

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

**CONSTITUTIONAL CASE NO. 0011/2022**

**HELD AT MASERU**

**In the matter between**

**TAU MAKHALEMELE**

**APPLICANT**

**AND**

**BOARD OF ENQUIRY OF NATIONAL**

**SECURITY SERVICE**

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

**NATIONAL SECURITY SERVICE**

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

**MINISTER OF LAW AND JUSTICE**

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

**MINISTER OF DEFENCE**

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

**ATTORNEY GENERAL**

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

Neutral citation: Tau Makhalemele vs Board of Inquiry of National Security Service & 4 others [2022] LSHC CONST 156 (07 July 2022)

**CORAM** : **MONAPATHI J.**  
**MAHASE J.**  
**RALEBESE J.**

**HEARD** : **23 MAY 2022 and 8 JUNE 2022**

**DATE OF JUDGMENT:** **06 JULY 2022**

### **SUMMARY**

*Constitutional litigation – Jurisdiction of the High Court exercising constitutional jurisdiction –Prayers in the notice of motion not substantiated in founding affidavit – Attempt to amplify case in arguments – Applicant failed to found constitutional jurisdiction– Court declining jurisdiction on the application- No order as to costs.*

### **ANNOTATIONS**

### **CITED CASES:**

#### **LESOTHO**

Attorney-General and Others v Tekateka and Others (C of A (CIV) No. 7/2001) (NULL) [2001] LSHC 153 (12 October 2001)

Frasers Lesotho Ltd v Hata-Butle (Pty) Ltd LAC (1995-1999)698 of 702)

Lesotho Public Service and Another v Chief Magistrate North and Others (C of A (CIV) 63/19) [2020] LSCA 3 (29 May 2020)

Pascalis Molapi v Metro Group Limited and Others LAC/CIV/R/09/03

Phaila V Director of Public Prosecutions and Others (C of A (CIV) 23/2021) [2021] LSCA 34 (12 November 2021)

Phaila v Director of Public Prosecution and Others (Const 24/2018) [2021] LSHC 07 (18 March 2021)

Sechele v Public Officers Defined Contribution Pension Fund and Others (C of A (CIV) No.43B/2010 [2011] LSCA 23 (20 April 2011)

Sechele v Public Officers Defined Contribution Pension Fund and Others (6/2010) (NULL) [2010] LSHC 94 (13 December 2010).

### **SOUTH AFRICA**

Director of Hospitals Services v Mistry<sup>1</sup> 1979 (1) SA 626

Visser NO and Others v Van Niekerk and Others<sup>2</sup> (5937/16) [2018] ZAFSHC 200 (9 November 2018)

### **STATUTES:**

Constitutional Litigation Rules Legal Notice No. 194 of 2000

Constitution of Lesotho 1993

High Court Rules Legal Notice No.9 of 1980

### **BOOKS:**

Herbstein and Van Winsen, The civil Practice of the Superior Courts in South Africa, 4th Edition.

## **RULING ON JURISDICTION**

### **Background**

1. The applicant in this matter is a member of **National Security Service** (2<sup>nd</sup> respondent) (hereinafter referred to as NSS) holding the position of a Director. Applicant has been on suspension following institution of disciplinary enquiry against him which commenced sometime in February 2018. It appears from applicant's founding papers that he was at some point acquitted of disciplinary charges. The disciplinary proceedings were however re-instituted after the **Director General of the NSS** had complained to the **Minister of Defence and National Security** about the finding of the first disciplinary enquiry. Consequently, applicant has been subjected to another disciplinary enquiry that commenced on 06<sup>th</sup> May 2022 before the Board of Enquiry of the NSS

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<sup>1</sup> 1979 (1) SA 626 at 635-636.

<sup>2</sup> (5937/16) [2018] ZAFSHC 200 (9 November 2018).

(1<sup>st</sup> respondent). It was this disciplinary enquiry, which was ongoing at the time of institution of these proceedings, which prompted applicant to institute these proceedings.

