REPORTABLE

LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO.07/2021

In the matter between:

TEFO MAPESELA	**1ST APPLICANT**
KOSE MAKOA	**2ND APPLICANT**

And

SPEAKER OF THE NATIONAL ASSEMBLY	**1ST RESPONDENT**
CLERK OF THE NATIONAL ASSEMBLY	**2ND RESPONDENT**
BUSINESS COMMITTEE, NATIONAL ASSEMBLY	**3RD RESPONDENT**
NATIONAL ASSEMBLY OF LESOTHO	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**
MEMBERS OF PARLIAMENT LISTED IN ANNEX "A"	**6TH RESPONDENT**
POLITICAL PARTIES LISTED IN ANNEXURE "B"	**7TH RESPONDENT**

CORAM:	**S.P. SAKOANE CJ**
	E.F.M. MAKARA J
	P. BANYANE J
HEARD:	**16 NOVEMBER 2021**
DELIVERED:	**4 FEBRUARY 2022**

Neutral Citation: Mapesela and another v. Speaker of the National Assembly and others [2022] LSHC 149 Const (4 February 2022)

SUMMARY

Constitutional Law – motion of no confidence in the Government coupled with motion to vote by secret ballot - procedure for voting on the motions – whether the Speaker has discretionary power to depart from the procedure to vote by voice and to direct voting in secret – whether alleged intimidation and bribery of Members of Parliament by the Prime Minister constitute good reasons to vote by secret ballot - Constitution, sections 2, 20 (1), 75 (1), 81 (1), 85 (5)(a) and (8) and 119 (1); Parliamentary Powers and Privileges Act, 1994, sections 19g and 20; Standing Orders Nos. 34, 45 (1), 46, 47, 48, 97(6) and 111.

ANNOTATIONS

CITED CASES:

LESOTHO

Mokhothu and others v. The Speaker of the National Assembly and others Constitutional Case No. 20/2017 (21 February 2018)

ENGLAND

Pickin v. British Railways Board [1974] AC 765

INDIA

Ashish Shelar and Ors v. The Maharashtra Legislative Assembly and another 2022 LiveLaw (SC) 91

State v. Rajasthan v. Union of India [1978]1 S.C.R. 1

GERMANY

Wüppesahl Case 80 BverfGE 188 (1989)

SOUTH AFRICA

Cape Gate (Pty) Ltd v. Eskom Holdings SOC Ltd [2019]1 A11 SA 141 (GJ)

National Treasury and others v. Opposition to Urban Tolling Alliance and others 2012 (6) SA 233 (CC)

Pharmaceutical Manufacturers Association of South Africa and others; In Re: Ex Parte Application of President of the Republic of South Africa and others 2000 (3) BCLR 241 (CC)

BOOKS:

Brazier R. (1991) Constitutional Reform-Reshaping the British Political System (Oxford University Press)

Grayling A.C. (2017) Democracy and Its Crisis (London : Oneworld)

Griffith J.A.G. and Ryle M. (1989) Parliament, Functions, Practice and Procedures (London: Sweet and Maxwell)

Palmer V.V. and Poulter S.M. (1972) The Legal System of Lesotho (Virginia: Michie)

JOURNALS

Engelen B. and Nys T.R.V. "Against the secret ballot: Toward a new proposal for open voting" Acta Politica (2013) Volume 48 (4) 490-509

Kinzer, B.L. "The unenglishness of the secret ballot" Albion Quarterly Journal Concerned with British Studies (1978) Volume10 (3), 237-256

STATUTES

Constitution of Lesotho, 1993
Parliamentary Powers and Privileges Act No.8 of 1994
Standing Orders of the National Assembly of Lesotho, 2008

JUDGMENT

I. INTRODUCTION

> "The purpose of a secret vote is to counteract 'a great class of evils, including violence and intimidation, improper influence, dictation by employers or organizations, the fear of ridicule and dislike, or of social injury – all coercive influences of every sort depending on a knowledge of the voter's political action'. In addition, a secret vote ensures that elections represent the 'free and honest expression of every citizen."[1]

[1] This is a constitutional motion brought by two members of the National Assembly seeking the utilization of a secret ballot to pass a resolution of no confidence in the Government. The no confidence resolution is provided for in section 87(5)(a) and (8) of the Constitution and read as follows:

> "(5) The King may, acting in accordance with the advice of the Council of State, remove the Prime Minister from office:
>
> (a) if a resolution of no confidence is passed by the National Assembly in the Government of Lesotho and the Prime Minister does not within three days thereafter resign from office;
>
> .....
>
> (8) A resolution of no confidence in the Government of Lesotho shall not be effective for purposes of section 5 (a)... unless it proposes the name of a member of the National Assembly for the King to appoint in the place of the Prime Minister."

[1] Henry Wigmore quoted by Engelen B. and Nys T.R.V. "Against the secret ballot : Toward a new proposal for open voting" Acta Politica (2013) 48 (4),490-507

[2] The manner of deciding questions and motions in Parliament is provided for in section 75 as follows:

> "(1) Save as otherwise provided for in this Constitution, any question proposed for decision in either House of Parliament shall be determined by a majority of the votes of the Members present and voting.
>
> (2) The person presiding in either House of Parliament shall, if he is a member thereof, have an original vote but he shall have no casting vote, and whenever there is an equality of votes on any question, the motion before the House shall be deemed to have been negatived."

