

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CONSTITUTIONAL CASES NOS. 0013 and 0015/2022**

In the matter between:

**KANANELO BOLOETSE**

**APPLICANT (in No.0013)**

**LINTLE TUKE  
No.0015)**

**APPLICANT (in**

And

**HIS MAJESTY THE KING**

**1<sup>ST</sup> RESPONDENT**

**THE PRIME MINISTER**

**2<sup>ND</sup> RESPONDENT**

**COUNCIL OF STATE**

**3<sup>RD</sup> RESPONDENT**

**SPEAKER OF THE NATIONAL ASSEMBLY**

**4<sup>TH</sup> RESPONDENT**

**PRESIDENT OF THE SENATE**

**5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**6<sup>TH</sup> RESPONDENT**

Neutral citation: Boloetse and Tuke v. His Majesty The King and others [2022] LSHC 216 Const (12 September 2022)

**CORAM: S.P. SAKOANE CJ, T.E. MONAPATHI**

**and M.P. RALEBESE JJ**

**HEARD: 25 AUGUST 2022**

**DELIVERED: 12 SEPTEMBER 2022**

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## SUMMARY

Constitutional law – declaration of state of emergency and recall of dissolved Parliament to deal with it – whether citizens have locus standi to litigate on basis of rule of law review – whether failure by Parliament to pass bills before it is dissolved constitutes a public emergency – whether Parliament can be recalled to pass bills it failed to pass before its dissolution – Constitution sections 23, 70 and 84 (2); Interpretation (Amendment) Act, 1993 section 27A; Parliamentary Powers and Privileges Act, 1994 section 24; National Assembly Standing Order No.106; Senate Standing Order No.95

## ANNOTATIONS:

### CASES CITED:

#### LESOTHO

*All Basotho Convention (ABC) and others v The Prime Minister and others* Constitutional Case 0006/2020 (17 April 2020)

*Attorney General v His Majesty The King and others* C of A (CIV) 13/2015 (12 June 2015)

*Bolofa and others v Director of Public Prosecutions* LAC (1995 – 99) 231

*Democratic Congress and another v Independent Electoral Commission and 52 others* [2022] LSHC 173 (Const) (8 August 2022)

*Dr. Mosito and others v Letsika and others* C of A (CIV) No. 9/2018 (26 October 2018)

*Justice Hlajoane and others v Letsika and others* C of A (CIV) No. 66/ 2018 (1 February 2019)

*Mofomobe v Minister of Finance; Phoofolo v The Prime Minister (out-going)* Constitutional Cases Nos 07/2017 and 08/2017 (03 April 2017)

*Transformation Resource Centre and another v Speaker of the National Assembly* Constitutional Case No. 14/2017 (10 August 2017)

#### AUSTRALIA

*Western Australia v Commonwealth* (1975)134 CLR 201

#### CANADA

*Thorson v Attorney General of Canada* [1975] 1 S.C.R. 138

#### EUROPE

*A and others v. United Kingdom* ECHR 301 (19 February 2009)

#### INDIA

*S.P. Gupta and others v. Union of India* [1982] 2 S.C.R. 365

*S.R. Bommai and others v. Union of India and others* [1994] 2 S.C.R. 644

*State of Rajasthan and others v. Union of India* 1978 SCR (1) 1

#### NAMIBIA

*Federal Convention Namibia v. Speaker, National Assembly, Namibia* 1994 (1) SA 177 (NmHC)

*S v. Acheson* 1991 (2) SA 805 (Nm)

#### SOUTH AFRICA

*National Assembly v. De Lille and another* 1999 (4) SA 863 (SCA)

#### TANZANIA

*Mtikila v. Attorney General* [1996] 1 CHRLD 11

#### UNITED KINGDOM

*A v. Secretary of the Home Department* [2004] UKHL 56 (16 December 2004)

#### UNITED STATES

*Flast et al v. Cohen* 392 US 83 (1968), 20 L Ed 2d 947

#### ZIMBABWE

*Smith v. Mutasa And Another* NNO 1990 (3) SA 756 (ZSC)

#### STATUTES:

*Constitution of Lesotho, 1993*

*Interpretation (Amendment) Act No. 4 1993*

*National Assembly Standing Orders, 2008*

*Parliamentary Powers and Privileges Act No. 8 of 1994*

*Senate Standing Orders, 2010*

#### LEGAL NOTICES:

*Declaration of a State of Emergency, Proclamation, 2022*

*Dissolution of Parliament Notice, 2022*

*Recall of the Tenth Parliament Notice, 2022*

BOOKS:

Basu's *Commentary of the Constitution of India*. 7<sup>th</sup> Edition Vol. G

*Black's Law Dictionary* 6<sup>th</sup> Edition

Khaketla, B.M. (2000). *Lesotho 1970: An African Coup under the Microscope*. (Moriya Printing Works)

Locke J. (1690) *The Second Treatise On Government*

Nwabueze, B.O. (1974). *Presidentialism in Commonwealth Africa*. (London: C. Hurst & Company)

Seervai, H.M. (1993). *Constitutional Law of India*. 4<sup>th</sup> Edition Vol. 2 (Bombay: N.M. Tripathi Private Ltd)

Wade and Forsyth *Administrative Law*. 8<sup>th</sup> edition

ARTICLES:

*Siracusa Principles* (1985) 7 HRQ

INTERNATIONAL INSTRUMENTS:

*European Convention of Human Rights, 1950*

*International Convention on Civil and Political Rights, 1966*

*Paris Minimum Standards of Human Rights Norms in a State of Emergency* (International Law Association, 1984)

# JUDGMENT

**SAKOANE CJ:**

## **I. INTRODUCTION**

“It has been said that the Constitution confers power, but it does not guarantee that the power would be wisely exercised. It can be said equally that the Constitution confers power but it gives no guarantee that it will be worked by men of high character, capacity and integrity. If the Constitution is to be successfully worked, an attempt must be made to improve the political atmosphere and to lay down and enforce standards of conduct required for a successful working of our Constitution.”<sup>1</sup>

“Take again the declaration of a state of emergency. This is something very serious for the country as a whole, because once the declaration has been made, most things become abnormal, particularly when the Constitution has been suspended. Such a declaration, therefore, cannot and must not be resorted to unless and until all other means of maintaining law and order have been tried and found wanting. Because of its gravity, such a step is something in which the Monarch should be fully involved. He is the country’s custodian of the Constitution which enshrines all the rights of every citizen, no matter how lowly. This is the position the King wished to retain in order to be able to deter any Prime Minister of any political party from using his power against his opponents for the protection of his own political interests, as happened on January 30, 1970.”<sup>2</sup>

[1] These two constitutional motions were filed separately by the applicants. The Court decided to consolidate them because of the same cause of action impugning the Prime Minister’s declaration of a state of emergency and the resultant recall of Parliament by His Majesty The King. The reliefs sought are the same save in one respect, namely that

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<sup>1</sup> H.M. Seervai (1993) **Constitutional Law of India** 4<sup>th</sup> Edition Vol.2 (Bombay: N.M. Tripathi Private Ltd) p.2060 para 18.57

<sup>2</sup> Khaketla B.M. (2000) **Lesotho 1970: An African Coup under the Microscope** (Moriya Printing Works) p.115

applicant *Tuke* goes further to seek the nullification of any business Parliament may have concluded pending the outcome hereof as Parliament continued with the business despite the presiding officers being joined in the suit.

[2] The applicants are adult Basotho males. They do not disclose their professions or occupations, but the Court knows applicant *Tuke* as a practising lawyer and an officer of this Court. However, he is not litigating in that capacity.

## **Relief**

[3] The applicants seek the following relief:

3.1 To interdict Parliament from sitting pursuant to Legal Notices No.66 and 67 of 2022 pending finalization of these proceedings.

3.2 Declaring the Declaration of a State of Emergency, Proclamation, 2022 gazetted as Legal Notice No.79 of 2022 as null and void on account of being inconsistent with section 84(2) of the Constitution.

3.3 Declaring the Recall of the Tenth Parliament Notice, 2022 gazetted as Legal Notice No.82 of 2022 null and void on account of being inconsistent with section 84(2) of the Constitution.

3.4 Declaring as null and void any business concluded by the two Houses of Parliament.

### **Locus standi**

[4] The respondents challenge the *locus standi* of the applicants. Their contention is that they have failed to demonstrate any damage they suffer as individuals by the declaration of the State of Emergency and the recall of Parliament. The respondents miss the legal basis of the applicants' standing, which is that their case is a rule of law review and not a Bill of Rights review arising from a complaint about limitation of their rights and freedoms. The former review protects the Constitution from desecration by rulers. The latter review protects rights and freedoms of individuals.

