

IN THE HIGH COURT OF LESOTHO

In the matter of :

REFILOE M. MOSEMENE	1st Applicant
MOTSUMI NGAKANE	2nd Applicant
THULO MAHLAKENG	3rd Applicant

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PHOKA	FOSA	1st Respondent	
NGOSA	MAHAO	2nd Respondent	
THOZAMILE	BOTHA	3rd Respondent	
KETSO	LETSELA	4th Respondent	
RAKUOANE	RAKUOANE	5th Respondent	
N.	U.	L.	6th Respondent

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. J. Unterhalter
on the 3rd day of December, 1982.

The Applicants in their Notice of Motion claim various declarations and an interdict. There is also a claim for an order that the administration of 6th Respondent be ordered to call and conduct elections in view of the fact that the Interim Students' Representative Council is in default and out of term of office, such elections to be held within 21 days of the Court Order.

The first declaration sought is that the Interim Students' Representative Council has been operating out of its term of office and illegally by reason of not having held annual elections. The second declaration sought is that the purported adoption of a new constitution by the Interim Students' Representative Council on 14th October 1982 is invalid. I should add that these last two words are not included in the prayer but presumably they were omitted in

error. The third declaration sought is that meetings of the students union of 12th October 1982 and the 14th October are null and void in so far as they purport to have a new constitution of the students union adopted. The fourth declaration sought is an order to the effect that the constitution purportedly adopted on the 14th October 1982 is null and void in so far as it was adopted illegally.

The interdict sought is that the Interim Students' Representative Council be restrained forthwith pending the election of a new Students' Representative Council from functioning as the Students' Representative Council and an order is also sought that certain property detailed in the prayer be handed to the Administration of the 6th Respondent.

All the Respondents save the 6th Respondent gave notice of intention to oppose and filed answering affidavits to which the Applicants replied. The matter was heard as one of urgency on the 17th November 1982 and the court sat until 7.00 p.m. in order that an immediate decision should be made. The application was dismissed with costs and the court stated that if reasons were requested they would be given; such request has been made and the reasons now follow.

It is not clear from the founding affidavit on what facts the Applicants based the claim for relief. There were references to the Student Union constitution but this was not attached to the papers and the Court is therefore not in a position to take notice of these references. It has therefore not being established that the Respondents as members of the Interim Students' Representative Council have conducted themselves in a manner that is contrary to the provisions of the constitution.

It is said that meetings of the student body were held for

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the adoption of a constitution and inadequate notice was given as to the time and date of the holding of these meetings. The Applicants state that the notice was given on the 11th October 1982 for a meeting to be held on the 12th October 1982 and the Respondents say that on the 30th September 1982 notice was given that a meeting of the Students Union would be held soon after the short break which ended on the 9th October 1982 for the purpose of discussing a draft amended constitution, copies of which were distributed to the Student Union at the time that the notice was given. There^{is} thus a dispute of fact as to whether adequate notice was given and it cannot be resolved on these papers. It is said by the Applicants that at least seven days notice must be given prior to such Student Union meeting and reference is made to article 18-2, the submission being that the purported notice was irregular and illegal. The Respondents deny that article 18-2 operates in the present matter by reason of the fact that the Interim Students' Representative Council had been specifically charged by the Student Union at its meeting held on the 7th May 1982 to prepare an amended draft constitution and to present this to the Student Union for consideration and adoption as soon as it was ready. Here too there is a conflict of fact which cannot be resolved on the papers. The Applicants describe the events that took place at meetings that were held on the 12th October, 1982 and the 13th October 1982 and allege that the adoption of the constitution at the last of the two meetings was fraudulent. The Respondents deny certain details as to what happened in regard to disorderly conduct at the meetings. They say that voting on the motion to adopt the constitution took place, it was adopted by six hundred votes with two abstentions and no votes against, and there is a denial that the adoption was fraudulent. Again

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there is a dispute of fact that cannot be resolved on these papers.

