C. of A.(CIV) No. 12/97

IN THE LESOTHO COURT OF APPEAL

In the matter between:

STELLA KAKA	Appellant
and	
LESOTHO BANK	1st Respondent
JOHN KHOTLE	2nd Respondent
COMMISSIONER OF LANDS	3rd Respondent
ATTORNEY GENERAL	4th Respondent
TS'ELISO DONALD KAKA	5th Respondent

HELD AT:
MASERU

CORAM:

LEON, J.A.
V.D. HEEVER .J.A.
BECK, A.J.A.

JUDGMENT

V.D. HEEVER .J.A.

The entire conduct of this case, and the record before us on appeal, constitute

a travesty of justice. I point out with a measure of detail the faults both in form and in substance apparent from the record, not as an expression of displeasure, but in the hope that it will provide guidance useful to the future administration of justice in the Kingdom of Lesotho. I refer in what follows to the parties in their capacities in the court a quo, where the appellant was the applicant.

The record

Formal flaws consist of -

Poor typing and/or proof-reading. There are innumerable spelling mistakes as well as grammatical and other errors. Merely as example, *monior* for *minor*: *hense* for *hence*: First *Applicant* when first *Respondent* is intended (p.6 para 6 and 7); incomplete sentences, such as

> "I have in fact written to First Applicant's Counsel through my Counsel with the request that First Applicant allow me to take over the mortgage payments and verily believe."

Applicant's heads of argument, included in the record, are slipshod in the extreme - riddled with things like *mot* importantly; *enternal* prejudice; *emcumberance*; *invested* in lieu of *instead*; *motgages*, *interst*.. The index - certainly in the copy of the record made available to me - is incorrect as regards the numbers of the pages where documents are supposed to appear.

Poor copies of documents. Pages 45 is illegible; and page 48 is reproduced so that portion of the script is unavailable, being bound into the spine of the volume.

Missing pages. My record has no pages 13, 14 and 15. And there is no indication that the papers, or the rule nisi granted, were/was served on any of the respondents. Errors of this nature reflect adversely on the quality of the service provided to both the client, who is expected to pay despite faulty delivery, and to the court, distracted from the merits of the matter by the irritation of such unnecessary blemishes.

Material flaws apart from the merits of the dispute as such -

A matter is introduced and left hanging in the air, which is either quite irrelevant, or of great significance (in that it might well reveal that the applicant is abusing the process of the court by her present litigation). In paragraph 5.6 of her founding affidavit the applicant says

> "In May 1995 it came to my notice that my former husband was selling the property. In an attempt to prevent the sale I filed motion proceedings in **CIV/APN/178/95** seeking an interdict".

We are not told what the outcome of that was. It is a reasonable inference that her application was unsuccessful, otherwise it would hardly have been described as merely an "attempt". Why the property was not sold at that stage we do not know.

Legal practitioners have a dual capacity. They are not only in the business of providing a service to members of the public who engage them, but are also officers of the Court. As such it is in my view improper for them to insult or attempt to demean those brought before the courts, whether their colleagues, opposition parties, or witnesses - as it in my view would be improper and distressing were a member of the Bench to do so. Lawyers deal - or should deal - in facts, logical conclusions, propositions of law, and should encourage their clients to conduct

themselves with similar dignity. In particular, a lawyer should not burden a client with bad manners when drafting an affidavit based on consultations between the pair of them, to which the client deposes but the format of which is almost invariably that chosen by the lawyer; or which the lawyer could and should tone down before the affidavit is finalised where the actual wording emanates from the deponent. Comments such as

> "Respondent's allegation about Respondent not involving itself with marital dispute, ...smacks of gossip and is better left unanswered .....(N)obody is disputing Respondent" (*sic*) "right to moneys owed. But that is not where the issue lies and Respondent knows .... I seriously wonder what case Respondent is trying to put before this *Honourable Court*"

are in poor taste. The applicant's representative is not the first or only local practitioner guilty of this kind of harangue. I have come across many trial records where witnesses are insulted by practitioners without the Bench stepping in to put a stop to this. The credibility of a witness may often be more effectively destroyed by cool courtesy than emotional crudity.

There is no point in a lawyer's rushing into court unless and until he has analysed the facts given him by his client and determined what cause of action may be founded on those facts *and against whom;* or (where his client is the defendant or respondent) whether those facts reveal a valid defence to the claim brought against his client by the plaintiff or applicant. Similarly even a busy judge faced with an ex parte application for a rule nisi, should not succumb to the temptation of granting it merely because the respondent will be given the opportunity on the return day of opposing it, unless he is satisfied already from the allegations in the founding affidavit that a proper cause of action has been made out against the opposition

cited. Failure to scrutinize the founding papers closely may involve both litigants in unnecessary costs, benefit only the lawyers, and pro tanto lead to injustice.

