IN THE HIGH COURT OF LESOTHO

(Sitting as Constitutional Court)

CONS. CASE NO. 11/2019
CONS. CASE NO.1 (a) 2019
(Application for Recusal)

HELD AT MASERU

In the matter between

MADAM JUSTICE 'MASEFORO MAHASE	*1ST APPLICANT*
JUDICIAL SERVICE COMMISSION	*2ND APPLICANT*
THE PRIME MINISTER	*3RD APPLICANT*
THE ATTORNEY GENERAL	*4TH APPLICANT*
HIS MAJESTY THE KING	*5TH APPLICANT*

And

LEBOHANG HLAELE	*1ST RESPONDENT*
THE LAW SOCIETY OF LESOTHO	*2ND RESPONDENT*

JUDGMENT

CORAM: *Honourable Monapathi J.*
Honourable Peete J.
Honourable Moahloli J.

Date of Hearing: 30th October 2019

Date of Judgment: 28th November, 2019

A SUMMARY

***Recusal** – Principles governing – A real or imagined perception of likelihood of bias over impartiality - Judges presiding in an application to "kick-start" impeachment proceedings of the **Acting Chief Justice** under **Section 121 (5)** of the **Constitution of Lesotho** – Collegiality – Nature of – Does it disqualify a judge or is a factor to be taken into consideration in a recusal application - **Judicial impartiality** – Nature of - rigorous double test of reasonableness – Nature and meaning.*

***In any recusal application**, the important principle is whether there is shown to exist a real or imagined perception that there is a real likelihood of bias in the given facts of the case - On its own **"collegiality"** should not disqualify other judges from presiding over a case in which a colleague is a litigant. A judge ordinarily is competent but may be "disqualified" or "ill suited" under the particular exigencies of the case.*

***Presumption of judicial impartiality** is a strong muster to be passed and casts a heavy **onus** on the Applicant and also to pass the **"double test of reasonableness."** Allegations of mistrust or uneasy relations may affect perceptions among Judges. Justice must not only be done but must be manifestly be seen to be done.*

***An allegation** of **"incompetence"** is a very serious accusation that can be made against judge or judges without cogent reasons because it questions his or their fitness to exercise judicial functions hence his or their liability to impeachment.*

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Annotations:

Lesotho

Statutes:

Constitution of Lesotho 1993
Criminal Procedure and Evidence Act No.9 of 1981

Reported Cases:

Lesotho

***Lesotho Electricity Corporation v Forrester** - LAC (1970-1979) 321*
***Sole vs Cullinan** LAC (2000 - 2004) 572*
***Manyeli v Rex** – LAC (2007 – 2008) 377*
***Mpali v Magistrate** – LAC (2011 – 2012) 306*
***Molapo v Ntsekhe** – CIV/P/2007 (8 August 2007)*
The Speaker of the National Assembly v Likeleli Tampane CIV/APN/235/2018

South Africa

S.v. Bam – 1972 (4) SA. 41 (E)
Punshon v. Wise – 1948 (1) SA 84 (N)
***S v Basson** – 2005 (1) SA. 171*
***BTR Industries SA Pty Ltd v Metal Workers Union** – 1992 (3) SA 673*
***De Lacy & Ano v SA Post Office** – 2009 (5) SA 255 2011 ZACC (CC)*
***Bernert v ABSA Ltd** – 2011 (3) SA - 92*
***S v Radebe** – 1973 (1) SA 796*
***S. v. Shadewell** – (2001 (4) SA. 1 (SCA)*
***SA Motor Acceptance Corp Bpk v Oberholzer** – 1974 (4) SA 809*
***R. v. Milner Erleigh** – 1951 (1) SA 1 (AD)*
***S. v. De Vries** – 1964 (2) SA 110*
***Danisa v British Overseas Insurance** – 1960 (1) SA 808*
***President of the Republic of South Africa v SARFU** 1999 (4) SA 147*
***S v. Roberts** – 1999 (4) SA. 915*
***South Africa Commercial Catering and Allied workers Union and Other vs Irvin & Johnson** – 2000 (3) SA. 705*
***Hlophe v. Premier of the Western Cape Province** – 2012 (6) SA. 13 (CC)*
***Take and Save Trading vs Standard Bank** - 2004 (4) SA 1 (SCA)*
***Van Rooyen v The State** – (General Council of the Bar of South Africa 2002)*

Namibia

***S v. Heita and Another** – 1992 (3) SA. 785 (NM)*

Swaziland

Minister of Justice and Constitutional Affairs vs Stanley – *CIV/A/NO.49/2009*

Canada

Wewaykum Indian Band v Canada - *(2003) 231 DCR 1 (4th ed) (unreported)*

United Kingdom

R v Sussex JJ exparte McCarthy *(1) CRC 457*
Millan vs. Dickson 2002 *(1) LRC 457*
Stansbury vs. Datapulse – *2004 IRLR 466 CA Pinochet [No.2] (1999) 1 All ER 577.*

Texts

Voet *5.1.43 – "Exceptio Judicis Suspecti"*
Van Leeuwen – *Roman Dutch Law – 5.17.3*
Digest – *4.8.32*

Books

De Smith – *Judicial Review Ethical Principles*
Baxter – *Administrate Law*
Hoexter – *Administrative Law*
1961 South African Law *Journal 80*
1973 Annual Survey *370*
Potchefstroom Electronic Review – *2011 PER – ISSN 1727 -3781 - 15 -* ***(Professor Okpaluba and Juma)*** *Vol. 14 No.7*
1999 Oxford Journal of Legal Studies 379

Cur adv cult

Postea (October 22)

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The Court ***(per Peete J.):***

A Historical Background

*On the ... **November 2019** sitting as a **Constitutional Court**, we formally ruled that we recuse ourselves from this **Constitutional Case No.11 of 2019** and indicated that reasons for our decision would follow. The following are the reasons:*

***Recusal** – the essence of*[1]

[1] Recusal is a judicial decision to withdraw from adjudication on a matter *subjudice*. Recusal may be *mero motu* or consequent upon an application requesting withdrawal upon perception – real or imagined – of bias and lack of impartiality on the part of a judge. All things being equal, recusal may be the only honourable *"thing"* to do – without conceding timidity, cowardice or bowing to spurious influence. Recusal should morally be altruistic and empathetic while maintain the judicial authority of the judge (court) to ensure that justice is not only be done but must be manifestly be seen to be done. As reality can show, a recusal is rarely appealed against, such appeal can demonstrate a spurious motive and ulterior preference of one or other judges over others.