[5] Perhaps what has clouded their standing is the averment by applicant *Boloetse* in his founding affidavit that the Declaration of the State of Emergency impacts his constitutional rights and by virtue of his right in section 20(1) to participate in government, he is entitled to challenge it.



In my respectful view, that averment is superfluous and unnecessary to support standing for rule of law review which this clause is about.

[6] There is a catena of judgments of this Court and judgments of other jurisdictions explaining the necessity, relevance and importance of granting *locus standi* to citizens to sue a government if it contravenes the Constitution.

[7] The problem presented by the doctrine of *locus standi* in public law litigation is judicial reticence in refusing standing to citizens to defend the Constitution when it is disobeyed by governments. Do citizens not have a stake in defending the Constitution through the judicial process when it comes under attack by ruling elites? This is the question that arises from the objection raised by the respondents and needs to be answered.

[8] The discourse rejecting citizens' standing is riddled with misunderstanding and lack of appreciation of the common sense proposition that the Constitution is not an ordinary law but is an embodiment of a social contract in terms of which the people entrust governments with the power and duty to serve and protect. By entering into the social contract, the people do not surrender their sovereign right

to defend the social contract. We dare not forget that John Locke<sup>3</sup> articulated that the original purpose and reason for entering organized society and entrusting their power to governments in this way:

“...for all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty and be safe and secure within the limits of the law; and the rulers too kept within their bounds and not be tempted, by the power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly.”

[9] It is in this context and for good measure that courts have described Constitutions in glorious language. In **Bolofo And Others v. Director of Public Prosecutions**,<sup>4</sup> Steyn P said this about our Constitution:

“The Constitution has not been enacted merely for purposes of promoting the Kingdom as a country that expresses a commitment to acceptable international norms and standard of behaviour. On the contrary, it is a solemn and effective covenant regulating the relationship between the Crown and its citizens.”

[10] In **S v. Acheson**<sup>5</sup>, Mahomed AJ (former President of the Court of Appeal) described a constitution in these memorable words:

“The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a ‘mirror reflecting the national soul’, the identification of the ideals and aspirations of a nation; the articulation of the values bounding its people and disciplining its government. The spirit and the tenor of the constitution

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<sup>3</sup> **The Second Treatise On Government**, 1690 (Chapter XI)

<sup>4</sup> LAC (1995-99) 231 @ 247 D-E

<sup>5</sup> 1991 (2) SA 805 (Nm) @ 813 A-B

must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”

[11] It, therefore, cannot be expected that citizens should stand idle when the covenant of relationship between citizens and the Crown is broken and the mirror that reflects the national soul shattered. Citizens have the sacred duty to protect the Constitution and hold its breakers accountable as they do likewise in civil and criminal litigation. There is no good reason in law why courts should continue denying them the right and audience to do so when the supreme law of the land is desecrated.

[12] There is more of a reason to allow citizens standing because, as we have been told by the Court of Appeal<sup>6</sup>, it is not the duty of the Attorney General to institute proceedings to challenge unconstitutional behaviour by the Crown because of him being its first law officer. It is for this very reason of unavailability of the Attorney General to protect the Constitution from violation by the Crown that courts must be ready to allow well-meaning citizens standing to protect the Constitution. Apex courts in other constitutional democracies have done so. This Court has followed suit as I will later demonstrate.

## **Comparative jurisprudence**

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<sup>6</sup> The Attorney-General v. His Majesty The King and Others C of A (CIV) 13/2015 (12 June 2015)

[13] In **Flast et al. v. Cohen**<sup>7</sup> the Supreme Court of the United States of America allowed standing to plaintiffs who were challenging a program that involved expenditure of federal tax funds to finance religious schools contrary to the establishment of religion clause in the First Amendment.

In a concurring opinion, Douglas J<sup>8</sup> said:

“The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers – in spite of flowing opinions and resounding constitutional phrases.

I would not be niggardly therefore in giving private attorneys general standing to sue. I would certainly not wait for Congress to give its blessing to our deciding cases clearly within our Article III jurisdiction. To wait for a sign from Congress is to allow important constitutional questions to go undecided and personal liberty unprotected.

There need be no inundation of the federal courts if taxpayers’ suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like. When the judiciary is no longer ‘a great rock’ in the storm, as Lord Sankey once put it, when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly, the force of the Constitution in the life of the Nation is greatly weakened.

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I would be as liberal in allowing taxpayers standing to object to these violations of the First Amendment as I would in granting standing to people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights.”

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<sup>7</sup> 392 US 83 (1968), 20 L Ed 2d 947

<sup>8</sup> Pages 111-114; 20L Ed 2d 968-969

[14] In similar vein, standing in **Thorson v. Attorney General of Canada**<sup>9</sup> the Supreme Court of Canada allowed the appellant who had brought a class action challenging the constitutionality of expenditure to support implementation of an Act of Parliament. Laskin J said:

“...where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers’ action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.” (p.161)

“It is not the alleged waste of public funds alone that will support standing but rather **the right of the citizenry to constitutional behaviour by Parliament where the issue is such behaviour is justiciable as a legal question.**” (p.163) (emphasis added).

[15] A thoroughgoing exposition of the jurisprudential soundness for jettisoning judicial reluctance to allow citizens standing comes from the judgment of the Supreme Court of India in **S.P. Gupta & Ors v. Union of India**.<sup>10</sup> In a penetrating and illuminating analysis of historical evaluation of the doctrine of *locus standi* and the growing demand for relaxing its strictures in the rapidly developing law of public interest litigation, Bhagwati J said, *inter alia*:

“The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legal protected interest by the impugned

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<sup>9</sup> [1975]1 S.C.R. 138

<sup>10</sup> [1982]2 S.C.R. 365

action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. **This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born.**” (p. 513H-514C)

“It will be seen that, according to this rule, it is only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who can bring an action for judicial redress. Now obviously where an applicant has a legal right or a legally protected interest, the violation of which would result in legal injury to him, there must be a corresponding duty owed by the other party to the applicant. This rule in regard to locus standi thus postulates a right-duty pattern which is commonly to be found in private law litigation. But, narrow and rigid though this rule may be, there are a few exceptions to it which have been evolved by the Courts over the years.” (p. 514G-515B)

“But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owned by it. The courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddling interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice.” (p.5224H-523E)

“It is also necessary to point out that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and in that process, the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the court of law.” (p. 524E-G)

“Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery, which at best would be able to exercise only a limited control and at worst, might become a participant in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived sections of the community meaningless and ineffectual.” (p. 525G-526B)

“We have undoubtedly an Attorney General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see sections 91 and 92 of the Civil Procedure Code, But, even if we had a provision empowering the Attorney General or the Advocate General to take action for vindicating public interest, I doubt very much whether it would be effective. **The Attorney General or the Advocate General would be too dependent upon the political branches of Government to act as an advocate against abuses which are frequently generated or at least tolerated by political and administrative bodies. Be that as it may, the fact remains that we have no such institution in our country and we have therefore to liberalise the rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights.** It is for this reason that in public interest litigation - litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not

possible for the Court to lay down any hard and fast rule or any straight-jacket formula for the purpose of defining or delimiting 'sufficient interest', It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable sections of the people by creating new social, collective 'diffuse' rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the court in a particular case has sufficient interest to initiate the action.” (p. 526E-527E) (emphasis added)

[16] These penetrating and forward looking expositions by apex courts of Canada, India and the United States of America would not have been relevant and persuasive if our Constitution had been framed like that of Tanzania which provides that:

“Every person is entitled, subject to the procedure provided by law, to institute proceedings for the protection of the Constitution and legality.”

This provision was inserted because of the realization that the majority of Tanzanians have limited resources to engage lawyers when their rights are infringed and the constitution is perverted by the powers that be.

[17] In interpreting these words in **Mtikila v. Attorney General**<sup>11</sup>, Lugakingira J held that in determining *locus standi* in the context of constitutional litigation, notions such as ‘personal interest’, personal

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<sup>11</sup> [1996]1 CHRLD 11



injury’ or ‘insufficient interest’ of the general public no longer apply. The court would not deny standing to a *bona fide* litigant acting for the public good if it is capable of providing an effective remedy.