And that brings me to the merits of the application..

The founding affidavit, dated 17th October, 1996, is both meagre (a mere nine paragraphs, with two short annexures), and ambivalent.

The applicant initially cited only the first four respondents. Her ex-husband is not referred to as a respondent in her affidavit, and seems to have been included at a late stage since his name was inserted in writing in the certificate of urgency accompanying that, and was incorporated as a fifth respondent in the interim order granted the following day. Costs were sought only against the first and second respondents. There is no indication in the record whether the papers were served on any of them, except that since the first respondent opposed the application one must assume that it did receive them.

The affidavit reads as follows (I quote it with warts and all):

1.

"1.1 I am the Applicant herein, a divorced woman residing at Maseru West, I was formerly married to one DONALD TSELISO KAKA.

2.

2.1 First Respondent is LESOTHO BANK a Commercial bank established as such by the Lesotho Bank Act of 1978.

2.2 Second Respondent is JOHN KHOTLE a male mosotho adult residing at Maseru East, in Maseru urban area.

2.3 Third Respondent is the Commissioner of Lands a Department of Government of Lesotho.

2.4. Fourth Respondent is the Attorney General of the Law Office who is cited in these proceedings as representing the government of Lesotho. The 4th Respondent in the aforementioned capacity is representing the Registrar of Deeds and the Commissioner of lands.

3.

The facts deposed herein are unless the contrary is stated known to me and are to the best of my knowledge and belief true and correct.

4.

About four days ago the following facts came to my notice for the first time namely that:

(a) A deed of sale had been signed between First and Second Respondents' herein in terms of which First Respondent sold to Second Respondent property at Maseru East plot number 13281-312 jointly owed by former husband and me. The said property was mortgaged to First Respondent.

The said agreement of sale, I gathered, was pursuant to a Writ of Execution (CIV/T/64/96) in terms of which the property was to be sold to recover debt owed to first respondent by my former husband Donald Kaka.

(b) Lesotho Bank has applied to Lands and Survey amd Physical Planning for consent to transfer the property to Second Respondent herein.

5.

Before I elaborate on the issues which I have addressed in paragraph 4 above I should draw the attention of the Honourable Court to the following facts.

(a) When this honourable Court granted the divorce between my former husband and myself in CIV/T/442/92 on the 2nd November 1992 annexed to the divorce order was a Deed of Settlement which provided that our property situate at Maseru East would be transfered to the two minor children born of the marriage between my former husband and myself. The agreement was, needless to say, made subject to the mortgage bond in which First Respondent was the mortgagee.

(b) Until such time that the property was transfered to our minor children my former husband and I continued to hold it jointly minus his marital power.

(c) In May 1995, it came to my notice that my former husband was selling the property. In an attempt to prevent the sale I filed motion proceedings in CIV/APN/178/95 seeking an interdict.

6.

Coming back to the issues raised in paragraph 4 herein, I have this to say. In view of the fact that until the property was transfered to the minor children, I remained the co-owner of the property (minus marital power), it is my case that First Respondent ought to have joined me as co-defendant in CIV/T/94/96 and failure to do so was a serious omission on the part of First Respondent. As co-owner of the property (subject to the mortgage) I had/have substantial interest in the outcome of the proceedings and I am prejudiced by the loss of my half share of the estate.

Had First Respondent joined me I would without hesitation made an offer of

settlement out of Court.

The second and more serious consideration is that the property at Maseru East is the home of my children. The sale of the property to Second Respondent herein means that my children are being kicked out of their home. This Honourable Court as the upper guardian of all minors, I humbly submit, ought to take into account the fact that the minor children deserve to have a home.

Taking into account that the First Respondent is entitled to recover his debt I would not justifiably apply for a rescission of the Default Judgment granted to First Respondent on the ground of non-joinder.

However, it is my submission, I ought to be, have been given the first option to buy the property at Maseru East. That is, if First Respondent does not favour the other option, namely that I step into my former husband's shoes and take over the payment of the mortgage bond.

I have in fact written to First Applicant's Counsel through my Counsel with the request that First Applicant allow me to take over the mortgagage payments and verily believe.

I have not yet received a reply from First Applicant. Instead I am informed that there is pressure exerted from some quarters to have the minister's consent issued as a matter of urgency.