The Main Application ***Constitutional Case No. 11 of 2019*** was originally filed in Court on ***26th August, 2019***. The relief sought is couched thus:

1. *Dispensing with the forms and service and time limits provided for in the Rules, and hearing the matter as one of urgency at such time*

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[1] ***Pontius Pilate** recused himself by washing his hands amidst cries of **Jews** baying for blood of **Jesus Christ** they wanted crucified otherwise, they questioned loyalty of **Pontius Pilate** to **Emperor Julius Caesar***

and in such manner and in accordance with such procedure as this Honourable Court may deem fit.

2. *A Rule Nisi be issued returnable on a day and time as the Honourable Court may deem fit calling upon the Respondents to appear and show cause on a date as determined by this Honourable Court why an order in the following terms should not be granted:*

   2.1. *The 2nd Respondent and/or any person to be appointed by this Court be directed to represent to the 6th Respondent* ***(His Majesty the King)****, within 5(five) working days, that the question of removing the 1st Respondent* ***(Justice "Maseforo Mahase)*** *as Puisne Judge of the High Court of Lesotho in terms Section 121 (5) of The Constitution of Lesotho 1993 (as amended) ought to be investigated.*

   2.2. *Upon representations made in terms of Prayer 2.1. the 6th Respondent cause for the appointment of a tribunal pursuant to the provision of Section 121 (5) of the Constitution of Lesotho 1993 (as amended) to enquire into the fitness or otherwise of the 1st Respondent to hold office as a Puisne Judge of The High Court of Lesotho.*

   2.3. *Upon establishment of a tribunal pursuant to Prayer 2.2 the 2nd Respondent and/or any person appointed by this Court be directed in terms of Section 121 (7) of The Constitution of Lesotho 1993 (as amended) to recommend to 6th Respondent the suspension of 1st Respondent as a Puisne Judge of The High Court of Lesotho pending the outcome of the enquiry by the tribunal.*

2.4. *That it be declared that the substantially similar letter authorised by the 1st and 3rd Respondents dated 29th May 2019 and 5th July 2019 and addressed to The President of the Court of Appeal amount to an utter breach of Section 118 (2) of The Constitution of Lesotho 1993 (as amended).*

2.5. *That it be declared that the letter authored by the 1st Respondent to The President of the Court of Appeal and dated 27th May 2019 amounts to an utter breach of an oath of judicial office as prescribed under Section 122 and 126 of The Constitution of Lesotho 1993 (as amended).*

Alternatively, to Prayer 2.1, 2.2, and 2.3.

2.6. *The 3rd Respondent be directed to represent to the 6th Respondent* ***(His Majesty The King)****, with 5 (five) working days of grant of this order, that the question of removing the 1st Respondent* ***(Madam Justice Maseforo Mahase)*** *as Acting Chief Justice and Puisne Judge of The High Court of Lesotho in terms Section 121 (5) of The Constitution of Lesotho 1993 (as amended) ought to be investigated.*

2.7. *Upon representations made in terms of Prayer 2.6, the 6th Respondent cause for the appointment of a tribunal pursuant to the provisions of Section 121 (5) (a) of The Constitution of Lesotho 1993 (as amended) to enquire into the fitness or otherwise of the 2nd Respondent to hold office Acting Chief Justice and Puisne Judge of The High Court of Lesotho.*

2.8. *Upon establishment of a tribunal pursuant to prayer 2.7, the 3rd Respondent be directed in terms of Section 121 (7) to recommend to 6th Respondent a suspension of 1st Respondent*

of The Constitution of Lesotho 1993 (as amended) as a Puisne Judge of the High Court of Lesotho pending the outcome of the enquiry by the tribunal.

3. *That it be declared that the substantially similar letters authored by the 1st and 3rd Respondents dated 29th May 2019 and 5th July 2019 and addressed to The President of the Court of Appeal amount to an act of putting the judiciary into disrepute.*

4. *That costs be awarded in the event of apposition hereof.*

5. *Granting Applicant such further and/or alternative relief.*

The Attorney General and the ***Acting Chief Justice*** have filed Affidavit supporting the Prayer sough in the Notice of Motion.

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[2] Recusal to recuse may raise another perception of a judge's own personal involvement and partisanship on the part of a judge who refuses to recuse himself or herself.

Founding Affidavit of Mr. Lebohang Hlaele *(Main Application)*

[3] It is quite clear that the main application seeks to ***"kick – start"*** a process to impeach the ***Acting Chief Justice, 'Maseforo Mahase;*** it purports to do so under ***Section 121*** of the ***Constitution of Lesotho***. The *Constitutional Court Panel* consisting of ***Monapathi J, Peete J*** and ***Moahloli J*** had been empanelled to hear the application. All the three Justices are Judges of the High Court of Lesotho which in all has twelve Judges all with Chambers at the ***Palace of Justice in Maseru Lesotho***. Every judge takes a solemn

oath of office upon appointment to dispense justice impartially and without bias. In law, this grounds the fundamental ***"presumption of judicial impartiality."*** It is a presumption of law recognised throughout all commonwealth and Anglo-American jurisdiction.

