CIV/APN/75/94

IN THE HIGH COURT OF LESOTHO

In the Application of

LEONARD NTSOEBEA — Applicant

vs

BASOTHO NATIONAL PARTY — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 30th March, 1994

At about 1.35pm on the 11th day of March 1994 Advocate M. Mafantiri appeared before me to move an urgent application of the Applicant. The Orders prayed for were framed as follows:

1. That a Rule Nisi be and it is herby issued returnable on the 11th day of March 1994 calling upon the respondent to show cause, if any, why:-

   (a) The periods of notice as required by the Rules of Court should not be dispensed with in account of urgency.

(b) Declaring the general conference of the Respondent scheduled for 11th and 12th March 1994 null and void.

(c) Declaring the executive committee of the respondent unconstitutional as its term of office has expired.

(d) Directing the respondent to elect an interim committee forthwith from among members of the purported general conference.

(e) Interdicting the respondent from continuing with the purported general conference and elections of the Respondent's executive committee forthwith.

(f) Respondent to pay for the costs of this application.

2. Prayers 1 (a), (d) and (e) to operate with immediate effect.

I refused to grant orders (d) and (e) I did grant the Rule Nisi only to enable argument by both parties on prayers (b) and (c) on Monday the 14th March, 1993. I need not now explain fully why I refused to grant the other orders except to say that it was not in the interest of justice, it was extremely inconvenient and it would result in such utter confusion to which this Court felt

disinclined to lend its hand. The order prayed for in (d) I found difficult to understand its purport and implications.

The parties appeared before me represented by Mr. H. E. Phoofolo and Mr. A.M. Ntlhoki Both parties persuaded me that they should file their additional papers to be ready to argue on the 18th March, 1994. Hence the argument which proceeded accordingly and was postponed to the 23rd March 1994. The Applicant had filed his founding Affidavit accompanied by the constitution of the Respondent (marked Annexure LN1). The Respondent filed his answering affidavit which was accompanied by not less than ten annexures - LJ1 to LJ17. The Applicant filed a replying Affidavit to which was annexed LN2.

The Respondent's conferences are provided for and governed by its constitution in the following clauses which Counsels have referred to in their argument. The Annual National Conference - clause 17, (a) (b) (c) (i) and Special National Conference - clause 17 (c) (ii). The procedure for amendment of the Constitution is to be found in clause 30 of the Constitution. It is clear that the whole case of the Applicant revolves around the circumstances of the general meeting of the Respondent of the 11th and 12th March 1994 and the interpretation of the three mentioned clauses of the Respondent's Constitution. I need to quote them in extenso.

"17(a) Dates and Venue for Annual Conference

(i) The Annual Conferences shall be held in the month of December, and the exact dates shall be announced not later than 90 days before they are held.

(ii) There can also be a special national conference which can be convened at the request of at least ten members of N.E.C. or two thirds of people qualified to attend the ordinary annual conference as delegates.

30. AMENDMENTS OF THE CONSTITUTION

(a) No amendments of any kind shall be made to this Constitution unless so resolved at an Annual General Conference or the Special Conference.

(b) Amendments by individual members of the Party shall be proposed in writing to the National Executive Committee at least 6 months

before the holding of a conference. Such a proposal should have the support of at least nine members of the N.E.C., shall be circulated by the Secretary-General among delegates to the Annual Conference at least 90 days in advance.

(c) Amendments to this Constitution shall require a two-thirds majority of delegates to the Annual Conference, or special Conference." (my underlinings)

The Applicant is a member of the Koeneng Constituency No. 15 of the Respondent, having been adopted into the Conference as a proxy in the place of the Chairman of that Constituency who was the Vice-President of the Respondent. The later participated on the side of the Executive Committee in the conference It is said this is the practice of the Respondent and to that extent the credentials of the Applicant were accepted as valid. This is shown also in Annexure LJ11. I do observe that one Ralepesho Makhatha is one such other proxy (see LJ17) I am satisfied that the Applicant is entitled as a member of the Respondent to

contest the legality of the Conference that is subject of these proceedings. Applicant was also Vice Chairman of his Constituency.

As could clearly be gathered from the parties' arguments the following matters appear to be common cause:

(a) That the Conference was not held during the month of December 1993 but about seventy three (73) days later, that on the 11th and 12th March 1994.

(b) The Conference was in the contemplation of clause 17(c)(ii) the Respondent

(c) The Conference was not intended to amend the Constitution in the contemplation of clause 30 of the Constitution.

(d) LJ5 (LJ5A) being circular No.7 dated the 1st December 1993was in fact made and received as appointing the dates of the Conference for the 11th and 12th March 1994.

(e) It is following upon facts in (d) above that the Applicant and others duly attended at Conference in response to the notice.