I am informed and verily believe that in spite of the contract of sale between First Applicant and Second Applicant, moneys have not yet passed hands, hense the pressure being exerted to have the consent issued.

8.

8.1 It is essentially as the mother of the two minor children who are highly prejudiced by the contract between First and Second Respondents that I am approaching the Honourable Court for a remedy.

8.2 That I approach the Court in desperation. My children have no other home except the one at Maseru East. There is no other remedy as far as I am aware except that the Deed of sale be declared nul and void and I be given the first option by First Respondent to buy the property back for my children.

9.

I aver that the matter is very urgent and that the granting of the ministerial consent and the transfer of the property to Second Respondent should as of necessity be held at bay pending the outcome of this Application.

In view of all thefactors outlined above I cannot be afforded substantial relief in due course.

I am making this Affidavit in support of prayers in the Notice of Motion".

Annexed to this, without being referred to therein except obliquely in

paragraph 5(a), are the decree of divorce on 2nd November 1992 "in terms of Deed of Settlement", and a document labelled Deed of Settlement signed on 24 and 31 August by the applicant and her husband respectively. The latter document is almost as meagre as the applicant's affidavit in the present matter. All it records is that the applicant was sued by her husband for restoration of conjugal rights, failing which a decree of divorce on the grounds of her malicious desertion; custody of the children; and forfeiture of the benefits arising from the marriage in community of property; and that the parties "do contract and agree with each other" that she will not oppose his action, and should the Court grant an order of divorce, the terms of their agreement should be incorporated in such final order, namely ....

> "(b) Residential house situated at Maseru East be transferred to minor children, namely **NKANE KHABANE KAKA** and **MZIMKULU PATRICK KAKA** jointly;
>
> © Custody of minor children be awarded to plaintiff, with defendant being given reasonable access to them;
>
> (d) That household property be divided equally between the parties hereto"

There is a deathly silence as to the maintenance of the children and repayment of the bond. Donations are not lightly presumed, so that one cannot infer that the husband and/or wife was/were obliged to repay the bond without recourse against the children in due course. (She nowhere suggests, in any event, that she made any contribution towards bond repayments). Nor is there any justification for an inference that any repayments made by the husband would increase the wife's own "interest", at best a purely reversionary one, in the property, since the common estate was frozen at the divorce, and only the assets then extant were to be divided between them.

What the applicant sought, and obtained, on these papers, was an order dispensing with the rules of court by reason of alleged urgency, and a rule nisi calling on the respondents to show cause why-

2. (a) the deed of sale between first and second respondents should not be declared ineffective

(b) the Bank should not be ordered to give the applicant first option to "buy back" the plot on behalf of her minor children

© the Commissioner of Lands should not be restrained from processing the application for ministerial consent for transfer of the plot in question, pending the outcome of the application

(d) the Registrar of Deeds should not be restrained from registering transfer to second respondent

(e) first and second respondent should not pay applicant's costs should they oppose her application:

paragraph 2© to operate as an interim interdict.

We do not know what plot 13281-312 was worth as at the date of the divorce, and what the size of the mortgage was then, from which one may calculate exactly what it was that the parties intended to donate as to half each, to their children. In short we do not know what the alleged interest is - as I have already suggested, at most a purely a reversionary one that might revive should one or both the children predecease their mother intestate - which the applicant purports in one breath to be her own which she seeks to protect, in the next the interest of her children which she is looking after since their father is allegedly not doing so. As regards the second stance, her emotional allegation that the children are entitled to a home, is meaningless since for all we know she herself may be able to take them

in (and both parents are bound in law to contribute towards the maintenance of their children, according to their respective means and the needs of the children). Or the father may be intent upon buying some other, more suitable, property by means of a potential surplus from the selling price after deduction of what is owing to the Bank. That children deserve to be provided with a home is true - provided they are unable to provide it from their own resources, and their parents or, failing them, certain defined relatives have the means to do so. But there is no obligation in law burdening any outsider such as the bank executing a writ consequent upon a valid judgment, to provide them with one. The applicant criticises that judgment but in the next breath disavows any intention of trying to have it rescinded. She gives no indication of any legal right, in the face of that judgment, entitling her to some sort of option from the Bank to "buy back" - whatever may be intended by those words: from whom? - the plot and deprive the buyer of his rights in terms of a contract which must be seen as valid as long as the judgment stands and may be executed upon. Nor does she give any indication that, even did she have some such right or claim as against the Bank and consequently also the buyer, she would be capable of exercising it without disadvantaging the bank. There is no hint of what sort of out-of-court settlement she might have offered the Bank; nor, assuming she has the sort of money that would enable her to pay the Bank what is owed to it under the bond - doubtful, to put it mildly, in view of the further "option" she seems to want to arrogate unto herself, of making monthly payments in reduction of the debt - how she intends arranging matters between herself and her ex-husband. Admittedly, that is not a matter which concerns the Bank, save as an indication weighing against the existence of either of the rights (as district from "wants") she claims: a personal one, alternatively on behalf of her children, both of which, whatever their content may be, must lie against fifth respondent, not against the Bank. At the risk of being tedious, I repeat that the Bank has a judgment in its favour by reason of which its

