THE COURT OF APPEAL OF LESOTHO
JUDGMENT

Case No: C of A (CIV) No 62/2013

In the matter between:

THE PRESIDENT OF THE COURT OF APPEAL	**APPELLANT**

and

THE PRIME MINISTER	**FIRST RESPONDENT**
JUSTICE Z YACOOB NO	**SECOND RESPONDENT**
JUSTICE Y MOKGORO NO	**THIRD RESPONDENT**
JUSTICE M JOFFE NO	**FOURTH RESPONDENT**
ATTORNEY GENERAL	**FIFTH RESPONDENT**

Heard: 24 March 2014

Delivered: March 2014

Coram: Brand, Cachalia, Malan, Louw *et* Cleaver AJJA

Summary: Section 125(5) of the Constitution – Tribunal appointed by the King upon representation of the Prime Minister in terms of this section – to enquire whether the appellant should be removed from his office as President of the Court of Appeal for inability or misbehaviour – whether fair procedure preceding the representation required by the section – if so, whether the appellant had been treated unfairly.

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JUDGMENT

Brand AJA (Cachalia, Malan, Louw *et* Cleaver AJJA concurring):

[1] This is an appeal against the dismissal of an application by the appellant in the high court. My four colleagues and I are honoured by acting appointments as judges of this court. The reason for this rather uncommon event is that the appellant, Justice Michael Mathealira Ramodibedi, is the President of this court. On 22 August 2013 he was informed by the first respondent, who is the Prime Minister, that a Tribunal, consisting of the second, third and fourth respondents, had been appointed by His Majesty the King, in terms of s 125(5) of the Constitution of Lesotho, to enquire into the appellant's removal from the high judicial office that he holds for misbehaviour or inability to perform the functions of that office. In a separate letter of the same date the Prime Minister invited the appellant to make written representations as to why the King should not be advised to suspend him from the exercise of his judicial functions with full salary benefits pending the outcome of the enquiry by the Tribunal. The appellant did not respond to this invitation but he instituted legal proceedings in the high court which has led to the present appeal.

[2] In the high court the appellant sought an order essentially setting aside the Prime Minister's decisions (a) to request the appointment of the Tribunal of inquiry by the King and (b) to seek his suspension from office pending the outcome of that inquiry. He also sought to set aside the decision by the King to appoint the Tribunal and to suspend him from his office in the interim. The contention that the Prime Minister's decision to suspend him and the King's appointment of the Tribunal were invalid rested entirely on the alleged invalidity of (a). In the end the crisp issue arising from the application thus turned on whether the decision in (a) had been vitiated by non-compliance with the rules of natural justice. In the founding papers the appellant raised three points of review: (a) failure to hear him; (b) failure by the Prime Minister to apply his mind adequately; and (c) bias. As it turned out, only (a)

remained. The matter was eventually heard by three South African high court judges who, like ourselves, held acting appointments in the Kingdom of Lesotho. In the majority judgment of Moshidi AJ, with Potteril AJ concurring, it was held that the application should fail on various grounds. In a separate judgment Musi AJ agreed with the result, but for substantially different reasons. The import of these judgments and the aspects on which they differ will be better understood against the statutory and factual background.

[3] The statutory background of the dispute between the parties lies in s 125(3) to (7) of the Constitution of Lesotho. In relevant part these sections provide:

'(3) An appointed judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(4) An appointed judge shall be removed from office by the King if the question of his removal has been referred by the King to a tribunal appointed under subsection (5) and the Tribunal has advised the King that the appointed judge ought to be removed from office for inability as aforesaid or for misbehaviour.

(5) If the Prime Minister . . . represents to the King that the question of removing an appointed judge under this section ought to be investigated, then –

(a) the King shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected in accordance with the provisions of subsection (6) from among persons who hold or have held high judicial office;

(b) the tribunal shall enquire into the matter and report on the facts thereof to the King and advise the King whether the appointed judge ought to be removed from office under this section for inability as aforesaid or for misbehaviour.

(6) When the question of removing the President is to be investigated, the members of the Tribunal shall be selected by the Prime Minister . . .

(7) If the question of removing an appointed judge from office has been referred to a tribunal under subsection (5), the King, acting in accordance with the advice of the Prime Minister . . . may suspend the appointed judge from the exercise of the functions of his office and any such suspension may at any time be revoked by the King, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the Tribunal advises the King that the appointed judge should not be removed from office.'

