

CONSTITUTIONAL CASE NO.5/2016

IN THE HIGH COURT OF LESOTHO

Held at Maseru

**DEVELOPMENT FOR PEACE EDUCATION
TRANSFORMATION RESOURCE CENTRE**

1ST APPLICANT

2ND APPLICANT

AND

SPEAKER OF NATIONAL ASSEMBLY

1ST RESPONDENT

PRESIDENT OF SENATE

2ND RESPONDENT

CLERK TO THE NATIONAL ASSEMBLY

3RD RESPONDENT

MINISTER OF LAW, HUMAN RIGHTS AND

CONSTITUTIONAL AFFAIRS

4TH RESPONDENT

SENATE HOUSE OF PARLIAMENT

5TH RESPONDENT

NATIONAL ASSEMBLY HOUSE OF

PARLIAMENT

6TH RESPONDENT

PORTFOLIO COMMITTEE ON LAW AND

PUBLIC SAFETY OF THE NATIONAL

ASSEMBLY

7TH RESPONDENT

ATTORNEY GENERAL

8TH RESPONDENT

JUDGMENT

CORAM: 1. *HONOURABLE CHIEF JUSTICE NTHOMENG MAJARA*
 2. *HONOURABLE JUSTICE MONAPATHI*
 3. *HONOURABLE JUSTICE PEETE*

DATE OF HEARING : 30TH NOVEMBER 2016

DATE OF JUDGMENT: 13th March, 2017

Summary

Constitution of Lesotho 1993 – Section 78, Section 80 and Section 20 of the Constitution – Right “to take part in the conduct of public affairs” under Section 20 – Standing Orders No.54 and No.76 of the House of Assembly give Portfolio Committee of the National Assembly the authority and discretion to determine whether a Bill requires public participation and involvement – Scope of participation defined - Locus standi of a non-governmental organisation under Section 20 of the Constitution – Citizenship and voting- Chapter IV and Chapter VI of the Constitution.

Where a Bill on Human Rights is tabled before the National Assembly and it appears or it is claimed that inadequate or no public participation was allowed by the Portfolio Committee on the Bill, the legal effect of the Standing Orders 54 and 76 guaranteeing public participation, though laudable, cannot be equated to “a constitutional dictate.” Compliance therewith, a matter that lies squarely within the jurisdiction of the National Assembly.

The Court will intervene only where such Standing Orders are disregarded to the detriment of fundamental rights or other principles of the Constitution of Lesotho.

Quare: *All Instruments and Bills affecting human rights and freedoms of the citizens of Lesotho must always be handled with full circumspection and with due regard to Lesotho’s obligations under continental and international protocols and conventions. Human rights by nature are supra-political and essentially require adequate involvement in the democratic governance. A Human Rights Commission must ostensibly be seen to be independent and supra-political. Any proposed constitutional reforms should consider the UN Paris Principles when re-looking the Human Rights Commission established under our present Constitution.*

Interpretation of human rights provisions should always be given benevolent and purposive interpretation

Annotations

Statutes

- *Constitution of Lesotho 1993.*
- *Sixth Amendment to the Constitution Act No.13 of 2011.*
- *Human Rights Commission Act No.2 of 2016.*
- *Standing Orders of the National Assembly.*
- *Paris Principles – UN Resolution No.48/134 – December 1993.*
- *Constitution of the Republic of South Africa - Act No.10 of 1996.*

Cases

- *Lesotho Human Rights Alert Group vs Minister of Justice and Human Rights – LAC (1990 – 1994.)*
- *De Lille vs Speaker of the National Assembly – 1998 (3) SA 381, 1999 (4) SA 836.*
- *Wood vs Ondangwa Tribal Authority – 1975 (2) SA 274 (A).*

Books

- *GE Devenish – Interpretation of Statutes (1996)*
- *1983 South African Law Journal – page 278*
- *African Human Rights Law Journal – Vol. (2), 2002 – page 68-91*
- *Kelsen – A Theory of Law*

THE COURT: (Per Peete J):

An Introduction

- [1] The issues raised in this constitutional motion are indeed of great fundamental constitutional importance to our budding democracy in Lesotho – a democracy which should aptly be described as a “representative” and “participatory” one¹. **Section 20 of the Constitution of Lesotho** solemnly reads:

“Right to participate in government

20. (1) Every citizen of Lesotho shall enjoy the right-

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) *to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot;*
- (c) *to have access, on general terms of equality, to the public service.*

(2) *The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution.” (our underline)*

Section 20 of the Constitution is entrenched under Section 85 (3) of the Constitution. This right like other rights under Chapter II, are enforceable before this Court under Section 22 of the Constitution.