[3] Parliament is constitutionally authorized by section 81(1) to regulate its procedure and make rules for the conduct of proceedings. It reads thus:

> "Subject to the provisions of this Constitution, each House of Parliament may regulate its own procedure and may in particular make rules for the orderly conduct of its own proceedings."

Procedures for voting

[4] It is pursuant to section 81(1) that the National Assembly has made Standing Orders. The Standing Orders which regulate the procedure for voting are Standing Orders Nos. 45 (1), 46, 47 and 48. They read as follows:

> **"45 (1). Decision of Questions**
>
> (1) Subject to the provisions of the Constitution and any other law, all questions put to the House shall be decided by the majority of votes of the members present and voting.
>
> **46. Collection of Voices**
>
> (1) When the Speaker or Chairperson has put a question to the House or to the committee for its decision, those who are in favour of the question are called upon to say "Aye" and then upon those who are against to say "No".

(2) As soon as the Speaker or Chairperson has collected the voices of the Ayes and the Noes, the question being then fully put no other member may speak to it.

(3) The Speaker or Chairperson shall in judging the number of voices on either side, state whether the Ayes have it or whether the Noes have it. If no member challenges the statement under the next paragraph the Speaker shall declare the question to have been so decided.

(4) A member may challenge the statement of the Speaker or Chairperson by claiming a division. Whenever a division is claimed it shall be held forthwith in the manner prescribed in Standing Order No.47 (Divisions).

(5) If the speaker or Chairperson considers that a division has been unnecessarily claimed, the members who challenge that decision may be called to rise in their places; and if less than ten such members so rise, the question shall be declared to have been decided according to the original statement, and the names of the members who rose in their places shall be recorded in the minutes of proceedings.

(6) In every instance where the Constitution lays down that a fixed majority is necessary to decide any question, the Speaker or Chairperson may not collect the voices but shall direct that a division be taken.

47. Divisions

(1) When a division has been claimed a bell shall be rung for two minutes. On the conclusion of that time the doors of the Chamber shall be shut and no further members may enter or leave the chamber.

(2) Subject to paragraph (3) of this Standing Order, the votes shall then be taken by the Clerk who shall ask each member separately in alphabetical order how the member wishes to vote. A member shall upon his or her name being called, give a vote by saying "Aye" or "No" or by expressly stating abstention from voting.

(3) A member shall vote according to his or her voice given under paragraph (1) of the Standing Order No. 46 (Collection of Voices), and the vote of a member who has claimed a division shall be recorded among those cast in the sense counter to the statement of the Speaker or Chairperson under paragraph (3) of that Standing Order.

(4) .....
(5) .....

48. Electronic Voting

(1) If a system is in place to record the votes of members electronically, members shall vote by

(a) pressing the "yes" button if they wish to vote in favour of a question;

(b) pressing the "no" button if they wish to vote against a question;

(c) pressing the "abstain" button if they wish to abstain from the vote.

(2) As soon as the voting is complete the Speaker shall declare the results. The declaration may not thereafter be challenged."

Motions of no confidence and secret ballot

[5] On 25 August 2021, the applicants presented a motion of no confidence in the National Assembly which reads as follows:

> "That this Honourable House has no confidence in the current Government of Lesotho which is led by the Rt. Honourable the Prime Minister Dr Moeketsi Majoro. In his place the House proposes the name of official leader of Opposition Honourable Dr. Monyane Moleleki for His Majesty to appoint as the next Prime Minister."

[6] On 7 September, the applicants presented another motion which reads thus:

> "That this Hon. House resolves to use secret ballot on the coming motion of vote of no confidence to (sic) the Government of Lesotho and the Right Hon. the Prime Minister Dr. Moeketsi Majoro."

The two motions were read by the Speaker to the members of the National Assembly on its sitting on 10 September. The secret ballot motion was ruled to have the effect of amending the Standing Orders whereas that is the delegated mandate of the Standing Orders Committee.

Relief

[7] It is because of aforegoing ruling that the applicants are suing the Speaker, the Clerk of the National Assembly, the Business Committee, all the hundred and twenty (120) members of the National Assembly and the fourteen (14) political parties represented in the National Assembly. The applicants seek the following prayers:

> "**PART A (*Interim Relief*)**
>
> 1. **PENDING THE FINAL DETERMINATION** of **Part B** of this Notice (sic), the Honourable Court shall grant the Applicants the following orders to operate with immediate effect as interim relief:
>
> 1.1. Dispensing with the ordinary Rules of Court pertaining to notice, periods of notice and service and Forms and condone non-compliance with those Rules, on account of the urgency of this matter.
>
> 1.2. Interdicting and restraining the 3rd Respondent [i.e. the Business Committee] forthwith from determining and giving notice as to the date on which the motion of no confidence in the Government of Lesotho filed by the 1st Applicant shall be tabled, debated and determined by the National Assembly.
>
> 1.3. Interdicting and restraining the 2nd Respondent [i.e. the Clerk of the National Assembly] forthwith from preparing any Order Paper of the National Assembly which includes as the business of the House, the motion of no confidence in the Government of Lesotho filed by the 1st Applicant.
>
> 1.4. Interdicting and restraining the 1st Respondent [i.e. the Speaker] forthwith from presiding over the motion of no confidence in the Government of Lesotho filed by the 1st Applicant.
>
> 1.5. Interdicting and restraining the 4th Respondent [i.e. the House] forthwith from debating and determining the motion of no confidence filed by the 1st Applicant.