[4] As to the factual background of the dispute, I find a convenient starting-point in a meeting held at the office of the Prime Minister on 22 April 2013. It was attended by the appellant, the Prime Minister and two other members of the Cabinet. At the meeting the Prime Minister raised concerns about a range of problems within the judiciary. Most of these problems arose out of a protracted dispute between the appellant and the then Chief Justice over who was the more senior in the judicial hierarchy. The conflict escalated into a matter of public embarrassment at the birthday celebrations of the King in July 2012, which was widely reported in the media. What happened, broadly stated, was that the chauffeur-driven vehicles of the Chief Justice and the appellant, were vying for preferential protocol treatment in a convoy leaving the venue of the celebrations. The vehicles executed dangerous manoeuvres nearly running over two bystanders in the process. The conflict between the two judges also led to the cancellation of the Appeal Court session in January 2013. On that occasion the appellant issued a public statement in open court blaming the Chief Justice for what had happened. As a result of the public furore arising from this incident the Law Society of Lesotho formally requested the Prime Minister to enquire into the conduct of the appellant and the Chief Justice. In an attempt to resolve the conflict, there was an enquiry by a high level mission of the International Commission of Jurists (ICJ) – chaired by a former South African Chief Justice. In its report the Commission inter alia recommended that:

'Prompt action must be taken against behaviour that is likely to bring the judiciary into disrepute.'

And that:

'The first steps will entail holding the most senior officials accountable to the Constitution from which their position derives.'

[5] Against this background, the Prime Minister explained to the appellant at the meeting of 22 April 2013 that he had already met with the Chief Justice who had chosen to take early retirement. He suggested to the appellant that he consider doing the same. The appellant took umbrage at the suggestion and expressed the view that this was an unconstitutional interference with his judicial independence. He then left the meeting. The following day he discovered an instruction by the Ministry

of Justice to the registrar of the Court of Appeal that the appellant's two official vehicles be surrendered when the court was not in session. These two events prompted the appellant in May 2013 to bring an application in the high court – to which I shall refer as the first application – for orders interdicting the Government from what he contended to be 'unlawful interference with the independence of the judiciary' and compelling the return of his two official vehicles.

[6] The respondents sought a dismissal of the application. In their answering affidavit they informed the appellant that the Prime Minister intended to initiate impeachment proceedings against him by advising the King to appoint a Tribunal of enquiry in terms of s 125(5) of the Constitution. And as an alternative to the dismissal of the application they would seek an order staying the application pending the conclusion of the impeachment proceedings. The respondents also set out in detail the grounds upon which the impeachment would be sought. These involved numerous serious allegations of misconduct against the appellant, including that:

(a) His protracted and public dispute with the former Chief Justice seriously undermined the integrity of the judiciary.

(b) He had instructed his government-appointed driver, a sergeant in the Lesotho defence force, to submit a false insurance claim to cover the damages caused to the appellant's official vehicle in an accident, indicating that the sergeant was the driver at the time of the accident while in fact the vehicle was driven by the appellant's son, who had no authority to do so.

(c) The appellant overcharged the Government for exercising his duties as President of the Court of Appeal by claiming and acquiring remuneration and travel allowances from the Government to which he was not entitled.

(d) He simultaneously held two permanent judicial appointments: as President of the Court of Appeal of Lesotho and as the Chief Justice of Swaziland, which was incompatible with the requirements of judicial independence prescribed by the Lesotho Constitution and further rendered the appellant unable to perform his judicial functions in Lesotho properly.

(e) He had committed serious misconduct and abused his office as Chief Justice of Swaziland as alleged in an official complaint by the Law Society of Swaziland

against the appellant in July 2011. This complaint comprised eight charges of misconduct, including the sexual harassment of female employees; the abuse of financial resources of the judiciary; the subversion of judicial independence by issuing practice directives calculated to impermissibly protect the King of Swaziland against civil judgments and his refusal to recuse himself as Chairperson at the Swaziland Judicial Service Commission's disciplinary hearing into a complaint against a high court judge which he had brought himself.

(f) He had brought the first application against the most senior officials in Government, including the Prime Minister, without first attempting to resolve the issues in accordance with the requirements of co-operative government and he thereby rendered himself unable to sit as a judge in matters involving the Government of Lesotho.