2. Applicant launched these constitutional proceedings on urgent basis in terms of which he prayed for a rule nisi to be issued calling upon the respondents to show cause if any why the following prayers (amongst others) shall not be made absolute:

“ (a) *That the disciplinary case against applicant before the board of the Enquiry of the National Security Service be stayed pending finalization of these proceedings;*

*(b)....*

*(c) That it is hereby declared legal notice number 85 of 2010 National Security Services Act (Amendment of Schedules) Notice, 2021, is unconstitutional for violating section 70(1) of the Constitution.*

*(d) That the Board of Enquiry of the National Security Service comprising of Chairperson Mr. Mafisa and the other panelists has no jurisdiction to enquire into the allegations against the applicant.”*

3. In reaction to the application, the respondents filed a notice in terms of **Rule 12(1) of the Constitutional Litigation Rules** read with **Rule 8(10) (c) of the High Court Rules**. The notice simply reads:

*“Kindly take notice that the Respondents herein intent to oppose the urgency and interim prayer for stay of disciplinary hearing ex facie the papers without filing an answering affidavit on account of the very short time provided by applicant to move his application.”*

Rule 8(10) (c) of the High Court Rules provides:

*“Any person opposing the grant of any order sought in the applicant’s notice of motion shall:*

*(a)...*

(b)...

*(c) if he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question.”*

4. On the date of hearing, the court decided that the matter was urgent. The court then permitted both counsel to make oral submissions. **Advocate Nku** for the respondents raised the issue that the applicant had not established the constitutional jurisdiction of the court as there were no averments in the founding affidavit to found the jurisdiction of the court.
5. **Advocate Molati** for the applicant on the other hand submitted that applicant had relied on the prayers in the notice of motion to found jurisdiction of the court. He intimated that the court should infer from the reading of prayer (c) in particular that it is only the **High Court** exercising its constitutional jurisdiction that can determine such a prayer.
6. After Counsel had both made oral submissions, the court directed both counsel to make written submissions confined to the jurisdictional issue. Counsel accordingly filed written heads of argument which augmented what they had already submitted.

### **Constitutional Jurisdiction of the High Court**

7. The **Lesotho Constitution** in various provisions confers jurisdiction on the **High Court** on a number of issues. These provisions include: *Section 7(4); section 17(2); section 22; section 45(5); section 46(3); section 69; section 77(2); section 119(1); section 128; and section 130.* The question is whether all these provisions, by virtue of being constitutional

provisions, necessarily confer constitutional jurisdiction on the **High Court**. The answer to this question is indisputably in the negative. It was never the intention of the legislature that whenever a constitutional provision confers jurisdiction on the **High Court**, then the **High Court** will invariably exercise such jurisdiction sitting as a constitutional court. Otherwise the **High Court** would, in each and every civil, criminal and review matter indiscriminately sit in its constitutional jurisdiction pursuant to *section 119(1)* of the **Constitution** which provides that:

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

Furthermore, the **High Court** would hear all appeals sitting in its constitutional capacity pursuant to *section 130* of the **Constitution** which reads:

*“In addition to the supervisory jurisdiction and jurisdiction on a reference conferred on the **High Court** by this Constitution, the **High Court** shall have such jurisdiction with regard to appeals from decisions of any subordinate court, court-martial or tribunal as may be conferred by Parliament.”*

8. It follows therefore that a mere conferment of jurisdiction on the **High Court** by the **Constitution** does not necessarily connote the constitutional jurisdiction of the court. The big question then is under what circumstances the **High Court** should appropriately exercise the

constitutional jurisdiction. The answer to this question can be found in the **Constitutional Litigation Rules**<sup>3</sup>. The heading/title therein reads:

*“In exercise of the powers conferred on me by sections 22(6) and 69(5) of the Constitution, I...Chief Justice of the High Court of Lesotho make the following Rules-” (My emphasis)*

9. Section 22(6) of the **Constitution** provides that:

*“The **Chief Justice** may make rules with respect to the practice and procedure of the **High Court** in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the **High Court**).” (My emphasis)*

Section 69(5) on the other hand provides that:

*“Parliament may make provision with respect to -*

*(a) the circumstances and manner in which and the conditions upon which any application may be made to the **High Court** for the determination of any question under this section; and*

*(b) the powers, practice and procedure of the **High Court** in relation to any such application, but, subject to any provision in that behalf made by Parliament under this subsection, the practice and procedure of the **High Court** in relation to any such application shall be regulated by rules made by the Chief Justice.” (My emphasis)*

It can be inferred therefore from the reading of the heading/title of the **Constitutional Litigation Rules** and the foregoing provisions of the **Constitution** that the constitutional jurisdiction of the **High Court** is limited to the court’s exercise of powers conferred by *section 22* and *section 69* of the **Constitution**.