## Local jurisprudence

[18] Mr. *Rasekoai*, for the respondents, did not contest the force and relevance of these dicta and the necessity of not leaving constitutional breaches unremedied because of the strictures of a doctrine which the courts evolved in the context of private litigation. Hence the necessity to allow standing given the weightiness of the issues raised in these proceedings. However, his submission was that although he is aware of two judgments of this Court in **Transformation Resource Centre and another v. Speaker of the National Assembly**<sup>12</sup> and **Democratic Congress and Another v. Independent Electoral Commission and 52 Others**<sup>13</sup> on rule of law review, he felt constrained to take the point of *locus standi* because of the two judgments of the Court of Appeal to the contrary in **Dr. Mosito and Others v. Letsika and others**<sup>14</sup> and **Justice Hlajoane and Others v. Letsika and Others**<sup>15</sup>. He submitted that this Court is bound by the dicta in these two judgments. The dicta in the judgments of this Court and those in the judgments of the Court of Appeal need to be

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<sup>12</sup> Constitutional Case No.14/2017 (10 August, 2017)

<sup>13</sup> [2022] LSHC 173 (Const (8 August, 2022)

<sup>14</sup> C of A (Civ) No.9/2018 (26 October 2018)

<sup>15</sup> C of A (Civ) No.66/2018 (1 February 2019)

juxtaposed to determine whether there is indeed a precedential constraint for this Court to allow the applicants standing.

[19] In **Transformation Resource Centre** this Court held as follows:

“[28] Having found that public participation is not a constitutional imperative, I turn to the inquiry whether the impugned Act was passed and enacted in compliance with the constitutional procedures under sections 78 and 80.

[29] This inquiry brings us back to the issue of applicants’ *locus standi* to challenge the law. If they do not have *locus standi, cadit quaestio*. While they have *locus standi* to sue in pursuit of their stated objects and functions, challenging the constitutionality of a law is a different kettle of fish. A corporate body and an unincorporated voluntary association, just like natural persons, do not have:

‘... *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights other than in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. Put otherwise, a constitutional right that invalidates a law may be invoked by a person affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law.... The exception is where the person is the accused in a prosecution for breach of the law.’ **(Retrofit (PVT) Ltd v. Posts And Telecommunications Corporation (Attorney-General of Zimbabwe Intervening)** 1996 (1) SA 847 (ZSC) at 854 D-F)

[30] The applicants’ contention is that they are acting in the public interest. The respondents counter by submitting that this is tantamount to exhumation of *actio popularis* which was ceremoniously buried in **Lesotho Human Rights Alert Group v. Minister of Justice** LAC (1990-94) 652

[31] Since the contention by the applicants is at odds with principle and for that reason rejectable, the only remaining leg that they can possibly stand on is that of rule of law review in relation to alleged non-Bill of Rights unlawful constitutional action. This leg rests on section 2 of the Constitution which provides:

‘This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency be void.’

[32] This section grants citizens a legitimate interest in upholding the Constitution and the rule of law by invoking the unlimited jurisdiction of this Court under section 119 (I) of the Constitution. This is a proposition that the Court of Appeal of Trinidad and Tobago

articulated and subsequently endorsed by the Privy Council in **Attorney General v. Dumas** [2017] UKPC 12 para 13 thus:

‘In our opinion, barring any specific legislative prohibition, the court, in the exercise of its supervisory jurisdiction and as a guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action, provided that the litigation is bona fide arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous or otherwise an abuse of the court’s process.’

[33] In my respectful view, the time has arrived to accept this proposition in this Kingdom. It stands apart from and above the principle in **Lesotho Human Rights Alert Group** as it articulates a jurisdiction which the Constitution provides post the said judgment.

[34] I would, therefore, accept that the applicants would have *locus standi* to challenge a law which, in their bona fide belief and as a matter of public interest, is enacted in violation of peremptory constitutional procedures.”

[20] In **Democratic Congress**, the following was said:

“[7] Thus, applicants’ case is in essence a rule of law review 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.

.....

[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 subsidiarity and constitutional avoidance.

.....

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

[21] In **Dr. Mosito**, the Court of Appeal said:

“The 1st - 5th appellants argued that the Court *a quo* erred in holding that the respondents had *locus standi* to launch the Constitutional challenge against the removal of Judge Nugent and appointment of Dr. Mosito in view of the fact that they failed to allege that the provisions of section 4 to 21 (inclusive) of the Constitution had been, was being or likely to be contravened in relation to themselves, in terms of section 22 (1) of the Constitution. Mr. Maqakachane for the 1st - 5th appellants argued that the standing requirements contained in section 22(1) are restrictively interpreted as to allow access to Court to mount Constitutional challenge only when the applicant's fundamental rights and freedoms are being or likely to be infringed. In support of this argument he cited the decision of this Court in ***Mofomobe and Another v. Minister of Finance and Another; Phoofole KC and Another v. The Right Hon. Prime Minister and Others***. This Court said:

‘[27] As we see it, the issue will always be whether there has been an infringement of an individual’s fundamental rights or freedoms, and that may, as contended in this appeal, involve the right to take part in the Conduct of public affairs. Thus s. 22 (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there had been (or likely to be) a contravention of the Declaration of Rights, in the case of S.20 (1) (a) when a person alleging to be aggrieved is given the right to go direct to the Constitutional Court. The litigant’s right to bring an application, and therefore his standing to do so, is circumscribed by S. 22(1)...’

[23] Adv. Maqakachane, in support of the restrictive interpretation of S.22 (1), referred to a plethora of authorities from jurisdictions where similarly worded provisions in the Constitutions of those countries was restrictively interpreted; ***Zimbabwe - United Parties v. Minister of Justice, Legal and Parliamentary Affairs (ZS) Botswana - Attorney General v. Dow*** , Mauritius - ***Marie Jean Nelson Mirble and Others v. The State of Mauritius and Others***. Mr Maqakachane argued that *in casu* the respondents in their founding affidavit alleged that the

basis of their instituting the proceedings is that they are Legal Practitioners and that the administration of justice will be brought into disrepute should an unqualified person be appointed to head the apex Court, and further that as Legal Practitioners they have legal' and 'ethical' obligations and duties to uphold the rule of law: he argued that these bases disqualified the respondents from being bestowed with standing in terms of S.22 (1) of the Constitution as the respondents are not alleging infringements of their fundamental rights and freedoms.

[24] Mr. Maqakachane, in an argument not contained in the written Heads of argument, argued in the alternative that, perhaps the respondents could have sued in terms of S.2 of the Constitution - the Supremacy clause. He argued that the supremacy clause permits public interest litigation in certain circumscribed circumstances and referred this Court to the approach in Canada as evidenced by the decision in *Minister of Justice (Can) v. Borowski*. While we agree that there maybe much force in this submission, it needs to be remembered that the respondents were not challenging "any other law" for being inconsistent with the Constitution. This argument, in our considered view does not find application in casu."

[22] In **Justice Hlajoane**, the Court of Appeal pronounced itself as follows:

"[31] I re-affirm the decision of this court in *Lesotho Human Rights Alert Group v. Minister of Justice and Others (supra)* at 9 based on *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty.) Ltd.*, where Wessels, C.J., remarked that:

*'The actio popularis is undoubtedly obsolete, and no one can bring an action and allege that he is bringing it in the interest of the public, but by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have.'*

[32] What a litigant in the position of the applicants was required to show was that his interest in the relief sought is direct, that it is not abstract or academic, and that it is present and not hypothetical. In the Judgment of *Dr. Kananelo Mosito and 6 others v Qhalehang Letsika and 3 others (supra)*, this Court following *Mofomobe and Another v Minister of Finance and Another, Phoofolo KC and Another v the Right Hon Prime Minister* said:

*‘As we see it the issue will always be whether there has been an infringement of an individual’s fundamental rights of freedom and that may, as contended in this appeal, in issue is the right to take part in the conduct of public affairs. This **Section 22(1)** contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the declaration of rights. In the case (a) of **Section 20 (1) (a)** the person alleging to be aggrieved is given the right to go direct to the Constitutional Court and his or her right to bring an application and therefore his legal standing to do so is circumscribed by **Section 22 (1)**. In this case **Section 20 (1) (a)** when the person alleging to be aggrieved is given the right to go direct to the Constitutional Court. The Litigant’s right to bring an application and therefore his standing to do so is circumscribed by **Section 22 (1)**.’*

[33] In my view, the issue of *locus standi* was put to bed and it need not be repeated. The view that I take is that following our decisions in *Mofomobe and Dr Mosito*, the Respondents had no *locus standi* and the Court below ought not to have entertained the application. Technically, that disposes of the second ground of appeal.”

[23] In *Dr. Mosito*, counsel suggested that perhaps the respondents could have brought a rule of law review. The Court of Appeal “agree(d) that there may be force in this submission” but found that the respondent’s case did not impugn any law as being inconsistent with the Constitution. So, the issue of standing in rule of law review did not arise for determination. The result is that there is no higher precedent that stands in the way of this Court to allow standing if is so persuaded.