[7] In his replying affidavit in the first application the appellant responded to these allegations of misconduct relied upon in the respondents' answering affidavit. It is common cause that the grounds for impeachment relied upon in the Prime Minister's letter of 22 August 2013 are the same as those set out in the answering affidavit, save for two exceptions. The one exception relates to an additional instance of an irregular claim for travelling expenses. The other concerns details of additional incidents that allegedly occurred in Swaziland. On 22 July 2013 the first application was postponed sine die by agreement between the parties. In his answering affidavit in the second application – which led to this appeal – the Prime Minister said that he agreed to the postponement 'to avoid the spectacle of litigation involving the President of the Court of Appeal and the Government as opposing parties'.

[8] The day after the postponement of the application on 23 July 2013, the Prime Minister made representations to the King to appoint a Tribunal in terms of s 125(5) of the Constitution. On 16 August 2013 the King acceded to the Prime Minister's request by appointing a Tribunal consisting of three judges – the second, third and fourth respondents – and on 22 August 2013 the Prime Minister addressed the two letters to the appellant that triggered the second application.

[9] It appears from the majority judgment by Moshidi AJ that he dismissed the application on three grounds. The first two related to issues of urgency and procedure while the third concerned the merits of the case. In this court the respondents disavowed any reliance on the first two grounds, they said, not because they were unmeritorious but because they want this court to decide the case on its merits so that if the decision went in their favour the Tribunal can expeditiously proceed to do its work.

[10] As to the merits, the appellant's case in the high court relied on the narrow point that by virtue of the celebrated principle of procedural fairness, known as *audi alteram partem* – the *audi* principle – he was entitled to make representations to the Prime Minister before the request was made to the King for the appointment of the Tribunal. Moshidi AJ held that the appellant had no such right. Section 125(5), so he said, was silent on the issue and the appellant had failed to make out a case for the section to be construed as creating such a right by implication. Musi AJ, on the other hand, held that the appellant did have a right to procedural fairness before the request was made to the King. However, so he went on to find, on the facts of this case, the appellant had failed to establish that his treatment was procedurally unfair. In the main, the basis for this finding relied on the facts that in the first application (a) the appellant had been advised of the Prime Minister's intention to request the appointment of a Tribunal as well as (b) the allegations of misconduct against him on which the request would be founded and that (c) the appellant had responded to these allegations in his replying affidavit

[11] The legal principles dictating the approach in matters of this kind appear from the following statement in this court by Gauntlett JA in *Matebesi v Director of Immigration & others* [1998] JOL 4099 (Les A) [1998] LSCA 83 at 7-8:

'(1) Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by implication indicates the contrary, that person is entitled to the application of the *audi alteram partem* principle (*Attorney General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 661A-B; *SA Roads Board v Johannesburg City Council* 1991 (4) SA

1 (A) at 10J-11B; *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231C-D).

(2) The right to be heard (henceforth 'the *audi* principle') is a very important one rooted in the common law not only of Lesotho but of many other jurisdictions. . . . It has traditionally been described as constituting (together with the rule against bias, or the *nemo iudex in re sua* principle) the principles of natural justice, that "stereo-type expression which is used to describe [the] fundamental principles of fairness" (see *Minister of Interior v Bechler; Beier v Minister of the Interior* 1948 (3) SA 409 (A) at 451). More recently this has mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in *Ridge v Baldwin* [1964] AC 40, particularly in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) and more recently, *Du Preez v Truth and Reconciliation Commission supra* and *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 (HL) at 106d-h.'

(Referred to with approval by Steyn P in *Commander of the Lesotho Defence Force and others v Mokoena & others* [2002] LSCA 11 para 5.)

[12] In applying these principles Moshidi AJ held that the appointment of the Tribunal was merely a preliminary step which had no adverse effect on any of the appellant's rights. The contention that it affected the appellant's right to his reputation and dignity, he found 'plainly without merit'. I do not agree with this finding. On the contrary, common sense dictates, in my view, that a judge's reputation will inevitably be tainted by the appointment of a Tribunal of inquiry into allegations of serious misconduct or incompetence against him or her. I am fortified in this view, for instance, by the judgment of the Privy Council in *Rees & others v Crane* [1994] 1 All ER 833 (PC) which concerned the interpretation of statutory provisions virtually identical to s 125 of the Lesotho Constitution.

[13] But I do not agree with the appellant's further contention that the appointment of the Tribunal in itself impacted on his right of security of tenure. In terms of the Constitution, impeachment is entirely dependent on the findings of the Tribunal which, self-evidently, will not be influenced by its own appointment. Be that as it may, the impact of the appointment of the Tribunal on the appellant's reputation in and of itself gives rise to the presumption that a fair procedure must precede the

initiation of its appointment. As Gleeson CJ said in the New South Wales case of *ICAC (Independent Commission Against Corruption) v Chaffey & others* (1993) 30 NSWLR 21 para 28, admittedly in somewhat different context:

'The authorities amply demonstrate that potential damage to the reputation of a person who is the subject of a complaint being investigated at a hearing by the Commission enlivens the requirement to observe the rules of natural justice and entitles that person to procedural fairness . . .'