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[4] Recusal to recuse may raise another perception of a judge's own personal involvement and partisanship on the part of a judge who refuses to recuse himself or herself.

[5] In his lengthy Founding Affidavit, ***Mr. Lebohang Hlaele*** describes himself as an "*... adult Mosotho male and a* ***politician*** *from the district of Mohale's Hoek. ...*" He encapsulates his case by stating as follows:

-4-

> *"4.1. The prime motivation behind the current application stems from what I conclude to be an unconstitutional act(s) of collusion between the Acting Chief Justice and The Prime Minister to compromise a litigation in which I was personally involved but onto only that but to compromise the institution of the Court of Appeal. The entire history which comprehensively articulates my long-drawn legal battle which ultimately gave birth to my current litigation stems from all the cases that had to do with The All Basotho Convention. A political party of which the incumbent Prime Minister is the leader."*

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The Recusal Application in Constitutional Case No11 of 2019

[6] Since this is an ***"application for recusal,"*** it is proper wisdom for us to avoid delving into the merits of the main application from which we are being asked to recuse ourselves. In recent times, this application is *sui genesis* in the history of recusal law in Lesotho. Often bias is perceived when a litigant loses a case, and when victorious, the judge is impartial. It is all about human perceptions.

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[7] This ***application for recusal*** was filed a month later in Court on the ***24th September 2019***. The relief sought is couched as follows:

> *"1. That a Rule Nisi issue returnable on the date and time to be determined by this Honourable Court calling up on the respondent to show cause (if any) why:*
>
> *(a) The Rules as on notice and form shall not be dispensed with on account of urgency;*
>
> *(b) The Court shall to give directions for the matter to be dealt with at such time and such in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with the Rules of Court;*
>
> *(c) The* **Honourable Justice T. Monapathi** *together with two other Honourable Judges[2] forming the panel shall not recuse*

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[2] ***Honourable Justice Monapathi (Judge since 1994), Honourable Justice Peete (Judge since 1997)*** *and* ***Honourable Justice Moahloli (Judge since)*** *– All three are Judges of the High Court and there are other eight Judges on the Bench.*

themselves from the panel of judges to preside over ***Constitutional Case No.11/2019;***

(d) *The other Judges of the Lesotho High Court Bench shall not recuse themselves except the foreign judges to be appointed to preside over this matter;*

(e) *That the main application be stayed pending finalization hereof;*

(f) *Cost of suit only in the event of opposition hereof;*

(g) *Further and/or alternative relief as the Court may deem fit.*

2. *That prayers 1 (a), (b) and (d) operate with immediate effect as interim relief."*

[8] To the Recusal Application 4th Applicant ***(The Attorney General)*** has filed the Founding Affidavit and the 1st Applicant ***(The Acting Chief Justice)*** has filed a Supporting Affidavit. In the main the 4th Applicant contends that the Applicants.

> *"... intention to file recusal of the whole panel including the rest of the High Court Bench on numerous reasons and due to close affinity they might likely have towards the 1st Applicant as their current boss. ... The essence of the application for recusal in this case is that no Judge of the High Court can sit in judgment on one of his colleagues with whom in the nature of things he/or she has or will have a close relationship. ... It is my contention that it is only fair that the matter is heard by foreign judges who have no relationship with any of the parties in these proceedings. ..." [Para 4.1, 4.2]* ***(Our underline)***

[9] The 4th Applicant also alleges that there exists a real likelihood of being compromised due to the smallness and close relationships within the High Court Bench. He contends that because of the prevailing political climate and vilification of Judges who had handled ***ABC*** related cases, the declining confidence of the public and apprehension of bias in the Judge of the High Court Bench as a whole or in the panel to hear this dispute, exists.

[10] Even more explicit is an allegation under *Para 5.6* which reads:

> "5.2. *It is in the best interest of justice and fair trial that the whole High Court Bench should not sit to hear this case. There has been insinuation in the media and social media and out right cries by some of the parties and the public who entertain a reasonable apprehension that one or the other judge is biased in recent past cases and did not bring an impartial and unprejudiced mind to the resolution of the question involved before him or her. We should avoid that in this matter. We however also entertain the fear of the public in the instant case."* (Our underline)

[11] Coming to case at hand, it must be stated clearly that the *Bench of the High Court of Lesotho* is not incompetent … or disqualified to adjudicate in any matter regardless of how high profiled. We give a benefit of doubt to anyone … anyone who wants judicial competence to suit his/or her own prurient scheme. We stand firm under our judicial oath which rings but clearly in our ears, and in our conscience. Otherwise we stand ready to be impeached!

[12] Indeed the 4th Applicant boldly states at *Para 8.2*:

> *"8.2. I aver that they are* ***incompetent to preside over the matter in which 1st Applicant is one of the litigant and the prayers are directed against her. I am apprehensive that they will not judge according to the dictates of justice and the sense of duty of an upright mind. I am reasonably apprehensive that they will be biased. They are suspect and should decline to hear this matter where prayers are directed at their interim boss.*** *" (Our underline)*

***

[13] We respect the *Parliament*, of the *Kingdom of Lesotho Executive* and expect mutual respect and honour. Sinister perceptions should be entertained for cogent and not for trivial or frivolous reasons. We truly took judicial oath seriously and for a good and gallant cause for justice. We belong to no one – except our ***King – His Majesty*** and to the common people of Lesotho - and to nobody else – re

"Judicial incompetence" *– allegation of*

[14] We take serious view that the Attorney general alleged that we are incompetent to deal with the matter *in casu*. Unfortunate as it is, it reflects upon us as Judges of His Majesty who have each taken a judicial office to administer justice to all without fear favour or prejudice.