(f) The outgoing Executive Committee of the Respondent proceeded to function until the 12th March 1994 when it was voted out, subject to the procedure specially prescribed for the President namely a vote of confidence as provided for in clause 15(a).

(g) The meeting of the 11-12 March 1994 was intended to be an Annual General Meeting in terms of clause 17(a) (b) (c)(i) and not a Special National Conference envisaged in clause 17(c)(i).

(i) It is the Executive Committee of the Respondent which appointed the Annual General Conference.

I believe that the National Executive Committee of the Respondent (NEC) was not bound to call a Special National Conference in order to nor to apply to the Conference to extend its period of Office, as long as it believed rightly or wrongly that it was capable of calling an Annual General Meeting even soon after the month of December 1993. I am not persuaded that the NEC had to adopt this special procedure even for this reason that its term of Office had expired. I find that the NEC despite its period of office having expired could function on until taken out of office. Whether one calls it a trustee or *de facto* committee that is not quite important. See G.P. RAMOREBODI vs

N. MOKHEHLE & 6 ORS (CIV/APN/139/91 B. P. Cullinan C.J. 18/06/91, page 13. There was no vacuum. As a fact the NEC continued to function. That is why I find this mechanism or strategy that the Respondent speaks of at paragraph 8 Re : 5.5 of the Affidavit of LEKHOOANA JONATHAN that "..... the President and the leader of the Respondent, whose term of office had expired, decided on his own to re-allocate the rest of the portfolios of the National Executive Committee........" does not make sense as an answer to whether or not the NEC's term of office had expired. It may be true that was done but it was ineffectual. Indeed if the term of office of the NEC had expired I do not see why that of the President should not have expired. It therefore means the NEC continued to "lawfully" perform all the functions of a NEC. But that is not what this Court is faced within.

I do not agree that the NEC was not empowered to appoint an Annual General Meeting. I do not accept the argument that since the term of office of the NEC had expired it could then adopt the provisions of clause 17(c)(ii) that is to appoint a Special National Conference in order to deal with this problem that faced the NEC, namely, to appoint and conduct a Conference that happened to fall after the month of December 1993. I do not see how a special National Conference could cure the alleged defect. I do not see how a Special Conference would cure that defect more

or better than an Annual General Meeting. I found it difficult to appreciate Applicant's argument that a Special National Conference would have dealt better with the Conference intended for the 11th and 12th March 1994 because the Conference sought to or had the effect of amending the Constitution. Whether a Conference appointed to amend a Constitution is a Special one or an Annual one is not important (see clause 30(a)). What is important is that it must comply with the provision of clause 30(b) and (c) of the constitution. Otherwise it cannot amend the Respondent's Constitution.

There is no doubt that the Applicant was dissatisfied with the following aspects about the Respondent's General Meeting namely:- The holding of the meeting after the month of December 1993 and the participation of certain dependants of one LEBAKAE NCHAPA who was Chairman of Constituency No.9. This latter complaint was, in his reply persisted in by Applicant's Counsel. No clear case on facts or at all was made as to this argument. It should not worry this Court anymore. It is not quite clear as to how long and since when the Applicant has been harbouring his complaint about the first aspect. But I am persuaded that he must have laid it before the Conference, where most probably he was voted out or there was quite a negligible support, on the point, from the membership. But be that as it may, I am not persuaded that he was estopped from later raising it up by way

of an application in Court as he did, seeking to declare the proceedings null and void. All members are bound by the decision of the majority at a properly convened meeting, but any individual member may act to protect the interest belonging to all, in his personal capacity. Applicant seems to have spoken out in the right circumstances. We did not waive his rights. (See SARIDAKIS t/a AUTO WEST v LAMONT 1993(2) SA 164(c), JOWES & OTHERS v TRUST BANK OF AFRICAN LTD AND ORS 1993(4) SA 415(c)). Participation does not per se constitute a waiver of an irregularity (See MISTRI & SON v NATAL CIGARETTE & TOBACCO DISTRIBUTORS ASSOCIATION LTD. 1958 1 PWF 2(D).

The NEC of the Respondent stated that as long ago as 10th August of 1993 they became aware that they would be unable to have the Annual General Meeting take place in December 1993. There was by reason of the failure of the different Committees to be re-elected and to be put in place to be able to forward delegates to the Annual Conference. This had not fully been done as at November 1993. Hence the meeting of the NEC of the 18th November to address the issue. It then ended up the Annual Meeting being appointed on 1st December 1993 for the dates of 11th and 12th March 1994. I believe therefore if in fact the appointment of the Annual General Conference had been made as early as the 1st December 1993 then the dates of the 11th and 12th March are well outside a period of 90 days as required by

Clause 17(a)(1) of the Respondent's Constitution. The NEC said it was not easy to assemble the Committees in time. That is their reason of the failure to have the Conference in December 1993. The Applicant says that, while not disbelieving the Respondent in its alleged inability to raise these Committees in time, that this was due to the negligence of the Respondent. Applicant goes further to say that the Respondent NEC became *mala fide* by not doing its work properly with the resultant delay. Applicant did not go further to boldly state that there was deliberateness in the failure to organize the Committees in time. I would not find that from the papers even from the arguments, I was persuaded that there was *mala fide* nor deliberateness. Nor do I find that the NEC of the Respondent caused (in bad faith) the impossibility of holding the Conference during the month of December, 1993.