[14] The respondents' contention in this court as to why the presumption of a fair procedure requirement did not arise was that the Prime Minister's request to the King in terms of s 125(5) constitutes the exercise of executive power as opposed to administrative action on his part. Although I agree with that classification, I find it of no consequence. As appears from the quoted statements from *Matebesi* it is the adverse effect of the decision of the public official on the rights of the individual, and not the classification of that act as administrative, that gives rise to the presumption of the requirement of fair procedure. As it happens, both decisions of this court to which I have referred, ie *Matebesi* and *Makoena,* concerned the exercise of executive powers as did the decision in *Attorney General, Eastern Cape v Blom* 1988 (4) SA 645 (A) on which Gauntlett JA in turn relied as authority for his exposition of the relevant principles in *Matebesi.*

[15] Section 125(5) clearly does not expressly exclude the requirement of fair procedure. The respondents contended that it does so by necessary implication. In the main their argument in support of this contention relied on the fact that the appointment of a Tribunal is only a preliminary step and not an investigation of the allegations against the appellant, which requires a fair procedure. It is only the conduct of the investigation by the Tribunal, which requires a fair procedure and during which he shall be afforded ample opportunity to put his case. The respondents sought to find authority for this argument on the following statement by the South African Supreme Court of Appeal in *Langa & others v Hlope* 2009 (4) SA 382 (SCA) para 40:

'While a judge is obviously entitled to be heard in the course of the investigation of a complaint . . . that is not what we are concerned with in this appeal. We are concerned instead with the act that initiates such an enquiry (the "trigger"), which is the decision to lay a complaint. In that respect there is no authority to which we were referred or of which we are aware - whether in decided cases or in judicial protocols anywhere in the world - that obliges a complainant to invite a judge to be heard before laying the complaint.'

[16] I do not believe that this statement from *Langa* lends authority to the respondents' argument. The constitutional procedure for the removal of judges in South Africa is quite different from the s 125(5) procedure that concerns us. Central to the South African procedure – provided for in s 177 of the Constitution of the Republic of South Africa 108 of 1996 – is an investigation by the Judicial Service Commission (the JSC) which can be triggered by a complaint against a judge, irrespective of its origin. Underlying the dictum in *Langa* on which the respondents sought to rely, was the court's finding (see paras 44 and 45) that although the appellants were the Justices of the Constitutional Court, they were acting as complainants and not as the court when they filed their complaint against the respondent with the JSC. What the court thus essentially held was that a complainant is not bound to give effect to the principles of natural justice and fair procedure before he or she lays a complaint with the JSC. Thus understood, the position of the Prime Minister in terms of s 125(5) is quite different from that of a complainant to the JSC. First, he is the only one who can request the King to appoint a Tribunal and secondly, once he has done so, the King must accede to the request. He has no discretion. The request by the Prime Minister will therefore inevitably give rise to the appointment of a Tribunal, with all its potentially negative consequences for the reputation of the judge concerned. In addition, the appointment of the Tribunal brings in its wake the potential of an interim suspension from office.

[17] The same distinction holds true, I think, for all the other South African decisions, such as *Competition Commission v Yara SA (Pty) Ltd & others* 2013 (6) SA 404 (SCA). In the same way as *Langa*, these cases emanate from substantially different legislative schemes. By contrast, the decision in *Rees* concerned the

interpretation of statutory provisions virtually identical to those of s 125. What the Privy Council held in that case was that these provisions do not exclude the requirements of fair procedure in principle and that because the procedure preceding the request for the appointment of a Tribunal in that case was substantially unfair, that request was bound to be set aside. To interpret s 125(5) so as to exclude fair procedure in all cases may lead to consequences that are demonstrably unfair. This would be the case where an unsubstantiated complaint is lodged with the Prime Minister and may be conclusively refuted, without the need for the appointment of a tribunal if the judge is afforded the opportunity to do so. The rhetorical question that arises, as I see it, is why the judge should not, in these circumstances be offered the right to respond? It follows that I cannot agree with the respondents' argument, which found favour with the majority of the court a quo, that the right to fair procedure is impliedly excluded by s 125(5).

