CIV/APN/194/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAKHABANE HLASOA MOLAPO	PETITIONER
V	
MATTHEWS PIKITI MOHASOANE	1ST RESPONDENT
THE ATTORNEY-GENERAL	2ND RESPONDENT

Before Cullinan C.J., Molai J. and Kheola J. on the 15th day of June, 1993.

For the Petitioner : Mr. N. Ntlhoki
For the 1st Respondent: Mr. L. Pheko
For the 2nd Respondent: Mr. K.R.K. Tampi, Deputy Attorney-General

ORDER

Cases referred to:

(1) Hartlepool Case (1869)19 L.T. 821.

CULLINAN C.J.

This election petition was called on for hearing yesterday. When the matter was called on, Mr. Ntlhoki informed the Court that the petitioner wished to close his case, without giving or adducing any *viva voce* evidence and instead wished merely to rely upon the verifying affidavit which he had filed in support of the

petition.

Thereafter the Court pointed out the provisions of section 104(3) of the National Assembly Election Order, 1992 (No.10 of 1992) ("the Order") which read thus:

> "(3) At the trial of an election petition, the Court has power:
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> (a) of its own motion or on the application of a party to the petition, to compel the attendance of witnesses and the production of documents; and
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> (b) to examine witnesses on oath; and
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> (c) to punish a contempt of its authority by fine or imprisonment."

The Court then invited submissions on the aspect as to whether or not those provisions empowered the Court to compel the petitioner to give evidence. Mr. Ntlhoki submitted that the Court was empowered to do so. For their part, Mr. Pheko and Mr. Tampi submitted that the petitioner should give evidence, that he had made a grave allegation as to certain qualities possessed by the ballot papers used in the election, and that public policy required that he support such allegation with *viva voce* evidence or in the least subject himself to cross-examination.

Mr. Ntlhoki then made a number of submissions in support of his request that the Court should not require his client to go

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into the witness box. As I see it, he raised a number of matters which affect the merits of this and the other petitions filed. I do not consider that this is an appropriate time to consider such matters, much less to make any finding thereon and I do not propose to advert to them in this ruling.

Mr. Ntlhoki however submitted that this petition was not properly before the Court and that the Court lacked jurisdiction in the matter. He relies upon the provisions of section 106 of the Order which read thus:

> "106 (1) If the Court of Disputed Returns so orders, the petitioner must provide as security for the costs of trying an election petition such amount, not exceeding M1,000, as the Court specifies in the order.
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> (2) Security ordered under subsection (1) is to be provided within such period as the Court specifies in the order.
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> (3) If an order under subsection (1) is not complied with within the specified period, the election petition is taken to have been withdrawn."

The Court in fact, on 19th May, 1993, ordered that the petitioners in all 28 petitions lodged (excluding CIV/APN/196/93) should provide security in the amount of M300; in the case of petition CIV/APN/196/93 security was fixed at M500. In any event, Mr. Ntlhoki submitted that security had in fact been provided in only six election petitions, and that the other

twenty-two petitions, including the present petition, must be "taken to have been withdrawn". Further, he submitted that of the six petitions in which security had been filed, only three of those had been set down for hearing, and that the other three were affected by the unilateral notices of withdrawal served in all twenty-eight petitions on 3rd June, 1993 and on which the Court made a ruling on 7th June. In sum, Mr. Ntlhoki submitted that only three of the twenty-eight petitions filed, now remained before the Court.

Mr. Pheko observed that the Court's order for security of costs did not stipulate any period within which security was to be provided, and that therefore it could not be said that the order had "not been complied with within the specified period". When asked by the Court as to how the order should then be interpreted, he submitted that security must be provided within a reasonable period and that as the Court's order was made on 19th May, it could not be said that the intervening period was unreasonable. For his part, Mr. Ntlhoki submitted that where security is ordered, it must be provided before the commencement of the particular proceedings.

There are then two issues for the Court's decision, namely, whether this petition is properly before us, and if so, whether the Court can compel the petitioner to give evidence.

It seems to me that the reference to "a reasonable time",

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is taken from rule 48(4) of the Rules of the High Court, where the High Court, having ordered that proceedings be stayed until its order that security be given is complied with, may then dismiss any proceedings instituted, "if security be not given within a reasonable time". As I see it, the stipulation as to "a reasonable time" is necessary, in view of the indefinite period involved in the High Court's first order in the matter. It must be stressed that security for costs in the High Court is a matter of practice, covered by subsidiary rules of court. Security for costs is however covered by substantive legislation in the matter of an election petition, and section 106(2) of the Order, contemplates that the Court will specify a period within which security is to be provided. Further, section 106(3) provides that the petition is "taken to have been withdrawn", if security is not provided within the period specified in the Court's order. I cannot see that the Rules of the High Court, subsidiary legislation, can be prayed in aid in interpreting substantive legislation, that is, the Order.