[15] Our Basotho People are a peace loving lot homogeneous but presently split asunder by petty political rivalries that have put a knife upon.

[16] Speaking for myself as ***His Majesty's Judge*** I state clearly that I have 22 years of judicial experience under my ***"black belt."*** I will not be taken as incompetent by anyone. I can never surrender my judicial intellect and independence to any one; and I fear no one or belong to anyone. I can with much each and ease interpret *Section 121(5)* of Constitution of Lesotho and I can pen without any bias the constitutional issues intricate as then may be. So can my brother Judges.

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[17] ***En passant***, we should note that the word *"incompetent"* may carry some semantic ambiguity – It may relate to *"fitness"* to handle a matter or it may meant *"disqualified."* We graciously give the ***Attorney General*** *"a benefit of doubt"* otherwise the word *"incompetent"* may *"question"* our very fitness to engage and consider the Constitutional issue in ***Constitution Case No.11 of 2019***. If a judge or judges are incompetent and unfit to hold judicial office,[3] then they all deserve to be impeached! Any allegation of incompetence is a very serious accusation that can be made against a judge or judges without cogent reasons.

[18] He further submits that:

> *"6.1.(a) The 1st Applicant is the* ***Acting Chief Justice*** *and colleague of the Presiding Judges and Bench of the High Court of Lesotho. The Bench is small. The 1st Applicant has been sued in their jurisdiction. On this, there is a reasonable ground for all Judges of the High Court Bench recuse themselves from trying the proceedings on the reasonable apprehension or likelihood of bias; (b) The* ***recusatio judicis suspecti*** *apply to all*

[3] ***Section 121 (3) of the Constitution of Lesotho***

Judicial Officials irrespective of what their order of rank in the hierarchy of their administration of justice might be; (c) It makes no difference whether the action concerned is of a civil or criminal nature; (d) The Applicants are bona fide in making this application. We have reasonable grounds for recusal when we request the bench of the High Court to recuse itself."

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[19] He concludes his affidavit by stating:

> *"8.4. I aver that the plight by 1st Respondent herein to probe the* ***ACJ*** *is solely premised by nothing but political vendetta and merely to bring the judiciary into disrepute. I aver that the Court should be cautious not to be compromised and led into a well-defined political plot to oust the* ***ACJ*** *or assist in ousting her to the detriment of the reputation of this Court and this nation. To avoid making absurd decisions that might compromise the rule of law and warp the justice and administration of justice, the panel of judges in my considered and objective view should recuse itself together with the whole Bench of the High Court. I so humbly pray that this Honourable Court should grant this application as prayed in the notice of motion."*

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[20] No doubt the main application involves the 1st Applicant, the ***Acting Chief Justice*** and an intended investigation by a tribunal towards her impeachment. It is a common fact that the ***Acting Chief Justice*** as Head of the Judiciary as Heard of the Judiciary sits at the ***Palace of Justice of***

the High Court. Smallness and close proximity of all Judges of the High Court of Lesotho is also common cause although closeness does *per se* not necessarily mean collegiality – collegiality may itself be a close *"camaraderie"* or may be distant non-existing.

[21] Unless the ***Attorney General*** in attributing *"incompetence"* to the whole Bench of the High Court, only meant *"disqualified"*, it was a most unfair and unfortunate comment to emanate from the most *Senior King's Counsel* and *First Officer of the High Court.* The *Attorney General* is a man of great honour and of long experience at the Bar. Judges of this High Court are ***His Majesty's Judges*** who have all taken a solemn and sacred oath of judicial office to administer justice to all people without fear and all enjoy the age-old ***"presumption of judicial impartiality".***[4]

[22] The ***Acting Chief Justice*** has deposed to an Affidavit whose salient points are as follows:

(a) *that she has previously interacted with her fellow colleagues judges extensively in different capacities and settings;*

(b) *due to a "highly charged politically environment, vilification and accusation of bias are common;*

I *there is always suspicion over decisions of High Court Judges;*

(d) *recusation will protect the reputation of the High Court against vilification and tarnish.*

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[4] ***S. v. Shadewell*** *– 2001 (4) SA 1 (SCA)*

I   *<u>in particular one or other of the Judges in the Panel are allegedly being dealt with by the Judicial Service Commission</u>.*

(f)   *that this is a case where all Judges of the High Court Bench have to recuse themselves <u>so that aspersions are not cast in future</u>.*

(g)   *all Judges of the High Court have "<u>direct interest</u>" in this application because it affects their very security of tenure.*

(i)   *it is not alleged that any of the judges bear a grudge against the Acting Chief Justice or that they sitting complicated.* ***(Our underline)***

[23] In particular, at *Para 7.5* it is stated:

> *"7.5. It is trite that in our democratic dispensation, an impartial judge is of pivotal and fundamental importance for a fair trial; and if there is a reasonable apprehension honestly held that despite their own judicial oath and their integrity, the judicial offices might not be impartial, they should not decline to recuse themselves – not on the ground that they will not be honest and impartial but on the ground that objectively there exist a cogent ground for a reasonable apprehension over their impartiality."*

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[24] As regards the 2nd Respondent - the ***Law Society of Lesotho*** – and who have not filed any notice of intention to oppose the recusal application - the ***Acting Chief Justice*** alleges that her suspicion is that the Law Society has *"been hijacked"* by politicians to serve certain individuals and push a

political agenda hence why it is silent and … is actuated by malice and is *mala fide* and that it *"would only be prudent for the Bench of the High Court of Lesotho to recuse itself to protect their individual dignities."*

[25] She further contends that the Bench of the High Court is disqualified by their association with her and they will always have an aura of bias contrary to the principles of ***nemo judex in sua causa***, and this disqualification should apply to the whole Bench of the High Court of Lesotho. … The whole Bench of the High Court is suspect.