1.6. A rule *nisi* issue and is hereby issued returnable on such date and time as this Honourable Court may determine, calling upon the Respondents to show cause, if any why, prayers sought in **PART B** of this Notice shall not be granted as final relief.

PART B (*Final Relief*)

2. **DECLARING** that section 75(1) of the Constitution of Lesotho permits the motion of no confidence in the Government of Lesotho to be decided and determined by a secret ballot of members of the National Assembly in special circumstances.

3. **DECLARING** that Standing Order No.45(1) of Standing Orders of the National Assembly permits the voting by members of the National Assembly through the secret ballot in the determining (sic) any question put before the House, in special circumstances, and that the said Standing Order is unconstitutional to the extent of excluding secret ballot voting by members of the House in special circumstances.

4. **DECLARING** that the decision/resolution of the 1st Respondent that the motion of no confidence in the Government of Lesotho filed by the 1st Applicant shall be decided and determined by open/public vote is unconstitutional, null and void.

5. **DIRECTING** the 1st Respondent to determine, within **fourteen (14) days** of the order of this Honourable Court whether the circumstances put forth by the Applicants in this case and consideration of general principles, usages and procedures of Members of Parliaments of the **SADC** Region, the Commonwealth Parliamentary Association and the Inter-Parliamentary Union, warrant the voting by secret ballot on the motion of no confidence filed by the 1st Applicant and to notify in writing his decisions and reasons therefor to the National Assembly, accordingly.

6. **ALTERNTIVELY** (to 5 above), **DIRECTING** the 1st Respondent to investigate and report in writing to the National Assembly within fourteen (14) days of the order of this Honourable Court:

6.1 the usage and practices of Members of Parliaments of the **SADC** Region, the Commonwealth Parliamentary Association and Inter-Parliamentary Union; ***and,***

6.2. The circumstances raised by the Applicants in the present matter which implicate the decision or determination on the motion of no confidence filed by the 1st Applicant to be made on secret ballot; ***and,***

on the basis thereof, frame and determine a temporary Standing Order as to whether or not the motion of confidence filed by the 1st Applicant require to be decided or determined on secret ballot, in terms of Standing Order No.110 of the Standing Orders of the National Assembly.

7. Costs of this application.

8. Further and/or alternative relief deemed fit by this Honourable Court."

[8] When counsel for the applicants attempted to move Part A of the notice of motion on 16 September, the court pointed to him that there was no return of service to prove that each Member and some of the political parties had been served. Because of that, we ordered that all be served and only thereafter would the court deal with the matter.

[9] On 28 October when the court resumed sitting, there was still no return of service. Counsel for the applicants informed us that he had not filed replying affidavits because he was unable to find his clients. He applied for a postponement and intimated that if thereafter his clients could still not be found, he would have no option but to withdraw.

[10] Indeed, when the court assembled on 16 November, it was made aware that new counsel, Miss *Kuoane,* had taken over because the previous counsel had filed a notice of withdrawal on 1 November. However, Miss *Kuoane* had also not filed any replying affidavits. She informed the court that she

would rest her submissions only on legal issues projected in the two sets of affidavits.

II. NATURE OF APPLICATION

[11] The applicants say their application is "a rule of law review application instituted in terms of the dictates and values underlying the supremacy clause (section 2 of the Constitution) read with section 119(1) (first part) of the Constitution."

[12] They seek to interdict the National Assembly and its Business Committee from making preparations to table their motion of no confidence for debate. They also seek to review and set aside the ruling of the Speaker that their secret ballot motion is in effect an amendment of the Standing Orders to adopt a secret ballot as a procedure for voting on motions of no confidence.

[13] The Speaker and the Business Committee of the National Assembly oppose the application on three grounds. The first is that the court does not have jurisdiction to review the decision of the Speaker. The second ground of objection is that the applicants have no cause of action. The third objection is that the applicants lack standing to sue (*locus standi*).

[14] In essence, therefore, the applicants challenge the Speaker's decision to stick to the stipulated procedure of voting prescribed by Standing Orders 46, 47 and 48. This challenge postulates the existence of a discretionary

power of the Speaker to depart from the stipulated method of voting if requested by the mover and seconder of a motion. The applicants' case rests on this postulate.

Jurisdiction

[15] The postulate raises the fundamental question of whether the Speaker has a discretionary power to decide in favour of a secret ballot and if so, whether refusal to make that choice is reviewable. This question implicates the doctrine of separation of powers and the jurisdictional competence of courts to review internal proceedings of Parliament.

