissioners' contracts expired[16]. New Commissioners were appointed on 13 December 2020 and resumed duties on 14 December 2020[17].

17.2 The variances in the voter population numbers in some of the constituencies as reflected in the impugned **Delimitation Order** exceed the higher limit and also fall below the lower limit of the quota of 15,507[18].

## The Law

[18] The applicants' attack of the **Delimitation Order** is based on breach of sections 67(2) and 67(3). The latter stipulates the period for the IEC to do a review of constituency boundaries. The former provides criteria for altering constituency boundaries. It is, therefore, logical to interpret section 67(3) first. The reason is that if the applicants' contention on it are right, they are dispositive and it will not be necessary to reach the section 67(2) enquiry.

## Section 67(3) interpretation

[19] Sections 67(3) of the Constitution quoted earlier provides that a review of boundaries of constituencies must be made "not less than eight nor more

[16] Footnote 5 at para 9.3
[17] Op.cit. paras 9.3 and 9.4
[18] Founding Affidavit paras 19.1-19.10 read with para 19.4 of Answering Affidavit

than ten years from the date of completion of the last review". The IEC may carry out such a review whenever a population census has been held and then alter constituency boundaries if it considers desirable in consequence of the census.

[20] It is the contention of the applicants that the correct interpretation of section 67(3) is that no review of constituency boundaries can be made if not started and finished within the eight to ten-year period of the last review.

[21] The IEC's contention is that sub-section (3) and the proviso thereto provides for two types of review. The first type of the review is that which must be done every eight to ten years of the last review. The second type of review is referenced in the proviso which has to be carried out whenever a census of the population is held. This may be any time after the production of a census report and is not regulated by the eight to ten years period of the last review.

[22] The contention of **Yearn for Economic Sustainability** is that section 67(3) must be read with section 159(3). If so read, they are transitional provisions which provided for delimitation of sixty-five constituencies which were in place for electing the first National Assembly. On this understanding, currently the Constitution does not provide for any time frames for delimiting constituencies.

[23] The contention of **Yearn for Economic Sustainability** need not detain us. It overlooks the provisions of section 67(1) introduced by the Second Amendment to the Constitution **Act No. 7 of 1997**, in terms of which the sixty – five constituencies were abolished, and the IEC divided the Kingdom into eighty constituencies. It is these eighty constituencies whose boundaries are subject to review in terms of section 67(3). Again, regard being had to the words "any review" in section 67(3), it becomes pellucid that the Constitution contemplates periodic reviews subsequent to the review referenced in section 159(3).

[24] Thus, the interpretation contended for by **Yearn for Economic Sustainability** leads to an absurd result that the boundaries of the eighty constituencies are not subject to regular reviews and alterations despite imperatives for review such as growth in voter population and changes in demographics.

[25] The interpretation contended for by the applicants and the IEC is the same, which is that the review and alternation of boundaries of constituencies is a must. The only difference is whether there are two types of reviews and if so, whether both are subject to the strictures of the stipulated period of eight to ten years.

[26] In determining the validity of this difference, regard must be had to section 75 (5) which reads as follows:

> "For purposes of this section the number of inhabitants of any part of Lesotho of or above the age of eighteen years shall be ascertained by reference to the latest census of the population held in pursuance of any law:
>
> Provided that if the Commission considers, by reason of the passage of time since the holding of the latest census or otherwise, that it is desirable so to do it may instead or in addition have regard to any other available information which, in the opinion of the Commission, best indicates the number of those inhabitants."

[27] Sub-section (5) requires that in ascertaining the number of eligible voters aged eighteen years or above, the relevant information must be sourced from the latest population census. So, the relevant importance and purpose of a census is clear. It is needed for the head count of the voting population nationally and determination of quota to arrive at the number of inhabitants a constituency should have in terms of section 67(2).

[28] Thus, a census provides information for the number of voting population. It does not determine the frequency or period for a review. The period or frequency is fixed at eight and not more than ten years from the date of completion of the last review. It is therefore not correct that the proviso to section 67(3) introduces another review different from the review referred to in the sub-section. Rather, it makes it obligatory for the IEC to use in the course of doing a review.

[29] The IEC's contention treats the proviso to section 67(3) as independent from the main body of the sub-section. This approach misses the true function and effect of a proviso in an enactment. In explaining the function

and effect of a proviso, Botha J.A. in **Mphosi v Central Board for Cooperative Insurance Ltd** [19] said:

> "This argument altogether overlooks the true function and effect of a proviso. According to Craies, *Statute Law, 7th ed., at p.* 218 – 'the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the proceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it: and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect'.
>
> In *R. v Dibdin*, 1910 P. 57, Lord FLETCHER MOULTON at p. 125, in the Court of Appeal, said –
>
> > 'The fallacy of the proposed method of interpretation (i.e. to treat a proviso as an independent enacting clause is not far to seek. It sins against the fundamental rule of construction that a proviso must be construed in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte Partington*, 6 Q.B. 649; *In re Brocklbank*, 23 Q.B. 461. and *Hill v. East and West India* Dock Co., 9 App. Cas. 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso".