[18] Proceeding from this premise, the appellant's further argument went along the following lines: one of the fundamental elements of fair procedure is the right to have been heard, or at least to be afforded an opportunity to make representations, after the judge was informed of the Prime Minister's intention to request the appointment of a Tribunal; since the appellant was afforded no such opportunity, the Prime Minister's request for the appointment of the Tribunal was vitiated by non-compliance with the rules of natural justice. With regard to this line of argument, it is clear to me that the appellant had not been invited to make representations as to why the Prime Minister should not seek the appointment of a Tribunal after the latter's intention to do so had been made known to him. Hence I agree that the strict requirements of the *audi* principle were not complied with. (For these principles, see eg Cora Hoexter *Administrative Law in South Africa* (2nd ed, 2012) (Hoexter) at 369 et seq.) But this does not mean that the appellant is correct in his contention that the consequences of the failure to afford him a hearing vitiated the decision because it is based on an over simplification of what the right to fair procedure – which includes the *audi* principle – requires.

[19] As explained by Gauntlett JA in his earlier quoted dictum from *Matebesi,* the requirements of fair procedure, which includes the *audi* principle, have 'more recently mutated to an acceptance of a more supple and encompassing duty to act fairly'. The same sentiments appear from the statement by Hoexter under the rubric '*audi alterem partem'* (at 363):

'From the late 1980s . . . our courts have steadily retreated from the old formalistic and narrow approach to "natural justice" and towards a broad and flexible duty to act fairly in all cases.'

And in the same vein (at 362):

'. . . [P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'

[20] The principle that procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and that the one-size-fits-all approach is inappropriate, has been explicitly recognised by the highest courts in England (see eg *Doody v Secretary of State for the House Department and Other Appeals* [1993] 3 All ER 92 (HL) 106d-h) and in South Africa (see eg *Du Preez & another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 231-3; *Minister of Health & Another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 152). This means, as I see it, that the strict rules of the *audi* principle are not immutable. Where they are not strictly complied with, as in this case, the question as to whether in all the circumstances of the case the procedure that preceded the impugned decision was unfair, remains. I am mindful of the fact that the Prime Minister's case from the outset was not that the procedure preceding his request to the King was fair. On the contrary, his case was that the requirement of fair procedure did not apply. But notwithstanding the Prime Minister's stance, as I see it, the appellant must still persuade us that in all the circumstances the treatment meted out to him was unfair.

[21] In having regard to all the circumstances of the case, it must firstly be borne in mind that inherent to the impugned decision is the fact that it is a preliminary step aimed at causing an enquiry by an independent body, where the appellant shall be afforded ample opportunity to refute the allegations against him. This means that the Prime Minister's decision has no immediate effect on the appellant's tenure as President of the Court of Appeal. Nor could it in this case have led to the appellant's suspension without him being heard, since he was expressly invited to make representations as to why he should not be suspended. The potentially adverse effect of the decision was therefore limited to the appellant's reputation only. In this regard the adverse effect to the appellant's reputation shall, in the event of the Tribunal finding the allegations against him to be unimpeachable, in all likelihood not be permanent.

[22] The fact that the adverse effect of the impugned decision will be confined to the appellant's reputation leads me to a further consideration. It is this. At the time of the appointment of the Tribunal most of the allegations of misconduct against the appellant were already in the public domain. I say that in the light of the following:

(a) The unseemly incidents flowing from the protracted conflict between the appellant and the Chief Justice had been widely publicised.

(b) Some of the allegations against the appellant had been the subject of formal complaints by the Lesotho Law Society while others were raised in a formal publicised memorandum of complaint by the Law Society of Swaziland.

(c) Some of the allegations against the appellant were mentioned in the report of the ICJ Committee.

(d) There was a petition by a group of concerned citizens to the Prime Minister calling for the ouster of the appellant from judicial office, which also received coverage in the local press.

(e) Finally there was the litigation between the appellant and the Prime Minister, where virtually all the allegations of misconduct relied upon by the Prime Minister were ventilated in the papers before the high court.

[23] The upshot of all this, as I see it, is that the appellant's reputation was already tarnished before the request for the appointment of a Tribunal by the Prime Minister. On the face of it, it seems to me that the only way to salvage his reputation is for the appellant to successfully refute the allegations before the Tribunal. The case is therefore distinguishable from the situation that arose, such as in *Rees (supra)* where the harm to the judge's reputation arose solely from the appointment of the Tribunal itself. The feature of wide prior publication also rendered the case distinguishable from situations such as *Rees* in another respect. The removal of the uncertainty surrounding the appellant's reputation caused by the wide publication is not in his interest only. It also affects the unconditional public respect for the integrity of the judiciary without which the court simply cannot function. The interest of the administration of justice thus required the appointment of the Tribunal as a matter of urgency.

