

IN THE COURT OF APPEAL OF LESOTHO
(HELD AT MASERU)

C OF A (CIV)/ 5/2016
CIV/APN/379/201

In the matter between;

TEFO HASHATSI

APPELLANT

AND

THE PRIME MINISTER
JUSTICE PHUMAPHE OF
PHUMAPHI COMMISSION OF INQUIRY
ATTORNEY GENERAL
MAMPHANYA MAHAO
TRANSFORMATION RESOURCE CENTRE

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
AMICUS CURIAE

FILING SHEET

Herewith the Heads of Argument presented for filing by Messrs Mei & Mei Attorneys Inc.

DATED AT MASERU THIS 4TH DAY OF AUGUST 2016.

08/08/16
09:15 am

Handwritten signature and date
05/08/16



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**AND TO: MESSRS PHOOFOLO ASSOCIATES INC
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IN THE HIGH COURT OF LESOTHO

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1ST RESPONDENT

JUSTICE PHUMAPHI NO

(CHAIRMAN OF COMMISSION OF INQUIRY)

2ND RESPONDENT

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3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

HEADS OF ARGUMENT FILED ON BEHALF OF APPLICANT

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INTRODUCTION

- 1.1 For convenience the parties will be described as they were in the court a quo .The applicant is a Lieutenant Colonel in the Lesotho Defence Force. He has however filed this application in his personal capacity following his appearance before the Commission of Inquiry

chaired by Justice Phumaphi, which we, for convenience, call the Phumaphi Commission or simply the Commission.

1.2 The relief that the applicant seeks is set out more fully in the notice of motion, and for the sake of brevity we need not set it out except that for the sake of convenience we shall discuss each prayer separately where appropriate, or jointly where that is possible.

1.3 The application was opposed by one Mamphanya, simply referred to in these heads as fifth respondent. The fifth respondent intervened after being granted leave by the court a quo. She claimed that she had a direct and substantial interest in this application because the death of her husband is the subject matter of the Commission of Inquiry. Though the application was not then opposed, this was influenced more by the need to clear the way for a hearing of the application on the merits, rather than incur a delay caused by interlocutory matters, we record that the fifth respondent has no legal interest in these proceedings.

1.4 It is important to note that the second and third respondents did not file an intention to oppose the application. But they filed a document styled “notice to raise points in limine”

1.5 The document has annexures attached to it including an affidavit by the Chairman of the Commission stating that 2nd and 3rd respondents enjoy immunities and privileges against all legal process in the Kingdom of Lesotho for reasons set out therein. This argument was not upheld by the court a quo and there is no cross appeal noted thereanent.

1.6 It is sufficient to state that even though the “*notice*” was not filed after a proper intention to oppose had been filed, the applicant made no issue out of such omission, and asked the court a quo to regard the “*notice*” as if had been duly filed.

1.7 On the 20th of October 2015 this application served before *Justice Monapathi*, where an interim order sought in prayer 1(i) was granted. On that occasion it is important to note that the 2nd and 3rd respondents were represented by Adv. Ntlhoki KC and present in court was Brigadier Waly. Mr Ntlhoki rose to inform the court that the granting of prayer 1(i), as interim relief was not opposed.

1.8 What is important in relation to this appearance is that the Learned Counsel, after taking instructions from Brigadier Waly,

indicated that in so far as the dispatch of the record of proceedings, sought in prayer 1(i) of the notice of motion, this was not opposed either, but that as the Commission was still then in progress, it would pose logistical difficulties to produce and submit the record at that time. Counsel undertook to have the issue of the record sorted out by the Commission and that it would be availed.

1.9 Given the sensible difficulties pointed out no order for immediate production and dispatch of the record was sought. However until the matter was disposed of no record had been dispatched. What happened is that the second and third respondents left Lesotho the following day after the granting of prayer 1(i), and have since left the jurisdiction, without dispatching the record.

1.10 The production of the record would have been a very important aspect of these review proceedings, both from the procedural point of view and from the fairness point of view. It would have been more beneficial if the record had been produced in the court a quo to enable it to see the record, apart from the averments made by the applicant, which are however sufficient even in the absence of the record. As a matter of fairness the record is important in that the commission is amenable to due process and it is transparent. The

review however was competent on the material that was placed before the court a quo.