[24] A closer examination and analysis of the dicta in the judgments of the Court of Appeal reveal that it grappled with the standing in accordance with assertions of violation of the Bill of Rights. The jurisdictional requirement for standing in terms of section 22(1) is that the litigant must

allege contravention or likelihood of contravention of the provisions of the Bill of Rights. This mirrors the common law requirements of standing in private law litigation where standing is dependent on vindication of own personal right and not the interest of the public or an interest shared by all citizens. Thus, the Court of Appeal has so far not grappled with a rule of law review. It is then not surprising that none of its judgments refers to this Court's jurisprudence on rule of law review. If, as urged by Mr. *Rasekoai*, this Court's judgments on rule of law review have been overruled, that would have been done *sub-silentio*. This is not how apex courts overrule judgments of courts below them. The right way to overrule judgments brought to the attention of an appellate court, it to discuss and then explicitly state that they are overruled.

[25] Authorities from the Supreme Courts of Canada, India and the United States of America are highly persuasive in stating that it is good practice to allow citizens to protect the Constitution from attack by governments because the Attorney General cannot do that being the lawyer of the Government. The participation of citizens is a guardrail that protects the Constitution as the covenant of the people and mirror of its soul. This ensures that the Constitution does not become a paper tiger but remains a true tiger that is strong, forceful and powerful. This litigation is geared towards doing exactly this. I would, therefore, allow standing to the applicants.

## II. MERITS

[26] The applicants attack the constitutional validity of the Declaration of a State of Emergency by the Prime Minister and the Recall of Parliament by His Majesty The King pursuant to the Declaration. The Declaration was gazetted on 16 August and the Recall was gazetted on 23 August.

### **Declaration of a State of Emergency**

[27] The Declaration reads as follows:

***“Declaration of a State of Emergency, Proclamation, 2022***

*WHEREAS it is the Government’s legal duty and moral responsibility to safe-guard the existence of the national stability and prosperity;*

*WHEREAS the current political climate poses substantial threat, risk and danger against the country’s stability and prosperity;*

*REALISING that Lesotho has endured sustained political instability, injustice and discord going back to the 1960s and that the situation is continuous and aggravating;*

*HAVING identified factors that undermine political stability, justice, and peace as unchecked politicisation of the public service, including the security agencies, loopholes in the Constitution, formation of coalition governments, unregulated floor crossing in Parliament and inadequate regulation of political parties;*

*ACKNOWLEDGING that Lesotho still relies heavily on international partners for financial and investment support and that some of that support is linked to Lesotho undergoing reforms to bring about lasting political stability, justice and peace;*

*HAVING undertaken to undergo national reforms to bring about lasting political stability, justice and peace by passage of laws in Parliament, namely the Eleventh Amendment to the Constitution Bill, 2022 and National Assembly Electoral Amendment Bill, 2022;*



*REALISING that failure to pass the two bills means continuation of unchecked politicisation of the public service, including the security agencies, loopholes in the Constitution, formation of coalition governments, unregulated floor crossing in Parliament and inadequate regulation of political parties, which have been identified as factors undermining political stability, justice and peace in the country;*

*CONSIDERING the impact of imminent sanctions and loss of financial and investment support from Lesotho's international partners due to failure to pass the two bills;*

*CONSIDERING the gravity of the killings post the general elections and other cruel and inhuman attacks that are being caused and perpetrated by political factionalism;*

*RECOGNIZING the adverse effects of Lesotho's political instability post the general elections and the impossibility of preventing its continuance through the current legal framework;*

*SINCE Parliament has failed on account of lapse of time to pass the Eleventh Amendment to the Constitution Bill, 2022 and National Assembly Electoral Amendment Bill, 2022 aimed to avert the above stated undesirable situation;*

*SINCE it is necessary to take measures to counter and prevent social, economic, security and political damage being caused by political instability;*

*WHEREAS the conditions are of extreme peril to the safety of persons and property and exist due to the above stated undesirable situation;*

*UNLESS the stated undesirable situation is addressed, it is likely to be beyond control and escalate thus causing more threat to the peace, safety and stability of the Basotho nation; and*

*Recognising that failure to pass the bills constitute public emergency;*

*NOW THEREFORE, I,*

**MOEKETSI MAJORO,**

*Prime Minister of Lesotho, pursuant to section 23(1) of the Constitution of Lesotho, 1993 and acting in accordance with the advice of the Council of State, and recognizing that failure to pass the bills constitutes public emergency, by proclamation, declare the state of emergency to exist in Lesotho, from the 16<sup>th</sup> to 29<sup>th</sup> August, 2022."*

## **Recall of Parliament**

[28] The notice of Recall of Parliament reads thus:

**“Legal Notice No.82 of 2022**

### **Recall of the Tenth Parliament Notice, 2022**

Pursuant to section 84(2) of the Constitution of Lesotho, 1993, and acting in accordance with the advice of the Council of State and owing to the State of Emergency declared by the Prime Minister in terms of the Declaration of State of Emergency Notice, 2022, and as a need for the Tenth Parliament to complete the enactment of the Eleventh Amendment to the Constitution Bill, 2022 and the National Assembly Electoral (Amendment) Bill, 2022, I,

### **LETSIE III**

**KING OF LESOTHO**, do hereby recall the Tenth Parliament to deal with the business of passing the Bills into law in order to overcome the public emergency.

2. Owing to this urgent need, the Parliament shall convene from the 24<sup>th</sup> August to the 29<sup>th</sup> August, 2022, thereafter shall stand dissolved.

**DATED: 23<sup>RD</sup> AUGUST, 2022**

**LETSIE III  
KING OF LESOTHO”**

[29] What is common in both legal instruments is reference to the existence of a state of emergency caused by failure of Parliament to pass two bills, namely, the **Eleventh Amendment to the Constitution Bill, 2022** and the **National Assembly Electoral (Amendment) Bill, 2022** Parliament could not pass the two Bills because His Majesty The King dissolved

Parliament on 14 July<sup>16</sup>, as His Majesty was constitutionally obligated, when its life of five years came to an end. By operation of law, therefore, the dissolution rendered inoperative Parliament's law-making powers and put to an end to all its unfinished legislative business including Bills awaiting Royal assent<sup>17</sup>.

[30] The applicants make the following contentions:

30.1 Failure of Parliament to pass bills cannot be characterised as a problem of such magnitude as to constitute a threat to the life of the Kingdom. All the things mentioned in the preambular part of the Declaration do not present imminent danger.

30.2 It is not a novel nor dangerous thing for bills to be beaten to time in Parliaments here and elsewhere. The Declaration is an abuse of the constitutional power to remedy a political failure that the Government must have foreseen. The Constitution envisages an event of a calamity and not "a state of political stagnation, mismanagement or proper lack of governance".

30.3 His Majesty does not have power to issue directives for the legislative business of Parliament. The directive to Parliament to pass the Bills constitutes a violation of separation of powers.

[31] In their response, the respondents contend as follows:

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<sup>16</sup> Dissolution of Parliament Notice, 2022 (Legal Notice) No.61 of 2022

<sup>17</sup> Basu's Commentary on the Constitution of India, 7<sup>th</sup> Edition, Vol. G pp.36-38

- 31.1 All the factors recited in the Declaration fall within the description of a state of emergency that warranted the recall of Parliament.
- 31.2 It is for the relevant constitutional authority to determine what situation constitutes a state of emergency. The term should be understood to accommodate a wide range of crises such as the peculiar one facing the Kingdom which is a product of many challenges the country has faced since independence in 1966.
- 31.3 The Declaration was meant to preserve democracy and to safeguard national stability and prosperity.
- 31.4 Both the National Reforms Authority (NRA) and Parliament had a mammoth task of revamping constitutional and legislative frameworks. They made their best of time and it cannot be said that they were involved in political failures.
- 31.5 This Court's jurisdiction is ousted by section 24 of the **Parliamentary Powers and Privileges Act No.8 of 1994**.

## **The Law**

### **Ouster of Jurisdiction**

[32] Before entering into the interpretation and discussion of sections 23 and 84 (2) which confer powers on the Prime Minister to declare a state of emergency and His Majesty to recall Parliament, I would like first to dispose of the respondents' contention that this Court's jurisdiction is ousted by section 24 of the **Parliamentary Powers and Privileges Act, 1994**.

[33] As I understood the submission, it is that this point is taken only in relation to the issue whether this Court can review and set aside the Recall notice to the extent that its purpose is to direct Parliament to pass two Bills – something which, as contended by the applicants, is ultra vires the power of His Majesty. It was argued, on behalf of the respondents, that the Recall notice is a matter of privilege of Parliament. Since His Majesty is part of Parliament, he is within his powers to issue directives for the business of Parliament.