[24] Shifting the spotlight to a different facet of the case highlights the element singled out by Musi AJ as the basis for his minority judgment against the appellant. The basis for this finding was that the appellant had been informed in the answering affidavit in the first application of the Prime Minister's intention to initiate impeachment proceedings in terms of s 125(5); that virtually all the allegations of misconduct against the appellant eventually relied upon by the Prime Minister for his request to the King were made known to the appellant in the same affidavit; and that the appellant had availed himself of the opportunity to respond to these allegations in his replying affidavit. Moreover, from the contents of the letter of 22 August 2013, which informed the appellant that a Tribunal had been appointed, it was apparent that the Prime Minister had had regard to the appellant's response when he approached the King.

[25] It is true, as the appellant argued, that he was not formally invited by the Prime Minister to make representations as to why the request for the appointment of the Tribunal should not be made. Consequently, so he contended, his answer to the allegations in his replying affidavit was not a response to an invitation of that kind. I accept that the appellant was not invited to make representations regarding the

appointment of the Tribunal and that what he said in his replying affidavit cannot be construed as having been such a response. It is also true that two of the allegations relied upon by the Prime Minister in his letter of 22 August 2013 had not been referred to in the answering affidavit in the first application. In consequence, the appellant had no opportunity to respond to these allegations either before the Prime Minister's impugned request was made to the King. But it is difficult to think of any reason why his response to the allegations would have been any different simply because it was given for a different purpose. Furthermore the overwhelming probabilities seem to indicate that the impugned request was not dependent on the additional allegations. And since the appellant's objection is aimed at the appointment of the Tribunal, and not at individual charges against him, the additional allegations would appear to be inconsequential in the present context.

[26] In all the circumstances of the case I am therefore not persuaded that the Prime Minister's failure to afford the appellant a hearing in the strict sense before requesting the King to appoint a Tribunal was unfair. Conversely stated, in the view that I hold, insistence on strict compliance with the *audi* principle in all its ramifications would in the circumstances of this case have been overly burdensome on the Prime Minister, undermined the administration of justice and unhelpful to the appellant. It follows that in my view the appeal against the high court's dismissal of the appellant's application cannot be sustained.

[27] What remains are issues of costs. The court a quo granted costs against the appellant on the basis that there was no reason why costs should not follow the event, particularly since the application amounted to an abuse of court process. But in South Africa the Constitutional Court has laid down the general principle that in constitutional litigation, unsuccessful litigants against the Government should not be ordered to pay costs lest these litigants be discouraged from asserting their constitutional rights (see eg *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) paras 21-23). As also pointed out in *Biowatch*, however, the general rule is not an immutable one. If, for instance, the litigation is found to have been vexatious or frivolous, the rule will not apply. As I see it, this approach is a

salutary one that should be adopted by this court. In this case the appellant was clearly seeking to enforce his constitutional rights and I find the high court's conclusion that he was abusing the court process unwarranted. I can therefore see no reason for deviating from the *Biowatch* principle. It follows that in my view there should be no order as to costs, either in the high court or on appeal. Since the court a quo seems to have failed to consider the *Biowatch* approach and was influenced by an unjustified inference of abuse, we are constrained to interfere with its costs order.

[28] In the result it is ordered:

1 The appeal is dismissed with no order as to costs.

2 (a) The order of the high court is confirmed save to the limited extent referred to in (b).

(b) The order that the appellant should pay the costs of the application is set aside and replaced with the following:

'No order as to costs.'

for F D J BRAND
ACTING JUDGE OF APPEAL

for A CACHALIA
ACTING JUDGE OF APPEAL

for F R MALAN
ACTING JUDGE OF APPEAL

W J LOUW
ACTING JUDGE OF APPEAL

R B CLEAVER
ACTING JUDGE OF APPEAL

APPEARANCES:

For the Appellant:

P B Hodes SC, S Phafane KC, Z Mda KC, S P Sakoane KC

Instructed by:

T Mahlakeng

Suite No 2

Manty Buildings

MASERU

For the First Respondent:

G T Marcus SC, S Budlender, ~~M H Mdluli~~ G S MDITLULI, L MAKHULELA

Instructed by:

K T Nthontho Attorneys

Husteds Building

MASERU