

IN THE HIGH COURT OF LESOTHO

In the matter between:-

AUGUSTINE T.E. FOKO

Applicant

and

TSITSO CHAKACHE  
NKOANE J. KABI  
SIMON MANYOKOLE  
IKANENG MAKHOANE  
SUPERVISOR OF ELECTIONS OF MASERU  
URBAN AND MUNICIPAL ELECTIONS  
ATTORNEY-GENERAL  
MINISTER OF INTERIOR

1st Respondent  
2nd Respondent  
3rd Respondent  
4th Respondent  
5th Respondent  
6th Respondent  
7th Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 12th day of June, 1989

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This is an election petition in which the petitioner seeks  
an order in the following terms:-

- (a) A declaration that the Municipal and Urban Councils Elections in Lithabaneng Ward No.14 held on the 23rd March, 1989 is void; and or
- (b) A declaration that the election of 4th Respondent at the said elections was undue; and or
- (c) The scrutiny of the ballots at the said elections on the grounds that the Applicant had majority votes.
- (d) Further and alternative relief.
- (e) Costs of suit.

At the hearing of this application prayer (c) was abandoned.

In his founding affidavit, <sup>he</sup> deposes that he is a registered elector and he was a candidate for the Ward No.14 of Lithabaneng in the Maseru Urban and Municipal Elections held on the 23rd March, 1989, which elections were held in terms of Urban Government Act No.3 of 1983 and the Municipal and Urban Councils Elections Regulations 1987.

It is common cause that the first, second, third and fourth respondents were also candidates and that the fourth respondent was declared the winner for the aforementioned Ward 14.

The applicant has stated his reasons for this petition in paragraphs 4,5,6,7,8,9,10 and 11 of his founding affidavit. He alleges that the poll in Ward 14 did not open until 12.20 p.m. and that voting only commenced at 12.45 p.m. on the 23rd March, 1989. Before the commencement of the voting most electors who had arrived as early as 8.00a.m. had departed and could not vote on account of the absence of the polling officer. He alleges that before the time of commencement of voting the polling officer had been driving up and down in different vehicles in the company of the first, second, 3rd and 4th respondents.

The petitioner complains that the oath of secrecy was administered by a polling officer and not by the Returning officer as provided in Regulation 52.

He also complains that the polling agents of the other candidates were not introduced to the polling officer in writing.

He was the only candidate who gave the polling officer a letter introducing his polling agent in terms of Regulation 38 (5). The polling agent of the 4th respondent was not even registered as an elector anywhere or at all and was thus disqualified to be an agent.

He further complains that on the election day the first respondent collected a number of voters registered at Borokhoaneng Ward No.12 and brought them to Lithabaneng polling station No.14 where they cast their votes. He refers to Mrs. 'Matsobotsi Matee and Mrs. 'Malibuseng Mohapi. He alleges that one polling agent one Lehlohonolo Mohapi prevented some electors from attending at the polling stations for the reason that the electors were urged or encouraged by him to register or would vote for him. One of such electors is one 'Mammuso of Lithabaneng.

The petitioner alleges that at the closing time on the 23rd March, 1989 the returning officer dismissed all the candidates and their polling agents and the following things were done in their absence:

- (a) the unused and spoilt ballot papers were not exhibited nor made up into separate packets;
- (b) no candidates or their agents were invited to attach their seals onto the ballot papers;
- (c) no copies of registers of voters and the counterfoils ballot papers were exhibited;
- (d) no invitation was made to candidates or their agents to affix their seals on the ballot boxes.

It is common cause that one Lefu Letsapo voted for his mother 'Manthabiseng Letsapo and that before the counting of the ballot

papers was done in the presence of all the candidates and their agents, his ballot paper was traced and found in one of the ballot boxes and was destroyed. It was not included in the counting of the ballot papers.

The petitioner alleges that the 3rd respondent solicited one Masopha who was registered in Abia No.15 Ward to come and vote at Lithabaneng No.14 Ward.

In his viva voce evidence the petitioner repeated all the allegations he has made in his founding affidavit. He testified that at about 10.30 a.m. the people who had been assembling at the polling station from 8.00 a.m. started to go away because they were going to work. The people who went away were a very large group. Just before the voting started the polling officer called all the candidates and their agents and assembled them in the school building. The other candidates just pointed out their polling agents without any letters of appointment. Then the polling officer gave them the forms and ordered them to fill them. The petitioner objected to this but his objection was ignored .