1.11 The fifth respondent raised several points in limine, all of which had no merit but the court a quo upheld only one of them namely that the application had been launched prematurely. It also pronounced itself on the merits and dismissed the application.

1.12 The court a quo has failed, in spite of numerous requests, to produce a written judgment or alternatively a typed version of the ex tempore judgment it delivered on the 8th February 2016. We were made to understand by the Registrar that not even the judge a quo was satisfied that the said ex tempore judgment would be of any use to this court because it was incoherent. That we respectfully accept to be the case because it was incoherent even as it was being delivered, and we could only hope that a proper judgment would have been prepared and filed. The court a quo should have taken heed of the numerous decisions of this court deprecating non delivery of written judgments. This is all the more important in the case of this significance.

FACTS THAT ARE COMMON CAUSE

2.1 It is common cause that a Commission of Inquiry was set up by the Prime Minister acting in terms of Section 3 of the Public Inquiries Act of 1994, to investigate matters set out in Legal Notice 75 of 2015 as amended by Legal Notice 88 of 2015. It is common cause that one of the issues that were to be investigated was the killing of Mr Mahao and circumstances relating to his attempted arrest.

2.2 The legal notice referred to many other issues, which for the sake of brevity we do not set out, but are common cause or may be judicially noticed. It is important to single out the fact that in terms of paragraph 4 of Legal Notice No 75 of 2015, the Commission was required to make a written report and submit the same to the chairman of SADC Organ on Politics, Defence and Security Cooperation, within sixty days or any such extended time as the Prime Minister may agree.

2.3 It is common cause that the Commission commenced hearings and these were concluded on the 21st of October 2015. It is common cause that the applicant was subpoenaed and appeared as a witness before the Commission and that he gave evidence under oath. It is during testimony that he was asked certain questions by the 2nd and 1st

respondents that prompted the present application. The narration of facts by the applicant relating to this incident is not denied, and can be regarded as established. The applicant has in the circumstances established a right to come before this court and seek declarators and review of the proceedings of the Commission in the circumstances.

2.4 The fifth respondent claims the applicant lacks *locus standi* to challenge para 4 of the terms of reference. There is no merit in that contention. The fact that the applicant came before the commission and was unfairly treated by the commission is not disputed by the fifth respondent. The applicant was actually accused of murder¹ and it is not denied that the things Justice Phumaphi put, as facts, to the applicant were never said in public or notified to applicant by the commission²; that sitting in a foreign country contrary to the Act and appointing instrument the third respondent provided a public platform where applicant's reputation was tarnished³; that second respondent said he was not bound by the laws of Lesotho as his was a SADAC not Lesotho commission⁴; that he said that the commission was only domesticated to enable it to summon and compel witnesses⁵.

¹ See p 10-11 paras 18,21

² P13 paras 26-27 p.15-16 para 36

³ P.15 para 33

⁴ P.15-16 para 36

⁵ P16 para 37

2.5 The provisions of the Act were intended to protect persons or individuals who appear before the commissions of inquiry or those who might be named by those who testified before such commissions. The applicant falls in that class, and in particular has been accused of wrongdoing by the commission. Clearly the applicant has *locus standi* in those circumstances⁶

2.6 Apart from the common law the public inquiries Act itself confers *locus standi* on persons concerned with the commission to refer questions of law to the High Court, and the High Court has been clothed with jurisdiction to deal with any such questions⁷. Though the Act deals with referrals in section 23, it clearly contemplates that individuals have *locus standi* to obtain determinations from the High Court, and thus the narrow common law objection to *locus standi* is not available. *Locus standi* is conferred on any one who has a point of law, affecting him, to get a determination from the High court.