- [2] Through the ages, “**democracy**” has always fitted its original Greek definition of a “government of the people – by the people and for the people.”² Participatory democracy is often very fundamental to good governance because the (voters) people are thereby involved in their own

¹ Section 20 of the Constitution of Lesotho – CF of Section 59 of the South African Constitution – our para 55 - infra.

² *Socrates and Aristotle* in the ancient Greece.

government. However, democracies of the world are not the same nor are they cast in stone. They vary from one country to another.

[3] The prayers sought in this constitutional application read thus:-

“NOTICE OF CONSTITUTIONAL MOTION

KINDLY TAKE NOTICE THAT an application will be made before this Honourable Court for an order in the following terms:

1. *That it be declared that the decision of the 3rd Respondent dated the 20th April 2016 to recall the Human Rights Commission Bill, 2015 before it was passed or rejected by Senate is inconsistent with the Constitution of Lesotho;*
2. *That it be declared that the Human Right Commission Act No.2 of 2016 was passed and enacted in a manner inconsistent with section 78 (1) and (3) read with section 80 (3) of the Constitution of Lesotho, and is therefore invalid;*
3. *That it be declared that the 6th and 7th Respondents have failed in their constitutional duty to facilitate proper public participation before passing the Human Right Commission Act No.2 of 2016, and such failure renders the Act invalid;*
4. *That it be declared that refusal by the 7th Respondent to allow the Applicants to make representations on the Human Rights Commission Bill is inconsistent with section 20 of the Constitution of Lesotho read with Standing Order No.76 of the National Assembly Standing Orders;*
5. *That the order of invalidity of the Human Right Commission Act No.2 of 2016 is suspended for a period to be determined by this honourable court to enable the respondents to re-pass the law in a manner consistent with the Constitution and allow for proper public participation;*
6. *Costs of suit;*

7. *Further and/or alternative relief.*”

[4] The relief claimed brings into microscopic examination the following:

- (a) *Section 80 of the Constitution of Lesotho (recalling the Bill from Senate by the Clerk of the National Assembly);*
 - (b) *the alleged inconsistency of the Human Rights Commission Act with Section 78 and Section 80 of the Constitution of Lesotho;*
 - (c) *lack of public participation/involvement contrary to Section 20 of the Constitution; and the*
-
- (d) *suspension of the Human Rights Commission Act 2016 pending public participation and passage through Parliament;*

At all times it should be borne in mind that the Constitution of Lesotho is the supreme law (*Grundnorm* –**Kelsen’s Theory of Law**) and all laws of Parliament and its Standing Orders must pass the “*constitutional muster*.”

[5] In his founding affidavit, **Mr Sofonia Shale** – Executive officer (CEO) of 1st Applicant, **Development for Peace Education (DPE)** describes it as a “*non-governmental organization duly registered and operating as such in Lesotho. Its main objective and activities are civic empowered peace building and strengthening public participation*”. It has a registered constitution. He further describes the 2nd Applicant, **Transformation Resource Centre (TRC)** as also a non-governmental organisation ... its

main objectives are “...to campaign for respect of human rights, participatory democracy, good governance and social justice....” TRC has a registered constitution. It can sue or be sued.

- [6] It is clear that it is not so much the speedy or hasty recall of the Human Rights Commission Bill from the Senate that is a thorn on the foot of the applicants but what irks them is the cavalier treatment they allege they were accorded by the Portfolio Committee when they requested to be consulted or be heard so as to make or propose amendments to the then **Human Rights Commission Bill 2015-** a brainchild of the **Sixth Amendment to the Constitution Act No.13 of 2011.**³

- [7] The thrust or gist of this Constitutional application is multi-pronged. In the main it alleges that the **Speaker of the National Assembly of the Parliament of Lesotho** denied the Applicants their constitutional right to participate during the legislative process over the Human Rights Commission Bill around 20th May 2016 and thus violated their right under **Section 20 of the Constitution of Lesotho** which section – the applicants allege - gives them both the *locus standi* and right to participate in parliament and in the public affairs of Lesotho.

A Historical Background

- [8] The Constitution of Lesotho having been without a Human Rights Commission since coming into operation in 1993, and which was indeed

³ As will be later shown much consultation and public involvement should have taken place before the Sixth Amendment to the Constitution Act No. 13 passed in June 2011 amending the Constitution and establishing the Constitution of Lesotho 1993.

long overdue was finally established by the **Sixth Amendment to the Constitution of Lesotho Act No.13 of 2011**. *Section 133A* thereof reads in part:

“Establishment of the Human Rights Commission

“133A. There is established a Human Rights Commission (in this Chapter referred to as “the Commission”) which shall be independent and free from interference and subject only to this Constitution and any other law.

Composition

133B. The Commission shall consist of the chairman and two other members who shall be appointed by the King acting in accordance with the advice of the Prime Minister.