[16] Section 2 of the Constitution proclaims its superiority over other laws. Section 119(1) provides for this Court's:

> "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 only law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law."

[17] The jurisdiction conferred by section 119(1) is two dimensional: first, to hear and determine any civil or criminal proceeding; second, to review decisions or proceedings of the listed courts, bodies and institutions. Although Parliament is not one of the listed bodies and institutions, this by itself does not mean Parliament is beyond and above constitutional control. Constitutional control of Parliament is provided for under section 2

pursuant to which this court is empowered to control the exercise of parliamentary power by reviewing all laws it passes and its conduct if inconsistent with the Constitution. [2] It is by virtue of this constitutional scheme of checks and balances that:

> "Parliament's power to legislate is restricted both substantively and procedurally by the Constitution. The provisions respecting fundamental human rights are clearest example of substantive restraints upon the range of permissible legislative topics. The provisions concerning the amendment to the Constitution establish certain procedural restraints which must be fulfilled before an amendment can be validly passed. Laws inconsistent with the Constitution are void."[3]

[18] Differently put by the Supreme Court of India:

> "...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. Instead, it would be its constitutional obligation to do so... 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..."[4]

[19] The Judiciary also performs its functions subject to the Constitution and any other laws[5]. The word "law" is defined in section 154(1) (i) and (ii) of the Constitution to include any instrument having the force of law made in the exercise of a power conferred by a law. Thus, by virtue of the Standing Orders being made pursuant to section 81(1) of the Constitution, they are

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[2] Pharmaceutical Manufacturers Association of South Africa and Others; In Re: Ex parte application of President of the RSA and Others 2000(3) BCLR 241 (CC) paras [40] and [51]
[3] Palmer V.V. and Poulter S.M. (1972) The Legal System of Lesotho (Virginia: Michie Company) p.245
[4] State of Rajasthan v. Union of India [1978]1 SCRI
[5] Section 118(2)

covered by this definition. They are subject to the Constitution and liable to be struck down if their administration violates provisions of the Constitution. But absent any violation of the Constitution, the imperatives of separation of powers bar judicial intervention in parliamentary proceedings.[6]

[20] Prayers 3 and 4 in Part B of the notice of motion seek declarators that (a) **Standing Order 45(1)** is unconstitutional to the extent of excluding vote by secret ballot in the alleged special circumstances and (b), that the decision/resolution of the Speaker that the motion of no confidence shall be decided and determined by open/public vote is also unconstitutional.

[21] These prayers raise a direct challenge to the constitutionality of both **Standing Order 45(1)** and the Speaker's ruling on the motion for a secret ballot, which motion, as I understand, was appended to the motion of no confidence but the Speaker took the view that it is tantamount to an amendment of the Standing Orders which can only be done by the collective decision of the House on the recommendation of its Standing Orders Committee. By these prayers, this court's jurisdiction is prayed in aid to uphold the supremacy of the Constitution over Standing Order 45(1)

[6] Mokhothu and others v. The Speaker of the National Assembly and others Constitutional Case No. 20/2017 (21 February 2018); Ashish Shelar and others v. The Maharashtra Legislative Assembly and others 2022 Livelaw (SC) 91

and the Speaker's ruling. In my respectful view, the court can proceed to assume jurisdiction but only for the restricted purpose of probing whether Standing Order 45(1) and the Speaker's decision on the motion for a secret ballot do indeed violate the provisions of the Constitution[7].

Lack of cause of action and locus standi

[22] As the sponsor and seconder, respectively, of the motion for a secret ballot, I consider that the applicants have the necessary *locus standi* to institute these proceedings. The objections of lack of cause of action and *locus standi* are, therefore, not sound and should be dismissed.

III. MERITS

[23] The Hansard records the details of the Speaker's remarks on the motion for a secret ballot. He is recorded to have said:

> "Now I have an appendage to that motion, there is an appendage to this motion. Let me start it from the background perspective, the similar issue peeped into this Parliament brought by Hon. S.T Rapapa. This is how he put it:
>
> 'That this Hon. House resolve to amend Standing Order No.111 by adding the following that the voting under this Standing Order will be done by secret ballot?'
>
> .....
>
> Here we are not going to debate; we are going to advise each other as to the correct procedure. In other words, this Honourable House has deprived itself of the power to amend standing orders. **It delegated same to Standing Orders Committee.** Meaning there is no time this House would stand up to amend the particular Standing Order, if it is there it is there.
>
> .....

[7] Footnote 6

It is for this reason that I corrected this matter of the Member of Mosalemane, Honourable Rapapa, of seeking to amend the Standing Orders **and referred it to Standing Orders Committee, because it is that Committee which will review, debate and determine and frame the standing order after long and appropriate consultations, it would thereafter come into this House. For the House to allow or disallow because it is the function of the Standing Orders Committee.**

.....

