

IN THE HIGH COURT OF LESOTHO

In the matter between:

BOFIHLA NKUEBE

Applicant

and

MOLEBATSI KHAILE
NATIONAL EXECUTIVE COMMITTEE
BASUTOLAND CONGRESS PARTY
BASUTOLAND CONGRESS PARTY
CHIEF ELECTORAL OFFICER

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent.

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 2nd day of March, 1994.

As I indicated yesterday, I am only going to give you the result after considering the application. The applicant claims that he is a registered member of the third respondent and it is common cause that for the years 1991 and 1992 he was such a member and he has produced cards to show that during those two years he was a member of the third respondent.

Now he alleges that for the year 1993 he paid his subscription to the second respondent because his local branch refused to register him on the ground that he was not staying or living at their place but was living at the Arrival Centre. He does not deny that he was actually not living there but was living at the Arrival Centre.

He actually says that he paid his subscription fee to the Secretary General of the third respondent and that the latter received his subscription fee and issued him with a membership card. Now the Secretary General has categorically denied that the applicant ever paid the subscription fee to him and that he accepted it.

In his answering affidavit he challenged the applicant and demanded that he must produce the receipt which was issued to him when he paid his subscription fee as proof that he made the payment.

I shall now read from the constitution the procedure that has to be followed when one is paying one's subscription fee. This appears in section 3 Part I C (2) which reads as follows:

"Application for membership shall be made on the form which is accompanied with subscription fee of 25c, the form is obtainable at the Constituency Office. This form plus subscription fee shall be forwarded to the Secretary General in terms of section 3 (b) who shall put it before the National Executive Committee of the party to decide its admission or rejection. The National Executive Committee has the power of rejecting the application or applications of those who wish to be the members of the committee and shall give reasons to the Constituency Committee concerned.

Every new member shall be on trial for 18 months before he/she becomes a full member".

Part 2 (a) reads as follows:

"All those who have filled the application form and

paid subscription fee, shall be regarded as members. He\she that shall receive the money shall issue the receipt which shall be kept by the applicant until he has been issued membership card by the National Executive Committee. 5 cents of the subscription fee will remain at the local branch, 10 cents with the constituency committee 10 cents be forwarded to the National Executive Committee which shall be forwarded to the Secretary General with the application form. When an applicant has been rejected his\her money shall be refunded.

Subscriptions shall be renewed annually and the 25 cents has to be paid before June the 30th and all those who fail to pay by that date shall not be registered as members "

Now the membership card for 1993 which was produced by the applicant before this Court differs in some respects from the previous cards. It is common cause that it was not signed by the Constituency Secretary but that probably can be explained by saying well, he refused to accept his money so he came to the headquarters. The second difference is that the year is hand written while in the previous years it was printed.

Now the most serious flaw in the applicant's case is his failure to produce a receipt. The procedure which is described in the constitution provides that when you pay your subscription fee you will be given a receipt. The applicant is not all that, well I will not use the word "stupid" but he is not a man who can part with his money without receiving a receipt. He is well known in this country, he writes in newspapers, he is a well educated man who cannot part with his money especially under the

circumstances that were prevailing at the time. It was clear that his membership was being refused by the local branch. And for him to pay at the headquarters, surely, he ought to have realised that he must have the receipt because "these people of mine at the local branch are up to something."

The Secretary General of the third respondent has actually challenged him to produce that receipt. He has not produced that receipt and he has not given any explanation as to why he is unable to produce it. Sometimes people lose receipts and say so when they are challenged to produce a receipt. He has not said anything about that.

So, as I say this is a serious flaw in his case. I think it casts a little bit of doubt as to whether the card that he has produced here which has those minor defects, I could not rely on those minor defects as conclusive evidence that it was not produced properly. I could not rely on those alone. But taking them together with the other things that he is now unable to produce a receipt, he is now unable to explain why he has not got a receipt. Those defects create a grim picture because the procedure that is in the constitution of the third respondent demands that when you part with your money you must be given a receipt. That is what it says.

So, as far as the membership of the third respondent is concerned, I am of the view that the evidence that is before me by the applicant really leaves much to be desired.