Qualification for appointment

133C. A person shall not be qualified to be appointed a member of the Commission if he is a public officer, and the Prime Minister shall not advise the King to appoint a person as a member unless he or she is satisfied that the person-

- (a) has extensive experience in human rights and related discipline;*
- (b) is of high moral character and integrity and possesses such qualities of mind as to enable him to discharge his duties impartially, fairly and free from bias or prejudice;*
and
- (c) does not take an active part in, or has retired from, the party politics or political party activity.” (our underline)*

Functions of the Commission

- [9] The Sixth Amendment further provides for functions of the Commission. These include inter alia, in relevant parts;

133F. The Commission shall perform the following functions –

- (a) *monitor the state of human rights throughout Lesotho.*
- (b)
- (c) *investigate violations of human rights and, if necessary, be responsible for instituting criminal proceedings against such violation in the courts of law.*
- (e)

[10] The **Lesotho Human Rights Commission Bill 2016** was the brainchild of this new constitutional dispensation. This Bill passed through both Houses of Parliament and has become law – the **Human Rights Commission Act** – No.2 of 2016. This is the Act of Parliament whose validity is being challenged by the Applicants. It must be noted that under our law there exists a presumption of its constitutionality ⁴

[11] *Mr Shale*, the CEO of 1st Applicant and deponent to the founding affidavit, alleges that on or about 7th December 2015 the then Minister chairing the Portfolio Committee, **Ms Lineo Molise-Mabusela** reneged on her promise to allow the applicants to make representation to the Portfolio Committee as previously requested. He also cited the **Standing Orders No. 54 and No.76 of the National Assembly**. The latter clearly ... “*obligates Parliament to facilitate public participation...*”

[12] **Standing Orders No.54 and No.76** read *seriatim*:-

“54. ***Procedure on Bills in Portfolio Committee***

(1)

⁴GE Davenish – *Interpretation of Statutes* – 1996 – p210

- (2)
- (3) *The Committee shall consider whether the Bill warrants public hearings as contemplated in Standing Order No.76 (facilitation of public participation) and if it is so resolved, the Committee shall conduct public hearings. (our underline)*
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CHAPTER XI

PUBLIC PARTICIPATION

“76. Facilitation of Public Participation

The National Assembly and its Committees shall facilitate public participation in its legislative and other processes through implementing the following:-

- (a) Observing the institutionalised days as provided in these Standing Orders;*
- (b) Conducting public hearings as and when necessary;*
- (c) Educating the public on their role in Parliament.”(our underline)*

[13] Indeed the former Justice Portfolio Committee had wide ranging functions and powers under **Standing Order 76** – these involved the rationale, purpose, effect of the proposed law and whether public interest of stakeholders whose interests are likely to be affected have been consulted about the proposed law.

[14] When the Chairperson of the **Portfolio Committee** the former Member of Parliament **L. Molise-Mabusela** handed in her **Portfolio Committee**

Report on the Human Rights Commission Bill which had first been tabled before the House on 2nd November 2015, she clearly stated that the **Ministry of Law and Constitutional Affairs** had consulted widely with all interested (listed Stakeholders) and these had made inputs. As proof of this consultation and inputs, the Report also alluded to the desired or proposed independence of the new Human Rights Commission. The Report even mentioned the fact that a UN team had stressed upon the functional and financial independence of the proposed Human Rights Commission.

- [15] In his founding affidavit *Mr Shale* states that between November 2015 and April 2016, the 1st Applicant undertook a national survey to gauge public perceptions over the nature of the proposed Bill and that these were “...to the effect that an independent Human Rights Commission is the bedrock of good governance and effective protection of human rights,” and that this would accord well with the UN Paris Principles 1983.
- [16] It must be realised that when this non-governmental survey was mounted in November 2015 by the 2nd Applicant the **Lesotho Human Rights Commission** had become⁵ an entrenched chapter of the Constitution of Lesotho.
- [17] Several major amendments to the 2015 Bill were nonetheless still proposed by the 1st Applicant. It is not necessary to detail them save to state that they were founded on the well known **UN Paris Principles**.⁶

⁵ Six Amendment of the Constitution Act No.13 of 2011 – *Section 133A* – H of the Constitution

⁶ **Paris Principles** provide in the status of national Institutions and were adopted by the United Nation General Assembly Resolution No. 48/134 of December 1993 – these Paris Principles are ably discussed by Professor Matshega his article : “South African and Ugandan Human Rights Commissions : Toothless Bull dogs?” African Human Rights Law Journal – vol (2) 2002 – page 68-91

- [18] In April 2015 after the *Human Rights Commission Bill* had been presented to the **Clerk of the Senate** since 9th December 2015, the **Clerk of the National Assembly** wrote to the Clerk of the Senate as follows:-

**“LESOTHO CORRECTIONAL SERVICE BILL, 2015 AND
HUMAN RIGHTS COMMISSION BILL, 2015**

Kindly note that pursuant to Section 80 (3) of the Constitution and the National Assembly Standing Order No.64 (7) and the Senate having received the above-mentioned Bills from the National Assembly on the 9th December, 2015, the period of Senate's consideration of the two Bills has long elapsed.