[30] According to the jurisprudence of the Supreme Court of India, proviso serves the following four purposes:

> "(1) qualifying or excepting certain provisions from the main enactment;
>
> (2) It may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
>
> (3) It may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

[19] 1974 (4) SA 633 at 645 C-E

(4) It may be used to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."[20]

[31] In *casu,* the proviso serves the purpose of qualifying the main enactment in section 67(3) by obliging the IEC to utilise the latest population census whenever it conducts a review. The use of the words "such a review" and "make such an alteration" in the proviso is a strong indicator that the proviso does not introduce another review as contended by the IEC. These words refer to the review referenced in the main body of the sub-section which directs that a review must be carried "out not less than eight nor more than ten years from the date of completing its last review". The proviso does not say a review must be carried out every time there is latest census report. The latest census report can be discarded if the IEC considers that by effluxion of time there is better information that has since emerged.

[32] Therefore, the Court rejects the interpretation urged by the IEC and accepts that of the applicants. The eight to ten-year period for review of constituency boundaries is the benchmark for periodicity of constituency reviews and not a census. The framers of the Constitution must have made a determination that this is the requisite and appropriate period to revisit the constituencies as a guard rail against infrequent reviews dictated by interest of transient political majorities and election management bodies. Yes, the IEC must use the latest census in conducting a review, but it is at liberty to discard it in favour of available best evidence of latest population figures.

[20] Delhi Metro Rail Corporation Ltd v Tarun Pal Singh Civil Appeal No.19356 of 2017 page 10

[33] To prevent temporary political majorities and election management bodies from tinkering with the constitutionally prescribed period, section 67 was entrenched. To amend it, Parliament can only do so by votes of two-thirds in both Houses of Parliament. This speaks to the unyielding nature of the period to review constituency boundaries. There is merit in the applicants' contention that it does not lie within the powers of the IEC to initiate and not complete a review within the prescribed period or even to postpone it.

## Section 67(2) interpretation

[34] Section 67(2) is couched in crystal clear language that "All constituencies shall contain as nearly equal numbers of inhabitants of or above the age of eighteen years as appears to the Commission to be reasonably practicable..." This language speaks to the principles of voter parity and equal representation. The number of voters in each of the eighty constituencies must be nearly equal to ensure that members of the National Assembly elected to represent constituencies each represent approximately equal number of voters. As explained by Cory J. of the Supreme Court of Canada[21]:

> "First, the right to vote is fundamental to a democracy. If the right to vote is to be of true significance to the individual voter, each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency. Any significant diminution of the right to relative equality of voting power can only lead to voter frustration and to a lack of confidence in the electoral process."

[21] Reference re Prov. Electoral Boundaries (Sask) [1991]2 S.C.R. 158 at 170

[35] McLachlin J expatiates[22]:

> "What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.
>
> But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. Sir John A. Macdonald in introducing the *Act to re-adjust the Representation in the House of Commons*, S.C. 1872, c. 13, recognized this fundamental fact (House of Commons Debates, Vol. III, 4th Sess., p. 926 (June 1, 1872)):
>
> ...it will be found that,... while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented, that the principle of numbers should not be the only one.
>
> Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.
>
> First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.
>
> Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.
>
> It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in *Dixon*, *supra*, at p. 414, that 'only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due

[22] Op.cit. pp 183-185

weight to regional issues within the populace and geographic factors within the territory governed'."

[36] These *dicta* illuminate the rational for reconfiguring the departure from absolute voter parity to relative voter parity and factors to consider under section 67(2). The factors that must be taken into account in configuring relative voter parity are the following:

> "(a) the density of population, and in particular the need to ensure adequate representation of sparsely populated rural areas;
>
> (b) the means of communication;
>
> (c) geographical features;
>
> (d) community of interest; and
>
> (e) the boundaries of existing administrative areas;"

[37] However, the configuration of the voter parity principle is disciplined by the constitutional requirement mentioned in the proviso to the section. It is that "the number of inhabitants, of or above eighteen years, of any constituency shall not exceed or fall short of the population quota by more than ten per cent." These words mean that when altering boundaries of constituencies, the IEC should not underload or overload the voter numbers by more than ten per cent of its determined quota. This is the red line that the IEC should not cross. There is no room for justification for non-compliance with the proviso which is carefully crafted to delineate the parameters of what is permissible and what is not.

## IV. DISCUSSION

### Did the IEC initiate and complete the review within eight to ten years as prescribed by section 67(3)?

[38] The parties are on common ground that the IEC commenced the impugned review in 2018. This was following the last Delimitation Order of 26th July 2010 (Legal Notice No. 108 of 2010). When it commenced the review process, the IEC used the 2016 population census on the basis of which it produced an inception document titled "Review of constituency boundaries 2018". This document was shared with registered political parties and members of the community and a consultation process ensued.

