CIV/APN/30/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

CHIEF SETENANE MAPHELEBA APPLICANT

and

MAREMATLOU FREEDOM PARTY RESPONDENT

J U D G M E N T

Delivered by the Honourable Justice G.N. Mofolo
on the 1st day of December, 1995.

This is an application in which the applicant Chief Setenane Mapheleba applied to this court for an order in the following terms:-

1. That a Rule Nisi be issued returnable on the day of February, 1995 calling upon the respondent to show cause, if any why:-

   (a) Interdicting the respondent from continuing with its annual general conference scheduled for the 3rd to the 5th February, 1995 pending finalization of this application.

   (b) Declaring the conference of the respondent scheduled for the 3rd to 5th February, 1995 null and void for non-compliance with the constitution.

   (c) Dispensing with the normal period of service prescribed for by the rules of court on account of urgency of this matter.

   (d) Granting applicant further and/or alternative relief.

   (e) Directing applicant to pay costs of this application.

2. That prayer 1(a) and (c) operate with immediate effect as an interim order of court.

A certificate of urgency was lodged by Mr. Mofana Mafantiri who bona fide considered the matter to be of urgent relief. This was on 2nd February, 1995 and a court order was obtained on 3 February, 1995 and the rule nisi was made returnable on 20 February, 1995. Prayers 1(c) namely dispensing with normal period of service 'on account of the urgency of this matter' was granted.

Then thereafter several postponements including revival of the rule were made culminating on 5th September, 1995 when the matter being crowded out was postponed to a date to be arranged with the Registrar.

On 27 October, 1995 the matter came before me. It was argued on behalf of the applicant by Mr. Phoofolo that:

(a) The fixing of subscription at M1-00 when according to the constitution the amount was 30c was violation of section 9 of the constitution.

(b) The decision by 7 members of National Executive Committee of the respondent to hold an Annual General Conference was also violation of section 19 of the constitution as was,

(c) The fixing of date of the conference without giving a clear 90 days notice.

Mr. Phoofolo went on to submit that passing a resolution increasing membership subscription was one thing and that

amending the constitution was another. According to him, the constitution should have been amended before passing a resolution to increase membership.

On the other hand, Mr. Ntlhoki submitted that as there was no specific order to stop the holding of the Annual General Conference and the conference had in any event proceeded it was unheard of to have the proceedings of the conference declared null and void more especially so because if it was the applicant's intention to focus this application on the conference, as this matter was understood to be urgent, it should have been proceeded with speedily. As for declaring the proceedings of the Annual General Conference null and void retrospectively, public policy frowned on ex-post facto decisions. Now that the court refused the applicant interim relief in this regard that was the end of the matter and any argument on this aspect of the application was of only academic interest.

Regarding Mr. PHOOFOLO'S submission above at (b), this must also be read in conjunction with applicants founding affidavit whose paragraph 4 :

4.2 reads:-

> The respondent is going to hold its annual general conference on the 3rd, 4th, and 5th February, 1995.

4.3 I have only learnt on the 27-01-95 that the conference will be held as aforementioned AD. PARA. 4.2. I have tried everything possible to resolve this matter with the respondent but to no avail.

4.4. I wish to aver that I was a representative of the respondent at Senqunyane No.34 in the past general elections. Since I only learnt on the 27.01.95 that there will be this conference my constituency will not be represented as it does not know the same.

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In terms of section 19 of the respondent constitution the quorum for the executive committee shall be eight members. The decision to call the alleged conference has been made by seven members as opposed to eight., I accordingly annex the said minutes marked "SM3." I refer also to "SM4" herein attached.

I reproduce hereunder the first page of "SM3".

Motto: KHOTSO KE NALA
M.F.P. PEACE IS PROSPERITY

MAREMATLOU FREEDOM PARTY

P.O. Box 0443 Maseru West 105 Lesotho

MINUTES OF THE EXECUTIVE COMMITTEE MEETING

LETSATSI: 09-PHALANE-1994

NAKO: 12:00 hrs

BA TENG:

1. Mong. V.M. Malebo (Party Leader)
2. " T. Leanya (Deputy Party Leader)
3. " M. Mohapeloa (Ass. Secretary General)
4. " M. Monyake (Ass. Secretary General)
5. " T. Motselebane (Setho)
6. " S. Thebe (Setho)
7. Mof. 'Masempe Sempe (Setho

BA SIEO KA MABAKA:

1. Mof. 'Maselebalo Ohobela (Treasurer)
2. Mong. Molomo Nkuebe (Secretary General)
3. Mof. 'Manapo Majara (Setho)
4. Mong. Tseko Mosito (Setho)

Now, it was in this meeting of 9 October, 1994 comprising 7 executive committee members that it was decided to hold the Annual General Meeting on 07 January, 1995 while the attendance

of 7 members thereof went against the spirit of the relevant section of the Constitution which reads:

Section 19 :

> For meetings of the National Executive Committee the quorum shall be 8 (eight) members, among whom shall be the Leader or his Deputy

For reasons that are not clear but most probably because the National Executive Committee felt the composition was not enough for the passing of a resolution to hold an Annual General Conference on 07 January, 1995 the conference was not held on this date but was held on 03 February to 5 February, 1995, being the very dates challenged by the applicant vide paragraph 4.2 of his founding affidavit. In fact it is this conference the applicant would have me invalidate.