2.7 The power of the High Court to make declarations or review proceedings of commissions remains untouched. This is especially so in

⁶ Smalberger and another v Cape Times 1979(3) 457 at 461 H; Van der Merwe and others v Slabbert No and others 1998(3) SA 613 (NPD); Re Pergamon Press Ltd [1970]3 ALLER 535; Dupreez and another v Truth and Reconciliation Commission 1997(3) SA 204; Goodman International v Mr Justice Hamilton 1992(2) 1 R 542; Patz v Greene and co 1906 TS 407; Baxter Administrative Law Juta 1984 p 659-60, where he also discusses Patz v Greene supra.

⁷ Section 23(1)

this case where respondents claimed the law of Lesotho did not apply to them. The *locus standi* argument is without substance.

2.8 We can now proceed to examine each prayer and the material in support thereof.

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JURIDICAL NATURE OF COMMISSIONS OF INQUIRY AND PRINCIPLES THAT GOVERN THEM

JURIDICAL NATURE

3.1 It has been judicially stated that a Commission of Inquiry is a tool of the Executive to assist it in the task of government. There is no obligation on the part of the government to accept its findings or to act in accordance with its recommendations.⁸

3.2 Costello J., put the matter more aptly when he said the functions of the commission are:-

“ [to] inquire, report and if appropriate make recommendations. When reporting on allegations of wrongdoing it expresses an opinion as to whether the

⁸ President of RSA v South African Rugby Union 2000(1) SA @ 97 para 220 F-G

Act. It was stated in *President RSA v SARFU*¹¹ that the power to appoint a commission has other constraints namely that :-

“The doctrine of legality applies, as it does to all power exercised in terms of the constitution. The President also must act in good faith and must not misconstrue the nature of his powers”

3.5 The court will immediately see that indeed this is what is being raised in this case in relation to the question whether the Prime Minister has properly construed his powers, under the Act, when he directed the Phumaphi Commission to report to SADC contrary to section 8.

3.6 It is thus submitted that it is one of the juridical aspects of a commission that it has to be appointed *intra vires* the powers conferred by the law. Merely because it is a tool to assist the executive in the duty of the government is no excuse, the appointment must be *intra vires*¹².

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PRINCIPLES GOVERNING A COMMISSION

¹¹ P.26-27

¹² See *S v Naude* 1974(2)SA 697 ; *Erasmus v SA Associated newspapers* 1979(4) SA 447 at 450

It is respectfully submitted that the first port of the call in relation to the commission established in terms of a statute are the provisions of the statute that it was created under ¹³.

4.1 DUTY TO ACT FAIRLY

It is respectfully submitted that the legislature has built into the Public Inquiries Act mechanisms of fair procedure calculated to benefit, not just the public, but individuals who may be affected by the proceedings of the commission. A clear example is that the commission may not make a finding of misconduct against a person unless it has given such person fair procedure rights set out in section 13 of the Act. The Act also provides for a privilege against self-incrimination¹⁴

4.2 The common law also requires that the commission of Inquiry must act fairly and in accordance with the rules of natural justice.¹⁵ We shall also discuss a few cases that set out this principle because they are persuasive authority on which this court will act.

4.3 But before we do so, we point to the fact that even though there is no lis between individuals as stated in the case law, commissions of inquiry have a potential to damage peoples reputations and to affect them prejudicially, hence the requirement that they should act fairly.

¹³ Beir v Minister of Interior and another 1948(3) SA 409

¹⁴ Section 16(3)

¹⁵ President SA v SARFU p 27 para 34 a-b

4.4 *In re Peragamon*¹⁶ Lord Denning MR., was dealing with the inspectors of companies tasked with a duty of investigating company affairs. He found that even though they were only investigative, and not courts of law or quasi judicial, they had to act fairly and follow rules of natural justice because

“They may, if they think fit, make reports which are very damaging to those whom they name. They can accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose people to criminal actions....seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly”

4.5 This dictum was approved in two South African cases that have a remarkable resemblance to the present case. Both those cases concerned commissions of inquiry; The first case is *Dupreez and another v Truth and Reconciliation Commission*¹⁷. The facts, stated briefly, were that the Human Rights Committee, which was a subcommittee of the Truth and Reconciliation Commission had given notice to the appellants in that case that evidence was about to be given before it, that implicated them in human rights violations. The notices