[39] During the consultation process, the stakeholders and other consultees raised issues outlined in para 16.3 *ante*. While the IEC was busy addressing those issues, the contracts of Commissioners expired on 1 June 2019 and they left without completing the review. Thus, the review stalled. New Commissioners only came into office on 14 December 2020. By that time the eight to ten years period for conducting a review had already expired in July 2020. This notwithstanding, they studied and reviewed the work done by their predecessors thus far and decided to continue where they left. A re-run of the consultation process was done by issuing the impugned **Legal Notice No.109 of 2021**. This provided the stakeholders a second opportunity to raise issues that may have cropped up during the period when the IEC had no Commissioners. The period for representations ran from Monday 27 September to Friday 22 October 2021.

[40] The applicants do not, in their replying affidavit contest what the Commissioners did. Crucially, the applicants do not say whether or not they honoured the invitation to make representations. Thus, an adverse inference should be drawn that they received the Legal Notice but did not make any representations. Their contention that in issuing the Legal Notice, the IEC did not say this was a continuation of the stalled review is neither here nor there. In the light of the concession by Counsel for the applicants that the dispute as to when the review was commenced and completed must be resolved in accordance with the *Plascon Evans* rule[23], the respondents' version must be preferred that the Legal Notice was issued to continue the review.

[41] If the applicants entertained any doubt on whether the Legal Notice was an initiation of another review or continuation of the stalled review, they could have sought clarity in order to make relevant representations. They did nothing, not even to challenge the issuance of the Legal Notice.

[42] It is only when the IEC issued **Legal Notice No.140 of 2021** inviting political parties and voters to raise objections to the proposed new boundaries that the first applicant raised a query about the constitutional competence of the review. The objections relevant to the lawfulness of the review were the following two:

> "(a) The IEC is acting in breach of section 67 of the Constitution.

[23] Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] (3) 623 (A)

(b) The time within which to undertake the constituency delimitations has elapsed. The process ought to have started in 2016 alternatively 2018 and concluded in 2020."

[43] The IEC rejected these objections on the ground that they "do not fall within the stipulations of section 153 (1) (c)" [of the **Electoral Act, 2011**] in that they were not directed "to any specific proposal to constituency boundaries". The IEC was correct because these objections were not directed at informing and influencing the outcome of the review process namely, alteration of constituency boundaries. Rather, they questioned compliance of the IEC with a provision of the Constitution.

[44] The Court finds as a fact that the review commenced in 2018 following the release of the 2016 census report. The Court has not been told exactly when the last review that resulted in the issuance of the Delimitation Order of 2010 was completed. According to the **Interpretation Act No. 19 of 1977** a year means a calendar year. The Delimitation Order of the last review was issued on 26th July 2010. Using the civil computation method, the period for the impugned review started on 26th July 2010 and ended at midnight on 25th July 2020. This computation does not take into account the period of one year six months and thirteen days during which the IEC had no Commissioners. The said period is from 1st June 2019 to 13th December 2020. If this period is taken into account the ten year period ended on 12th January 2022.

[45] The parties are on common ground that the previous Commissioners contracts expired on 1st June 2019 and the current Commissioners assumed

duties on 14th December 2020. They, however, disagree on whether the absence of Commissioners during that period meant that the IEC was still operational by virtue of absence of Commissioners. The resolution of this dispute is provided for by how the IEC is constituted in terms of the Constitution. The relevant section is section 4 of the **Fourth Amendment to the Constitution, Act No. 4 of 2001**. It amends section 66(1) of the Constitution by substituting the following:

> "There shall continue to be an Independent Electoral Commission consisting of a chairman and two members, who shall be appointed by the King acting in accordance with the advice of the Counsel of State."

[46] According to section 66B as inserted by the **Second Amendment to Constitution, Act No. 7 of 1997**, the Commissioners are the ones who make decisions for the IEC and regulate its procedure. One of IEC 's functions in terms of section 66A as inserted by the Second Amendment is to delimit the boundaries of constituencies in accordance with the provisions of the Constitution and any other law. It follows that if there are no Commissioners in office, no decision can be made to review and alter constituency boundaries. Thus, the absence of the Commissioners for a period of one year, six months and thirteen days means that there was no IEC to review and alter boundaries. The contention of the applicants that the IEC was always in place must therefore be rejected.

[47] After the new Commissioners were appointed, they were entitled to continue where their predecessors had left. They rightly issued **Legal Notice No. 109 of 2021** in terms of which the IEC invited representations in respect of the review. The Legal Notice was issued on 24th September

2021. The period for representations ran from Monday 27th September to Friday 22nd October 2021. The issuance of this Legal Notice falls within the period of the impugned review that ended on 12th January 2022. Following the issuance of **Legal Notice No.109**, the IEC issued **Legal Notice No. 140** on 17th December 2021 inviting objections to the proposed boundaries of all constituencies from 4th January 2022 to 28th January 2022. Both Legal Notices were issued within the period of the review though the period of objections in the latter went beyond the review period by sixteen days. However, **Legal Notice No. 140** is not a subject of attack at all by the applicants.