But I am still receiving such motions until now. As I said there is an [appendage] to the motion of no confidence which I have no objection about and which I have already approved because it meets all legal requirements. **The said appendage says**:

> **'That this Honourable House resolves to utilize secret ballots in respect of the vote of no confidence in the government of Lesotho [led] by the Honourable Prime Minister Dr. Moeketsi Majoro.'**

The motion is not one of impeachment but of no confidence in the government. We are not impeaching the Honourable Majoro the Prime Minister. We are talking Motion III, this House's Motion of No Confidence in the Government. **This House is a public institution, it cannot do anything in secret unless prior allowed by its rules of procedure.** It might first of all be enabled to proceed in that way, once that law has been passed. **This motion has the same effect of (sic) as the one brought by Honourable Rapapa, it has the same effect of amending the Standing Order.** [Emphasis added]

[24] The applicants contend that by these remarks, the Speaker made two rulings:

> "6.3.1. The motion of no confidence in the GoL headed by Dr. Moeketsi Majoro is admissible and therefore admitted and has been referred to the Business Committee (3rd Respondent) for processing and appointment of a date for (sic) which will be debated and determined by the House.
>
> 6.3.2. The Secret Ballot Motion/request is denied and the voting on the motion of no confidence shall be public, that by open/public vote."

[25] They contend further that the decision of the Speaker to exclude a secret ballot violates the right of Members to vote by secret ballot, which right they say is derived from the "structural design of the Constitution of Lesotho". Therefore, to the extent that **Standing Order No.45(1)** also does not permit a secret ballot, it is unconstitutional, null and void.

Respondents' answer

[26] The respondents dispute the contentions of the applicants. Their counter-arguments are that:

26.1 The procedures for voting cannot be inferred from the provisions of the Constitution as they are expressly stated in the Standing Orders formulated under section 81. Absent any challenge to the constitutionality of the specific Standing Orders prescribing the manner of voting, the applicants have no case.

26.2 The structure of the Constitution does not support the assertion that Members have a right to vote by secret ballot. The constitutional structure is that Parliament holds the executive accountable. It would make a mockery of a parliamentary system that internal rules of Parliament should be modified because of an alleged fear of the Executive. The applicants have no right to change the rules to suit their

individual circumstances and prejudice accountability of Members to the public.

26.3 The applicants server **Standing Order No.45(1)** from the other Standing Orders in Chapter VII and, thereby, ignore Standing Orders 46, 47 and 48 which specifically provide for public/open voting.

26.4 **Standing Order No.45(1)** mirrors section 75(1) of the Constitution and it then cannot be said that this Standing Order is unconstitutional.

26.5 Open/public vote is provided for in **Standing Orders No.46** to **48** which are not being challenged as unconstitutional. They have been formulated *intra vires* the Constitution in terms of section 81(1).

IV. ANALYSIS

[27] The applicants contend that they derive the right to vote by secret ballot from the structure of the Constitution. I do not discern any such right. Seemingly, the applicants fail to understand that their rights to vote are derived from their constitutional status as people's representatives. Their

status is of a representative nature and does not confer personal rights. As held by the Constitutional Court of Germany[8]:

> I.1. Parliament is the direct representative organ of the people, composed of elected representatives who represent the whole people. The basis for parliament's position as the 'specific organ' (Article 20 [2] of the Basic Law) of the people lies in the constitutionally guaranteed status of members of parliament as representatives of the whole people (article 38 [1] of the Basic Law); representatives exercise state authority that emanates from the people ..... The tasks and powers constitutionally assigned to parliament cannot be asserted independently of its members. Thus, each member is entitled to participate in all of parliament's activities. Parliament must organize its work in manner consistent with the constitutional framework and based on the principle of universal participation. The rights of representatives include, above all, the right to speak, the right to vote, the right to ask questions and obtain information, the right to participate in parliamentary voting, and the right to unite with other representatives to form a political party. By exercising these rights, representatives perform the tasks of legislating, shaping the budget, obtaining information, supervising the executive, and otherwise carrying out the duties of their offices.
> All representatives have equal rights and duties because parliament as a whole, not individuals or groups of legislators, represents the people. This assumes that each member participates equally in the legislative process.
>
> 2. The rules of parliamentary procedure (RPP) assist representatives in carrying out their parliamentary duties. The power to pass [rules] independently and to shape their content is constitutionally granted to Parliament (Article 40 [I] of the Basic Law). Parliament's sphere of authority has traditionally included matters of procedure and discipline; it also embraces the [general] power to fulfill its assigned tasks. For instance, parliament must be able to shape the legislative process and to specify all its concomitant rights and duties (e.g., defining committee functions, composition, and procedure; initiating laws; collecting information; specifying the rights of parliamentary parties; and laying down the rights of speaking in Parliament), to the extent that these matters are not regulated by the Constitution itself. The rights of representatives are derived from their constitutional status, not from parliament's rules of procedure; the rules [only] set out the basic condition for the exercise of these [constitutionally guaranteed] rights. These rights exist as, and can only be realized as, membership rights; they can be granted and reconciled only in relation to each other. Only in this way can parliament properly fulfill its tasks..."