The oath of secrecy was administered by the polling officer and not by the returning officer as the Regulations provide. At the closing time he suggested that because the voting had started about five hours after the time prescribed by the Regulations, the voting should be continued on the following day and that the ballot boxes be kept by the police. The suggestion was turned down. He finally agreed that the counting of the ballot papers should be done but the results should not be announced and that the elections be extended to the following day. The suggestion was turned down. The counting

was done and the 4th respondent was declared the winner. Then the returning officer ordered them to leave saying that he and the security officers would do the job.

Under cross-examination the petitioner stated that the majority of the people who left at about 10.30 a.m. were going to vote for him because they were the people he had touted to come and vote for him. He denied that at 5.30 p.m. the agents were ordered to go and fetch their letters of appointment.

'Manthabiseng Mohanoe corroborated the petitioner that voting at Lithabaneng polling station started after lunch or at lunch-time. She confirmed that many people had already gone away when the voting started. She also went away before the voting started because she was hungry. She came back and cast her vote.

The evidence of 'Maneo Moshoeshoe corroborated the petitioner's evidence in all material respects. She was the petitioner's polling agent. Alosia Mataleng also corroborates the petitioner that at Matala polling station the polling agents did not have their letters of appointment.

The fourth respondent testified that at Lithabaneng the voting started slightly after 10.00a.m. He admits that after the closing of the polling station at Lithabaneng the petitioner did complain that the polling was opened later than the time stipulated in the Regulations. The fourth respondent says that he insisted that the counting should be done because there were no longer any people who were still waiting to cast their vote at 8.00 p.m. when the polling station was closed. He says that about 8.00 a.m. when he arrived at Lithabaneng

polling station there were about two hundred people who were waiting there to cast their votes. He left for Leqele's polling station and Matala's polling station. When he returned to Lithabaneng at about 10.30a.m. he observed that there were still about 200 people when the voting started. He admits that their agents did not have letters of appointment but that the letters were written immediately after the omission was discovered and not at 5.30 p.m. as the petitioner alleges.

The first respondent testified that the polling at Lithabaneng had not yet started at 12.30 p.m. when he left for other polling stations. He denies that on that day he was going up and down with polling officers in his vehicle. He estimates that there were about one hundred and fifty people who were waiting at Lithabaneng polling station when he arrived there at about 8.45a.m. He admits that at Lithabaneng he introduced his polling agent verbally to the polling officer.

The evidence of the second and third respondents is the same with that of the first and fourth respondents. They also estimate that the voting at Lithabaneng started at about 12.45 p.m. The third respondent estimates that there were about one hundred people when the voting started.

Lineo Nthako was a returning officer at Matala's polling station. She admits that the polling agents did not have letters of appointment. The evidence of Malefane Molapo is the same as that of the respondents. Their evidence is to the effect that after the results were announced and the 4th respondent was declared the winner there was so much jubilation and congratulations to the 4th respondent that the candidates and their polling agents left

before the documents, i.e. ballot papers, letters of appointment were sealed into separate envelopes. Lineo Nthako denies that she dismissed the candidates and their agents immediately after the announcement of the results. She attempted to call them back but they could not hear her because of the shouting. However, the closing and sealing of the envelopes and the ballot boxes was done by the polling officials in the presence of the security officers.

There is overwhelming evidence that the voting at Lithabaneng polling station started at about 12.45 p.m. This evidence comes from some of the respondents who were candidates. The evidence of Malefane Molapo who was the returning officer at Lithabaneng to the effect that the voting started at about 10.00 a.m. cannot be true. He was a rather evasive witness and it is clear to me that he was merely defending himself as a senior officer in charge and did not want to give the impression that he conducted the elections in an irresponsible manner. But if there were sound reasons why he could not start in time nobody could blame him for that. I am convinced that the polling station at Lithabaneng opened for voting at about 12.45 p.m. The provisions of Regulation 38 (2) of the Municipal and Urban Councils Regulations 1987 were not complied with. Regulation 38 (2) reads as follows:

"The poll in an electoral ward shall open at eight o'clock in the forenoon of the day prescribed in the writ issued under regulation 24 for the taking of the poll and shall close at eight o'clock in the afternoon of that day:

Provided that the polling officer may in his discretion permit polling to continue on the following day if he bona fide believes that there will not be sufficient time to admit to the polling station and to issue ballot papers to all those voters who are present at the polling station and who wish to cast their votes:

Provided further that the polling officer shall take action in the exercise of his discretion under this sub-regulation only during the last hour before the time prescribed for closing the polling station, and shall forthwith announce verbally, and by posting up a notice outside the polling station, the hours during which polling will be continued on the following day."