Unfortunately, while minutes of what transpired, in the executive meeting of 9 October, 1994 which decided the conference of 07 January, 1995, are available, I have no minutes and the applicant has not provided this court with minutes of what transpired in the executive meeting which decided on the conference of 03 February to 05 February, 1995 and I am not able to say that in this particular meeting members present did not form a quorum as is contemplated in the constitution of the respondent. The onus was on the applicant to satisfy me that the meeting which fixed 03 - 05 February, 1995 as date of the conference was not property composed. Applicant having failed to discharge such onus applicant's prayer to set aside the Annual

General Conference of 3 - 5 February, 1995 on ground of

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General Conference of 3 - 5 February, 1995 on ground of insufficient quorum fails.

As for MR. PHOOFOLO'S submission (a) above, this must be read with applicant's affidavit which reads:

4.

4.1 In terms of section 9 of the respondent constitution the subscription fee is (30c). On the other hand in terms of section 15(4) no person shall be elected as a delegate if he has not paid his annual subscription. I accordingly annex the constitution of the respondent herein marked "SM1". Contrary to the section, the executive committee of the respondent has increased subscription fee from thirty cents to one loti. I accordingly annex a copy of the respondent's membership card and marked "SM2".

With regard to the subscription payable section 9 of the Constitution of the respondent reads:

> Each member shall pay an annual subscription of 30c (thirty cents).

As to amendments complained of by the applicant, Section 28 of the Constitution reads:

> Subject to the proviso in Clause 20(4)(i), this Constitution or any part hereof may be amended, rescinded, altered, or additions made thereto, by Resolution carried, by a two-thirds majority at an Annual Conference held every second year following the year 1962, unless the National Executive Committee advises that the amendments shall be specially considered at any Annual Conference because of the urgency of the matter. Notice of any such Resolution, embodying any such proposals, must be sent to the Secretary-General at the Head Office of the Party, at least 30 (thirty) days before the date fixed for the annual Conference.

But section or clause 20(4) (i) reads :

(4)

> The duties and powers of the National Executive Committee shall also include the following:-

(i) To propose to the Annual Conference such amendments or additions to the Constitution and Rules as may be deemed desirable, and to submit to the Annual Conference or Special Conference summoned in accordance with the provisions of the Constitution, such resolutions and declaration affecting the programme, principles and policy of the Party as in its view may be necessitated by political circumstances - provided that in cases of extreme urgency the National Executive Committee may amend the Constitution by a unanimous decision of all the eighteen members of the Committee, and make the amendments effective until they are ratified by the next Annual Conference.

This makes it abundantly clear that the National Executive Committee has the authority, constitutionally, to amend the constitution so long as the amendments are ratified by the next Annual Conference.

Now, it is the Annual General Conference which, according to minutes of 26 September, 1992 amended the constitution and membership fee was raised from 30c to one loti.

The applicant has endeavoured to show that there was no such Annual General Meeting on 26 September, 1992 and to this end he has invited one Napo Mahloane to support him. But Mahloane's affidavit is way out and in no way helps the applicant in that he says it is respondent's executive committee which imposed the one loti membership fee as was 'Malefa Mapheleba's affidavit which did not take the matter any stage further. As we have seen, even if the executive committee had imposed the fee this was in order so long as the executive committee had their decision ratified by the succeeding Annual General Conference.

Minutes of 26 September, 1992 however prove the contrary in that it is the Annual General Conference which imposed the membership fee of one loti.

In opposing the application, the respondent was supported by 'Maselebalo Ohobela and Mophato Monyake who have deposed that the amendment to the constitution and imposition of one loti membership fee was adopted by the Annual General Conference of 26 September, 1992 in which applicant was present as a fully paid member and that the applicant participated in the election and proceedings of the said conference of 26 September, 1992.

In this application there are members of the Respondent who claim to have attended the Annual General Conference of 26 September, 1992 either as supporters of the applicant or the respondent who variously claim that the conference did amend the constitution and fix the one loti subscription fee while others claim no such amendment to the constitution or the accompanying subscription fee from 30c to one loti was fixed by the Conference. As commonly happens in applications, a dispute of facts has arisen which cannot be decided except by viva-voce evidence. In opting for application proceedings, applicant knew or ought to have known that such dispute of facts would arise and he regardless proceeded by way of application. The onus was on the applicant to prove all the essential facts and he has failed to do so.

Applicant has contended that no amendment to the constitution was made by the Annual General Conference of the respondent thus raising the subscription fee from 30c to one loti in that were there such an amendment it would be, as he said in his own words, "registered in the Law office"; applicant also claimed that he had made a thorough search at the Law Office and found there was no such amendment with the Law Office. Surprisingly, counsel for the applicant took up this assertion vigorously and sought to persuade this court that there was no such record of the amendment as is in law required.

