

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.3/93
CIV/APN/400/92

IN THE MATTER BETWEEN:-

MACHITJE DAVID TLABA	1ST APPELLANT
MALITSANE BONIFACE MOTENE	2ND APPELLANT
ANDREAS RAFONEKE	3RD APPELLANT
MOLUOANE MOLUOANE	4TH APPELLANT
MOHLOKI AZEKIEL KHAKHAU	5TH APPELLANT
LENKA ARIC NTS'IHLELE	6TH APPELLANT
CAROLINE MACHELE MOKENELA	7TH APPELLANT
MAEMA MAKHETHA	8TH APPELLANT
MOLETSANE RANYALI	9TH APPELLANT

and

T. KULEHILE	1ST RESPONDENT
P. NQOSA	2ND RESPONDENT
L. MAFATLE	3RD RESPONDENT
R. LECHESA	4TH RESPONDENT
L. LECHESA	5TH RESPONDENT
P. MOLAOA	6TH RESPONDENT
V. KOTELO	7TH RESPONDENT
M. BOSIU	8TH RESPONDENT
MAMOHAU MALAHLEHA	9TH RESPONDENT

CORAM:

Leon, J.A.

Steyn, J.A.

Browde, J.A.

JUDGMENT

Leon J.A.

On the 17th November, 1992 the nine appellants, by Notice of Motion, brought an urgent application in which the following relief was sought:-

- 1- Dispensing with the normal periods of service provided by the Rules
2. directing the Respondents to convene within seven days of the granting of the order an annual general meeting of the IKETSETSENG Private School and, upon their failure to do so (3) authorising the applicants or any of them to convene the said meeting:
4. directing the respondents to pay the costs of the application in the event of their opposing it.

On the 7th December, 1992 the learned Judge a quo granted the relief sought in the form of a rule nisi. The matter became opposed and on the extended return day, the learned Judge, after hearing argument, discharged the rule with costs. It is against that order that the appeal is brought.

Parents of pupils at the school are ipso facto members of its Governing body. The appellants brought the application as members of such body being parents of pupils at the school. The Respondents are members of the executive Committee of the school.

The appellants' case is set forth in the affidavit of the first appellant. He has never regarded the Respondents

as being a duly elected committee of the school nor does he know when they were elected, if indeed they were. He did not receive any notice of, or invitation to, such meeting. However he accepts the Judgment of this Court in the case of KHAKETLA and IKETSETSENG (C of A (CIV) No.1/92 in which the Respondents were declared to be the lawful executive of the school. But when he heard that in terms of the Appeal Court judgment Khaketla was directed to hand over to the Respondents the property and the management of the school he and the majority of members of the Governing Body of the school became apprehensive because:

- a) The period of office of respondents expired in about August 1991 "as appears more fully from the affidavits filed in the aforesaid case against the said Khaketla." (the affidavits are not put up).
- b) Lefu Lechesa, who was a Trustee and to whom Khaketla had been ordered to hand over the property of the school, lost his membership of the Governing Body at the end of 1990 by virtue of the fact that his child ceased to be a pupil at the school having completed the last class thereof. But in the next sentence the first appellant states that Mrs. Kotelo withdrew her child from the school in June

1992 before the Appeal Court judgment.

The first appellant alleges that since their term of office came to an end the respondents had failed to call an Annual General Meeting in terms of the Constitution of the school. They had also appealed to parents over the radio and in writing to stop paying school fees to Khaketla but to pay them into an account opened by the respondents at the Lesotho Building Finance Corporation.

Because of their apprehension the appellants had prevailed upon Khaketla to delay the handing over of the school to the respondents in terms of the judgment of this Court.

The allegations made by the first appellants are supported by the others who each aver that he or she had never received any notice of, or invitation to, any meeting of parents convened by the respondents.

The application was also supported by one Paleo Tlelai who built and donated a block of buildings housing the school and who identified himself with the fears and sentiments expressed by the

appellants.

Affidavits opposing the application were deposed to by the first, fourth, sixth, eighth and ninth respondents. No service could be effected upon the second and third respondents nor was the fifth respondent served personally. Copies of the papers were left for him with the fourth respondent.

The allegations made by the appellants are very much disputed on the affidavits. The first respondent is the Chairman of the Executive Committee of the school. He states that the second and third respondents have ceased to be members of the Executive Committee.

With regard to the calling and holding of meetings the averments of the first respondent may be summarised as follows:-

- a) The first meeting was held on 1 September 1990 at which the Executive Committee was elected. The pupils of the school were given letters of invitation to hand to their parents or guardians. Notice of the meeting was broadcast over Radio Lesotho and was also

given at all major churches in Maseru. The meeting was well attended by many parents or guardians.

- b) At a meeting of the Governing Body held on 10th December, 1991 the first appellant and his wife were present and signed a petition requesting that Judgment in CIV/APN/317/90 be delivered. A copy of the list of petitioners is put up.