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[26] We have duly noted the specific allegations made in the Affidavit of the ***Acting Chief Justice***. Without being judgmental, we take them as constitution a perception that she entertains a perception – rightly or wrongly – that this court is likely to be biased against her regard being had to the said allegations in her Affidavit.

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Answering Affidavit of 1st Respondent – (Mr. Lebohang Hlaele)

[27] In his Answering Affidavit, 1st Respondent in the recusal application, ***Mr. Lebohang Hlaele***, contends that this application for recusal is *"but a blatant abuse of Court process, beyond that, it defiles the decorum of the institution of the judiciary and is meant to frustrate operationalization of important constitutional processes which meant to discipline a "highest ranking Puisne Judge in the country* – ***ACTING CHIEF JUSTICE.***"

[28] He further contends that the ***Acting Chief Justice*** has failed to display the highest level of confidentiality and professional astuteness in the conduct

of her affairs. He says the *Prayer 2.2* of the main application seeks to ask the Constitutional Court to *"kick-start"* the process for the establishment of the tribunal to investigate the fitness and competence of the ***Acting Chief Justice*** to hold office.

[29] He contends that the ***Attorney General*** and the ***Acting Chief Justice*** have *"colluded in a political a vendetta"* to prevent the enforcement of discipline of a highest ranking judge – resulting in a constitutional impasse.

[30] He contends that in openly attacking other Judges not on the Panel breached the oath of secrecy and that any *"institutional recusal is legally untenable and illogical."* He says he takes a strong exception to the utilization of the word *"boss"* by the ***Attorney General***.

[31] He submits strongly that the application for recusal was made in bad taste and that averments made by ***Acting Chief Justice*** should be ignored as irrelevant for purposes of this recusal application and that *"... they are only relevant to purposes of staging additional charges in her impeachment proceedings." [Para 17.2.]*

[32] He disputes the contention that the enquiry into her fitness is politically driven. *"The **Acting Chief Justice** cannot hide behind the veil of institutional independence of the judiciary when she is effectively being sued in her personal capacity for has personal flaws in the conduct of her professional work." [Para 18.2.]*

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Bias – Concept of

[33] It is often the inner desire and intend to placate someone or interest or to subvert justice for an improper motive that activate bias at the expense of impartiality and inconsistent with the solemn oath of judicial office. Jurists ***C. Okpaluba*** and ***L. Juma***[5] have penned a brilliant monograph on the concept even referring to recent cases in Lesotho. It makes a good read.

[34] Current lack of confidence in the judiciary is a culture nurtured and entertained and fuelled across the whole strata of the public – "*there prawls a tiger in every forest.*" "... Bias is a concept which has eluded philosophers and psychologists as to it real meaning. Much reliance should be placed upon physical or verbal manifestations of perceptions and biases.[6]

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Recusal *(Recusatio) – Principles of*

[35] Under our law ***"recusal"*** is a decision taken by a judicial officer to withdraw from presiding in a given case upon grounds that there exists a real likelihood that the judicial officer will not be impartial in the case. Thus under our law, "***recusal***" is by all means a serious step in the Court proceedings. It touches and impinges on the *"judicial oath of office"* and upon the judge's ability to discharge his functions in any given case. Once he or she has recused from a case, the judge becomes *functus officio*[7] and has no power or authority to give any decision or directive in the proceedings *sub judice*.

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[5]*Professors Chucks Okpaluba – Okpaluba@yahoo.uk and Lawrence Juma – juma@ru.ae.za "Problems of proving actual or apparent bias: and Analysis of Contemporary Development in South Africa*
[6] *Potchefstroom Electronic Review – 2011 vol. 14 No.7 http:/dx.org/10.43/petj; see also Stevens – 1990 Oxford Journal of Legal Studies 39.*
[7] *Punhorn v Wise – 1948 (1) SA. 84 (N)*

The Historical Origins of "Recusatio"

[36] With ancient ***Roman Law*** origins that have transcended through the ages to the ***Roman Dutch Law***[8] and ***Common Law***, the notion of ***recusatio*** *(recusal)* was formally known as exception ***recusatio exceptio judicis.*** There is a *plethora* of court decisions both in ***Lesotho*** and in ***South Africa*** stating the basic principles that should govern recusal process and ***"justa causa exceptionis"*** *"– a very just fear that will give rise to suspicion in one of the litigants that they will not be judged according to dictates of justice and sense of duty of an upright mind."* Many countries have many court decisions on this concept: *UK*, South Africa, *Canada*, *Namibia* and modern jurist have researched brilliantly on the topic.[9]

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[37] Way back in *1978* the ***Court of Appeal of Lesotho*** had occasion to discuss the issue of recusal in ***Lesotho Electricity Corporation v Forrester***[10] – on whether an *"extra – curial"* remark by a presiding judge could create a real likelihood of bias and held that ultimately *"matters of recusal are matters for the conscience of the Judge."* The ***Court of Appeal of Lesotho*** discussed the principles of recusal in later decisions.[11] In South Africa many decision abound on the issue of recusal and the principles applicable.