[8] Wüppesahl Case 80 BVerfGE 188 (1989)

[28] The Constitution guarantees the right to vote by secret ballot in section 20(1)(b). But this right belongs to the general populace when voting in general national elections. Nowhere else does the Constitution expressly mention voting by secret ballot, not even in section 75(1) which provides for voting in Parliament. If the writers of the Constitution had wanted to confer a right to a secret ballot in Parliament for Members to pass a resolution of no confidence in the Government, they would have easily done so. Silence on this score means that voting by secret ballot in Parliament is not a constitutional right. It is a matter for adoption as a procedure to utilize if the House so desires. Thus, the impugned ruling of the Speaker does not violate the provisions of the Constitution and it is so declared.

[29] Voting Procedures in the National Assembly fall are matters for adoption, practice and traditions. In Westminster parliamentary practice, which Lesotho follows, the independence of Members to vote is impacted by the whip system. It is by the whip system that political parties get Members to vote and be seen to vote along party lines. The parliamentary culture cultivated by the whip system is laid bare by Professor *Grayling* who writes that:

> "As the independence of members of the House of Commons has decreased under the system of party discipline – it is known as 'whipping' by analogy with the fox hunting practice of whipping packs of hounds into order for the pursuit – so both the quality and reputation of MPs has declined, rendering them even less likely to behave

independently. The lack of independence of MPs adds to the low estimation in which politicians are held by the general public, as does their lack of genuine influence, as individual MPs, in dealing with problems faced by constituents. The questions both of quality and degree of influence are important, because if MPs had the ability in both relevant senses to make a genuine difference to local and national issues alike, the respect in which they are held, and the ambition of able people to offer themselves for the role, would increase.
The question of whipping is almost never discussed, but it is arguably a serious matter of constitutional import. It can be reasonably argued that MPs can be whipped by their party managers to support legislation promised in an election manifesto on the basis of which they were elected. In all other matters it is unacceptable that MPs should be required to vote in line with the executive's wishes whatever their own individual judgment. It is common knowledge that the party Whips press MPs to toe the line with promises and threats. Rebels are warned that they will not be offered ministerial posts, or will not receive support for re-election; so much is admitted by any MP you ask. If MPs hold either an actual or a 'shadow' ministerial post, or serve as a Parliamentary Private Secretary to one such, they are expected to resign if they defy the whip. If a backbencher repeatedly refuses to obey the whip, suspension can follow, with loss of privileges, access to party meetings, and support. Defying the whip is regarded as a very serious matter.

This is bad enough: it is illegal in every other workplace in the country to secure compliance with bosses' wishes by threats analogous to these. This is harassment and coercion. How can this be acceptable in Parliament? It is *permitted* because the precincts of Parliament are *outside the law of the land*, and within the boundaries of the Palace of Westminster MPs can do many things with literal impunity for which they would be arrested outside. Some of these privileges are important for free speech: no one can be libelled in Parliament, for example. But MPs do not avail themselves of this particular privilege in the way that most matters often enough or in the most crucial circumstances – holding the executive to account, challenging it, refusing it the *carte blanche* that the whipping system gives it – and yet these particular undesirable privileges are regularly exercised by the party Whips.

All this, to repeat, is bad enough. But matters are even worse. Not only are threats used, but bribes – and how can it be either legally or morally acceptable that MPs can be made to vote as the executive wishes by suborning them with the offer of advancement or support? And not just bribes, but blackmail – stories circulate of Whips telling recalcitrant MPs that their private affairs and peccadilloes will be leaked, damaging their personal lives and reputations as well as their careers. In our society revelations of marital infidelity, or of the fact of being homosexual without wishing to avow that one is, are nobody's business, but the tabloid press makes a field day of such matters, and a politician's life and career can be seriously jeopardized as a result.

> The 'three Bs' of the Whips, 'bribery, blackmail and bullying' as MPs themselves call it – each of them in quite literal sense; there is said to be a case where an MP was forced into the desired lobby with his arm twisted up behind his back – might be permitted by the arcane provisions of parliamentary privilege, but they are not acceptable, illegal anywhere but in the Palace of Westminster, and fundamentally subversive of democratic principles and the duty of MPs to constituents and the country."[9]

[30] The constraints imposed on the freedom of Members to vote according to their wishes and still remain loyal to the party are also vouched for by **Brazier**[10] who writes:

> "Once returned to the House of Commons the Member's party expects him to be loyal. This is not entirely unfair or improper, for it is the price of the party's label which secured his election. But the question is whether the balance of a Member's obligations has tilted too far in favour of the requirements of party. The nonsense that a Whip – even a three-line whip – is no more than a summons to attend the House, and that, once there, the Member is completely free to speak and vote as he thinks fit, was still being put about by the Parliamentary Private Secretary to the Prime Minister, as recently as 1986. No one can honestly believe that. Failure to vote with his party on a three-line whip without permission invites a party reaction. This will range (depending on the circumstances and whether the offence is repeated) from a quiet word from a Whip and appeals to future loyalty, to a ticking-off or a formal reprimand (perhaps from the Chief Whip himself), to any one of a number of threats. The armoury of intimidation includes the menaces that the Member will never get ministerial office, or go on overseas trips sponsored by the party, or be nominated by his party for Commons Committee Memberships, or that he might be deprived of his party's whip in the House, or that he might be reported to his constituency which might wish to consider his behaviour when reselection comes round again ... Does the Member not enjoy the Parliamentary privilege of freedom of speech? How can his speech be free in the face of such party threats? The answer to the inquiring citizen is that the whip system is part of the conventionally established machinery of political organization in the House, and has been ruled not to infringe a Member's parliamentary privilege in any way. The political parties are only too aware of the utility of such a system, and would fight in the last ditch to keep it."