[34] Section 24 of the **Parliamentary Powers and Privileges Act, 1994** reads as follows:

“24. **Exercise of jurisdiction of courts.** The President or Speaker and the officers or the Senate or the Assembly shall not be subject to the jurisdiction of any court **in respect of the exercise of any powers conferred on or vested** in the president or speaker or the official of Parliament by or under this Act.” (emphasis added)

[35] The purpose of the Act, as stated in the preamble, is “to declare the powers, privileges and immunities of each House of the Parliament of Lesotho and the Committees and members of each House, and for related matters.” So, section 24 understood in the light of the purpose of the Act, is that it ousts the jurisdiction of courts from enquiring into only those powers, privileges and immunities of Members, Senators and officers as defined in the Act.

[36] The section does not and cannot oust the jurisdiction of this Court to make an enquiry into a compliant that Parliament’s recall and its conduct

contravene the Constitution. Provisions of a statute are subordinate to the Constitution and where duty calls for this Court to uphold the Constitution, section 24 must yield. As held by Levy J in **Federal Convention Namibia v. Speaker, National Assembly, Namibia**:<sup>18</sup>

“...where there are written provisions in the Constitution which have to be complied with, that is peremptory provisions, even if such provisions relate to internal matters of one of the Houses of Parliament, a Court of law will have jurisdiction to see to it that there is such compliance unless such jurisdiction is specifically and lawfully ousted.”

[37] In **Speaker of the National Assembly v. De Lille And Another**<sup>19</sup> Mahomed CJ, in characteristic clarity of thought and forthrightness said:

“[14] This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.

[38] In **Smith v. Mutasa And Another NNO**,<sup>20</sup> Dumbutshena CJ held that the statute on parliamentary powers and privileges is subject to constitutional control in a constitutional democracy. In his words:

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<sup>18</sup> 1994 (1) SA 177 (NmHC) @ 191J-192A

<sup>19</sup> 1999 (4) SA 863 (SCA)

<sup>20</sup> 1990 (3) SA 756 (ZSC) @ 761I-762B

“The difference between the powers of the House of Commons and our House of Assembly is that the Constitution of the United Kingdom does not permit the Judicature to strike out laws enacted by Parliament. Parliament in the field of legislation is sovereign and supreme. That is not the position in Zimbabwe, where the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the Constitution and all legislation. In Zimbabwe the Judiciary is the guardian of the Constitution and the rights of the citizens.

It is essential to understand that all the three branches of Government, the Executive, the Legislature and the Judiciary, are bound by and work within the confines of the Constitution. For instance, the House of Assembly cannot, in the name of parliamentary privileges, immunities and powers, disregard the fundamental rights enshrined in the Constitution. If it does that, it invites the intervention of the Judiciary:”

[39] In **State of Rajasthan and Ors v. Union of India**<sup>21</sup> Bhagwati J said:

“So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed, it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is *Suprema lex*, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law... Where there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the Court to intervene. Let it not be forgotten, that to this Court as much as to other branches of government, is committed the conservation and furtherance of democratic values. ”

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<sup>21</sup> 1978 SCR (1) 1 at 80F-81D

[40] Whereas the respondents are right in contending that the King is part of Parliament, they are wrong to extrapolate therefrom the proposition that he is empowered to direct Parliament to debate and pass bills. Section 54 does make His Majesty part of Parliament. His role as part of Parliament is provided for in section 78 and it is simply to assent or withhold assent to bills passed by the two Houses. Ordinarily, bills originate in the National Assembly and if passed, are sent to the Senate. If passed by the Senate, are sent to the King for assent.

[41] Nowhere does the Constitution assign any other role to the King in this legislative process. The contention of the respondents that the King is empowered to give directives to Parliament on what bill to debate and pass misconceives the position of the King in Parliament.

[42] Thus, the respondents' contention that section 24 of the **Parliamentary Powers and Privileges Act, 1994** ousts the jurisdiction of this Court to enquire into the constitutionality of the royal recall of Parliament to debate and pass the bills lack substance and is rejected.

### **Interpretation of sections 23 and 84 (2) of the Constitution**

[43] The power of the Prime Minister to declare a state of emergency is provided for in section 23 as follows:

**“Declaration of emergency**



(1) In time of war or other public emergency which threatens the life of the nation, the Prime Minister may, acting in accordance with the advice of the Council of State, by proclamation which shall be published in the Gazette, declare that a state of emergency exists for the purposes of this Chapter.

(2) Every declaration of emergency shall lapse at the expiration of fourteen days, commencing with the day on which it was made, unless it has in the meantime been approved by a resolution of each House of Parliament.

(3) A declaration of emergency may at any time be revoked by the Prime Minister acting in accordance with the advice of the Council of State, by proclamation which shall be published in the Gazette.

(4) A declaration of emergency that has been approved by a resolution of each House of Parliament in pursuance of subsection (2) shall, subject to the provisions of subsection (3), remain in force so long as those resolutions remain in force and no longer.

(5) A resolution of either House of Parliament passed for the purposes of this section shall remain in force for six months or such shorter period as may be specified therein:

Provided that any such resolution may be extended from time to time by a further such resolution, each extension not exceeding six months from the date of the resolution effecting the extension.

(6) Where the resolutions of the two Houses of Parliament made under subsection (2) or (5) differ, the resolution of the National Assembly shall prevail.

(7) Any provision of this section that a declaration of emergency shall lapse or cease to be in force at any particular time is without prejudice to the making of a further such declaration whether before or after that time.

(8) The King may summon the two Houses of Parliament to meet for the purposes of this section notwithstanding that Parliament then stands dissolved, and the persons who were members of either House immediately before the dissolution shall be deemed, for those purposes, still to be members of that House, but, subject to the provisions of sections 61(4) and 63(4) of this Constitution, neither House shall, when summoned by virtue of this subsection, transact any business other than debating and voting upon resolutions for the purposes of this section.”

[44] The power of the King to recall Parliament is provided for in section 84 (2) in these terms:

“(2) If, after a dissolution of Parliament and before the holding of a general election of members of the National Assembly, the King is advised by the Council of State that, owing to a state of war or of a state of emergency in Lesotho, it is necessary to recall Parliament, the King shall recall the Parliament that has been dissolved and that Parliament shall be deemed to be the Parliament for the time being (and the members of the dissolved Parliament shall be deemed to be the members of the recalled Parliament), but the general election of members of the National Assembly shall proceed and the recalled Parliament shall, if not sooner dissolved, stand dissolved on the day immediately preceding the day fixed for such general election or, if more than one such day, the first of such days.”

[45] It is clear from both sections 23 (1) and 84 (2) that in the exercise of their respective powers to declare a state of emergency and to recall Parliament, His Majesty and the Prime Minister do not act by their volition and judgment but act in accordance with the advice of the Council of State. In this sense, the trigger for the declaration of a state of emergency and the recall of Parliament is the advice tendered by the Council of State to the Prime Minister and His Majesty. The jurisdictional fact for the exercise of section 23 and 84 (2) power is the advice that there exists a state of emergency in Lesotho.

[46] Thus, the Prime Minister and His Majesty do not act out of their personal wishes, whims, views, opinions and *ipse dixits dehors* (outside) information, material and facts grounding the advice. They are obliged by the Constitution to follow the advice of the Council of State. Nowhere does the Constitution enjoin the Council of State to consult or obtain the concurrence of the Prime Minister and His Majesty before it submits

advice. Once the advice is given, they have to accept it and act accordingly by the Prime Minister issuing the declaration of state of emergency and His Majesty recalling Parliament.

### **Role of Parliament during state of emergency**

[47] The declaration of a state of emergency expires after fourteen days unless Parliament approves it by resolutions of both the National Assembly and the Senate. From there, the continuation of the Declaration is coterminous with the resolutions remaining in force. But the Prime Minister may at any time, on the advice of the Council of State, revoke the Declaration by proclamation in the Gazette.

[48] If at the time the Prime Minister declares a state of emergency Parliament stands dissolved, His Majesty can recall Parliament to meet for the purpose of transacting only the business of debating and voting upon resolutions to approve the declaration of the state of emergency. A harmonious interpretation of sections 23 (8) and 84 (2) is that the mandate of a recalled Parliament is only to debate and pass resolutions approving the Declaration and not to exercise section 78 powers to make laws. The procedure for debating the Declaration is by motion to approve moved by a Minister in both Houses<sup>22</sup>.