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[8] ***Voet. 5. 1. 43, Van Leeuwen – Roman – Dutch Law – 5. 17 .3; Digest 4.8.32.14; Danisa v British Overseas Insurance – 1960 (1) SA. 800 at 801; SA Motor Acceptance Corp. Bpk v. Oberholzer – 1974 (4) SA 808 Recusation – 1924 SALJ 37.***

[9] ***Professors Chucks Okpaluba – Nelson Mandela School of Law, University of Fort Hare** and **Lawrence Juma*** *(Faculty of Law –* **Rhodes University** in **Potchefstroom Electronic Review**. "The *Problems of Proving* actual or apparent bias : An Analysis of Comporary Developments in South Arica"

[10] *LAC (1970-1979) 321 AT 331 (per* ***Schutz AJA) – see also Molapo v Ntsekhe – CIV/APN/2007(Peete J)*** *(Mercedez benz gifts to Judges of the Hig Court)*

[11] ***Sole v Cullinan*** *– LAC (2000 – 2004) 572;* ***Manyeli v Rex*** *– LAC (2007-2008) 37*

[38] ***Howie JA*** [12]crisply highlighted the following requirements of the test for recusal:

"(1) There must be a suspicion that the judicial officer might, not would, be biased;

(2) The suspicion must be that of a reasonable person in the position of the accused or litigant;

(3) The suspicion must be based on reasonable grounds."

[39] The following principles governing recusal are however very clear:

(a) Fair trial in civil and crucial proceeding is guaranteed under section 12 (8) of the ***Constitution of Lesotho 1993****.*

(b) There exists a ***presumption of judicial impartiality*** [13] *premised upon the solemn judicial oath of office.*[14]

(c) ***Recusal*** *is a judicial process wherein a judicial officer withdraws from court proceedings because there exists a* ***"real likelihood"*** *of bias antithetical to impartiality –* ***exceptio judicis suspecti****.*

(cc) Real likelihood of bias should pass the ***"double test of reasonableness."***

(d) Not cast in stone, recusal process will depend upon the particular circumstances of each case.[15]

(e) One of those principles is that of ***nemo iudex in sua causa*** *– linked to collegiality.*[16] ***Collegiality*** *as a disqualification is not absolute or*

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[12] ***Mpali v The Magistrate and Others*** *– LAC (2011 -2012) 306 per* ***Ramodibedi P*** *at 308 E*
[13] ***Stansbury vs. Data pulse 2004 IRLR. CA. Canadian Council Ethical Principles 30 Wewaydum*** *(supra) - Canada*
[14] ***S v. Shadewell*** *– 2001 (4) SA 1 SCA*
[15] ***S. v. Roberts*** *– 1999 (4) SA 915*
[16] ***SA. Motor Acceptance Corp. Bpk v Oberholzer*** *– 1974 (4) SA. 809 (Afrikaans)*

exclusive and each case will depend upon its own particular facts and circumstances.

(f) ***Recusal*** *is primarily to ensure impartiality in the administration of justice in the particular case and should not be* ***frivolously*** *or* ***vexatiously*** *sought. The allegations should not outlandish bizarre or outrageous.*

(g) ***Recusal*** *is ultimately a matter of conscience and of judicial integrity.*

(h) ***Justice*** *not only be done but should manifestly and undoubted be seen to be done.*

[40] Professors *Okpaluba* and ***Juma***[17] *state:*

> *"The jurisprudence that has developed out of the principle of impartiality or rule against bias is such that the courts do not insist on the proof of actual bias on the part of the judge, since the appearance or a reasonable apprehension of bias if proved is enough to vitiate the proceeding."*[18]

Outright bias can or is rarely exhibited. The criteria of disqualification based on bias target to the judge's mind, to his conscience, and the reasonable person is being asked to imagine the decision-maker's state of mind under the circumstances from an objective perspective.

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[41] The case of ***SA Motor Acceptance Corp Bpk v Oberholzer***[19] held that collegiality may be a ground to disqualify a judge from presiding in a case his/her colleague is a litigant. Thus collegiality may be a ground for recusal. It must also be noted that collegiality standing on its own is never

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[17] ***Potchefstroom Electronic Review*** *231 DLR 2011 Volume 14 No. – 1974 (14) SA 809*
[18] ***Lord Hope Millar v Dickson*** *– 2002 (1) LRC 457*
R v Sussex JJ ex parte McCarthy *– 1924 (1) 256 259 KB*
Wewaykum Indian Band v Canada *- 2003*
[19] *1974 (4) SA 809*

absolute or exclusive. Particular circumstances of one case will vary from one case to another. Presumption of impartiality and double reasonableness test underscore the formidable nature of the burden resting upon a litigant who alleges bias. Recusal may justifiably be refused in cases of clear collegiality where clear convincing evidence exists or is admitted.

[42] The general principles seem to have achieved a common recognition throughout the Roman Dutch Law, the Common Law and the Commonwealth countries like ***Lesotho, Republic of South Africa, Swaziland, Namibia, Zambia, Iswatini*** and ***Ghana.***[20] Caution is necessary not to cast these principles in stone – the facts of each case and factual basis for likelihood of perception should always take precedence in order that justice in any given case should not be prejudiced.

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[43] The unique facts in the application before us are the following:-

(a) *The Bench of the* ***High Court of Lesotho*** *has through ages been very small. It presently stands at 12 judges.*[21]

(b) ***Collegiality*** *and close working relationships cannot be excluded.*

(c) *There exists some differences between the* ***Acting Chief Justice, President of the Court of Appeal*** *and the* ***Prime Minister****.*

[20] *See African Legal Information Institute (https//africanlii.org (controversial **recusal** decisions: **Lesotho, Namibia, and SA.) Sallah v Attorney General** – 1970 29; **Kasanga v Lusaka Golf Club Zambia – ZAMLII website.***

[21] *Collegiality could still be raised even if he Bench of the High Court of Lesotho consisted of 30 or more Judges*

(d) ***Impeachment*** *of Acting Chief justice is being planned by Applicants.*

(e) *There are some very serious misunderstandings between the* ***Acting Chief Justice*** *and some or most of the* ***Judges*** *of the* ***High Court.***