The next question to decide is whether or not there was a very large crowd of people in the morning at about 8.00 a.m. when the voting was expected to start. And whether at the time the polling was started at about 12.45 p.m. that number had drastically come down because people had left for work. It is the petitioner's submission that there were many people in the morning and that the majority of them left for work when the polling failed to start on time. He has not given an estimate of how many people were there in the morning. The respondents estimated that there were between 100 and 200 people in the morning and at the time the polling started.

I am of the opinion that the figures given by the respondents are not far off the mark because the low poll at Lithabaneng polling station seems to compare very well with the figures at the other two polling stations, namely Matala's and Leqele's. I have checked the registers for the three polling stations and found that low poll was a common feature in all of them. The petitioner's claim that there was a large crowd of people in the morning cannot be true. In any case, even if there were many people in the morning the first proviso to Regulation 38 (2) makes it clear that the polling officer may only allow the "polling to continue on the following day if he bona fide believes that there will not be sufficient time to admit to the polling station and to issue ballot papers to all those voters who are present at the polling station and who wish to cast their votes." I have underlined words in the proviso which are particularly relevant to the present petition.



It is common cause that between 5.00p.m. and 6.00p.m. on the polling day there were no longer any voters at the polling station who were waiting to cast their votes. The polling officer was entitled to decide that the polling should be closed at 8.00 p.m. and that the counting should go ahead. If there were people who had to go to work before the voting started why did they not come back after they knocked off between the hours of 5 and 8 that evening while the polling station remained open? It was suggested that they did not come because it is very dangerous to go about at night at Lithabaneng because thugs waylay people and rob or assault them. I must point out that 7 o'clock in March in Lesotho cannot be regarded as night because the sun sets at about 6.16 p.m.

The second complaint by the petitioner is that oath of secrecy was administered by polling officers instead of returning officers. It is correct that at Leqele's polling station the oath of secrecy was administered by a police officer. This was a direct breach of Regulation 52 (2) which provides that the returning officer shall have the power to administer oaths of secrecy.

It is again common cause that all polling agents in all the polling stations did not have letters of appointment but were pointed out to polling officers by the candidates. Only applicant's agents had letters of appointment. This was a direct contravention of Regulation 38 (5) which makes it clear that agents without letters of appointment must not be admitted to a polling station. It is common cause that letters were eventually made during the course of voting and that the polling officers accepted them.

The petitioner's allegation that the first respondent collected a number of voters registered at Borokhoaneng Ward No.12 and brought them to Lithabaneng polling station where they cast their votes cannot be true. It is not correct that they were not registered at Lithabaneng. Their names appear in the register of Lithabaneng Ha Keiso (Exhibit 8) (See pages 12 and 14). According to the register the two voters did not vote because their are not cancelled. There was evidence that when a voter came into the polling station his or her name was cancelled in the register and a ballot paper was given to him or her. The fact that the two names remain uncanceled is a prima facie evidence that they did not vote. The petitioner has failed to rebut this evidence.

The complaint of the petitioner that the candidates and their agents were not given the chance to affix their seals on the envelopes and ballot boxes after the announcement of the winner is without substance. Regulation 47 (9) provides that the returning officer shall seal up the ballot papers and other documents relating to the elections as required by these Regulations. Now the manner in which the sealing up of the documents is to be done is found in Regulation 46 (1) (a) (b) and (c) which read as follows:

- "(1) The polling officer or officer of each polling station shall as soon as practicable after the closing of the poll in the presence of such of the candidates and their polling agents as attend, make up into separate packets sealed with his own seal and the seals of the candidates or their agents if they desire to fix their seals -
- (a) the unused and spoilt ballot papers together;
  - (b) the marked copies of the register of voters and the counterfoils of the ballot papers; and
  - (c) the tendered votes list."