[49] The recalling of Parliament where it stands dissolved speaks to the vitality of the system of checks and balances for disciplining the Prime Minister's exercise of powers to declare a state of emergency and an

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<sup>22</sup> National Assembly Standing Order No.106; Senate Standing Order No.95

opportunity for the people's representatives and senators to act as brakes. It is a moot point whether Parliament can rise to the occasion and robustly hold the Prime Minister accountable. But Basotho should not tolerate a Parliament that performs its oversight of emergencies in a manner described by Professor Nwabueze in these words<sup>23</sup>:

“By law, of course, emergency regulations need to be approved by parliament either before they take effect or within a period of, say, three months thereafter. In practice the approval is given as a matter of course with little or no critical discussion of the necessity for the extent of powers claimed. It is ironical that it is at such times as this when the possibility of abuse is greatest, that parliamentary control is at its lowest and most ineffective, with parliament virtually abandoning the field to the executive. This might be considered a tragedy, especially when it is remembered that, apart from war, an emergency is whatever else the leaders regard as such, there being no definition in the constitution of the sort of situation that should constitute an emergency. The opportunity for abuse inherent in this lack of precise definition has not been missed in Commonwealth Africa, as witness the action of the government during the so-called emergency in Western Nigeria in 1962. The tragedy of the situation is further heightened by the fact that in practically all the presidential regimes in Commonwealth Africa, the authority to declare an emergency belongs in the first instance to the President alone; parliamentary approval comes only after the initial declaration by the President, and is then given again as a matter of course. A useful safeguard is that a declaration remains in force only for six months unless it is extended by parliament for further periods of six months at a time. Again, extensions are granted without question if only they are asked for by the President.”

### **Is failure to pass the two Bills a public emergency?**

[50] The question that arises is whether failure to pass the two Bills is a public emergency that threatens the life of the nation as prescribed in section 23 (1) of the Constitution. Section 23 (1) is worded similarly with Article 15 (1) of the **European Convention of Human Rights, 1950** and Article 4

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<sup>23</sup> Nwabueze, B.O. (1974). *Presidentialism in Commonwealth Africa*. (London: C. Hurst & Company) p.266-267

(1) of the **International Covenant on Civil and Political Rights, 1966** which Lesotho ratified on 9 September 1992.

[51] Article 4 (1) of that Covenant has principles promulgated to define the meaning of “threat to the life of the nation.” These are the **Siracusa Principles**<sup>24</sup> under the heading “**Public Emergency which Threatens the Life of the Nation**”, it is said:

“39. A state party may take measures derogating from its obligation under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called ‘derogation measures’) only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

- (a) affects the whole of the population and either the whole or part of the territory of the State, and
- (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.

.....

54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present or imminent danger and may not be imposed merely because of an apprehension of potential danger.”

[52] Importantly, the principles make it abundantly clear that a “Proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation in order to determine to what extent,

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<sup>24</sup> (1985)7 HRQ 3

if any, it poses a threat to the life of the nation.”<sup>25</sup> In this sense, therefore, the requirement of good faith based objective assessment opens the door of judicial review of the determination of the existence of a state of emergency.

[53] The Paris Minimum Standards of Human Rights Norms in a State of Emergency<sup>26</sup> define a public emergency as:

“an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.”

[54] In **A v. Secretary of State for the Home Department**,<sup>27</sup> the House of Lords said this about Article 15 (1) of the European Convention on Human Rights, 1950:

“110. Leaving a state of war aside as it does not arise in this case, the wording of this article can be broken down into three parts, each of which can be put in the form of a question. (1) Is the situation facing the High Contracting Party a public emergency which threatens the life of the nation? (2) Are the measures strictly required by the exigencies of the situation which has arisen? (3) Are the measures inconsistent with the High Contracting Party's other obligations under international law?

111. The phrase "threatening the life of the nation" is unique to article 15(1). But a similar phrase appears in article 4(3)(c). It permits service in the form of forced or compulsory labour to be exacted in case of an emergency or calamity "threatening the life or well-being of the community." The situation contemplated by these expressions was described in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, 31, para 28 as an "exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."

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<sup>25</sup> Siracusa Principles para 62

<sup>26</sup> Paris Minimum Standards of Human Rights Norms in a State of Emergency

<sup>27</sup> [2004] UKHL 56 (16 December 2004)

112. The present tense which this formulation uses might be thought to indicate a situation that has already arisen. But the European Commission in *The Greek Case* (1969) 12 YB 1, 72, para 153 adopted the word "imminent" which was used in the French text of the court's judgment in *Lawless*. So it has been recognised that derogation is permitted in the face of an emergency which has not yet happened but is imminent. The European Court has said that it will accord a large margin of appreciation to States in their assessment of the question whether the situation with which they are faced constitutes an actual or an imminent emergency: *Ireland v United Kingdom* (1978) 2 EHRR 25, 92, para 207. In the domestic legal order also great weight must be given to the views of the executive, for the reasons that were explained by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 194, 195, paras 57, 62.

115. The question whether there is a public emergency of the kind contemplated by article 15(1) requires the exercise of judgment. The primary meaning of the word is an occurrence that is sudden or unexpected. It has an extended meaning - a situation of pressing need. A patch of fog on the motorway or a storm which brings down power lines may create a situation of emergency without the life of the nation being under threat. It is a question of degree. The range of situations which may demonstrate such a threat will extend from the consequences of natural disasters of all kinds to the consequences of acts of terrorism. Few would doubt that it is for the executive, with all the resources at its disposal, to judge whether the consequences of such events amount to an emergency of that kind. But imminent emergencies arouse fear and, as has often been said, fear is democracy's worst enemy. So it would be dangerous to ignore the context in which the judgment is to be exercised. Its exercise needs to be watched very carefully if it is a preliminary to the invoking of emergency powers, especially if they involve actions which are incompatible with Convention rights.

116. I am content therefore to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament. The judgment that has to be formed on these issues lies outside the expertise of the courts, including SIAC in the exercise of the jurisdiction that has been given to it by Part 4 of the 2001 Act. But in my opinion it is nevertheless open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is "strictly required" by the situation which it has identified. The use of the word "strictly" invites close scrutiny of the action that has been taken. Where the rights of the individual are in issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion it is the proper function of the judiciary to subject

the government's reasoning on these matters in this case to very close analysis. One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency.”

[55] The judgment of the House of Lords was taken on appeal to the European Court of Human Rights<sup>28</sup>. In its upholding the judgment, the European Court of Human Rights said, among others:

“175. The applicants argued that there had been no public emergency threatening the life of the British nation, for three main reasons: first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other States, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established.

176. The Court reiterates that in *Lawless* (cited above, § 28) it held that in the context of Article 15 the natural and customary meaning of the words “other public emergency threatening the life of the nation” was sufficiently clear and that they referred to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”. In the Greek case (*Denmark, Norway, Sweden and the Netherlands v. Greece, Nos 3321/67, 3322/67, 3323/67 and 3344/67, Commission report of November 1969, Year book 12, p.70* (1969) 12 YB 1, § 113, the Commission held that, in order to justify a derogation, the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate. In *Ireland v United Kingdom* (cited above, §§ 205 and 212), the parties were agreed, as were the Commission and the Court, that the Article 15 test was satisfied, since terrorism had for a number of years represented “a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants”. The Court reached similar conclusions as regards the continuing security situation in Northern Ireland in *Brannigan and McBride*, cited above, and *Marshall v. the United Kingdom* (dec.), no. 41571/98, 10 July 2001. In *Aksoy*, cited above, it accepted that Kurdish separatist violence had given rise to a “public emergency” in Turkey.

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<sup>28</sup> *A. and Others v. United Kingdom* ECHR 301 (19 February 2009)



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179. The applicants' argument that the life of the nation was not threatened is principally founded on the dissenting opinion of Lord Hoffman, who interpreted the words as requiring a threat to the organised life of the community which went beyond a threat of serious physical damage and loss of life. It had, in his view, to threaten "our institutions of government or our existence as a civil community" (see paragraph 18 above). However, the Court has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the "nation" and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperiled to the extent envisaged by Lord Hoffman.

.....

185. The Government also submitted that the House of Lords erred in examining the legislation in the abstract rather than considering the applicants' concrete cases. However, in the Court's view, the approach under Article 15 is necessarily focused on the general situation pertaining in the country concerned, in the sense that the court - whether national or international - is required to examine the measures that have been adopted in derogation of the Convention rights in question and to weigh them against the nature of the threat to the nation posed by the emergency. Where, as here, the measures are found to be disproportionate to that threat and to be discriminatory in their effect, there is no need to go further and examine their application in the concrete case of each applicant."

