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LESOTHO: NEW JUDGMENT REINSTATES MOSITO

By Carmel Rickard

A **DECISIVE** new judgment by five acting judges of Lesotho's highest court has found that the former president of the appeal court, Kananelo Mosito, who resigned to pre-empt his impeachment, has been validly reappointed by government. The new decision that will see the acting chief justice swearing in Mosito very soon does not, however, resolve Lesotho's continuing judicial problems and in particular the alarming issue of ongoing political interference with the judiciary.

[THE decision, delivered on Friday morning by the highest court in Lesotho](#) [2], was entirely predictable given the tone of questioning and discussion in court during the hearing earlier in the week.

Lesotho's Court of Appeal has not been operating for some time as the judicial crisis surrounding the head of that court has played out, but five acting judges, headed by former Zambian judge, Philip Musonda, were appointed to hear this matter.

The appeal was brought by the former president of the court of appeal, Kananelo Mosito, along with the country's political leadership: the prime minister, the minister of law and constitutional affairs, the minister of justice and human rights and King Letsie III. The attorney general and the law society were also appellants. On the other side were four senior legal practitioners who said they had taken up the original case on a matter of principle.

History

In its new judgment, the court quite correctly said the history of the case is important in order to understand the issues.

It is a politically fraught history, however, one that follows the fortunes of government and opposition parties, and that goes back to Mosito's appointment in January 2015, just weeks before Lesotho's February 2015 elections. At the time the then-opposition party and prominent lawyers warned against it, saying there had been an agreement between the political parties that no major appointments would be made in the immediate run-up to the elections.

Despite these arguments, Mosito's appointment went ahead.

In the February 2015 elections, however, the former opposition party took power and relations between Mosito and the new government quickly became strained. By early 2016, a series of complaints against him had crystallized and a tribunal of three SA judges was appointed to investigate Mosito's fitness for office.

That tribunal found against him on a number of grounds, including allegations that he had not paid tax for many years. The tribunal further found for example that he could no longer function effectively in a judicial leadership capacity as he had unlawfully gathered and then released information purporting to show that his colleagues on the bench had also failed to pay tax. In December 2016 the tribunal recommended that he be dismissed.

Once he received a copy of the tribunal's report, Mosito wrote a formal letter of resignation to the King. He argued that, since he had resigned, it would be "legally pointless" to impeach him – but a notice of impeachment was gazetted all the same.

In Mosito's place retired SA appeal court judge Robert Nugent was appointed to take office as of 22 May 2017, but the following month saw government change once again after a snap election and the same party that had initially appointed Mosito was returned to power.

As the court of appeal put it this week, the new prime minister "revoked" the appointment of Judge Nugent, and he then announced the reinstatement of Mosito.

Those two decisions were challenged in court and were both found by a full bench of the high court, sitting as a constitutional court, to be invalid.

The decisions were taken on appeal and it is judgment in that matter which was handed down yesterday.

Scathing

The newly constituted bench was scathing in its [rejection of the constitutional court's decision](#) [3], accusing it of judicial overreach and of reaching a conclusion "unsupported by the common law, constitutional jurisprudence, statute law and the Constitution".

A major ground for this finding was that by the time the constitutional court sat, Judge Nugent had indicated that he was no longer interested in the post, given the way he had been summarily dismissed by the Lesotho authorities. The appeal court held that this meant the only person with a sufficient interest in the matter, Judge Nugent, was not a party to the case, and the constitutional court ought therefore not to have issued a declarator that his dismissal was unlawful.

They also referred to other developments that took place after the initial gazetting of the Mosito impeachment, and under the new pro-Mosito government. Most important of these was that the government reached a "compromise" that the tribunal's report would be annulled, with the annulment made an order of court. Further, the criminal tax case against Mosito collapsed when the state closed its case having led no evidence.

Given this state of affairs there was no longer any reason for a court to find that Mosito was disqualified from reinstatement, said the appeal court.

No stranger

Judge Musonda, who appears to have written the decision with the unanimous support of his colleagues, is no stranger to the position in which Mosito found himself.

In 2013, while a member of Zambia's supreme court, he was suspended over alleged professional misconduct and a tribunal was appointed to consider the issues against him.

Like Mosito – and every other African judge who has faced a tribunal in the last decade – Judge Musonda applied to the courts to stop the tribunal from going ahead. And, as in Lesotho, individuals of the powerful local law society argued that the tribunal should continue as its appointment involved no breach of the constitution.

Again, as in the case of Mosito and others faced with impeachment, Judge Musonda resigned before any impeachment was gazetted, saying that his resignation "completely and

finally curtailed” the tribunal’s authority to continue the case against him.

Finally, again as in Mosito’s case, a court later set aside the tribunal that investigated Judge Musonda.

Future

What will be the impact of the judgment in Lesotho? The new decision and Mosito’s now-certain reinstatement will not resolve the ongoing problem of political interference in the appointment and work of Lesotho’s judiciary. Recent history has shown that both of the two major power blocs believe this is their prerogative. As the country see-saws between these two political interests, the fortunes of an independent judiciary – and the very rule of law itself – are in jeopardy.

Read the judgment in [Mosito and Others v Letsika and Others \(C OF A \(CIV\) 9/2018\) \[2018\] LSCA 1 \(26 October 2018\)](#); ^[4] (discussed in this article)

Read the constitutional court judgment in [Letsika v Dr. K. Mosito \(CC 16/2017\) \[2018\] LSHC 1 \(09 February 2018\)](#); ^[3] (decision appealed)

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[Mosito](#) ^[10]

[impeachment](#) ^[11]

[reinstatement](#) ^[12]

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[1] <https://africanlii.org/sites/default/files/Copy%20of%20Namibia%20story%2027%20Sep.jpg>

[2] <http://lesotholii.org/ls/judgment/court-appeal/2018/1/>

[3] <https://lesotholii.org/ls/judgment/high-court-constitutional-division/2018/1/>

[4] <https://lesotholii.org/ls/judgment/court-appeal/2018/1/>

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[6] <https://africanlii.org/content/african-judiciary>

[7] <https://africanlii.org/og-blog-tags/lesotho>

[8] <https://africanlii.org/og-blog-tags/constitutional-law>

[9] <https://africanlii.org/og-blog-tags/rule-law>

[10] <https://africanlii.org/og-blog-tags/mosito>

[11] <https://africanlii.org/og-blog-tags/impeachment>

[12] <https://africanlii.org/og-blog-tags/reinstatement>