We therefore humbly request your good offices to send these two Bills to my office as soon as possible for purposes of processing them in accordance with Section 80 (4) of the Constitution.

Grateful for your usual cooperation.

Best Regards.

Signed: Clerk of the National Assembly.”

This request was being made by the Clerk of the *National Assembly* in terms of *Section 80 (3) and (4)* of the **Constitution of Lesotho** and of **National Assembly Standing Order No.64 (7)**.

- [19] In recalling the **Human Rights Commission Bill** from the Senate, the *Clerk of the National Assembly* was invoking provisions of *Section 80 (3)* of the Constitution. It reads thus:-

“80(1)

(2)

“(3) *When a bill, other than a bill that is certified by the Speaker as an Appropriate bill, is passed by the National Assembly and, having been sent to the senate at least thirty days before the end of the session, is not passed by the Senate within thirty days after it is so sent or is passed by the Senate with amendments to which the National Assembly does not agree within thirty days after the bill was sent to the Senate, the bill, with such amendments, if any, as may have been agreed to by both Houses, shall, unless the National Assembly otherwise resolves, be presented to the King for assent.*”(my emphasis)

- [20] The applicants allege that their right under *Section 20 (1) (a)* of the Constitution of Lesotho to participate in the public affairs of Lesotho and in particular their right to public participation were thereby violated by the *Clerk of the National Assembly* under *Standing Order 76* and thus they could not present the text of their proposed amendments to the Human Rights Commission Bill.

Parliamentary Processes and Proceedings

- [21] It should at all times be recognised that the **Parliament of Lesotho** has the power under the Constitution to make laws and to regulate its own procedure and processes and in particular to make rules for the orderly conduct of its own proceedings.⁷ This is a fundamental aspect of its legislative power vested in it by the Constitution⁸ and one that is indeed expressive of the doctrine of “*separation of powers.*”
- [22] The **Constitution of Lesotho** is the supreme law of the country; and thus even the **Standing Orders** and these Processes of both **Houses of Parliament**, must pass the “*constitutional muster*”. Where necessary, the

⁷ Section 81 (ibid)

⁸ Section 70

court will inquire into the constitutional propriety of all standing orders procedures and processes in Parliament while at the same time recognising the basic notion of separation of powers and of functions under the Constitution. The role of the court is not to interfere with the legislative process but to ensure its legality and constitutionality.

The Right guaranteed by Section 20 of the Constitution

[23] Section 20(1) of the Constitution of Lesotho reads:-

“Right to participate in government

20.(1) *Every citizen of Lesotho shall enjoy the right –*

- (a) *to take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) *.....”*

It is the view of this Court that the-“*the right to take part in public affairs*”- must be given a broad, inclusive and purposive interpretation, if at all we are to have a democratic government. “*Public affairs*” is a nebulous phenomenon that covers all aspects of human livelihood e.g. the making of laws, governance issues, essential services, security, food, human rights and freedoms, economic and social development, policies and many other aspects of life.

[24] National elections are periodically held in Lesotho so that the people can “*freely choose their representatives*” to represent them in Parliament which passes laws for the good of the people of Lesotho. The constitution

solemnly repose in them the right to participate in the law making process and this is of great importance and the people's will must be respected.

The democratic right of citizens to take part in the conduct of public affairs is firmly grounded and guaranteed by the **Constitution of Lesotho** under *Section 20*. That right is usually exercised through "*freely chosen representatives*" who are later solemnly sworn as **Honourable Members of the Members of Parliament** (MPs) – all other persons (including citizens) are "*strangers!*" who have **no right** of audience in the House!

[25] In guaranteeing "*public participation*" **Standing Order No.76** is indeed a clear manifestation of *Section 20* of the Constitution but it remains an internal instrument within the House of Assembly and has to be given a fair and just interpretation in that context. In South Africa, the Constitution⁹ provides specifically and in clear terms the "*public access and involvement*" in the Parliamentary legislative processes of the National Assembly.

[26] While there is no similarly worded constitutional provision in Lesotho, in its wisdom in passing the **Standing Order No.76**, the National Assembly deemed it fit and convenient to include the words ... "*shall facilitate public participation in the legislative and other processes through implementing the following.*"

(a) ...

(b) *conducting public hearings as and when necessary" (our underline)*

This is supported by **Standing Order No.54** which gives the Parliamentary Portfolio Committee the power/discretion to determine whether a Bill "*warrants public hearings*" and "*if it so determines and resolves*" the

⁹ Section 59 of the Constitution of the Republic of South Africa 1996. See our para [52] (*infra*)

whether a Bill “warrants public hearings” and “*if it so determines and resolves*” the Committee shall conduct public hearings. In parliamentary parlance, a Portfolio Committee consists of Members of the House and is mandated to discuss in detail the Bill that has been presented to the House. The Committee represents the “think tank” of the House.