[48] The applicants contend that the decision of the IEC to commission the review as contained in **Legal Notice No. 109 of 2021** dated the 24th September 2021 falls to be set aside for violating section 67(3), presumably because the decision was outside the prescribed period of the review. This contention is not sound because it does not take into account the period of one year six months and thirteen days during which there were no Commissioners. Once this period is taken into account, the decision was taken on time and this Legal Notice was issued within the prescribed period. The contention of the applicant falls to be rejected.

[49] The applicants attack **Legal Notice No. 37 of 2022 (Constituency Delimitation Order)** on the basis that it has been issued beyond the prescribed period for a review. The **Delimitation Order** was issued on 13th April 2022. This was obviously after the prescribed period for a review had ended on 12th January 2022. The **Delimitation Order** was issued four

months after (13th January to 13th April 2022). The question that arises is whether the applicants' attack has merit. This necessitates an interrogation of whether section 67(3) requires that a Delimitation Order necessarily need to be issued within the prescribed period or whether it may be issued within a reasonable time after its expiry. The word used in relation to the review in sub-section (3) is "shall" and the one used in relation to the issuance of a Delimitation Order is "may".

[50] Ordinarily the word "shall" means that it is peremptory to strictly comply with the law. Whereas, the word "may" requires substantial compliance. This means that it is peremptory that a review of constituency boundaries be done within the prescribed period but the issuance of a Delimitation Order is directory. However, this distinction between "peremptory" and "directory" is not necessarily determinative of whether failure to complete the review on 12th January 2022 and to issue the **Delimitation Order** inevitably results in their nullity. What matters is whether the object sought to be achieved by the injunction to do a review and alter constituency boundaries has indeed been achieved[24].

[51] The answer to this question whether the applicants' contention has merit is in the negative. The negative answer is fortified by sub-section (4) which provides that a Delimitation Order only comes into effect "upon dissolution of Parliament after it was made". This suggests that it is not obligatory for the IEC to publish the Order in the Gazette before the expiry of the period for review. Rather, it is obligatory that it be published in the gazette before

[24] NEHAWU v Minister of Public Service 2022 (6) BCLR 673 (CC) paras [71] – [72].

dissolution of Parliament which is the time that it will take effect. In the same vein the object to review constituency boundaries had been achieved when the objections were called for in January 2022. The objections were not about the review process itself but the proposed draft Order to alter constituency boundaries. Thus, navigating away from narrow peering at words, the Court does not see any purpose, and none was suggested for linking the period of the review with the issuance of the **Delimitation Order**. Nor does the Court see anything fatal in the Delimitation Order being issued after the end of the prescribed period for review. All that the IEC has done are effective to bring about the achievement of the review of constituency boundaries and their alteration.

## Is the voter population in each constituency below or above the population quota by ten per cent?

[52] The applicants contend that the IEC has failed to comply with section 67(2) of the Constitution in the following respects:

52.1 It has made wide variations between constituencies in the same district and thereby failed in its obligation to distribute equally the voter numbers in each district and between overlapping "administrative districts".

52.2 It has failed to ensure that the apportionment of voters in all constituencies or in respect of constituencies in a district does not exceed or fall short of the population quota by more than ten percent.

52.3 In dividing constituencies, the IEC is not bound to limit constituency boundaries within administrative boundaries of Districts.

[53] The IEC's counter argument is that the applicants misconstrue its obligations in that:

53.1 It distributes voter numbers per constituency and not by District. It does so using the template of voter population quota according to which each constituency voter number should not exceed it or fall short of it by more than ten per cent.

53.2 The population quota number is determined to be 15,507 and appears in the inception document titled "Review of constituency boundaries 2018".

53.3 The upper limit of ten per cent of 15,507 is 17,058. The lower limit is 13,956.

53.4 The applicants' calculation of differences in percentages is based on a wrong formula of comparing the voter numbers between constituencies in a District and not on the voter numbers in each constituency.

[54] The Court finds merit in the IEC's contentions save in one important respect, which is that it concedes that in some of the constituencies, the voter numbers are either below or above the population quota by more than

ten per cent. The following table is a full picture of voter population per constituency in terms of the **Delimitation Order:**

