

IN THE HIGH COURT OF LESOTHO

In the matter between:

TSEPANG MAKHALEMELE
JUBILEE MAKHETHA

1ST APPLICANT
2ND APPLICANT

and

DISTRICT SECRETARY, MOHALE'S HOEK
HON. MINISTER OF HOME AFFAIRS
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

J U D G M E N T

Delivered by The Honourable Mr. Justice G.N. Mofolo,
Acting Judge, on the 15th day of September, 1995.

This is an application in which the applicants sought an order in the following terms:-

1. Dispensing with the rules of court pertaining to modes and periods of service.
2. That a Rule Nisi be and is hereby issued returnable on a date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why:-

- (a) The 1st Respondent and/or his subordinates shall not be interdicted from engaging in re-elections in the villages of Thabana-Ts'ooana and Ha Potsane which are due to be held on the 22nd day of August, 1995 for the village development councils pending finalization hereof.
- (b) The purported declaration of the elections of the 11th August, 1995 as invalid shall not be declared null and void and of no force or effect.
- (c) The 1st respondent shall not be directed to proceed to call for holding of ward elections which he unlawfully cancelled.
- (d) Costs of suit on attorney-and-client costs in the event of opposition.
- (e) Further and/or alternative relief.

I granted the interim relief and made the Rule Nisi returnable on 25th August, 1995 and on this day the Rule was extended to 28th August, 1995 when the matter was argued before me.

In their Notice of Motion applicants in paragraph 2(a) called upon respondents to show cause (if any) why

The 1st respondent and/or his subordinates shall not be interdicted from engaging in re-elections in the villages of THABANA-TS'OOANA and HA POTSANE which are due to be held on the 22nd day of August, 1995 for the village development councils pending finalisation hereof.

In his Founding Affidavit and at paragraph 4 thereof 2nd applicant has deposed:

On or about the 11th August, 1995 Village Development Council elections were duly held pursuant to Legal Notice No.62 of 1995 in the Potsane Village where I am resident (I have underlined).

Paragraph 9 of the 2nd applicant's affidavit reads:

It ^{was} only this very yesterday the 20th of August, 1995 when I was told by one LEBONA and MALEBANYE both of whom are HLOAHLOENG returning officer and acting Principal Chief of LIKUENENG HA POTSANE respectively; that there will be held re-elections in my said village together with HA POTSANE Village in which there will be re-elections as there were protest pertaining thereto.

It will be observed that in paragraph 4 above 2nd applicant says he is resident at POTSANE Village and on paragraph 9 says 'there will be held re-elections in my said village' (of course meaning HA POTSANE) and HA POTSANE village. Certainly I am lost what the 2nd applicant means unless he is saying that it was intended that two simultaneous re-election were going to be held at HA POTSANE village; if this is what he means it is quite nonsensical because according to 1st Respondent's opposing affidavit the 4th paragraph thereof he deposes:

For the election to the Village Development Council of Thaba-Ts'ooana Ha 'Mapotsane, 20 (twenty) candidates were registered

1st Respondents paragraph 14 thereof reads:

The bye-election date for the Thaba-Ts'ooana Ha 'Mapotsane Village Development Council was the 22nd August, 1995. The election process did commence on the said date and only to be stopped after an Order of Court was served on the same day interdicting me from engaging in bye-elections in that village.

I must state that no bye-elections were or are ever to be held in the village of Ha Potsane.

The above must be read in conjunction with the supporting

list of candidates shown the court which showed that the Village Development Council elections were held at Thaba-Ts'ooana Ha 'Mapotsane and not at Thabana-Ts'ooana and Ha potsane as the 2nd applicant suggested.

It becomes clear that the applicants and 1st Respondent are not agreed as to where the election was held and the problem for the applicants is that, unfortunately, a deponent to an affidavit rises or falls by what he has deposed to in his affidavit.

Applicants' Notice of Motion and 2nd applicants' affidavit quite apart from the fact that applicants Notice of Motion is in conflict with 2nd applicants Founding Affidavit. 2nd applicants Founding Affidavit is itself self-contradictory. I cannot, therefore, go by 2nd applicant's affidavit to determine where the Village Development Councils were held but find that 1st Respondent's opposing affidavit is a true and reliable restatement of where these elections were held.