[27] It is quite clear that every *Portfolio Committee* of the National Assembly is vested with the power or authority by the Standing Orders to make a determination whether for a particular Bill, public participation¹⁰ or hearing is necessary. The court does not discern “*a constitutional duty to facilitate proper public participation*” but a power or discretion founded – not under the Constitution – but under the **Standing Order No.54** and **No.76** of the **House of Assembly**. Thus, the matter i.e. to determine whether it is necessary and if so how, is in the discretion of the Portfolio Committee

[28] Perusal of the documents in this case shows that the Applicants had proposed some thirteen amendments to **the Human Rights Commission Bill** and some of these touched on the appointment processes of the Commission, its composition, powers and functions. As they then stood – without comment upon their propriety – these proposals could have properly been presented to the *Ministerial Team* or even later to the *Parliamentary Portfolio Committee* on the constitutional amendment¹¹ way back in 2011!

[29] A five months opinion poll or survey was later mounted by the applicants from November 2015 to April 2016. The admitted facts show that the Applicants had previously made representations at Ministerial level and

¹⁰ Public participation imbues a law with ownership, legitimacy and authority.

¹¹ Sixth Amendment of the Constitution Bill - 2011

due to time constraints the Portfolio Committee decided that another representation would be an unnecessary repetition.

- [30] The Human Rights Commission Bill had been tabled before the Senate in April 2015; and the time limits under *section 80 (3)* of the Constitution could be invoked by the clerk of the National Assembly 30 days before the end of Session had elapsed. In all probability, the Applicants were not at all aware of the 30 days time limit under *Section 80 (3)* of the **Constitution of Lesotho**. Entitled as they were to a public participation under **Standing Orders 54 and 76**, the Portfolio Committee nevertheless retained the authority to determine whether such participation was necessary. This is supported by the fact that mention is made that the ~~Applicants had made their representations before the Portfolio~~ Committee.

- [31] In our view it was essential that the Portfolio Committee in inviting public participation should have done so timely and should have brought to the attention of the stakeholders concerned, the time limits involved in the legislative process – otherwise a belated participation will be but futile, illusory and without meaning. The right to participate or to be consulted should be exercised at ministerial level and should run up to the Parliamentary Portfolio Committee – otherwise the stakeholders should have immediately briefed their elected members of Parliament to espouse and advocate their cause.

Nature and scope of the right under Section 20) (1) (a) of the Constitution of Lesotho

- [32] As already stated, public affairs (*affairs of state*) consist of multifaceted aspects of public life. Essentially enjoyed only by citizens, this right under *Section 20* of the Constitution covers political/civil human rights and freedoms and their protection, governance, essential services, security, socio-economic benefits, peace, stability, policy, efficiency or performance of state organs, official matters and issues of concern such as crime, corruption, hunger, health, education and infrastructure and economic dispensation of state resources – the list is inexhaustible.
- [33] In the **United Kingdom** - the Parliament with its august **House of Commons and the House of Lords** is the most supreme organ in the Kingdom and no court of law can invalidate, review or set aside an Act or decision of Parliament. In Lesotho, the **Constitution of Lesotho** is supreme and the **Parliament**, the **Executive** and the **Judiciary** must without fail function according to the dictates and provisions of the Constitution. The courts can where necessary declare as *null* and *void* any legislative or executive act or decision that is shown to be inconsistent with the Constitution.¹²
- [34] Although *Standing Orders 54* and *76* do in fact promote public participation, they remain essentially instruments of the House and **do not form part of the Constitution of Lesotho**; for example they are **Standing Orders** which can be amended or even repealed by the House properly sitting for that purpose. But as long as they remain enforceable within the House and its Committees, the Court must accord due respect to the jurisdiction of Parliament to govern its own procedures and legislative processes as mandated by the Constitution.¹³

¹² Section 2 of the Constitution.

¹³ Section 81 (1) of the Constitution of Lesotho

resolutions made by the House of Parliament has been affirmed in many cases.¹⁴ As already stated, “public access and involvement” is provided for under the Constitution as opposed to what obtains in this Kingdom.