[56] These judgments and the **Siracusa Principles**, identify the following as features that characterize a public emergency that threatens the life of the nation:

56.1 It must be actual or imminent.

56.2 Its effects must involve or affect the whole nation.

56.3 It must threaten the continuance of organized life of communities in that normal day to day life is impossible.

56.4 The crisis or danger must be of an exceptional nature in that the normal measures permitted by the Constitution to deal with it are plainly inadequate.

[57] A declaration of the State of Emergency must be laid before Parliament for debate and approval by resolutions. This is the institution that blesses the continuance of the operation of the Declaration. But this does not necessarily preclude a judicial review before or after Parliament approves the Declaration. As held by the Supreme Court of India in **S.R. Bommai And Ors v. Union of India And Ors**<sup>29</sup>:

“There is no reason to make a distinction between the Proclamation so approved and a legislation enacted by the Parliament. If the Proclamation is invalid, it does not stand validated merely because it is approved of by the Parliament. The grounds for challenging the validity of the Proclamation may be different from those challenging the validity of a legislation. However, that does not make any difference to the vulnerability of the Proclamation on the limited grounds available.”

[58] Thus, resolutions of Parliament stand on the same footing as the laying of regulations by Ministers in the National Assembly for approval<sup>30</sup>. The

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<sup>29</sup> [1994] 2 S.C.R. 644 @ 740 B-C

<sup>30</sup> Section 27 A of Interpretation (Amendment) Act No.4 of 1993

laying procedure does not protect them from judicial review. It is immaterial whether the challenge be before or after the National Assembly's approval.<sup>31</sup>

[59] The applicable principle on review is the legality principle propounded by this Court in the **ABC**<sup>32</sup> case. It requires that the exercise of constitutional power and performance of duties be lawful to acquire legitimacy. The donee of power must act in good faith and not misconstrue the power and its purpose. The purpose of the power to declare a state of emergency is to deal with a threat to the life of the nation. The full explanation of what all this means was expounded on earlier. The question is whether the Prime Minister's declaration of emergency meets the constitutional threshold in section 23 (1).

### **III. DISCUSSION**

[60] The applicants' case rests on the following propositions:

60.1 The advice by the Council of State that failure by the Tenth Parliament to pass the two Bills before its dissolution on 14 June constitutes a public emergency is constitutionally baseless.

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<sup>31</sup> Wade and Forsyth Administrative Law 8<sup>th</sup> edition pp.26 and 376

<sup>32</sup> All Basotho Convention (ABC) and others v. The Prime Minister And Others Constitutional Case No.0006/2020 (17 April 2020)

60.2 The Prime Minister should not have declared a state of emergency in accordance with that advice.

60.3 Similarly, His Majesty should not have acted in accordance with that wrong advice and recalled the Tenth Parliament to pass the two Bills.

### **Attack on factual bases of Declaration of a State of Emergency**

[61] The proposition that the Prime Minister and His Majesty have been wrongly advised is grounded in the attack of recitals in the Declaration. These recitals are not a thumb-suck. The Prime Minister must have been provided with them by the Council of State as information and material grounding the advice to the Prime Minister to declare a state of emergency. The Constitution does not prescribe the manner and form a declaration of state of emergency must take. Therefore, the recitals are not conditions precedent to the validity of the declaration of a state of emergency. Reference to them was not necessary but mentioning them only serves the values of transparency in a democracy.

[62] Properly understood, the applicants' attack on the recitals is an attack on the correctness of the facts grounding the advice by the Council of State. The focus must then be on the recitals to test the validity of the assertion that failure to pass the two Bills constitutes a "public emergency which threatens the life of the nation."

[63] The recitals in the Declaration refer to a myriad of factors. Their theme boils to this:

- The Kingdom has endured sustained political instability, injustice and discord going back to the 1960's and the situation persists and is aggravating.
- To arrest the situation, the country embarked on a national reforms agenda culminating in the tabling of two Bills in Parliament, namely, the Eleventh Amendment to the Constitution Bill, 2022 and the National Assembly Electoral Amendment Bill, 2022.
- Parliament failed to pass the two Bills before its dissolution on 14 June. This failure constitutes a public emergency.

[64] The onus is on the Prime Minister and Council of State to justify the validity of the Declaration on the basis of the constitutional threshold. The onus should be discharged not on the basis of subjective views, opinions or perceptions but objectively with reference to objective conditions of a public emergency as defined in section 23 (1) of the Constitution. In other words, the existence of a public emergency is objectively justiciable.

[65] The Prime Minister's Declaration of the State of Emergency ascribes its existence to failure by the Tenth Parliament to pass the two Bills. According to him the importance of the two Bills is they are meant to close a lacuna in the legal frameworks meant to provide solutions for perennial political problems that have undermined justice and peace from 1966 when Lesotho attained independence. Therefore, properly understood, what is a public emergency is the failure by Parliament to pass the Bills that are meant to provide solution to problems mentioned in the recitals to the Declaration.

[66] History records that Lesotho was born a constitutional democracy in 1966. Its first Constitution was toppled four years into independence in 1970 on the basis of a declaration of a state of emergency by a Prime Minister posed to lose power<sup>33</sup>. There was no Constitution from 1970 to 1993 when the present Constitution was adopted and the Kingdom returned to democratic rule. Since then, the Kingdom has had moments of political crises and convulsions of instability caused by a cocktail of factors such as politicisation of the public service and security services by the political class. It is by way of providing solutions to these problems that a National Reforms Authority (NRA) was created to draft bills in the

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<sup>33</sup> Footnote 2

pursuance of the voice of Basotho on the reconfiguration of power relations and institutions of State.<sup>34</sup>

[67] Notwithstanding the political crises and instabilities, this Nation has gone on with its life. Institutions may have been shaken but certainly not collapsed. It is, therefore, a long shot for the respondents to assert that the failure by Parliament to pass the two Bills constitutes a public emergency. There is no demonstrable actual and imminent danger to the life of this Nation posed by the failure of Parliament to pass the two Bills before its dissolution on 14 June. The Declaration comes two months after the dissolution of Parliament. Apart from rising levels of crime, which is a law and order challenge that the recitals ascribe to killings caused by political factions, the business of governance is fairly smooth. The applicants are right in their contention that Parliament was simply beaten to time. This could have been avoided if Parliament had prioritised the passing of the Bills over other legislative business. It was the responsibility of the National Reforms Authority to bring the Bills to Parliament through the Minister of Justice<sup>35</sup>.

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<sup>34</sup> National Reforms Authority Act No.8 of 2019

<sup>35</sup> Op.cit. section 6 (5)

[68] It is, therefore, the failure to pass the Bills that triggered the advice by the Council of State for the declaration of a state of emergency and the recall of Parliament and not the problems that the Bills are meant to be a solution for. As it were, the medicine for the patient who has been sick since the 1960s failed to arrive on schedule or not at all when Parliament was dissolved. This is what pressed a panic button for the determination that the Kingdom faces a public emergency.

[69] The National Reforms Authority's statutory duty is to mid-wife reforms and draft bills for Parliament to pass. The draft bills bind all political parties who have representation in the NRA. If it dawned on Parliament and the Executive that the NRA would not complete its mandate in the Tenth Parliament, the Minister was empowered to extend its tenure until a week after the last Bill receives Royal Assent. The Court is not told why this was not done and whether the two Bills are the last draft Bills the NRA presented.

[70] The Court takes judicial notice of the fact that The NRA's lifespan came to an end on 30 April because the Minister of Law and Justice was not amenable to have its tenure extended. This stance of the Minister seems



to be founded on the view that the national reforms must be done and dusted under the present administration. Yet, by his own admission, the Prime Minister accepts under oath that despite an extension granted to the NRA to complete the national reforms:

“...it was clearly not practicable to expect such a mammoth task of revamping the constitutional and legislative regime which aims to address a country whose independence is more than half a century old to be embarked upon within such a limited time.”

[71] This is an admission that the national reforms project is a journey and not an event. The destination is the attainment of all the objectives of the national reforms stipulated under section 3 of the **NRA Act, 2019**. It is, therefore, in the national interest that the national reforms project continues in the next administration and all outstanding draft bills not passed by the Tenth Parliament be placed before the Eleventh Parliament that is soon to be born after the general elections which are just around the corner in October. In any case, the Minister of Law and Justice is obliged to reconvene the NRA “where exigencies of the Kingdom of Lesotho so require, for the purposes of peace and reconciliation, and in furtherance of the objectives of this Act and functions of the Authority under this Act.<sup>36</sup>”

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<sup>36</sup> Ibid

[72] This speaks to the recognition and acceptance of the fact of the NRA's "mammoth task of revamping the constitutional and legislative regime" to address national problems half a century old (to use the Prime Minister's words) is an unfinished business for the NRA and the next Parliament.