The Respondent is a political party in this country. I believe that it is one of the three biggest in the country. For that reasons matters concerned with the Respondent over its activities in electoral contests and disputes between its members are bound to call for national interest and a considerable amount of anxiety. This seems to highlight the fact that this dispute is a serious dispute which ought to be dealt with expedition and which would have significant ripples or impact in the horizon of the national politics in this country. It is for that reason

also that the judgment in the matter ought not to be delayed. It is a matter of national interest. Being a political party the respondent is an Association registered at the Law Office in terms of Societies Act No.22 of 1966. This is common cause.

An Association is founded on contractual basis " a contract suigeneris which does not fall within any of the well defined classes of contracts known to our law", i.e. in Cape of Good Hope Permanent Building Society (1898) 15 SC 323 at 326. Since the Constitution is a contract it must be constructed according to the rules of Constitution which are applied to contracts in general (see GARMENT WORKERS VULLOW WESTERN PROVINCE vs KEERRY 1961(1) SA 744(1) and JACOBS vs APOSTOLIC CHURCH OF SA 1992(4) SA 172.) We safely should now consider the question as to whether (a) the Respondent's failure to hold the Annual National Conference is a breach of the Constitution by analogy with a breach of a contract between members or the NEC and members by another extension? If it is a breach is it such a breach that it entitles the Annual General Conference to be vitiated and declared null and void? Was this breach actuated by impossibility of the NEC of the Respondent to perform in time on the part of the NEC? If so is such impossibility a defence in the application to declare the Annual General Conference of the Respondent null and void. If the impossibility relate to the inability only to hold the conference in December 1993, but which

conference was ultimately held in March 1994? Does this remedy an otherwise existing defect? In other words is time of essence in the interpretation of clause 17(c) 1 of the Respondent's Constitution?

Counsels have taken a great deal of time in debating the twin concepts of waiver and estoppel. I suppose that it was in their fair estimation that this concepts would have a final bearing in this judgment. I need to borrow quotation in an English case of PANCHAUD FRERES SA vs E.T. GENERAL GRAIN CO. (1970) 1 LOYIDS REPORTS 53 where Lord Denning said

> " .... when "waiver" is used in the legal sense, it only takes place when a man, with knowledge of breach, does on unequivocal act which shows that he has elected to affirm the contract still existing instead of dissaffirm it as, instance, in waiver of ferfeiture. In the present case Mr. Justice Roskill held that these buyers had not waived the right to reject for late shipment because they had not got actual knowledge of the breach. At most they had constructive notice of it; and our commercial law sets its face resolutely against any doctrine of constructive notice.

> "The present case is not a case of waiver strictly so called. It is a case of estoppel by conduct. The basis of it is that a man so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which has taken to be settled or ....."

Except that I have made my pronouncement in paragraph 8 of this judgment to say the Applicant had not waived his right to claim and neither would he be estopped to claim by reason of his participation in the Conference, I think that the judgment should revolve on some crispier issues such as what follows immediately. In no way do I under estimate Counsels great attachment to their argument in the issues of waiver and estoppel.

The description of an Association as a contract "suigeneris" become very relevant and all important when one considers that the concepts of performance, impossibility of breach and more become not very easy to harness. This can be explained in that the great part of the law of contract deals with concepts of specific performance in commercial setting most of the time, so that situation of performance of "holding a conference through a notice of less than 90 days during the month of December" does not easily agree to the usual mould of for example sale, delivery or transfer, as examples of transactions typical in the law of

contract. But there is no doubt that the two elements of ninety (90) days and the month of December are elements dictating that certain things are to be done at certain times in terms of clause 17(c)(i) of the Respondent's constitution. It of great importance now to investigate of the effect of the all important word "shall" which all have underlined.