¹⁶ [1970]3 ALLER 535; *President of the Republic of South Africa and othes v SARFU and others* 2000(1) SA 1 (CC) para 148

¹⁷ *supra*

given did not disclose names of witnesses or any details of the evidence that was going to be given. The Supreme Court of Appeal found that the commission had failed to act fairly, in accordance with the principles of common law. It found that the duty to act fairly required that full and a fair opportunity should have been given to the appellants in that they should have been given sufficient time and details of the evidence before the witnesses came to testify before the commission. The court said:-

“The Committee is charged with the duty of establishing, inter alia, whether such [human rights] violations took place and the identity of persons involved. The Committee findings in this regard and its report to the commission may accuse or condemn persons in the position of the appellants the ultimate results may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly”¹⁸ .

4.6 The court held that the giving of notice could not present difficulties as those who led evidence for the commission would make proper arrangements in time as need for notice would become apparent from the statements they would have taken from prospective witnesses.

¹⁸ Ibid p 233 C-E

4.7 This is important to the fact that *in casu* the lead counsel instead sat as commissioner and did not take statements from witnesses to comply with the notice and fair procedure requirement. In fact he was complicit in the violation of that rule.

4.8 Before discussing the next case it is important to note that the Public Inquiries Act specifically requires notice to be given to people who are implicated by facts in the possession of the commission as earlier stated otherwise no findings of misconduct may be made against such persons¹⁹.

4.9 The next case is *Van der Merwe v Slabbert*²⁰ In that case the commission that was appointed was to investigate alleged breaches of the code of conduct for councillors. The applicants who were councillors sought a rule nisi requiring the commission to supply them with statements and documents in their possession implicating the applicants. It was contended that there was no duty to do so. The court, while accepting that speaking generally bodies required to investigate and report and those required to investigate, report and make recommendations are not necessarily required to follow the rules of natural justice, there may be circumstances that would require them to do so. In a case before it the court found that by statute and the

¹⁹ Section 13

²⁰ *supra*

common law this requirement had to be met in that the respondent act or decision could prejudicially affect the applicants.

4.10 The fact that the commission could regulate its procedure was no reason for the commission not to act fairly towards the applicants²¹ . That incidentally appears to be the attitude of the fifth respondent *in casu*. Clearly this is no answer to the applicant's case.

4.11 It will again be observed that the persons implicated, or likely to be implicated, in the allegations of wrongdoing are treated differently from any other person even though they are not parties and there is no *lis inter partes* indeed in *Goodman's* case it was said that :-

*"There are no parties before the tribunal although persons accused of wrongdoing in allegations being investigated will have the same rights as if they were parties against whom a charge had been made"*²²

4.12 The case of *Goodman* also requires special discussion because it adds even two further dimensions to the debate. The first is that the commission must regulate its procedure in such a way that its public hearings do not violate fair trial rights of a person accused of misconduct.²³ This is said to be a requirement of fair procedure.

4.13 The second dimension is that even though the commission regulates its procedure, and rules of evidence are not applicable to it as in a court

²¹It was so argued by counsel at p. 617D-E

²² P.555 para 5

²³ P.558

of law, the court found that this too was subject to the requirements of fair procedure. The court made an example of hearsay evidence being admitted, and stated that nevertheless the commission will have to hear people affected by such hearsay.

4.14 As regards the first dimension, the *Phumaphi* commission totally breached the rule, just as it breached other fair procedure rules mentioned before. It did this by creating a public impression that the applicant was guilty of wrongdoing, apart from the fact that it was not known to the applicant whether the commission was or was not in possession of the said allegations. The nature of the questions asked by Justice Phumaphi ,were such that they condemned applicant as guilty of murder.

4.15 It is respectfully submitted that the second and third respondents violated all the principles discussed above without exception, hence did not observe a duty to act fairly.

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SUBMISSIONS ON THE MERITS

PRAYERS 1(B) AND (C)

5.1 The applicant challenges the directive in Legal Notice 75 of 2015 requiring the Commission to report to the SADC chairman as being ultra vires.