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<sup>3</sup> Legal Notice No.194 of 2000.

10. Notwithstanding the foregoing inference, it appears that the constitutional jurisdiction of the **High Court** has been extended to cover the rule of law reviews where the issue involves constitutional supremacy. The **Court of Appeal** endorsed this extended jurisdiction in **Sechele v Public Officers Defined Contribution Pension Fund and Others**<sup>4</sup>. This case involved an appeal against the decision of the **High Court** sitting in its constitutional jurisdiction wherein it had dismissed an application by Sechele. Before the **High Court** sitting as a **Constitutional Court**, Sechele had challenged *sections 3(1), 4, 5(1) and 27* of the **Public Officers Defined Contribution Pension Fund Act 2008** as unconstitutional for being inconsistent with *sections 17(1), 150(1), (2) and (4)* of the **Constitution**. Notwithstanding that the challenge was neither pursuant to section 22 nor *section 69* of the **Constitution**, the court *a quo*<sup>5</sup> assumed jurisdiction and dismissed the application on the merits. The **Court of Appeal** in endorsing the constitutional jurisdiction of the **High Court** in the matter stated as follows:

*“In determining these issues it is of fundamental importance to recognise that the Court is enjoined to uphold the supremacy of the Constitution in the event of inconsistency (if any) between the impugned Act and the Constitution. In this regard s2 of the Constitution reads as follows:-  
‘2. 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.’”*

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<sup>4</sup> (C of A (CIV) No.43B/2010 [2011]LSCA 23 (20 April 2011)

<sup>5</sup> *Sechele v Public Officers Defined Contribution Pension Fund and Others (6/2010) (NULL) [2010] LSHC 94 (13 December 2010).*



11. In **Phaila V Director of Public Prosecutions and Others**<sup>6</sup> the Court of Appeal again endorsed that the **High Court** sitting in its constitutional jurisdiction is empowered to entertain matters that impinge on the rule of law and constitutional supremacy. The **Court of Appeal** in that case said:

*“The appellant contends for an interpretation of the Corruption Act that would have implications for the authority allocated to the Police and the DPP by the Constitution. This is a constitutional matter.”*

In a nutshell therefore, the constitutional jurisdiction of the **High Court** is not limited to exercise of powers under *section 22* and *section 69* of the **Constitution**, but it also extends to review of constitutionality of legislation within the framework of constitutional supremacy.

### **Issues to be determined**

12. The issue to be determined at this stage of the proceedings is whether in *casu*, the constitutional jurisdiction of the **High Court** has been established in terms of any of the permissible avenue.

### **Analysis**

13. Jurisdiction is the power or competence that a particular court has to adjudicate a dispute. A person who has decided to litigate must select the proper court in which to proceed. The applicant as *dominis litis* herein bears the onus to proof that this court has jurisdiction to entertain this application. (**Visser NO and Others v Van Niekerk and Others**<sup>7</sup>).

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<sup>6</sup> (C of A (CIV) 23/2021) [2021] LSCA 34 (12 November 2021) at paragraph 11.

<sup>7</sup> (5937/16) [2018] ZAFSHC 200 (9 November 2018) at paragraph 9.