# CONSTITUENCY VOTER POPULATION NUMBERS

| District | Constituency Name & Number | Voters Number | Population Quota | Upper Limit | Lower Limit | Compliance |
|---|---|---|---|---|---|---|
| **utha – Buthe** | **1. Mechachane** | **12,977** | **15,507** | **17,058** | **13,956** | **No** |
| | 2. Hololo | 15,950 | 15,507 | 17,058 | 13,956 | Yes |
| | 3. Motete | 14,366 | 15,507 | 17,058 | 13,956 | Yes |
| | 4. Qalo | 14,957 | 15,507 | 17,058 | 13,956 | Yes |
| | 5. Butha - Buthe | 14,466 | 15,507 | 17,085 | 13,956 | Yes |
| **ibe** | 6. .Maliba- Matšo | 15,414 | 15,507 | 17,085 | 13,956 | Yes |
| | **7. Mphosong** | **17,380** | **15,507** | **17,085** | **13,956** | **No** |
| | 8. Thaba - Patšoa | 15,620 | 15,507 | 17,085 | 13,956 | Yes |
| | 9. Mahobong | 14,239 | 15,507 | 17,085 | 13,956 | Yes |
| | 10. Pela - Tšoeu | 14,195 | 15,507 | 17,085 | 13,956 | Yes |
| | 11. Matlakeng | 15,725 | 15,507 | 17,085 | 13,956 | Yes |
| | 12. Leribe | 16,065 | 15,507 | 17,085 | 13,956 | Yes |
| | 13. Hlotse | 16,463 | 15,507 | 17,085 | 13,956 | Yes |
| | **14. Tsikoane** | **17,574** | **15,507** | **17,085** | **13,956** | **No** |
| | 15. Maputsoe | 16,970 | 15,507 | 17,085 | 13,956 | Yes |
| | **16. Moselinyane** | **22,883** | **15,507** | **17,085** | **13,956** | **No** |
| | 17. Peka | 14,559 | 15,507 | 17,085 | 13,956 | Yes |
| | **18. Kolonyama** | **13,870** | **15,507** | **17,085** | **13,956** | **No** |
| **ea** | 19. Mosalemane | 14,004 | 15,507 | 17,085 | 13,956 | Yes |
| | 20. 'Makhoroana | 14,143 | 15,507 | 17,085 | 13,956 | Yes |
| | 21. Bela - Bela | 14,005 | 15,507 | 17,085 | 13,956 | Yes |
| | 22. Malimong | 15,383 | 15,507 | 17,085 | 13,956 | Yes |
| | 23. Khafung | 13,956 | 15,507 | 17,085 | 13,956 | Yes |
| | 24. Teya - Teyaneng | 14,160 | 15,507 | 17,085 | 13,956 | Yes |
| | **25. Tšoana - Makhulo** | **13,240** | **15,507** | **17,085** | **13,956** | **No** |
| | 26. Thuathe | 15,050 | 15,507 | 17,085 | 13,956 | Yes |
| | 27. Mokhethoanen g | 16,739 | 15,507 | 17,085 | 13,956 | Yes |
| | 28. Khubetsoana | 17,015 | 15,507 | 17,085 | 13,956 | Yes |
| | 29. Mabote | 16,064 | 15,507 | 17,085 | 13,956 | Yes |
| **seru** | 30. Motimposo | 16,727 | 15,507 | 17,085 | 13,956 | Yes |
| | 31. Majoe – A-Litšoene | 14,190 | 15,507 | 17,085 | 13,956 | Yes |
| | 32. Stadium Area | 15,992 | 15,507 | 17,085 | 13,956 | Yes |
| | 33. Maseru | 15,857 | 15,507 | 17,085 | 13,956 | Yes |