5.2 It is common cause that any report on any of the issues that were investigated by the Commission would necessarily include the evidence of the applicant, and where he is said to have been implicated in any wrong doing, covered by the terms of reference, this would directly affect him personally.

5.3 This being the case, the applicant has *locus standi in judicio* to challenge the legality of the Commission and the manner in which it was set up and authorised to operate, including the aspect of reporting..

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LEGAL FRAMEWORK

6.1 The power to establish a Commission is vested in the Prime Minister in terms of section 3 of the Public Inquiries Act 1 of 1994 (the Act). The section reads as follows:

6 (1) If the Prime Minister considers that it is in the public interest to do so, he may by notice published in the gazette appoint a commission of inquiry consisting of one or more commissioners of inquiry into any matter that is connected with the good government of Lesotho or is a matter of public concern.

(2) A notice appointing a commission shall specify the subject, nature and extent of inquiry concerned and may contain directions generally for carrying out the inquiry and in particular may contain directions as to the following matters:

(a) the appointment of a chairman;

(b) the date for the termination of the inquiry and delivery of the report;

(c) whether all proceedings of the inquiry are to be public;

(d) what coercive power the commission has.

(3) If the Prime Minister agrees, a commission may complete and deliver its report although the date specified under subsection 2(b) has passed.

6.2 The manner in which the report of the Commission should be made is provided for in section 8 of the Act which reads:

8(1) A commission's report to the Prime Minister must be in writing.

(2) subject to subsection (3) , the Prime Minister shall table a copy of the Commission's report in the National Assembly and the Senate within 15 sitting days of receiving that report.

(3) The Prime Minister need not table any portion of a report where, in his opinion, the public interest in disclosure of that part of the report is outweighed by other considerations such as National Security, privacy of an individual or the right of a person to a fair trial.

(4) Where a portion of a report has been deleted under subsection (3), the extent of the deletion and the reasons for that deletion shall be indicated on the copy of the report that is tabled under subsection (2)

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SUBMISSIONS

7.1 It is respectfully submitted that the manner in which the Commission should report is exhaustively dealt with in section 8. There is nowhere in the Act where the Prime Minister retains a discretion to provide any other method of reporting.

7.2 The section recognises that the Executive has the discretion, acting through the Prime Minister, to establish a Commission on matters of

public interest. It is because the issues inquired into are of public interest that the section requires, not merely prescribes, that the report must be placed before Parliament, within 15 days of its submission to the Prime Minister.

7.3 The fact that section 8(3) allows the Prime Minister a right to withhold certain portions of the report does not detract from the fact that he has an obligation to report. The discretion to withhold portions of the report is a circumscribed one. The Prime Minister can only withhold when the requirements set out in section 8(3) are present, and not at his whim. The Prime Minister has to provide reasons for the portions withheld.

7.4 The fifth respondent suggests that the Prime Minister has the power to decide to deviate from the reporting procedure set out in section 8, because of the provisions of section 3. That cannot be so with respect.

7.5 Section 3(2) (b) merely provides that the Prime Minister may provide the time frame within which the report may be delivered. It is only in respect of the time frame that the Prime Minister has discretion, as will appear in section 3(3). He certainly has no discretion to deviate from the provisions of section 8 which, itself, is enacted to serve the public interest.

7.6 It is respectfully submitted that this honourable court has power to inquire into whether the exercise of powers by first respondent in formulating para 4 of Legal Notice 75 of 2015 as amended, acted ultra vires his powers²⁴.

7.7 *In Erasmus v Associated Newspapers*²⁵, the court recognised that a commission of inquiry need not be authorised by statute . But once established by statute, the terms of reference assume an added importance. Only upon construction thereof is it possible to determine , firstly , whether the powers were validly conferred, and secondly, what their ambit is , which is necessary for purposes of establishing the extent of rights and duties created by the Act.²⁶That is a clear recognition of the ultra vires doctrine.

7.8 It is respectfully submitted that in providing for the submission of the report to SADC, the Prime Minister acted ultra vires his powers conferred upon him by the Act and prayers 1(b) and (c) must succeed.