14. As **Advocate Nku** for the respondents correctly pointed out, there are no averments whatsoever in applicant's founding affidavit to found the constitutional jurisdiction of this court. **Advocate Molati** contends that the court should refer to prayer (c) and infer from its reading that it is only the **High Court** exercising its constitutional jurisdiction that can determine such a prayer. The prayer simply reads:

*“(c) That it is hereby declared legal notice number 85 of 2010 National Security Services Act (Amendment of Schedules) Notice, 2021, is unconstitutional for violating section 70(1) of the Constitution.”*

15. Upon perusal of the founding affidavit, there are no averments whatsoever substantiating the said prayer (c) in order for the court to appreciate its essence. There is no mention of the contents/ provisions of the impugned Act (**National Security Services Act (Amendment of Schedules) Legal notice number 85 of 2010**); applicant has not pleaded how the impugned Act is alleged to violate *section 70(1) of the Constitution*; there are no averments as to how the impugned Act affects applicant's interests; and it is unclear whether it is the whole Act or certain parts of it that applicant impugns. The **Court of Appeal in Lesotho Public Service and Another v Chief Magistrate North and Others**<sup>8</sup> stressed that the applicant who relies on a particular statutory provision should clearly articulate the impugned provisions of the law in the founding papers.

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<sup>8</sup> (C of A (CIV) 63/19) [2020] LSCA 3 (29 May 2020) It said: “It is trite that a party what relies on the breach of o statutory provision or law for its cause of action must formulate the pleadings in clear terms with reference to the provisions of the specified law. In other words, the statutory duty should be defined and the breach specified. The particular provision relied upon may not be specified if the case is pleaded clearly enough to make it obvious to the respondent what case to meet.”

16. The approach suggested by **Advocate Molati** is clearly not how jurisdiction of the court should be founded in motion proceedings. **Rule 8(1) of the High Court Rules** unequivocally states that:

*“Save where proceedings by way of petition are prescribed by any law, every application shall be brought on notice of motion supported by an affidavit setting out the facts upon which the applicant relies for relief.”* (My emphasis).

It is my considered view that the facts to be set out by applicant to support the relief sought, should include facts establishing the locus standi of the applicant as well as the jurisdiction of the court in which the relief is sought. It is to the founding affidavit that the court will refer to determine whether applicant has founded the jurisdiction of the court in respect of the relief he is seeking. See **Director of Hospitals Services v Mistry**<sup>9</sup> where it was said

*“When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is.”*

17. The applicant in *casu* has failed, in his founding affidavit, to articulate the essence of the impugned law and how it allegedly violate section 70(1) of the **Constitution**. Consequently, the court is in the dark as to the actual complaint of the applicant for it to determine whether it has jurisdiction to adjudicate over it.

18. **Advocate Molati** in his submissions attempted, though equivocally, to found the court’s jurisdiction on *section 22(1)* of the **Constitution**. *Section 22(1)* provides that any person who alleges violation or imminent violation of his/her rights under *sections 4 to 21* of the **Constitution** may

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<sup>9</sup> 1979 (1) SA 626 at 635-636.

apply to the High Court for redress. In paragraphs 36 and 39 of the founding affidavit, applicant avers as follows:

*“36 I stand to suffer irreparable harm if I am forced to suffer double jeopardy. I submit I have no alternative remedy save to approach the court in the manner that I have done because I am protecting a clear right not to be prejudiced which is enshrined in section 12 of the Constitution of Lesotho.*

37...

38...

*39. I submit that in terms of the provision of section 12 of the Constitution of Lesotho a person is not tried twice for the same offence”*

It should be pointed out from the onset that none of the prayers sought by applicant in the notice of motion, correlates to the averments in paragraphs 36 and 39 of the founding affidavit as quoted above. Furthermore the two paragraphs represent the totality of averments applicant has pleaded regarding *section 12* of the **Constitution**. It is not clear from the founding papers how applicant believes his rights under *section 12* have been violated; considering that *section 12* specifically deals with the right to a fair trial in criminal proceedings.