As I have said the list of candidates which was shown the court reflects the election as having been at Thaba-Ts'ooana Ha 'Mapotsane and not Thabana-Ts'ooana and/or Ha Potsane - these are entirely two different villages and on the onset I find that there was no Village Development Council election held at Potsane villages or at Thabana-Ts'ooana and Ha Potsane but that the said election was at Thaba-Ts'ooana Ha 'Mapotsane.

It will be seen from the above that the purported interim relief which I granted on 21st day of August, 1995 should not have been granted if full facts had been known to the court then.

It was argued on behalf of the applicants firstly that the 1st Respondent should not have nullified the election as he had no such title in law so to act. Secondly it was also argued that 2nd applicant having won the election aforesaid in the Potsane Village 2nd applicant had a vested right which could not be taken away from him.

Concerning the first argument above, in terms of Legal Notice No.62 of 1995, the 1st Respondent was designated as supervisor of Development Councils Elections in terms of s.3(1) of the Notice. Section 4(a) thereof empowers the 1st Respondent to

exercise general supervision over the administrative conduct of elections.

As this legislation confers on the 1st Respondent power to superintend the elections, it goes without saying that the legislation has also conferred on him necessary discretion with regard to the running and control of Development Council Elections.

When, therefore, it came to 1st Respondents notice that there were irregularities in the election, he was entitled to act

to protect the smooth and just conduct of the election. It was, in my view, an irregularity for the polling officer or anybody to disqualify candidates though, as I have said, 1st Respondents action at Thaba-Ts'ooana Ha 'Mapotsane has not been challenged in this application.

As for the second leg of applicants' argument, it has been said that

'The only condition attached to this reshaping power is that, if the action of the subordinate organ has resulted to the acquisition of certain rights by individuals, the superior organ may retract only if it has express statutory authority to do so or if the action is invalid in law.' - Wiechers, Administrative Law, Butterworths, 1985 p.49.'

Wiechers on the same page as above says that the principle may be illustrated by way of a case where the licensing board of a city council issues a licence perfectly lawfully to an applicant and the council subsequently withdraws the licence: according to him, the council cannot subsequently withdraw the licence since the licence holder has already acquired rights in consequence of the granting of the licence and the city council may withdraw the licence only if it was invalidly issued or if the city council has authority to withdraw it.

These are precise terms in which Mr. Mosito for the applicants addressed this court and I can only say that quite apart from the fact that the election was invalidly held in that

the polling officer had no right to disqualify candidates, this question no longer arises as the act of the 1st Respondent to nullify elections at Thaba-Ts'ooana Ha 'Mapotsane is not challenged in these proceedings.

In this matter the superior organ in the form of Minister of Home Affairs has transferred his powers to the 1st Respondent in terms of Legal Notice No.62 of 1995. The superior organ has also given instruction to the inferior organ within the control relationship to the 1st Respondent. In this deconcentration of activities taking place within a specific administrative hierarchy of local authority the Minister delegated his powers to the 1st Respondent. And as Wiechers says in his Administrative Law on p.52:

'where the delegate performs a function on behalf of or in the name of the delegans, he replaces the delegans completely and performs the function as if the delegans himself were performing it.'

It has also been said:

'Now it is settled law that where a matter is left to the discretion of or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the result.' in *Shidiack v. Union Govt.* 1912, 642 (A.D.) at p.651.

also

'not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law either to make him change his mind or to substitute its conclusion for his own.' *ibid* o.651.

it was also said.

'There are circumstances in which interference would be possible and right. For instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter and exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of his discretion, even if it considered the decision inequitable or wrong.' op. cit. pp. 651 - 652.

It is unusual for a court of law to heap praises and accolades on a public official. In this judgment I have not found an official more deserving of his public duties. The discretion which he used was most fitting and appropriate in the circumstances. By annulling the election and ordering the holding of another election none of the parties in this application have been prejudiced. On the contrary, the holding of another election ensures that simple justice will not only be done, but will be seen to be done.

Accordingly this application is refused with costs to the 1st respondent.



G.N. MOFOLO

Acting Judge

14th September, 1995.

For the Applicant: Mr. Mosito

For the respondents: Mr. Putsoane