I was, of course not impressed with the applicant's assertion or submission of his counsel in that the applicant not being an official of the Law Office and not being in custody or control of documents or transactions of the Law Office he is not the right and proper person to tell me what is or is not registered in the Law Office. I have therefore rejected this submission with the contempt it deserves.

It has been suggested that applicant and his supporters and more specifically Napo Mahloane attended the Annual General Conference of 26 September, 1992 and that they had participated in the deliberations of this conference. Further that both the applicant and the said Napo Mahloane had both paid the one loti subscription fee the result of increase from 30c to one loti emanating from a resolution and amendment to the constitution in the said conference of 26 September, 1992.

What I find strange is why the applicant and Mahloane well knowing that neither a resolution or amendment to the constitution was made elected to pay the one loti and thus wittingly or unwittingly to submit themselves to what was, in their view, an illegality. My view is that applicant and the said Mahloane having participated in the deliberation of 26 September, 1992 and having subsequently paid membership fee emanating directly from the resolution of the Conference both applicant and Mahloane are estopped from making claims and allegation adverse to proceedings of 26 September, 1992 and other acts flowing directly from the said conference of 26 September, 1992.

My disapprobation is based on the principles of estoppel otherwise called personal bar in Scot law.

In his A Short Commentary on the Law of Scotland (W. Green & Son Ltd, 1962) p.292 T.B. Smith says Rankin on Personal Bar describes the doctrine as follows:

> It calls up in the mind of the pleader such terms as rei interventus, homologation, ratification, adoption, acquiescence, taciturnity, mora, delay, waiver, standing by, holding out and other phrases of conduct .

The author goes on to say that in Gatty v. MacLaine, 1921 S.C. (H.L.) 1, at p.7 the Earl of Birkenhead has attempted the following summary of the principle.

> The rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. When A by his

words or conduct justified B in believing that a certain state of affairs exists, and B has acted upon such belief to his prejudice A is not permitted to affirm against B that a different state of facts existed at the same time.

In cases quoted by T.B. Smith, Lord Campell L.C. in Cairncross v. Lorimer, (1860) 3 Macq. 827 at p. 829 has observed, with regard to acquiescence:

> If a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained - he cannot question the legality of the act he had so sanctioned to the prejudice of those who have given faith to his words or to the fair inference to be drawn from his conduct.

I find that applicant by participating in the affairs of the respondent, standing for election in respondent's conference of 26 September, 1992, voting in the said conference and subsequently paying respondent's membership fee of one loti he acquiesced in the affairs of the respondent, ratified acts of the respondent and generally held himself out as a fully-fledged member of the respondent and cannot, in good conscience, claim otherwise.

Although not exclusively, it is from the ranks of the National Executive Committee that national leaders are identified and one would expect these potential leaders to understand the principle of collective responsibility.

But collective responsibility given the nature of politicians is slippery and can hardly be used as a yardstick or rallying point of principles of good faith and comity of decisions among political entities. Collective responsibility is, to politicians, a chimera for a dyed-in-the-wool policitican has no respect for collective decisions and especially those to which he had reservations or had vigorously opposed; in such circumstance he is more likely than not to resign his post or resign from the party and drum up support among his constituents of the injustice of the decision taken.

The better view and one with which courts have associated themselves with is that political parties and their operatives being voluntary associations are expected to behave like analogous creatures of statute such as companies where joint decisions of company directors are binding on the directors and hence the company itself if taken intra vires and a director of a company may not be heard to say he was against such-and-such programme of action by the directors.

If the applicant had had the full impact and appreciation of the functions of his organisation plus the courage of his convictions he would not have launched these proceedings.

Courts of law are concerned with fundamental illegalities and irregularities and the redressing of wrongs. I have found nothing wrong or untoward with respondent's conduct of affairs.

One other thing: the applicant has complained that the purported Annual General Meeting of 3 - 5 February, 1995 did not comply with the stipulation of the constitution of the respondent which required ninety (90) clear days before the holding of the Conference.

The relevant section of the Constitution reads:

Section 12

(a) A notice summoning the Conference shall be given at least 90 (ninety) days before the date fixed for the Conference.

While I have found nothing in the functions and powers of the National Executive Committee of the respondent authorising the Executive Committee to convene an Annual General Conference such powers being assumed or perhaps appearing elsewhere in the Constitution, Mophato Monyake did, nevertheless, depose to such properly constituted National Executive Committee of 5 November, 1994 which 'adopted and ratified the earlier decision of 9 October, 1994' and only changed the dates of Conference from 6 - 8 January, 1995 to 3 - 5 February, 1995.

By my computation from 5 November, 1994 to 3 February, 1995 is exactly ninety days. It would be petty, trivial and bothering on the ridiculous to hold that at least 90 days notice was not given of the holding of the conference alleged. I reject the allegations that not enough notice was given.

Consequently I reach the conclusion that the rule in this application should be discharged with costs to the respondent and I have so ordered.

G.N. MOFOLO

JUDGE

1st December. 1995.

For the Applicant: Mr. Phoofolo

For the Respondent: Mr. Ntlhoki