| | | | | | | |
|---|---|---|---|---|---|---|
| | 34. Thetsane | 14,834 | 15,507 | 17,085 | 13,956 | Yes |
| | 35. Tsolo | 15,654 | 15,507 | 17,085 | 13,956 | Yes |
| | 36. Likotsi | 16,020 | 15,507 | 17,085 | 13,956 | Yes |
| | 37. Qoaling | 15,784 | 15,507 | 17,085 | 13,956 | Yes |
| | 38. Lithoteng | 15,670 | 15,507 | 17,085 | 13,956 | Yes |
| | 39. Abia | 15,742 | 15,507 | 17,085 | 13,956 | Yes |
| | 40. Lithabaneng | 14,928 | 15,507 | 17,085 | 13,956 | Yes |
| | 41. Matala | 14,239 | 15,507 | 17,085 | 13,956 | Yes |
| | 42. Thaba-Bosiu | 15,835 | 15,507 | 17,085 | 13,956 | Yes |
| | 43. Machache | 16,168 | 15,507 | 17,085 | 13,956 | Yes |
| | 44. Thaba - Putsoa | 14,165 | 15,507 | 17,085 | 13,956 | Yes |
| | 45. Maama | 15,167 | 15,507 | 17,085 | 13,956 | Yes |
| | 46. Koro-Koro | 16,363 | 15,507 | 17,085 | 13,956 | Yes |
| | 47. Qeme | 14,722 | 15,507 | 17,085 | 13,956 | Yes |
| | 48. Rothe | 14,269 | 15,507 | 17,085 | 13,956 | Yes |
| | 49. Matsieng | 15,374 | 15,507 | 17,085 | 13,956 | Yes |
| | 50. Makhaleng | 14,643 | 15,507 | 17,085 | 13,956 | Yes |
| | 51. 'Maletsunyane | 13,977 | 15,507 | 17,085 | 13,956 | Yes |
| feteng | 52. Thaba -Pechela | 14,060 | 15,507 | 17,085 | 13,956 | Yes |
| | **53. Phoqoane** | **17,781** | **15,507** | **17,085** | **13,956** | **No** |
| | **54. Matelile** | **13,822** | **15,507** | **17,085** | **13,956** | **No** |
| | 55. Maliepetsane | 16,034 | 15,507 | 17,085 | 13,956 | Yes |
| | 56. Thabana-Morena | 16,134 | 15,507 | 17,085 | 13,956 | Yes |
| | 57. Qalabane | 15,842 | 15,507 | 17,085 | 13,956 | Yes |
| | 58. Mafeteng | 16,982 | 15,507 | 17,085 | 13,956 | Yes |
| hale's Hoek | 59. Taung | 14,329 | 15,507 | 17,085 | 13,956 | Yes |
| | 60. Mpharane | 14,336 | 15,507 | 17,085 | 13,956 | Yes |
| | **61. Mohale's Hoek** | **19,824** | **15,507** | **17,085** | **13,956** | **No** |
| | 62. Mekaling | 17,051 | 15,507 | 17,085 | 13,956 | Yes |
| | **63. Phamong** | **19,861** | **15,507** | **17,058** | **13,956** | **No** |
| | **64. Hloahloeng** | **13,824** | **15,507** | **17,058** | **13,956** | **No** |
| | **65. Moyeni** | **19,789** | **15,507** | **17,058** | **13,956** | **No** |
| | 66. Sempe | 14,731 | 15,507 | 17,058 | 13,956 | Yes |
| | **67. Mt. Moorosi** | **17,334** | **15,507** | **17,058** | **13,956** | **No** |
| | **68. Qhoali** | **17,458** | **15,507** | **17,058** | **13,956** | **No** |
| )hacha's Nek | **69. Qacha's Nek** | **18,401** | **15,507** | **17,058** | **13,956** | **No** |

| | | | | | | |
|---|---|---|---|---|---|---|
| | 70. Lebakeng | 12,806 | 15,507 | 17,058 | 13,956 | No |
| | 71. Tsoelike | 12,749 | 15,507 | 17,058 | 13,956 | No |
| 'haba - Tseka | 72. Mantsonyane | 13,863 | 15,507 | 17,058 | 13,956 | No |
| | 73. Thaba-Moea | 12,807 | 15,507 | 17,058 | 13,956 | No |
| | 74. Thaba- Tseka | 16,834 | 15,507 | 17,058 | 13,956 | Yes |
| | 75. Semena | 16,843 | 15,507 | 17,058 | 13,956 | Yes |
| | 76. Mashai | 14,521 | 15,507 | 17,058 | 13,956 | Yes |
| Mokhotlong | 77. Malingoaneng | 14,371 | 15,507 | 17,058 | 13,956 | Yes |
| | 78. Senqu | 14,077 | 15,507 | 17,058 | 13,956 | Yes |
| | 79. Mokhotlong | 14,422 | 15,507 | 17,058 | 13,956 | Yes |
| | 80. Bobatsi | 13,070 | 15,507 | 17,058 | 13,956 | No |

[55] The highlighted parts of this table show that twenty constituencies are non-compliant in that they are either below or above the population quota by more than ten per cent. The IEC concedes that this is so, but seeks to justify this non-compliance in respect of some and not all.

[56] The reasons for justifying the non – compliance are difficult terrains, inaccessibility of services, population sparsity, community conflicts and proximity of employment. All these reasons fall in the category of factors mentioned in section 67(2) (a) to (e). According to the proviso to this section consideration of these factors is still subject to the requirement that the ten per cent threshold must still be observed. The proviso to section 67(2) is couched in mandatory language by use of the words "shall not exceed or fall short of the population quota by more than ten percent". This indicates that a red line has been drawn by the Constitution that dare not be crossed. Crossing it is a breach of the Constitution as the supreme law

of the land[25]. The imperatives of the rule of law demand that crossing this red line be declared null and void in terms of section 2 of the Constitution. Therefore, the Court does not accept that the justification by the IEC is constitutionally permissible.

[57] The permissible justifications in the Constitution are only provided for in respect of limitations of fundamental human rights and freedoms in the Bill of Rights. Outside the Bill of Rights, the Constitution does not brook any justification for its breach.

## Is the IEC bound to delimit constituency boundaries within the administrative boundaries of the country?

[58] The applicants further contend that the IEC acted unreasonably by confining the boundaries of each constituency within the administrative boundaries of Districts thereby making it to fail to observe the ten percent threshold provided for in section 67(2) of the Constitution. Section 67(1) of the Constitution, which obligates the IEC to divide the country into eighty constituencies for purposes of elections to the National Assembly, makes no reference to administrative district boundaries being the geographical localities of the constituencies. Again, if constituency boundaries were to be confined to administrative district boundaries, voter parity would never be achieved as districts are not evenly populated. Thus, the applicants' contention has merit.