### **Is a dissolved Parliament competent to pass the Bills?**

[73] This takes me to the issue of the constitutional propriety of recalling the Tenth Parliament to pass the two Bills as a matter of public emergency. The power to recall Parliament is premised on the existence of the declaration of a state of emergency. It is a conditioned and not absolute power. The Recall notice states the purpose of the recalling Parliament is to pass the two Bills. In other words, the very Parliament which could not pass the bills because of it being dissolved by operation of law is directed to complete what it could not by virtue of its dissolution.

[74] This raises the question of what is the role of a Parliament that is recalled because of a state of emergency? The answer is found in section 23 (8) as being to debate and pass resolutions to approve the state of emergency.

As earlier said, these resolutions are not legislative in character. They serve as a check and balance of the Prime Minister's power to declare a state of emergency. The stated business of a recalled Parliament is to debate and pass resolutions and not to legislate.

[75] I am fortified in this view by the effect of dissolution on the business of Parliament. A dissolution terminates all pending bills. It does not preserve them in a legislative fridge to be opened if Parliament is recalled. A recalled Parliament does not have jurisdiction and authority to resurrect business killed and buried by its dissolution.

[76] The 6<sup>th</sup> edition of Black's Law Dictionary defines dissolution as an "act or process of dissolving; termination; winding up." the verb "dissolve" means "to terminate; abrogate; cancel; annul; disintegrate. To release or unloose the binding force of anything." In my respectful opinion, this is what a proclamation of dissolution does to Parliament and all its pending business.

[77] It follows that failure by Parliament to pass the two Bills on 14 June when the Proclamation to dissolve it was gazetted had the effect of annulling and cancelling them for good. They became corpses which a declaration of the state of emergency cannot resurrect into a legislative business for a recalled Parliament. The notice of Recall is a textbook repurposing of the constitutional functions of a dissolved Parliament. To the extent that the Recall notice purports to authorise or direct Parliament to resurrect and pass the Bills, it is *ultra-vires* His Majesty's powers.

[78] His Majesty has been ill-advised. The blame should be put at the door of the Council of State as the constitutional adviser. To repeat what a larger bench of this Court said in the twin-cases of **Mofomobe** and **Phoofolo**<sup>37</sup>:

“[11]... in the case of a Constitutional Monarch (as in our situation), the King cannot act on his initiative. He is throughout the scheme of the Constitution obliged to act in accordance with the advice of prescribed official of the State or some Council. This is understood in the saying that the King does not err but is caused to err by his adviser(s). (*Motlotlehi ha a fose o oa fosisoa*).”

[79] It is in my respectful opinion, a matter of high importance and relevance that the state of emergency is declared by a Prime Minister of a caretaker government and that the recalled Parliament otherwise stands dissolved.

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<sup>37</sup> Constitutional cases Nos 7 and 8 of 2017 (3 April 2017)

This speaks to the limited mandates of the two institutions. They do not have the popular mandate of citizens. For this reason their mandate is only limited to sheparding the Nation by approving or disapproving the duration of the declaration of the state of emergency. Neither has powers to initiate a legislative agenda or pass laws.

[80] Thus, reference to the passing of the two Bills in the Recall notice issued be regarded surplusage which should be declared *ultra-vires* His Majesty's powers. The reference is done contrary to finer canons of constitutionalism<sup>38</sup>.

#### **IV. CONCLUSION**

[81] The failure by the Tenth Parliament to pass the two Bills falls far too low the threshold of being a public emergency that 'threatens the life of the nation. There is merit in the applicants' contention that the failure is symptomatic of malaise in governance and institutional weakness. The imperatives to continue with national reforms call for the passing of the two Bills to be left to the Eleventh Parliament. Heavens will not cave in if this be done.

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<sup>38</sup> *Western Australia v. Commonwealth* (1975) 134 CLR 201

[82] The proposition that failure by Parliament to pass the two Bills constitutes a public emergency is a manifestation of too much faith in the ability of the Constitution to answer all political and socio-economic problems. The Constitution, although indispensable for a functional democracy and the rule of law, is not a panacea for all problems thrown up by a dysfunctional political and economic system. As Steven Friedman<sup>39</sup> counsels:

“This reliance on constitutional engineering to achieve what politics and economics cannot is fantasy. Constitutions cannot produce the world free of angry black voices, which some in the suburbs crave, or the end to privilege, which those who urge greater equity want. All that they can offer is the political means which enable us to work towards these goals.

We can draft a constitution which says that everything we dislike will disappear. But we cannot turn it into a reality. Courts cannot order the economy to grow or inequality to end. At most they might contribute to a climate in which change is more possible. Even court orders requiring far more achievable results, such as that which told the authorities to provide housing to people in need, cannot be implemented unless people act to enforce the rights the court uphold.

And the more we bend the constitution to make it a vehicle for what some want, or try to turn it into a vessel for a particular view of what society should be, the more we discredit it among those who want other things, making it far more difficult for it to serve us.

A constitution cannot achieve what politics cannot deliver. If minorities seek greater tolerance or different political habits, they need to find the political allies they require to make these goals more possible – if they do not, legal victors will soon be overtaken by political reality. Across the world, the most effective steps towards greater justice and equity for the poor and disadvantaged have been a result of democratic political action, not constitutional tinkering. Failures to achieve progress are likely to stem from political weakness, not the constraints imposed by the constitution. And so those who claim that the constitution prevents them achieving their goals will

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<sup>39</sup> “Asking the wrong things from the Constitution” Business Day, 5 May 2010

make more headway if they improve their political effectiveness rather than relying on it to deliver what it cannot.

Whatever our goal, we are best able to seek it if our political rules allow everyone to act with fellow citizens to influence decisions and if they insist that the government listen when they do. The test is not whether the constitution includes our recipe for a better society but whether it gives us a fair chance to make the government hear us. If it does, it should not be blamed for political failures it did not create.”

[83] This exposes the soft underbelly of the assertion that the urgent passing of the two Bills is what the doctor ordered. It is in the nature of the democracy that Parliament passes some bills and fails to do so with others. This does not portend an emergency at all, irrespective of the expectations by powerful interests in a bill. The disappointment when a bill of popular interest fails to be passed into a law cannot be equated to an imminent and actual threat to the life of the Nation.

[84] The Members of the National Assembly and Senators who vote against a bill in the face of huge public interest in its passing perform a constitutionally perfect role when they oppose its passing. What the nation is entitled to are their reasons for so voting. It cannot be suggested that our democracy is thereby threatened and weakened. Neither can it be argued with any measure of seriousness that by failing to pass a bill, Parliament generates a public emergency.

[85] So, the notion that when Parliament fails to do its job efficiently and on time, it thereby causes a public emergency is misplaced. Section 23 (1) of the Constitution, which provides the power and purpose for declaring a public emergency, is certainly devalued if resorted to such tenuous reasons. If this important power can be exercised for such reasons, the country is put on a slippery slope towards rule by state of emergencies.

[86] Bills must be treated the same. It is Parliament only that decides which bill should be prioritised on the legislative agenda. The Executive and the Judiciary have no business in this business of Parliament. It remains the sovereign right and duty of the people of this Kingdom to hold Members of the National Assembly and Senators accountable whenever they fail to pass on time bills that the Nation wait with bated breath.

[87] It appears that our national salvation is placed in passing the Bills. But however important and good, when passed, they are not self-executing. Their effectiveness in tackling societal ills and protecting life will depend on well-resourced and professional law-enforcement agencies.



Therefore, it is not so much a matter of when the bills were passed but how effective their enforcement will be after being passed into laws. The endeavour to make them work successfully is to let them be worked by men and women of high character, capacity and integrity.

### **Costs**

[88] The applicants have succeeded in asserting the people's right to constitutional behaviour by Government. This is a victory for constitutionalism and the rule of law. They took up cudgels in defence of the Constitution in the public interest. They are true private attorneys-general. They deserve to get their costs.<sup>40</sup>

### **Order**

[89] In the result, the following order is made:

1. The Declaration of the State of Emergency by the Prime Minister is declared null and void for failing to meet the threshold in section 23 (1).
2. The Recall of the Tenth Parliament Notice, 2022 in terms of which the dissolved Parliament is recalled to pass the two Bills is *ultra vires* the power of His Majesty.

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<sup>40</sup> Biowatch Trust v. Registrar, Genetic Resources 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para [23]

3. The recalled Parliament has no constitutional authority to debate and pass the two Bills.
4. Costs to follow the event.

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**S.P. SAKOANE CJ**

I agree

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**MONAPATHI J**

I agree

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**RALEBESE J**

**For the Applicants: L. Tuke**

**For the Respondents: M.S. Rasekoai and C.J. Lephuthing**