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[9] Grayling A.C. (2017) Democracy and Its Crisis (London Oneworld) pp.135 - 137

[10] Brazier R. (1991) Constitutional Reform - Reshaping the British Political System (Oxford University Press) pp 48 and 49

[31] It is in this context that the debates of voting in secret when passing a resolution of no confidence in the Government should be understood. The no confidence resolution seeks to remove the Prime Minister and have him replaced by a Member. Since the identity of the incoming Prime Minister will be known by reference to section 87(8) of the Constitution, the group of Members whom there is more need to whip into party line are those of the governing party from which the Prime Minister usually comes from. It is them whose votes can save the Prime Minister and the ruling party. It stands to reason that it is them who would be protected more by a secret ballot if they are minded to vote with those from the opposition ranks who support the passing of the resolution of no confidence.

[32] There is no factual dispute on the Speaker's decision on the fate of the motion for secret ballot appended to the motion of no confidence. The Speaker accepted it but said it is similar to the one previously tabled by Honourable *Rapapa*, seeking the amendment of **Standing Order No.111** to permit secret voting on a motion of no confidence. That motion stands referred by the House to its Standing Orders Committee to look into it and recommend the necessary amendment. The Standing Orders Committee is yet to report back to the House.

[33] The Standing Orders Committee is established under **Standing Order No.97(6)**. Its mandate is to review and propose amendments of the

Standing Orders for consideration by the House. It can do this on its own initiative or on referral by the House.

[34] Thus, adoption of a secret ballot procedure for purposes of voting on motions of no confidence is already on the agenda of the House and being attended to by the Standing Orders Committee. This is a matter which the applicants are fully conversant with. It then defies logic and reason for them to table another motion raising the same issue instead of requesting the Committee to expedite the necessary amendments and bring them before the House before their no confidence motion is tabled for debate.

[35] I did not find any compelling reason, and the applicants have suggested none, for the Speaker to have accepted the applicants' secret ballot motion while the Standing Orders Committee is seized with a similar motion to amend the Standing Orders to cater for what they desire. The applicants rely on what they call special circumstances as reasons for their secret ballot motion. By these reasons, they accuse the Prime Minister of all manner of arrestable and prosecutable offences and unethical conduct. This court is not a forum for canvassing criminal culpability and unethical conduct by Members. In the first instance, these are matters for investigation by the House through its Ethics, Code of Conduct, Immunities and Privileges Committee. Secondly, the applicants can cause

criminal investigations by laying complaints with the police.[11] The alleged special circumstances are not good and sufficient reason for the court's intervention to direct the House to give effect to the desires of the applicants.

[36] There was no need for the applicants to rush to court to interdict the Business Committee, the House and the Speaker from making preparations for including their motion of no confidence in the business of the House for debate before their motion of secret ballot had been dealt with. The applicants have not shown any threat of violation of any rights to warrant protection by an interdict. An interdict is not a right but a remedy. A prerequisite for entitlement to a remedy is a right.[12] I do not see that the applicants have any constitutional right to a secret ballot that is being threatened by the respondents' action.

[37] The court must, therefore, be astute not to stop the National Assembly from dealing with its business in a manner it sees fit. The court should not even be seen to be restraining the House from performing its constitutionally ordained business in terms of its democratically chosen procedures[13].

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[11] Standing Order No.97(4) read with sections 19(g) and 20 of the Parliamentary Powers and Privileges Act No.8 of 1994.
[12] Cape Gate (Pty) Ltd v. Eskom Holdings SOC Ltd [2019]1 A11 SA 141 (GJ) para [106]
[13] National Treasury and others v. Opposition to Urban Tolling Alliance and others 2012(6) SA 223 (CC); 2012 (11) BCLR 1148(CC) paras [26] and [65]

[38] The applicants' case is a bare-faced request for the Court to direct Parliament how to run its internal business. What they are seeking is constitutionally impermissible. Absent any violation of the Constitution, the words of *Lord Morris* of Borth-y-Gest in **Pickin v. British Railways Board** remain true:

> "It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed." [14]

[39] The court must also heed wise counsel by *Professor Griffith and Ryle*[15] that:

> "It is however the House which is the master and the House which can do what it likes, not individual Members, not majority or minority groups and not the Speaker or its other officers. Unless and until the House, collectively and formally, changes its procedures, those procedures currently in force are binding on all its Members and officers.
>
> It is this binding quality which provides the first essential characteristic of good parliamentary procedures. They should have mandatory effect on those persons or parties to which they apply, and they should be applied consistently on all occasions to which they relate. They should therefore be certain and not arbitrary. Those affected by them should

[14] [1974] AC 765 at 790 C-E
[15] Griffith J.A.G. and Ryle M. (1989) Parliament, Functions, Practice And Procedures (London: Sweet and Maxwell) 172-173

> know the procedural consequences of pursuing any given course of parliamentary action. For these reasons – and despite Mr. Ley – where procedures are based on precedent rather than a written rule, those precedents should be followed consistently by those entrusted with the enforcement of those procedures (unless, of course, following Mr. Ley, the House deliberately decides otherwise). For these reasons Speakers and other occupants of the chair do not lightly 'pick and choose' among the precedents, following one on one occasion and another at some other time (though, occasionally, bad precedents – normally decisions which did not accord with earlier decisions – are quietly forgotten or laid aside.) They seek to maintain a consistent pattern of decisions that follow previous practices."