The Applicants say that three hundred students signed a petition submitted to the sixth Respondent requesting a declaration that the adoption of the draft constitution on the 14th October 1982 was null and void, requesting that the 6th Respondent order that the Interim Students' Representative Council cease forthwith to hold itself out as the students' representative and that the students' property be handed to the sixth Respondent; and further that the 6th Respondent maintain order and call for and conduct elections for a new Students Representative Council within a reasonable time. The Respondents say that a number of signatures on the petition were obtained through misrepresentation and that many students on learning the true purpose of the petition repudiated their signatures. The Applicants reply in connection with the alleged misrepresentation to students that the Respondents do not state what the terms of misrepresentation were and who the students were who repudiated their signatures. Here again there is a dispute of fact that cannot be resolved on the papers.

The Applicants conclude their replying affidavits by making the submission that the Respondents have not made out a case against the allegations that their terms of office have expired, that sufficient notice to amend the constitution has not been given, that the meeting of the 14th October 1982 was irregular and disorderly, and that the Applicants are by law compelled to hold elections. However, in this matter it was the Applicants who sought relief and it was for the Applicants to make out a case. In having alleged that there was a fraud committed in regard to the adoption of the constitution the Applicants must surely have been aware of the

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fact that a serious statement such as that would not be admitted by the Respondents and that consequently a dispute of fact would inevitably arise. The fact that no valid constitution exists is fundamental to the case of the Applicants and if this is to be proved it must be proved under conditions which enable the evidence adequately to be presented and tested. Ordinarily this is done by way of action when witnesses give their testimony in open court and are cross-examined. Rule 8(14) states that if in the opinion of the court the application cannot properly be decided on affidavit the court may, among other actions it can take, dismiss the application. It can also direct that oral evidence be heard on specified issues. The court was informed however, that as the elections were to be held on the day following the hearing the matter was of great urgency and it was clear that in the circumstances oral evidence could not be heard at that stage. The Notice of Motion was filed with the Registrar on the 26th October 1982 and the Applicants have only themselves to blame if they did not act sufficiently expeditiously in order to have the disputed issues resolved by oral evidence in good time before the elections took place.

The High Court Act No. 5 of 1978 in section 2(1) (b) provides that the court in its discretion and at the instance of any interested person has power to inquire into and determine any existing future or contingent right or obligation. The Applicants seek declarations in the terms stated earlier in this judgment and it is for the Court to decide whether in the circumstances it will exercise its discretion in favour of the Applicants.

There is no basis on the papers in their present state

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upon which the court can or would be disposed to exercise its discretion in favour of the Applicants.

The Applicants also seek an interdict and the granting of an interdict likewise is in the discretion of the Court. One of the factors that the Court will weigh in considering whether to grant an interdict or not is the balance of convenience. In the present matter it is my view that the balance of convenience is against the granting of an interdict. I consider that it is important that the Interim Students' Representative Council proceed with the elections and when a Students Representative Council is elected in terms of the constitution that was adopted, that body continue the administration of student affairs in terms of the constitution. In this way there will be some control of students affairs by representatives of the students. On the proposal as made by the Applicants these duties are to be performed by the 6th Respondent and although the 6th Respondent has not entered into the dispute it would seem that initially the responsibility for the conducting of the affairs of the students should be by representatives of the students and not by the 6th Respondent. It may be that there is merit in the complaint made by the Applicants. If this is so and if there is a large measure of support for them among the general student body, proper proceedings in due course can be taken to unseat the Student Representative Council that will be elected into office in terms of the constitution adopted in October 1982. But unless and until that is done it seems to me on a balance of convenience that the Court should not interfere with the present state of affairs, more especially by reason of the fact that the disputes referred to above exist. This is an important reason for exercising the Court's discretion against the Applicants.

Submissions were made in regard to the award of costs and it was said that because the Applicants are students an order of costs should not be made against them more especially as the Respondents as members of the Interim Students' Representative Council would be enabled to pay the costs if they were directed to do so out of the funds of the Students Representative Council. In my view this is not a sufficient reason for denying the Respondents their costs. Applicants must know that if they engage in expensive litigation in the courts they run the risk of having costs awarded against them. The present is a matter where in the exercise of a little wisdom the Applicants could have withheld action until such time as they were able adequately and comprehensively to present their case. Having chosen to act precipitately they must bear the consequences.

For these reasons the application was dismissed with costs.



J. UNTERHALTER
ACTING JUDGE.

For the Applicants : Mr. Monaphathi

For the Respondents : Mr. Sello