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[25] O'Donavan v Attorney General [1961] IR 114; O'Malley v An Taoiseach [1990] ILRM 461

## V. DISPOSITION

### Effects of the constitutional lapses

[59] The court is asked to review and set aside the **Delimitation Order** as irregular, unlawful and therefore null and void. This can only be done if it is inconsistent with section 67(2) in that some constituencies are not compliant with the threshold as the applicants contend in their founding papers.

[60] Reviewing and setting aside the **Delimitation Order** in respect of the twenty non – compliant constituencies would lead to the following constitutional problems:

(a) Persons who have registered to vote in the twenty non-compliant constituencies would be denied the right to vote and thereby effectively disenfranchised.

(b) If elections do not proceed there will be no representatives in the National Assembly. No laws will be made and there will be no new Government. Our democratic project will be in serious danger of collapse.

(c) If elections are held in order to avoid (a) and (b) above, the National Assembly will have a membership of representatives some of whom represent constituencies which are not constitutionally in order. The integrity of the democratic process will be questioned and democracy will slowly erode.

[61] The applicants' initial contention was that the solution to these problems is to hold the elections on the basis of "constituency boundaries as determined in their review in 2018". This contention was abandoned during the course of oral argument when it became clear that there is no review of 2018 which resulted in the alteration of constituency boundaries. This contention could have only meant that elections be held using the 2010 constituency boundaries. This proposition ignores population growth since the 2010 constituency delimitation. In fact, according to the document titled 'Review of constituency boundaries 2018', voter population across the country was 1,153,529 in 2010 and 1,240,537 in 2016.

[62] The IEC's job is to delimit constituency boundaries. It is also to hold elections and not to withhold them. But holding general elections on the basis of constitutionally flawed constituencies constitutes a subvention of the principle of voter parity and equal representation which are the building blocks of 'a sovereign democratic kingdom' proclaimed in section 1 of the Constitution.

[63] A literal interpretation of section 84 is that it is unyielding in that elections should be held within the prescribed period of three months after dissolution of Parliament. Such interpretation would collide the section with section 67 whose purpose is to ensure that what is done within those three months is constitutionally in order. Therefore section 84 must be given a purposeful interpretation which is that elections of a responsible

Government must be held within the prescribed period if the alteration of constituency boundaries has been validly done.

[64] In its research the Court found and considered the case of **Russell v The Attorney General for the State of Saint Vincent and Grenadines and Others (Saint Vincent and The Grenadines)**[26]. This authority was not referred to by Counsel in their heads of argument. The Privy Council had to interpret sections 33 and 49 of the Constitution of Saint Vincent and the Grenadines. Section 33 provided for the appointment of a Constituency Boundaries Commission to review and delimit constituency boundaries to observe voter parity whenever a population census was held. Section 49 provided that "elections shall be held at such time within ninety days after any dissolution of Parliament…". There were constitutional lapses in the appointment of the Commission which led to the elections being held without the reviewed and altered constituencies contrary to section 33.

[65] The Privy Council held that the appointment of a Boundaries Commission was not a condition precedent to a valid election. It dismissed the argument that a fresh delineation of the boundaries must be completed before elections were held on the ground that it flew in the face of section 49 which required elections to be held within ninety days of the dissolution of Parliament as doing otherwise would leave the State with no Government.

[26] [1997 UKPC 23 (15th May, 1997)

[66] But, the Court is not persuaded by this reasoning. It fails to make the necessary link between installing a new Government and the right to elect that Government by a process which gives effect to the principles of voter parity in section 67(2) of the Constitution. Tellingly, the delay in holding elections in order to ensure that constituencies are constitutionally compliant does not mean that there would be no Government as there can never be a vacuum. If necessary, the current Government should hold fort until all constituencies can hold elections.

[67] Constitutionally compliant constituencies are a *sine qua non* for holding credible elections. The holding of elections within the three months period prescribed by section 84 of the Constitution is premised on existence of eighty constitutionally compliant constituencies. It follows that if there is a problem with constituencies, no elections can be held within the prescribed period if the problem is not addressed. Based on the doctrine of objective constitutional validity, the twenty constituencies are invalid. Even absent a declarator regarding their invalidity, the Constitution already does not recognise them by virtue of its Supremacy Clause (section 2) which considers them void. As a result, going ahead to hold elections before the constituencies are corrected, will be tantamount to conducting elections on the basis of legally flawed constituencies thereby desecrating the Constitution.

## What must be done?

[68] The Court considered whether the twenty non-compliant constituencies can be severed from the rest. The test of severance or severability is laid in **R v. Phoofolo**[27] as follows:

> "The classical case on the test of 'severability' is the decision in *Johannesburg City Council v. Chesterfield House (Pty) Ltd* 1952(3) SA 809 (A) in which it was stated that:
>
> > 'Where it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute.
> >
> > Where, however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole statute must be declared *ultra-vires*."