(f) ***Acting Chief Justice*** *believes or is* ***apprehensive*** *that there exists likelihood of bias if the main* **Constitutional Case No.11 of 2019** *is presided over by judges some of whom administrative issues are still outstanding.*

(g) ***Collegiality*** *in one form or another exists – close or distant. If people belong to an institution, collegially should exist.*

(h) *The relief sought in the main constitutional is* **drastic** *in that its aim is the impeachment of the* ***Acting Chief Justice*** *under* ***Section 121*** *of the Constitutional of Lesotho. We also aware that obviously a hue and cry shall go viral over the social media whether we recuse or decline to recuse.*

(I) *As a matter of fact, it is clear that Acting Chief Justice has a perception that there exists a* **"real likelihood"** *that the present Panel of Judges will be biased against her because of certain administrative hiccups.*

(j) *The truth of allegations against judges is not relevant in the recusal proceedings.*

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Impartiality - *Perception*

[44] A ***"Perception"*** is defined in ***Oxford Dictionary*** as *"... the ability to see hear or become aware of something through the senses ... intuitive*

understanding and insight." A perception has to be founded on fact - real or imagined.

[45] It has been stated that impartiality can never be absolute and it is an *"ephemeral concept which has eluded both philosophers and psychologist as to its real meaning."* Much reliance is therefore placed on visible manifestation of bias.[22] The answer to the question whether a judge is biased or his/her judgment tainted with perceptions of bias would ultimately rest on subjective human conjectures or perceptions.

[46] No hard and fast rule should be made or be cast in stone like the ***Biblical Ten Commandments***. An open mind disabused of all idiosyncrasies and prejudices; an integrity of a reasonable man and conscious call by the judicial oath and a fair sense justice and fortitude are all that is required in all cases regardless of high profile a case may be.

[47] Faced with this reality, mindful of our solemn judicial oath, and cognizant of the presumption of judicial impartiality, which itself is never absolute; aware that the ***Acting Chief Justice*** has a perception – real or imagined – that this Constitutional Court as presently empanelled may be biased against her in the main application seeking her impeachment, we are fully cognizant to of the fundamental principle that justice must not only be done but must be done in this, and that this demands circumspection because of the serious allegations levelled against ***Acting Chief Justice*** as target of impeachment.

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[22] *Professors Chucks Okpaluba and Lawrence Juma in the Potchefstroom Electronic Review – 2011 vol. 14 No.7 – "The problems of proving actual or apparent bias – An Analysis of Contemporary Development in South Africa" – see also Take and Save Trading v Standard Bank 2004 (4) SA 1 (SCA)*

[48] A ***"perception"*** is a human assessment of a given situation – it may be wrong or it may be correct, but it can exist or be entertained in the mind of one judge and not in the mind of another – it is a matter of conscience of the particular judge and on this earth no absolute neutrality or impartiality is possible. It should also be realised that an application for recusal can be prompted by a fear apprehension to lose a case before a particular judge or judges.

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Grounds seeking Judges' recusal

[49] In this recusal application, the ***Acting Chief Justice*** has listed certain grounds for the application for recusal and has contended that there is – in her view – a *"likelihood of bias if the Judges presided over the main application."* This should be viewed objectively – and not to be discounted as lacking *bona fides*. *"Collegiality"* is not being pleaded but rather the *"likelihood"* to be biased on our part as Judges of the High Court of long tenure.

[50] In the rather controversial facts of this case, our decision is prompted by our well considered feeling that in this case *"justice needs not only to be done but must ostensibly be seen to be done."* In the main application, it is the final objective interpretation of ***Section 121 (5)*** of the ***Constitution of Lesotho*** of whether impeachment of the ***Acting Chief Justice*** can be kick – started in the manner ***Mr. Lebohang Hlaele*** has chosen to adopt. In the purview of analytical statutory interpretation, bias is hardly determinative – <u>law is law</u>. To be determined are (a) *locus standi* of ***Mr. Lebohang Hlaele*** and (b) cogency of grounds for impeachment.

[51] It is our firm decision that having regard to all recognised principles on recusal applications in our jurisdiction, the *"real or imagined likelihood of bias"* may be illusive depending upon the particular circumstances of each case. We finally are of the view that this is a case in which we have to recuse ourselves as we hereby do.

[52] However, we are of the view that it was most unfair for the ***Attorney General*** to allege as he did in his Affidavit that we are "***incompetent***" to deal with the matter of interpreting *Section 121* of the *Constitution of Lesotho*, nor does *"collegiality"* have the effect of disqualifying us from presiding over the matter. Imagined perceptions[23] are difficult to assess; but seemingly they do exist in the minds of the Applicants who have deposed to Affidavits.

[53] Collegiality as a concept and real or imagined perceptions aside, we should make it very clear that we are quite ***able*** and ***competent*** as ***Judges of the High Court of Lesotho*** to determine the issues raised in the main application regarding the *locus standi* of ***Mr. Lebohang Hlaele*** and the relief he seeks. It is a very simple question of interpreting ***Section 121*** of the Constitution of Lesotho and of ***locus standi***.

[54] Of significance, it should be noted that the ***Acting Chief Justice*** is not specifically pleading *"Collegiality"* as such in her Affidavit. She in fact saying that it is the uncordial relationships she has with some judges (even some on the Panel) that have caused her to have some perceptions that the Panel and in fact the whole Bench of the High Court will not be impartial in determining the constitutional issue in the main application.

[23] ***R. v. Milne & Erleigh** – 1951 (1) SA. 1(AD). SA. **Commercial Catering and Allied Workers Union vs.Irvin & Johnson** – 2000 (3) SA. 705 – per Cameron JA.*

[55] We state without equivocation that while the judiciary in Lesotho is today sadly inextricably embroiled in a political quagmire and it is only proper that for the sake of public interest that we recuse ourselves but without being called *timid* or *cowardly* – or *"incompetent"* as alleged in the Affidavits.