*Locus standi of Applicants*¹⁵

- [36] Under our law, locus *standi* is generally defined as the legal capacity of a person - natural or juristic -to bring legal proceedings claiming relief; he/she has to show that his/her direct and substantial interest or right has been violated.¹⁶ In the context of human rights, **locus standi** is provided for under *Section 22* of the Constitution of Lesotho.
- [37] In this case, both Applicants are registered “*juristic persons*” (non-governmental organizations) and we assume that their respective members are all citizens of the Kingdom of Lesotho.¹⁷ We also accept that their primary objects are to promote, preserve and protect human rights standards in Lesotho.
- [38] **Mr Nyane**, appearing for both applicants, submits perhaps rightly so that the applicants should or can be treated as “*organised groups of concerned citizens*” who have the object that promotes democracy and peace as stated¹⁸ in his well researched heads of argument which truly have been of much assistance in this *novel case*. He submits that the issue of **locus standi** where it affects enforcement of human rights should be benevolently defined in order to guarantee justice even to the vanquished. We agree - but do so from the perspective that 1st Applicant (DPE) and 2nd

¹⁴ De Lille v Speaker of the National Assembly – 1998 (3) SA

¹⁵ See *Lesotho Human Rights Alert Group vs Minister of Justice and Human Rights* – LAC (1990-1994) 652 (Per Tebbutt AJA) *Wood and Others v . Ondaugwa Tribal Authority* – 1975(2) SA. 294 (A)

¹⁶ Section 22 of the Constitution 1999 (4) SA

¹⁷ See Section 32 of the Constitution of South Africa.

¹⁸ *Interim Ward v Premier* (c) - 1998 (3) SA 1056

benevolently defined in order to guarantee justice even to the vanquished. We agree - but do so from the perspective that 1st Applicant (DPE) and 2nd Applicant (TRC) are in reality associations of “*Basotho citizens*” whose objects are to achieve the fundamental values of human rights, peace and good governance. While **Mr. Teele** made the correct submission that the Chapter II human rights envisage rights that are justiciable to humans only not juristic persons, it is our view that in the context of this case, the Applicants individually and collectively have the **locus standi**, even though they are registered collectively as juristic persons. In other words, we are drawing a distinction between this present application and others where the basic rights and fundamental freedoms would not be practically justiciable to juristic persons.

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- [39] In other words, for purposes of this judgment, we assume that the Applicants truly have **locus standi** not so much as juristic persons but “*as a collective or associations of citizens of Lesotho*” whose principal aim is to ensure peace, human rights and democratic governance, and that every citizen, either individually or collectively, has a fundamental right under *section 20* of the Constitution of Lesotho to take part in the conduct of public affairs of Lesotho. It is a right that is so hallowed and so fundamental that it must be respected by all – including the ***Parliament***, the ***Executive*** and the ***Judiciary*** in Lesotho.
- [40] Although we do not have a similarly worded constitutional provision as the *Section 38* of the **Constitution of the Republic of South Africa**, we are of the view that this benevolent and purposive interpretation would not result in an absurdity in the present case. The cited South African section provides that the following persons may approach court to invoke human rights:-

- (a) *anyone acting in their own interest;*
- (b) *anyone acting on behalf of another person who cannot act in their own name;*
- (c) *anyone acting as a member of or in the interest of a group or class of persons;*
- (d) *anyone acting in the public interest;*
- (e) *an association acting in the interests of its members;*

This constitutional provision is indeed laudable.

[41] The second leg of the inquiry is whether legislative process involves public participation as a form of “*taking part in the public affairs*”. Broadly defined “*taking part in the public affairs*” may include executive and administrative running of government departments, decision making in the whole state apparatus.

[42] If the freely elected representatives of the citizens can be assumed to exercise a “*participatory role*” in the public affairs especially in the legislative process, it is not easy to imagine how individual citizens – their elected representatives notwithstanding – can also assert their right to participate in the legislative process - thus rendering the elected representatives redundant. Associations lack electoral mandate.

[43] Standing as presently drafted, the **Constitution of Lesotho** has no specific provisions on “*public participation during legislative process*”. The Parliamentary practice in Lesotho has piously forever followed the aged old “*Westminster model*” since 1966. Lesotho has forever been a democratic Kingdom where the Constitution – and not the Parliament - is supreme!

Thus, even if a maximum and very purposive interpretation were to be given to the *Standing Order 76*, the ultimate discretion and power that vest in on the Portfolio Committee on all matters of public participation is clearly stated. It would thus be very difficult for this court to enquire into whether such discretion was exercised adequately or otherwise, that issue being a subjective one.

- [44] It is clear that, though they promote public participation, *Standing Order Nos. 54* and *76* are not an extension of *section 20* of the **Constitution of Lesotho**— their violation or non-observance or non-compliance does not *ipso facto* mean violation of *section 20*. They remain internal instruments that are amenable to any change by the *National Assembly* as they do not form part of the **Constitution of Lesotho**.