[69] It is not possible to sever because elections have to be held on the same date throughout the Kingdom in terms of section 80 of the **Electoral Act, 2011**. The Constitution and the Act do not provide for partial or staggered elections. The eighty members of the National Assembly must be elected on the same day and enter the Parliament on the same day with the other forty elected in accordance with the principle of proportional representation.

[70] The applicants' prayer in paragraph 2.1 of the Notice of Motion is that the **Delimitation Order** should be reviewed and set aside as irregular, unlawful and therefore null and void for non-compliance with section 67(2). This prayer is too broad in that it seeks the invalidation of the entire

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[27] LAC (1990-94)1 at 10G-I

**Delimitation Order**. The powers of this Court in terms of section 2 of the Constitution is to declare a law or an act null and void only to the extent of it being inconsistent with the Constitution. This in itself calls for a partial invalidation proportionate to the constitutional inconsistency. Thus, the **Delimitation Order** can only be voided in respect of the twenty non-compliant constituencies. But this does not mean that elections in the compliant constituencies shall be held.

[71] Be that as it may, the IEC is granted special powers to take corrective measures in terms of section 142 (1) of the Act which grants it the following special powers:

> "142. (1) If it appears to the Commission that, by of reason any mistake or emergency, the provision of this Act cannot be applied, the Commission may, by particular or general instructions –
>
> (a) extend the time for doing of any act;
>
> (b) increase the number of electoral officers or voting stations;
>
> (c) adapt any such provision in order to achieve the purposes of this Act to the extent necessary to meet the exigencies of the situation.
>
> (2) The Commission may suspend registration during an emergency".

[72] The question is whether the words "if it appears to the Commission that, by any mistake or emergency the provision of this Act cannot be applied" would cover the facts in this case whereby the IEC has altered constituency

boundaries in a manner that offends the ten per cent threshold in section 67(2) of the Constitution. Differently asked, does holding of elections in relation to a non-compliant constituency render the provisions of the Electoral Act inapplicable? The answer is found in one of the purposes of the **Electoral Act, 2011** which is "to provide for periodic elections under a system of universal and equal suffrage". This purpose speaks to the principle of voter parity in section 67(2) of the Constitution. Thus understood, altering a constituency boundary contrary to voter parity principle is undoubtedly a mistake which defeats the attainment of this object of the Act. Then the IEC is empowered to correct such a mistake before elections are held. Otherwise elections will be held on the basis of constitutionally flawed constituencies - something which is not constitutionally permissible.

[73] The Court takes judicial notice of the fact that during the pendency of this case, the King by Proclamation appointed 7th October 2022 as the date of elections. This is the target date the IEC should chaise in the course of taking any corrective measures in respect of the non – compliant constituencies to ensure that elections are held on the proclaimed date. The IEC has powers to take corrective measures in terms of section 142 (1) (c) of the Electoral Act by adapting the section 153 procedure of changing constituency boundaries "to the extent necessary to meet the exigencies of the situation".

## Costs

[74] The applicants have only partially succeeded in relation to prayer 2.1 where they sought a review and setting aside of the entire **Delimitation Order** as null and void. But they have also succeeded in prayer 5 where they sought a declaratory order that the IEC is not obliged to limit boundaries of constituencies within administrative boundaries of the ten Districts. However, they have failed in their attack against the decision to conduct and commission the review of constituencies and to invalidate the **Delimitation Order** for having been issued beyond the eight to ten years period of review. They are therefore entitled to 50% of their costs.

## Order

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

1. The Constituency Delimitation Order, Legal Notice No. 37 of 2022, is declared unconstitutional and set aside in respect of the following twenty constituencies:

    (a) No. 01: Mechachane

    (b) No.7: Mphosong:;

    (c) No.14: Tsikoane

    (d) No.16: Moselinyane;

    (e) No.18: Kolonyama;

    (f) No.25: Tšoana – Makhulo

    (g) No.53: Phoqoane

    (h) No.54: Matelile

(i) No.61: Mohale's Hoek;

(j) No.63: Phamong

(k) No. 64: Hloahloeng;

(l) No.65: Moyeni;

(m) No.67: Mt. Moorosi;

(n) No.68: Qhoali;

(o) No.69: Qacha's Nek;

(p) No.70: Lebakeng;

(q) No.71: Tsoelike;

(r) No.72: Mantsonyane;

(s) No.73: Thaba-Moea; and

(t) No.80: Bobatsi.

2. It is declared that in reviewing boundaries of constituencies the IEC is not bound to limit boundaries of such constituencies within the administrative boundaries of the Districts.

3. The rest of the prayers are dismissed.

4. The first respondent to pay 50% of the applicants' costs.

**S.P. SAKOANE CJ** **A.R. MATHABA J** **M.J. MAKHETHA J**

For the Applicants: M.E Teele KC

For the 1st Respondent: K. Letuka

For the 10th Respondent: Mr. C. J Lephuthing

For the 36th and 39th Respondents: M. Rasekoai

For the 52nd Respondent: F. Sehapi