[56] Lastly we also hope this our recusal in this matter shall not open the flood - gates for a deluge of recusal applications in every political case. ***Impartiality*** or ***neutrality*** can never be absolute concepts in our times. Judges are all human beings and all are fallible - regardless of rank. They have all taken a solemn oath of office which binds their consciences and that oath is a bell that should ring in their minds and ears at all times. ***Integrity*** and ***impartiality*** are the *"birds of the same feather that should flock together."* Prevailing distrust and lack of confidence in the judiciary in our country is totally bad, unBasotho and must be discouraged and deprecated only for the sake of the Judiciary of Lesotho for now but for future generations.

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[57] Most recently ***Makara J.*** in refusing to recuse himself had occasion to restate *"the double reasonableness test"* citing the *South African* cases of ***President of RSA vs SARFU***[24] and ***SA Commercial Catering and Allied works Union vs Irvin and Johnson.***[25] We agree.

[58] In the present case, recusal application is grounded not so much on *"collegiality"* but much on *"real or imagined perception"* that some

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[24] *1999 (4). 147 CC; 1999 (7) BCCR 725 at 748*
[25] *2000 (3) SA. 705*

judges on the panel or other Judges on the *High Court Bench* are likely to be biased due to some administrative hiccups they have with the ***Acting Chief Justice;*** and perceived bias if they sit on the main ***Constitutional Case No. 11 of 2019.***

[59] ***Makara J.*** in the case of ***Tampane***[26] found the recusal application had failed to pass *"the double reasonableness test."* The case however demonstrates that whatever a judge says during the court proceedings – depending on the contextual conception or understanding – may be taken as creating a *"real likelihood of bias"* – rightly or wrongly. At the end of the day, the litigant who loses a case will impute bias on the part of the presiding judge and his victorious will praise the judge for fairness and justice. It is human nature.

[60] Empirical psychological studies have shown that bias as well as prejudice and other idiosyncrasies are natural human instincts – like primitive criminal instincts which exists in all of us – which need control and management. For Judges, it is the strength of their *integrity* and *rectitude* that will enable them to put aside fear, favour and bias in all court proceedings in which he or she presides over.

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Institutional recusal of all Judges of the High Court of Lesotho

[61] As for *Prayer 5 (d)* of the *Notice of Motion* seeking institutional recusal of the whole Bench of the ***Judges of the High Court of Lesotho***, we truly find it difficult on principle to speak for other Judges of the High Court because this in fact would necessitate the sitting of the whole Bench of the ***High***

[26] ***Speaker of the National Assembly and Others vs Likeleli Tampane*** – *CIV/APN/235/2018*

Court of Lesotho[27] to determine to ***institutional recusal*** which in turn would activate the ***"doctrine of necessity"***[28] and create a potential conundrum. We have come to a firm decision to recuse ourselves and we do so with all honour and with clean conscience in this matter as we hereby do.[29] Because of its constitutional importance, we feel that our recusal will not present a gross injustice to anyone.

Epiloque

[62] The endemic absolute lack of trust and of confidence in Lesotho in the Judiciary and its being constant labelled as politicised and incompetent is truly regrettable. It is a strange behaviour unknown in other countries of Africa where their judiciaries are a pride of their nations and where on independent judiciary is an integral part of their national independence. Embattled and demonised as corrupt and weak, the judiciary of Lesotho cannot discharge its functions under the Constitution and Lesotho shall for ever be a highly politicized pariah nation with nothing but a bleak future.

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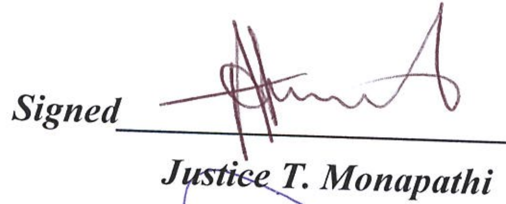
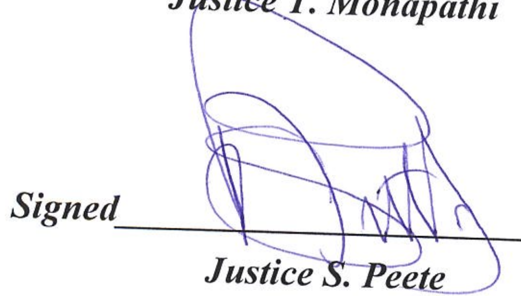
[27] ***South African Post Office vs De Lacy*** *– 2009 (5) SA 255 SCA 2011 ZACC 17 (application for recusal of whole Bench)*
[28] ***Judge President Hlophe v Premier – Western Cape*** *– [2012] ZACC 4 (CC) CCT 41/11 2012 (6) SA 1 SCA [****DCJ Mosenke, Jafta J. Nkabinde J.*** *recused themselves]*
[29] *We recommend all readers of the judgment to have a glimpse at the quoted article submitted by* ***Professor Okpaluba*** *and* ***Juma*** *in Potchefstroom Electronic Review.*



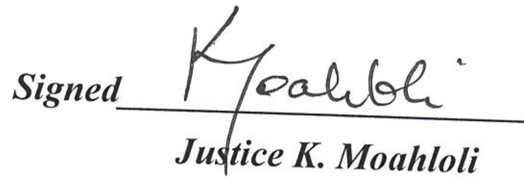
Signed______________

Justice T. Monapathi



I agree ***Signed***______________

Justice S. Peete



I agree ***Signed***______________

Justice K. Moahloli

For Applicants**: **Advocate Penzrhorn with him ***Advocate Setlojoane***
For Respondents**: **Advocate Ndebele with him ***Mr. Rasekoai***