A proper construction of the above Regulation is that the candidates and their agents may attend the sealing up if they so wish. Furthermore, Regulation 50 (2) provides,

"Where in these Regulations an act or thing is required or authorised to be done in the presence of the candidates or their agents the non-attendance of a candidate or agent at the time and place appointed for the purpose shall not, if that act or thing is otherwise duly done, invalidate that act or thing."

The sealing up of the relevant documents in the present petition cannot be validly challenged on any ground.

I am of the opinion that the petitioner has succeeded to prove that there was non-compliance with the following Regulations of the Municipal and Urban Councils Regulations, 1987:

1. Regulation 38 (2) in that the poll opened at 12.45 p.m. instead of 8.00 a.m.;
2. Regulation 52 (2) in that the administration of oath of secrecy at Ha Leqele was done by a police officer instead of a returning officer;
3. Regulation 38 (5) in that polling agents of the first, second, third and fourth respondents were admitted to polling stations without written notification of their appointment.

Section 13 of the Urban Government Act No.3 of 1983 reads as follows:

"No election shall be invalid or set aside by reason merely of -

- (a) a defect in the appointment or want of due appointment or title, of the returning officer or of any person assisting him at any election;

or

- (b) a mistake or non-compliance with this Act, if it appears that the election was conducted substantially in accordance with the principles laid down herein and that the mistake or non-compliance is not likely to have affected the result of the election."

There are also two Regulations which guide the Court how to deal with non-compliance with the provisions of the Regulations. Regulation 50 (1) reads:

"No election shall be invalid by reason of failure to comply with any provision of these Regulations relating to elections if it appears that the election was conducted in accordance with the principles laid down in such provision and that such failure did not affect the result of election."

Regulation 67 (b) reads as follows:

"The election of a candidate as a member of Council shall be declared void on an election petition on any of the following grounds which are proved to the satisfaction of the Judge.

- (b) non-compliance with the provisions of these Regulations relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election."

The above two Regulations use the words "if it appears that the elections were not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election." I have already said that as far as

the opening at 12.45 p.m instead of 8.00 a.m. does not seem to have affected the result of the election in any way because by 5 o'clock that evening there were no longer any voters waiting to cast their votes. There is no reason why if there were any people who left for work in the morning they did not come back to cast their votes after work. The petitioner's agent at Lithabaneng did go to her home to have lunch but returned and cast her vote. The voting could not be postponed to the following day when there were no voters still waiting to cast their votes at the closing time or during the last hour before the closing.

The word "principle" is defined in The Pocket Oxford Dictionary as "fundamental source; primary element; fundamental truth as basis of reasoning etc." The primary element of administering the oath of secrecy is to make the candidates and their agents to undertake by naming God that they would not do the thing enumerated in Regulation 52 (3), (4), (5), (6). There is no evidence that they committed any of those acts prohibited by the provisions of that Regulation. In other words the secrecy about those things was kept and they did not divulge any information that affected the results of the elections in any way. Although the oath was not administered by the proper officer it had the effect intended by the legislator on the minds of the candidates and their agents.

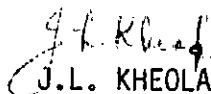
Regarding the fact that the polling agents were not properly introduced with written notifications I am of the opinion that that did not affect the elections in any way. They were not only pointed out to the polling officers by the candidates but the letters were subsequently made before the polls were closed. Their

work is to help the candidates and to represent them at the polling stations in order to identify voters and to represent their candidates when the ballot boxes are sealed up at the various polling stations. No candidate has complained that any agent did not carry out his or her duty according to the provisions of the Regulations.

I come to the conclusion that although the petitioner has proved that there was non-compliance with the Regulations, he has failed to convince the Court that such non-compliance affected the result of the elections.

In the result the petition is dismissed. The petitioner shall pay the costs of the first, second and third respondents because he wrongly brought them to Court. As far as the other respondents and the petitioner are concerned they shall pay their own costs.

The fifth and seventh respondents must approach the Honourable Chief Justice and ask him to make Rules of Court in terms of Regulation 77.

  
J.L. KHEOLA

JUDGE

12th June, 1989.

For the Applicant - Mr. Monaphathi  
For the Respondents - Mr. Lenono.