V. DISPOSITION

[40] The applicants complain that **Standing Order 45(1)** is an obstacle to their quest for a secret ballot. I do not consider that this Standing Order constitutes an unconstitutional barrier. It mimicks section 75(1) of the Constitution which simply provides that voting on any question in Parliament is determined by majority vote. Section 75(1) does not prescribe the procedure for voting. The procedures for voting are left to the wisdom of each House of Parliament to determine. The National Assembly's voting procedures are provided for in **Standing Orders 46** and **48** to be either by collection of voices or electronic voting. Members are to be seen and heard by others and the Speaker on how they voted. Secondly, the very motion for a secret ballot should be decided by majority vote by open ballot. Changes in voting procedures are matters for the House and not the discretion of the Speaker.

[41] Parliament, the Executive and the Judiciary are co-equal branches of Government subject to the Constitution and other laws. Each branch has its constitutional space to execute its mandate under the Constitution without interference by others. Parliament has oversight responsibilities over the Executive. The Judiciary exercises judicial review over Parliament and the Executive. But for the Court to exercise its review jurisdiction, litigants must prove that Parliament and the Executive have performed their functions in a manner that runs foul of the Constitution or have failed to perform their constitutional duties.

[42] Section 81 of the Constitution gives Parliament the power to adopt its own procedures and rules for orderly conduct of its business. The Speaker has the authority to enforce such procedures and interpret the rules. He does not have powers make or unmake them or suspend their operation. Such a power resides in the Members as a collective. These are matters for the collective wisdom and decision of Members and not the Speaker.

[43] *In casu*, the issue of adopting a secret ballot as a procedure for voting when passing a resolution of no confidence in the Government was referred to the relevant Committee by the House months before the applicants' motion. The Speaker cannot then be faulted for saying:

> "This House is a public institution, it cannot do anything in secret unless prior (sic) allowed by its rules of procedure. It might first of all be enabled to proceed in that way once that law has been passed."

[44] The Speaker's admonition that adoption of a secret ballot needs careful thought, consultation and agreement by Members is a noble one regard being had to the right access by members of the public to observe proceedings of the National Assembly as provided for in **Standing Order No.77**. A mandatory rule for a secret ballot in passing motions of no confidence would deprive the public and voters' access to the House to observe how each Member votes on a matter of immense national importance of toppling a sitting Prime Minister and possibly his Cabinet. A balance needs to be struck between protecting timid souls from the party Whips and revelation of their identities so that they can also be held accountable at the national polls.

[45] Because it is not for the Speaker to move for suspension, amendment or repeal of Standing Orders, I do not discern that he has any residual discretion to decide that a motion of no confidence should be voted on by secret ballot. Until the voting procedure of visible collection of voices provided in Standing Orders Nos. 46 and 48 are amended by the House to cater for a secret ballot, Members are duty-bound to vote in accordance with this procedure without fear of retaliatory action by the Executive. The Member's constitutional responsibilities of effective, robust oversight are sacred. They must reject the spirit of fear of retaliation, loss of popularity or patronage. Members should be bothered less about their security, loss

of popularity or patronage but more about ensuring effective delivery of services and good governance. That is where lies their security and popularity.

[46] Afterall, members who are unhappy about the performance of a ruling party, are free to leave it and thereafter bring its downfall. This is in keeping with political honesty. Political morality is the hygiene that is needed to embed and sustain the citizens' faith in our young democracy. Members might do good to embrace words of wisdom from *Kinzer* when he said:

> "A system of secret voting might suit a nation whose people were hypocritical, cunning, furtive and deceitful..., but it had no place in a country like England, whose people noted for their independence, manliness, honesty and frankness – always preferred to conduct their affairs in the open and in the light of day." [16]

Costs

[47] The applicants have raised a novel matter but of public importance. For this reason, they do not serve to be mulcted in costs.

Order

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

1. The application is dismissed.
2. Parties to pay their own costs.

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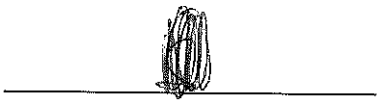
[16] Kinzer B.L. "The unenglishness of the secret of ballot" Albion Quarterly Journal Concerned with British Studies 1978, 10(3) 237-256 at 243

S.P. SAKOANE
CHIEF JUSTICE

I agree:

E.F.M. MAKARA
JUDGE

I agree:



P. BANYANE
JUDGE

For the Applicants: T. A. Kuoane instructed by Lephatsa Attorneys

For the Crown: M.E. Teele KC. instructed by Mei & Mei Attorneys Inc.