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PRAYER 1(D)

²⁴ See *S v Naude* 1975(1) SA 681

²⁵ 1979(3) SA 447

²⁶ P.450A

8.1 The applicant, in this prayer, seeks a declarator that the Commission was bound by the provisions of the Public Inquiries Act of 1994.

8.2 The applicant explains, and this is not contradicted, that second respondent claimed that the third respondent is a SADC commission and the only reason it was domesticated by Legal Notice 75 of 2015, was to enable it to compel witnesses to attend before it. Thus by necessary implication the second respondent was claiming that third respondent was not bound by Public inquiries Act ²⁷.

8.3 The reason the applicant complains about this issue is that he identifies specific areas where the Commission was failing to comply with the mandatory provisions of the Act ²⁸. These include failure to give notice of prejudicial information, acting outside its mandate in sitting in a foreign country; disavowing obligation to apply laws of Lesotho and acting unfairly.

8.4 In spite of some initial resistance, the fifth respondent appeared to accept that the Commission was established in terms of the Act²⁹. It was the fifth respondent's case though that the commission was established by SADC, not the Prime Minister, that the latter in promulgating Legal

²⁷ See pg 16 paras 37-38

²⁸ See p.13 paras 27, p.14 para 31-32, p.16 para 37-40

²⁹ See p95 paras 17 and 26

Notice 75 of 2015 was merely putting the decision of SADC into effect³⁰. It is respectfully submitted that this view mirrors the misconception that led the second respondent to believe that the Commission is not bound by the Act.

8.5 It is submitted that once established in terms of the Public Inquiries Act 1 of 1994, the Commission had an obligation to operate pursuant to the provision of the Act. This is axiomatic.

8.6 If the Commission was not bound by the Act, the question would be what was the instrument under which it operated if not the Act? There is no procedure set out in the SADC Treaty or any of its protocols dealing with, or prescribing the manner in which commissions investigating issues in the Member States should be conducted.

8.7 The decision to set up the Commission itself recognised that such commission had to comply with the laws of the Kingdom of Lesotho, and that it would not take off without legal instruments enabling it to do so being put in place in Lesotho³¹. It is respectfully submitted that the misconception of the applicable law was so fundamental to the work of the Commission that it vitiated its proceedings.

³⁰ See p.94 para 8

³¹ See minutes of the plenary session of SADC

8.8 It is respectfully submitted that the applicant has made out a case for the granting of prayer 1(d).

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PRAYER 1(E)

9.1 It is common cause that the 3rd respondent moved to South Africa and conducted its hearing there³². The starting point is that the Commission is an instrument of the Executive created by it in terms of Legal Notice 75 of 2015 as amended. There is nowhere in the Legal Notice where the Commission is given authority to operate extra territorially and as such it was operating outside its creating instruments. The legal position is that as a matter of a rule of law, no action can be undertaken that affects the public, which action is not authorised by law³³.

9.2 It is suggested by the fifth respondent that the Commission can regulate its procedure and is not bound by the rules of evidence hence the facts collected in South Africa were legally obtained. The answer to this strange proposition is first that the cases to which we have referred make it plain that the ability to regulate its own procedure does not

³² See p.14 para 32

³³ See Baxter Administrative law p77-80

authorise illegalities/unfairness. Second the Public Inquiries Act is not extra territorial in its application. Consequently section 11 of the Act regulates the matters set out there in within the Kingdom of Lesotho.

9.3 The Act provides that the Proceedings of the commission shall be in Public unless the Prime Minister has directed otherwise³⁴. The phrase “in public” must be construed to be limited to the territorial boundaries of the Kingdom of Lesotho. Indeed the entire provisions of the Act including, the keeping of order at the proceedings³⁵, coercive powers of the Commission³⁶, power to compel testimony and production of documents,³⁷entry and inspection of property,³⁸ interference with the proceedings of the commission,³⁹penalty for failure to attend⁴⁰, and reference of a question of law to the High Court⁴¹all point to the application of the Act within Lesotho and not beyond.