The first respondent claims that the first appellant's attendance at this meeting called by the Executive demonstrates his dishonesty when alleging that he was never given notice of any meeting.

- c) At a meeting held on 17 February 1991 the sixth appellant was present. A list of those present which includes the name of the sixth appellant is annexed.
- d) The 9th appellant attended meetings on 9 June 1991, 18 August 1991 and 22 January 1992. Lists of those who attended including the name of the 9th appellant are annexed.

- e) In respect of the years 1991 and 1992 Annual General Meetings of the Governing Body were held notice of which was given in the same manner as indicated above. At those meetings the present executive committee was elected unopposed save that two new members were elected to replace the second and third respondents.

- f) The period of office of the executive committee has not expired while the next Annual General Meeting would be called after the 31st December 1992 in terms of the Constitution.

The first respondent also draws attention to article 7 of the Constitution which provides that Special General Meetings may be called at any time by the Committee and shall be called by the Secretary on a requisition from ten members of the Governing Body. He contends that the appellants should have exhausted their remedies under the Constitution before approaching the Court.

With regard to the position of Mrs. Khaketla the first respondent states that she did not wish to hand over the school's management and property because her attorney Mr. Sello, at a meeting held on 8 November 1992 at the school's premises, informed

those present that Mrs. Khaketla had not lost a case and that the judgment of the Court of Appeal was difficult to understand. Contempt proceedings were being pursued against Mrs. Khaketla.

In the answering affidavits the fourth, sixth and eighth respondents associate themselves with the allegations of the first and ninth respondents.

The ninth respondent is the Principal of the school and a member of its Executive Committee. He confirms that the present executive committee was duly elected on or about 1 September 1990 by the Governing Body and at Annual General Meetings they were elected unopposed with the exception of the second and third respondents in 1992. Since September 1990 whenever the Executive Committee called meetings notices were handed to each child to pass on to his or her parents. Announcements of such meetings were also made on the radio and in churches at Maseru. There never was a meeting which was limited to those parents and guardians who were paying their fees at Lesotho Building Finance Corporation.

In his replying affidavit the first appellant draws attention to the fact that no dates or venues are given of the alleged annual general meetings for the years 1991 and 1992 nor are copies of the notices, agendas or minutes put up. He does not deny that he attended one or two meetings called by the respondents but denies that he was ever invited to or attended any meeting where the

respondents or anyone else were elected to a committee to run the school. Similar allegations are made by the other respondents in their replying affidavits and in ten supporting affidavits.

In his Judgment the learned Judge held that the appellants had approached the Court prematurely as they had not exhausted their remedies under the constitution of the school. In terms of Article 7 they could have called a Special General Meeting which could have called upon the respondents to hold an Annual General Meeting at which a new committee would be elected.

Reference is also made in the judgment to the respondents' allegations that Annual General Meetings were held in 1991 and 1992 in respect of which notice was given. Even if they applicants did not receive notices of such meetings, in terms of the proviso to Article 8 of the Constitution nothing done at any meeting shall be invalid merely because some member or members have not received notice. This finding assumes the correctness of the respondents' averments that annual general meetings were held for 1991 and 1992.

It was contended on behalf of the appellant by Mr. Sello that the onus lay upon the respondents to prove that annual general meetings were held. However counsel was correctly constrained to concede that the appellants bore the onus of proof. It was they who alleged that general meetings had not been held and, in accordance with the general principle that he who alleges must

prove, it was the appellants who had to prove that fact.

I am disposed to think that that onus was not discharged. In the course of his pertinacious argument Mr. Sello submitted, in effect that the denial by the respondents was a bare denial. But it was more than that. It is true that details were not provided of the precise time and place where such meetings were held nor were copies of the agendas or notices put up. On the other hand details were alleged of what had taken place at the meetings and the manner in which notice was given (i.e. by letters to the pupils and by announcements on the radio and in churches) were fully disclosed.

In any event it is clear that, as the learned Judge a quo found, the appellants in terms of Article 7 of the Constitution could have demanded that a Special General Meeting be called. In terms of that Article the Secretary is bound to call such a meeting on a requisition in writing from ten members of the Governing Body. It would hardly have required one of the labours of Hercules for such a meeting to have been summoned. On the contrary there are nine appellants and ten supporters on these papers. To summon such a meeting where an annual general meeting would have been insisted upon was a matter of ease.

Mr. Sello suggested that it would have been an exercise in futility but there is nothing in the papers which even hints at that.

In truth the appellants approached the Court, and, what is

more, as a matter of urgency, without having exhausted the provisions of their own constitution and the remedy provided thereby.

This appeal is without substance and in my view must be dismissed, with costs.



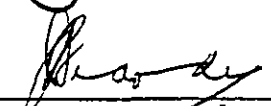
R.N. Léon
JUDGE OF APPEAL

I agree



J.H. Steyn
JUDGE OF APPEAL

I agree



J. Browde
JUDGE OF APPEAL

Delivered at Maseru this 22nd day of January.....1994.