I now come to the nomination. When the second respondent refused to endorse and present the applicant as its candidate at Qeme, the applicant decided to stand as an independent candidate. In other words, by his act or words he represented to the fourth respondent that 'I am an independent candidate'. This representation I find that it has a certain detriment to the fourth respondent because in the light of that conduct on the part of the applicant, the fourth respondent took certain steps to prepare for the by-election. He printed the ballot papers and as usual, it seems that the fourth respondent, or his bosses like to print these papers Overseas. He went back to wherever it is, whether it is Denmark like in the previous general elections, I do not know and had those papers printed. I do not think that Denmark will do that free of charge this time, it may be that the fourth respondent or his bosses did pay something for that. Now, for the applicant to come back and say that 'now I want this nomination to be cancelled so that I can make arrangements or persuade my party to present me as their candidate', surely that is a serious prejudice to the fourth respondent who has already gone into such expenses. It may not be a lot of expenses because it is only one constituency. It is not much money but there is

a little bit of prejudice on the fourth respondent. Even the other respondents, that is to say the second and the third are also going to be prejudiced because of this conduct of the applicants. When he had this quarrel with them he told them that well, if you do that then I am going to stand as an independent candidate. Why did the applicant not at that stage as soon as he discovered that this question of membership, and it came rather late, why did not he interdict the fourth respondent and everything so that it came to a standstill? In the meantime he could have cleared his membership of the third respondent. He did not do that, and that was the only procedure that I regard would have been proper. To stop the nomination process at that stage and say "No, I want these nominations to be stopped because my party is trying to reject me and yet I have been its member throughout. I want to fight my membership of the party before the nomination is done." Well, he allowed the nomination to go on and made a representation that he was an independent candidate. That was a serious mistake on his part. He should not have made a thing like that.

And now, is it possible for this court to reverse the process that has already been completed? I think that is almost impossible. On the first place he has failed to show that he is a member of the third respondent. That is the first ground. Secondly, the elections are just about two\three weeks from now

and that is his own fault, because he should have stopped the process right at the start

Now, there was this principle of Estoppel which was raised by the applicant's attorney, Mrs Kikine, but that was thrown back at her, that it was her client who has to be estopped from doing all these. He can not make a representation that "I am now standing as a private\independent candidate" and then later change and say "I challenge this I want to stand as a candidate of my party." I think that there is some substance in the argument that he is the very person who has to be estopped from behaving in the manner that he has done

Now There was the question of non-joinder. I considered this and found that when elections are set down for a particular date there are a lot of preparations that are made by everybody The villagers, the little committees in the village go out and talk to these people to vote for a particular person, for a particular party, gearing all their energies and resources to the date that has been set. Now, if all of a sudden that date is postponed, then it means that the preparations that were done by everybody in that constituency will have to be delayed and it means that the costs of campaigning will increase Well I do not know whether in this country the costs were so high but in some other countries like U S A you pay quite a lot for campaigning

Even in this small country I think you do incur some expenses. You travel, you take your people to certain places and you pay for that and then if the whole thing were to be started all over again, I think everybody would have to be affected. I think that this question of non-joinder which was raised by the fourth respondent has some substance in it.

The other candidates who have now settled down who are nearing the completion of their campaign would have to start all over again and if this by-election were to be postponed but for the reasons that I have stated, I do not think that it would be a proper thing to do to cancel these nominations and then force everybody in the constituency to start all over again for the reasons I have already stated.

I think these are the main reasons which will appear in my reasons for judgment which will take sometime to be written. But for anyone who will need these reasons urgently, I have given the outline, it is there in the record of this court, he can have it transcribed, go ahead because as Mrs Kikine pointed out on behalf of the applicant, this is a matter of life and death so, she may want to take action immediately after I have made an announcement of my finding.

For these reasons that I have stated, but before I come to

that, there was a mention about whether these prayers that appear in the application's application can be entertained, but I think that can be answered by saying Now that the nominations have been done, now that ballot papers have been prepared, those prayers can no longer be entertained They just came too late to be entertained by this Court.

For these reasons, the rule is discharged with costs.


J.L. KHEOLA
JUDGE

2nd March, 1994.

For Applicant	-	Mrs. Kikine
For 1st, 2nd, 3rd Respondents	-	Mr Pheko
For 4th Respondent	-	Mr. Mohapi.