I am most indebted in the forceful submission and the wholesome heads of arguments which both Counsels made in their debate. This ought to be an everyday occurrence in this Court. The meaning of the word shall in clause 17(c)(i) was given quite a considerable treatment. I am satisfied that one should take into account and consider the overall scope and object of the provision in which the word shall has been used. In this instance the Respondent is a political party with various constituent bodies such as village, locality, constituency committee. All these have to put forward delegates to the annual conferences which comes periodically, to do certain businesses and make resolutions. It seems that at the apex of all the activities then shall be election of a National Executive Committee which is to be elected every two years. This is the leadership of the party. The main purpose of clause 17(c)(1) is therefore to fix a time at which the Annual General Conference shall be elected on periodical basis. One thing I observe is that there is no penalty prescribed in the constitution for

failure to appoint a conference during the month of December. I am satisfied that the constitution of the Respondent has a fixed time of the month of December. It is not however like a fixed pole. It is subject to the following considerations:-

(a) Necessity, in that it is Necessary to do certain things in order to come up to and achieve certain things before that month itself or even afterwards.

(b) Prejudice: which means that if there is no prejudice to a person or group of persons such business of the Annual General Conference can still be transacted at any time reasonably soon after the month of December, taking into account the objects of the conference. In the absence of prejudice even an unconstitutional meeting cannot be set aside.

(c) Impossibility to perform certain functions. It is not important to decide now whether the impossibility was anticipated, initial or supervising as long as objectively seen it made it difficult to achieve certain things. What is to be borne in mind is the circumstances which caused the delay.

(c) That the object to which the provision relate are a matter

of priority. In other words the objects of the provision become the dominant feature. This is more so when time is not of essence as I believe in this matter. Time becomes the subservient feature (see BLOEM & ANO vs STATE PRESIDENT OF RSA 1986(4) 1064 at 1089) 1991)

(e) A fair large and liberal Construction - Which would best ensure the attainment of the objects of the enactment. It being borne in mind that every enactment is deemed to be remedial and not restrictive unless it specifically provides so.

(f) For the sake of justice and reasonableness a Court can imply that a term that the parties to a contract did not insert themselves. That is that by reason of factors that are beyond the control of the NEC and good reasons being an Annual General Conference can be held within a reasonable time after the month of December. Thus in GARDENER vs GRAY 1815 (4) CAMP 146 Lord Ellenbough said: "Without any particular warranty, this is an implied term in every such contract....... The purchaser cannot be supposed to buy good to lay tem on a dunghill." The most important point in that case was that the warranty was imposed or imputed by law. It was imposed because it was just and reasonable. Not because the parties had agreed to it either expressly

or impliedly. (See Lord Denning - Discipline of the Law page 12) I conclude that the use of word shall is not peremptory but merely directory. What was reasonable and just to do when delegates were not available to receive notices effectively comply with the ninety days required of section 17(c)(i)? It was practical to choose a date most suitable after the month of December 1993. Sound and good reasons cannot be ignored. Whether the legislative intended non-compliance to be visited with nullity - see Baxter - Page 449 at Footnote 402. "Just as permissible "language is an unreliable guide in determining whether a discretionary power exists, so too is "imperative" language (such as shall or must). Such words constitute *prima facie* guides but have frequently been held within specific contexts to be directory in nature" - footnote 407.

I have in my judgment indicated that the worst that I can hold against the NEC of the Respondent is that it was a trustee or *defacto* Committee of the Respondent as after the 31st day of December 1993 until another Committee was elected into office. I refuse to speak as if there was a vacuum or that there was no committee in place. I never got a clear answer as to what the difference was between the NEC before December 1993 and the NEC as between the 1st day of January 1994 and the 12th March 1994 when a successor committee was brought into being. This I asked

as regards the duties, rights and obligations of the Committee in the two circumstances or scenarios. I could gather that the case of Gerald Pokane Ramorebodi and Another vs Ntsu Mokhehle and 6 others CIV/APN/139/91 was not useful in answering this question. I grant that I may have not read it very well. I argued on behalf of the Five Respondents in the matter in June 1991 but I only saw a copy of the judgment on the 18th March 1994 when it was brought to my attention in arguments. I have no doubt that bar that its two year period had expired the pre-12th March 1993 NEC had full power rights and duties of an Executive Committee. It also had a duty to appoint a successor. To that extent I would hold that there is no tangible and justiable advantage in relation to the Applicant's position with reference to an existing, further or contingent legal right which must flow from the grant of a declaratory order sought "(see ADBRO INVESTMENT CO. LTD vs MINISTER OF INTERIOR 1961(3) SA 283 (T) at 285 and EDELOR (PTY) vs CHAMPAGNE CASTLE HOTEL PTY LTD 1972(3) SA 684(N) AT 689) I would also dismiss the prayer (d) of the Applicant's Notice of Motion.

From the above reasons it should be clear that I would discharge the rule and dismiss the Applicant's application with costs on the ordinary scale.

T. MONAPATHI

Acting Judge

30th March, 1994

For the Applicant : Mr. H. E. Phoofolo

For the Respondent : Mr. A. M. Ntlhoki