- [45] In amending the Constitution of Lesotho when the **Sixth Amendment to the Constitution Bill No. 13 of 2011** was being drafted in 2011 and in passing **the Human Rights Commission Act** in 2016, much more and indeed - deeper circumspection and introspection should also have been exercised then as the Bill was intended to amend the Constitution of Lesotho. It was indeed at the Portfolio and debate stage that a full debate of the House on the *Paris Principles* should have been given more and closer attention, so that a new Human Rights Commission could be drafted in such a way as to meet the desired international Paris Principle criteria at the constitutional level! Unfortunately, that was not done.
- [46] The debates of the *House of Assembly of the Parliament of Lesotho* are conducted openly and the general public have free access under law to the august galleries of the House and there to listen to them throughout. They however do not have the right to directly participate in the debates

of the House¹⁹ but have unhindered access –at any time - to brief their own political party representatives outside the “well and the floor of the House” to ventilate their views. That is the essence of “*taking part in the public affairs*” and of participating in the legislative process!

- [47] For avoidance of any doubt, this Court must state today and quite unequivocally that all Instruments or Bills affecting “*human rights and freedoms*” of the Basotho people are clearly matters of national concern; all such bills need great introspection, circumspection, full consultation, advise, wisdom, and magnanimity from all the people. Haste, alacrity, autocratic mind-sets or “political correctitude/correctness” can bring about a product that essentially lacks legitimacy, public acceptance and authority and efficacy.
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- [48] Without in any manner attenuating the hallowed rights of the citizens of Lesotho under *section 20* of the **Constitution of Lesotho**- individually or collectively organised - it is our considered view that this right to participate in public affairs does not extend to thus participating- as of right in the Parliamentary proceedings, debates or portfolio committee deliberations. Were it so, every citizen of Lesotho would indeed claim a right to be heard - **(a)** on the very floor of Parliament and **(b)** in Portfolio Committee deliberations. *Section 20* clearly states that this fundamental right can be exercised by citizens directly or through their “*freely chosen representatives*.”

- [49] Therefore, where there are freely chosen representatives, it stands to good reason or it can be reasonably inferred that the citizens’ right under *section 20* of the **Constitution of Lesotho** will be exercisable and enjoyed directly or through those “*freely chosen representatives*”

¹⁹ They are called “...strangers... - with no right of audience!

[50] The *rationale* behind the **Standing Order No.76** which authorises a Portfolio Committee to invite –“**where necessary**” - public participation or representation in the Committee deliberations is to give a meaningful effect to the ethos of *Section 20* of the ***Constitution of Lesotho***. Such invitation may be necessary where a particular public interest is involved. No doubt, human rights are essentially entrenched in our **Constitution of Lesotho** and any Bill or law that affects or attenuates such rights naturally should require adequate consultation with all interested groups and stakeholders in the discussion of the relevant Bill to echo the sacrosanct **Socratic** trite principle of “a **government of the people – by the people for the people.**”

[51] Thus in exercising their right to vote and to elect under *Section 57 (2) (a)* of the **Constitution of Lesotho**, Citizens of the Kingdom of Lesotho thereby solemnly repose their democratic right under *Section 20* of the Constitution to participate in the democratic government of Lesotho. The elected representatives have a sacred duty to “represent” their electors/voters in the National Assembly – without forsaking or forfeiting the basic right of the citizens to be consulted and to participate “when and if necessary”.

[52] Much care must be taken not to “*transplant*” constitutional provisions from other jurisdictions such as *Section 59* of the **Constitution of the Republic of South Africa Act-No. 108 of 1996** which clearly reads:-

“Public access to and involvement in National Assembly.

59. (1) The National Assembly must –

(b) *conduct its business in an open manner and hold its sittings, and those of its committees, in public but reasonable measures may be taken –*

- (i) *to regulate public access, including access of the media, to the Assembly and its committees; and*
- (ii) *to provide for the searching of any person and where appropriate the refusal of entry to, or the removal of, any person.”*

(2) *The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”*

[53] Notwithstanding its noble motive and any benevolent interpretation that may be given to it, the **Standing Order No. 76** cannot and should not be extended into or be equated to a “*constitutional dictate*.” The Portfolio Committee is entrusted with the responsibility in exercising “parliamentary authority and discretion” in determining whether a Bill before the Portfolio Committee requires “*public participation and involvement*.” The degree of participation and involvement required will differ from one Bill to another. Total exclusion of public involvement where such is necessary, may be unfair or unconscionable. But it is not a good ground for striking a law allegedly passed without adequate public participation - as being unconstitutional.

[54] Great care must always also be taken not to consciously transplant *in toto* and import a constitutional provision in the **South African Constitution** such as *Section 172* entitling the **Constitutional Court** to grant an order suspending²⁰ “*the declaration of the invalidity for any period or on any*

- (a) facilitate public involvement in the legislative and other processes of the Assembly and its committee; and
 - (b) *conduct its business in an open manner and hold its sittings, and those of its committees, in public but reasonable measures may be taken –*
 - (i) *to regulate public access, including access of the media, to the Assembly and its committees; and*
 - (ii) *to provide for the searching of any person and where appropriate the refusal of entry to, or the removal of, any person.”*
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suspending²⁰ “*the declaration of the invalidity for any period or on any conditions, to allow the competent authority to correct the defect.*” We do not have a similar provision in our Constitution nor can this Court grant such a relief *mero motu*.