Rule 10(2) of The Court of Disputed Returns (National Assembly Election Petition) Rules, 1993 prescribes that security must be furnished within five days. The Order refers however to "such period as the Court specifies in (its) order". It will be seen from section 106(1) that the power to order security is discretionary. Similarly, the period fixed in the Court's order is also a matter of discretion. In that event the provisions of rule 10(2) are a clog on such discretion and must be regarded as

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ultra vires the Order.

Again, rule 19 of the Court of Disputed Returns (National Assembly Election Petition) Rules, 1993 provides that,

> "The Rules of the High Court, shall, so far as they may be applicable, apply to any matter for which provision is not made in these Rules."

That provision does not take the matter any further; the former Rules have thus been applied to the interpretation of the latter Rules: they cannot be applied to the interpretation of the parent Order, under which the said Rules are made. As I see it, therefore, the order for security made by the Court under the Order, is defective and is of no effect. In any event, for the avoidance of doubt I would order that it be rescinded.

As for the second point, I agree with Mr. Pheko and Mr. Tampi that the gravest of allegations has been made in the election petition. I agree that it is in the public interest that such allegation should be tried in open court. Section 104 speaks of the "*trial* of an election petition in open court" and plainly the legislation and all previous legislation, and indeed the common law, contemplates that election petitions must be tried by *viva voce* evidence. It has been said so many times in

so many ways that the trial of an election petition is not to be compared with an ordinary civil action, and quite clearly the court has a public duty to perform, its powers being quasi-inquistorial in the matter.

Mr. Ntlhoki states that there is no question of his client withdrawing the allegations made. Then it seems to me that having made them by affidavit, his client should be prepared to substantiate them by *viva voce* evidence and subject them to the test of cross-examination. It seems to me that in the least it can be said that his civic duty clearly indicates that he should take this course.

I am not then satisfied with the reasons advanced by Mr. Ntlhoki. Suffice it to say that it is completely new to my experience that the petitioner in an election petition should seek not to give evidence. The question remains nonetheless as to whether the petitioner can be ordered to give evidence. It will be seen that the provisions of section 104(3)(a) seemingly connote a difference between "a party" and "witnesses". It may well be that the word "witness" is used to describe persons, other than the parties, who give evidence before the Court. In the Hartlepool case (1), decided in England in 1869, the petitioner apparently declined to give evidence, and the Court regarded such as a form of withdrawal, meriting "a special report to that effect to the Speaker", but there is nothing to indicate that the Court ever compelled the petitioner to give evidence

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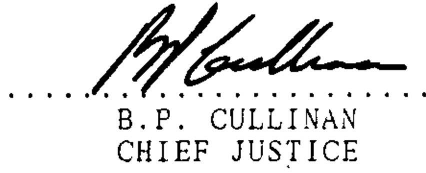
(see Halsbury 4 Ed. Vol.15 para.800) I am in some doubt in the matter. In any event, whatever about the ordinary witness, I do not see that it is in the interests of justice that the Court should be seen to force any party to an election petition into the witness box. In all the circumstances, if the Court has any power in the matter, that power must be discretionary and I would decline to order that the petitioner must give evidence.

Delivered at Maseru This 15th Day of June, 1993.

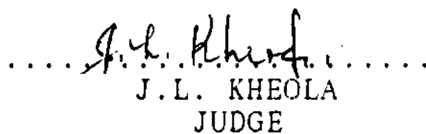


B.P. CULLINAN
CHIEF JUSTICE

I CONCUR

B.K. MOLAI
JUDGE

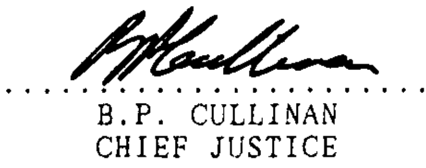
I CONCUR



J.L. KHEOLA
JUDGE

CULLINAN C.J.:

The Order of the Court therefore is that the order for security of costs dated 19th May, 1993 is hereby rescinded, and that the petitioner's case is closed.



B.P. CULLINAN
CHIEF JUSTICE