9.4 The key feature of the territorial application of the Act is clearly manifest in the provisions of section 5 of the Act. These need to be set out in detail. Section 5 reads:-

³⁴ See section 9

³⁵ Section 10

³⁶ Section 15

³⁷ Section 16,

³⁸ Section 17

³⁹ Section 21

⁴⁰ Section 12

⁴¹ Section 23

5(1) A commissioner has, in the exercise of duties as the commissioner, the same protection and immunity as a judge of the High Court.

(2) A legal practitioner assisting a commission, making representations to a commission or representing a party before a commission has the same protection and immunity as a legal practitioner has in appearing for a party in proceedings before the High Court.

(3) A person summoned to attend or appear before a commission as a witness, or producing a document or other thing to a commission, has the same protection as a witness in proceedings before the High Court.”

9.5 All the protections set out in section 5 do not apply outside the Kingdom of Lesotho. This has a direct bearing on the issue of public participation of the citizens if the Commission is held in a foreign country. Apart from logistics of travel and access to the venue of the hearings, if something be said about a person in public, there would be the danger of being without the protections set out in section 5 in the foreign country.

9.6 At the heart of the matter is also the issue of sovereignty of the Kingdom of Lesotho. For example, some of the issues that were being

investigated affected matters of national security, some of the people who were heard in South Africa are soldiers who are fugitives from military justice for military offences they are suspected to have committed in the kingdom of Lesotho. Public hearings on such matters on foreign land are the very antithesis of a commission that served the public interest identified by the appointing authority.

9.7 It is respectfully submitted that the applicant has made a case for the granting of this prayer as well.

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PRAYER 1(F) AND (H)

10.1 It is trite law that a body which has to decide anything under the law and it misconceives the law in terms of which it is supposed to act commits a reviewable irregularity⁴². There can be no doubt that the misconception of the applicable law has been the cause of the irregular procedures that the Commission followed and the proceedings are vitiated. These prayers must also succeed.

⁴² See Wade & Forsyth, Administrative law 9th ed. P302-5

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PRAYERS H , I AND K

11.1 Prayer (h) is a good prayer but has since been over taken by events in part. The commission completed its hearings on the 21st of October 2015. The work is not completely done before reporting. It is respectfully submitted that this prayer read with prayer 1(N), should operate to prevent the report from being made by the second and third respondents for reasons that fully justify the other prayers.

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Prayers J and K are natural consequence to the injustices that have been committed against the applicant. Clearly the commission treated the applicant unfairly not just in not giving him notice of allegations against him, but by itself accusing him in public of wrongdoing, ruining his good name, reputation and violating his right to presumption of innocence.

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On the merits of this application ought to have succeed with costs, such costs include employment of two counsel.

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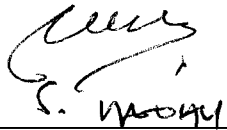
ALLEGED PREMATURE PROCEEDINGS

Of the points in limine that were raised by the respondent the court a quo upheld the contention that the proceedings had been brought prematurely. It is respectfully submitted that the court a quo erred in that regard. The authorities are clear that a party whose rights are infringed by the commission of inquiry may approach the court to prevent any further encroachment. In the case of Lesotho Co-operative Handicrafts Ltd and others v Commission of Inquiry into Co-operatives⁴³ this court entertained an application in the course of the proceedings of the commission of inquiry where the appellant was seeking an order setting aside the commission's ruling that it could not cross examine a particular witness. The appellant also sought an order requiring the commission of inquiry to supply it with the extract of the evidence of the witness in question and thereafter arrange the venue for him to be cross examined. The High Court refused the application and when the matter came on appeal the commission had completed its work, just as in this case. The court nevertheless made a declarator that the rights of the appellant had been infringed and upheld the appeal with costs. The same approach, of entertaining complaints of infringement of rights has been adopted in the South African cases we have discussed in these submissions. Consequently the court a quo erred in upholding this point in limine

⁴³ 1990-1994LAC 617

WHEREFORE it is prayed that this appeal be upheld .

DATED AT LERIBE ON THIS 01ST DAY OF AUGUST 2016.



S. M. M. M.

ADV.M.E.TEELE K.C

ADV.S. RATAU

CHAMBERS

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