- [55] The South African Constitution is one of the most progressive constitutions of the world today but this court should be circumspect when applying the valuable constitution jurisprudence of the South African courts.
- [56] The Human Rights Commission Act is a law today that has been passed by Parliament and has obtained the “*Royal Assent.*” To invalidate this Act for reasons of alleged lack of or inadequate public participation would also impinge on **Section 133A– H of the Constitution of Lesotho** as amended by the **Sixth Amendment to the Constitution Act No.13 of 2011.**²¹
- [57] Because of the cardinal importance of human rights in Lesotho, “*public participation and involvement*” at the very early stages in 2011 when the constitutional Bill was enacted through the **Sixth Amendment to the Constitution** was indeed necessary and imperative because the amendment directly impacted upon these human rights of the citizens and because Section 133 of the Constitution is specially entrenched under the Constitution of Lesotho.

²¹ Supplement No.1 to Gazette No.49 of 10th June 2011.

Certificate of the Speaker of the National Assembly

[58] “Powers of Certification” and computation of time periods over the Bills under *Section 80* of the **Constitution of Lesotho** are clearly vested in the **Speaker of the National Assembly** and the *Section 80* makes no mention of **Standing Orders** or public participation. *Section 80 (5)* of the **Constitution of Lesotho** solemnly reads:-

.....
 “(5) *A certificate given by the Speaker of the National Assembly under this section shall be conclusive for all purposes and shall not be questioned in any court.*”

This is a clear assertion of the “*principle of separation of powers* -” and it must be respected.

[59] From the record, it is clear that the *Speaker of the National Assembly* gave a **Certificate** after the Human Rights Commission Bill had been passed by the National Assembly on the 8th December 2015 – and had been recalled from the **Senate** on the 6th May 2016²² in conformity with the relevant constitutional provision.²³

[60] The effect of the **Certificate of the Speaker** and whether the Certificate can oust the jurisdiction of the court was discussed in the South African case of *De Lille vs Speaker of the National Assembly*²⁴. In *De Lille’s* case, the *Certificate* was issued in terms of *section 5* of the **Powers and Privileges of the Parliament Act** whereas in Lesotho, the Speaker’s Certificate is given “*by the Speaker of the National Assembly*” under

²² Page 90 – paginated record


²³ Section 78 of the Constitution

²⁴ *De Lille v Speaker of the National Assembly* – 1998 (3) SA 431 (c); 1998 (4) SA 836 (SCA)

- [61] When the Clerk of the *National Assembly* sends a Bill to the Senate under *Section 80*, it is primarily to afford the **Senate** an opportunity to debate and discuss and possibly amend the Bill. Ours is a “**Bicameral Parliament.**” Though a Lower House, the popular vote of the **National Assembly**- House of Elected Representatives- is final and the procedure under *section 78* of the Constitution of Lesotho is to be followed till the **Royal Assent** is given by His Majesty the King who constitutionally is the pinnacle of Parliament. In this connection, *Section 54* solemnly reads:-
“Establishment of Parliament – 54: There shall be a Parliament which shall consist of **the King, a Senate and a “National Assembly”**

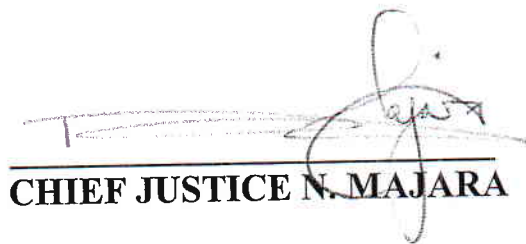
- [62] As was alluded to earlier, along the standing and trite presumption exists that an Act of Parliament has been passed according to legislative procedure and processes unless the contrary is shown.²⁵ Thus it is not correct to lay the blame at the door of the Speaker as she acted in accordance with the relevant constitutional provisions through the Clerk of the National Assembly.
- [63] For these reasons, the application ought to fail and is dismissed. The application is certainly constitutional in character and is not vexatious. No order as to costs is made.

²⁵ *GE Devenish – Interpretation of Statutes (1996)* – p.210; *Zimbabwe Township Developers v Lewis Stores* – 1984 (2) SA 784A – H



S.N. PEETE
JUSTICE

I Concur :


CHIEF JUSTICE N. MAJARA

I Concur :


T.E. MONAPATHI
JUSTICE

For Applicants : *Adv. Nyane and with him Adv. Motšoari*

For Respondents : *Adv. Teele KC, Adv. Mohau KC, Adv. Putsoane*