19. In a nut shell, the applicant has not pleaded any facts upon which he founds the constitutional jurisdiction of this court. In the absence of averments establishing jurisdiction, this court is unable to assume that it has jurisdiction. In **Phaila v Director of Public Prosecution and**

**Others**<sup>10</sup> the court said the following, which I find apposite in the circumstance of this case:

“ [15] *It is trite law that the jurisdiction of a court is concerned with*

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

[16] *Phaila’s founding affidavit falls short of this...*

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

20. Applicant’s counsel has attempted to magnify applicant’s case and to sneak in facts to found the constitutional jurisdiction of the court in arguments, both oral and written. This cannot be countenanced by this court as it will be tantamount to letting counsel give evidence from the bar and thereby supplementing applicant’s case at the argument stage. That approach was reproved by **Mosito AJ** in **Pascalis Molapi v Metro Group Limited and Others**<sup>11</sup> (which was decided on the strength of **Frasers Lesotho Ltd v Hata-Butle (Pty) Ltd**)<sup>12</sup> when he said:

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<sup>10</sup> (Const 24/2018) [2021]LSHC 07 (18 March 2021).

<sup>11</sup> LAC/CIV/R/09/03 at Paragraphs 17 and 23.

<sup>12</sup> LAC (1995-1999)698 of 702).

*“17. It was clearly irregular for the **Labour Court** to have permitted counsel for the respondent to have canvassed the issue of a wrong party having been sued when the pleadings themselves did not cover the issue...*

*23. We have already pointed out that, the Labour Court’s basing of its decision on an issue that had not been pleaded, and on which counsel for the respondent had been allowed to dwell, amounted to a gross irregularity which this courts has no hesitation in setting aside as such.”*

In **Attorney-General and Others v Tekateka and Others**<sup>13</sup> the **Court of Appeal** addressed the issue in the following terms:

*“...it is, in fact, unnecessary to decide the point because it is quite clear that (whatever may have been argued both in the court below and in this court) this ground for relief was not the case the applicants made out in the founding papers. It is trite that an applicant must make out his or her case in the founding affidavit and that a court will not allow an applicant to make out a different case in reply or still less, in argument.” (My emphasis)*

On the strength of the foregoing authorities, **Advocate Molati** cannot be permitted to augment applicant’s case to establish the court’s jurisdiction in the arguments.

21. In the circumstances of this case, there is no basis for this court to determine its constitutional jurisdiction to deal with applicant’s case in so far as it relates to prayer (c) of the notice of motion.

22.As regards prayer (d) which is to the effect that the court should find that the **Board of Enquiry of the National Security Service** has no

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<sup>13</sup> (C of A (CIV) No. 7/2001) (NULL) [2001] LSHC 153 (12 October 2001)

jurisdiction to enquire into the allegations against the applicant, it is undoubtedly *prima facie*, a matter falling outside the purview of the **High Court** exercising constitutional jurisdiction. In any case, there are no averments whatsoever in applicant's founding affidavit establishing the court's constitutional jurisdiction to deal with that prayer and applicant's counsel did not pursue this prayer even in his submissions. "*If the court is not satisfied on the facts stated in the application that it has jurisdiction, it will not entertain the proceedings.*" (**Hebstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa**<sup>14</sup>)

### **Disposition**

23. Premised on the foregoing reasons, this court declines to entertain the application as applicant has failed to discharge the burden of establishing the constitutional infringement empowering this court to exercise its constitutional jurisdiction. As the **Court of Appeal** said in **Phaila v Director of Public Prosecution and Others** (*supra*)<sup>15</sup>:

*"As a starting point the applicant in a matter such as this bears the onus to establish the alleged infringement of the Constitution. If there is no infringement then the enquiry ends there and then."*

24. Even if the court could for a moment suppose that it has jurisdiction in this case, applicant would still have an insurmountable challenge to sustain and prove the merits of his prayers due to the paucity of averments in the founding affidavit substantiating such prayers. The application is accordingly dismissed.

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<sup>14</sup> 4<sup>th</sup> Edition (Van Winsen, Cilliers and Loots), Juta & Co. Ltd, 1997 at page 364.

<sup>15</sup> At Paragraph 11.

25. There is no order as to costs.

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**RALEBESE J.**

I concur \_\_\_\_\_  
**MONAPATHI J.**

I concur \_\_\_\_\_  
**MAHASE J.**

For the Applicant: **Advocate L. Molati**

For the Respondents: **Advocate M. Nku**