conduct in having sold the property in execution is lawful. I would have thought that the only appropriate comment, is *cadit quaestio.*

In my view the rule nisi should not have been granted.

The further documentation merely highlights the confusion in the thinking behind the claims advanced by the applicant. It is unnecessary to go into detail. Merely for the sake of completeness, the Bank through its General Manager opposed the application, suggesting that the applicant has no *locus standi* to act for her minor children and should have sought the appointment of a **curator at litem:** an unnecessary frill in the confusion where the applicant had no case and in any event was ambivalent as to whose interest she was purporting to protect, as pointed out above. A copy of the bond is annexed as **LB2**. It was registered in November 1986 in the initial main capital amount of M51,000 to be released in instalments as building on the plot progressed. Clause 20 of the document provides that

> "The Mortgagor/s shall not pass any further bonds on the mortgaged property nor further burden or encumber the mortgaged property in any way without the written consent of the (Bank)".

There is no indication that consent was sought to transfer the property to the minors; or that consent would ever have been granted unless adequate provision was made to secure the debt owing to the Bank. By 31 October, 1995, the amount owing under the bond was M102,330.28 plus interest at 17% thereafter, and judgment was taken in this amount, with costs, on 1st April 1996, the property being declared executable. The fifth respondent has agreed to a sale at M180,000 to the second respondent (instead of by public auction. There is no suggestion that this price is not a proper one). The Bank says it proposes deducting from the purchase

price what is owed to it, and paying the balance to Donald Kaka. There is no suggestion that the latter will not utilize that balance for the benefit of the minor children, at least to the extent of the value of the interest of the joint estate in the property at the time of the divorce, whatever that might be. In the meanwhile the applicant herself is causing that balance to be steadily eroded to the detriment of her children since interest is presumably continuing to run for as long as the capital debt remains unpaid. First respondent says that the applicant was aware as far back as 30th April, 1996, that bank had attached the property in execution of the judgment: and came to court as a matter of alleged urgency only when she saw the application for Ministerial consent for transfer of the property to the second respondent.

The applicant's answering affidavit was not the place to set out a valid cause of action, nor did it in fact do so. There are some startling submissions of law - such as that the Deed of Settlement incorporated into the divorce order, was "simply a statement of the intention of the parties that the property should eventually devolve upon the children". And that the first respondent "keeps on dragging the issue of moneys owed to it as if this is in issue whereas it is not". The applicant seems to regard her half share in the property as at the divorce as inviolable and unencumbered, the burden of the mortgage as being solely the responsibility of her ex-husband. She denies having ever seen the writ of execution - which admittedly is an unsatisfactory document. This dispute of fact cannot, however, affect the outcome of the application. On her version she may have had little time to take action to attempt to prevent transfer of the property to the second respondent. That cannot alter the fact that where she has made out no cause of action entitling her to the option she wishes to exercise, the length of time available to her to make up her mind to litigate is irrelevant.

It is unnecessary to quote authority for what is a matter of basic principles: to summarize,

Husband and wife were married in community of property.

As such they were joint owners of fixed property over which a bond was registered. the husband alone administering the joint estate and as such responsible to the Bank for repayment of the bond.

A decree of divorce recorded that the spouses donated the property to their children. In the absence of further details, that meant the property as then encumbered, i.e. only the value of the interest of the spouses in the property at that stage.

We have no idea what that value was, i.e. what the former spouses are obliged to transfer to their children (subject to the right of the parent(s) to utilize assets belonging to the children, for their maintenance).

The bond registered against the property was a large one, and has grown over the years.

There is no indication that the applicant ever notified the Bank of the divorce.

The bank took judgment against the only mortgagor prima facie known to it, the applicant's former husband, to recover the moneys owed to it under the bond.

The applicant admits the validity of that judgment, which also declared the property executable.

The Bank has put the process of execution in motion by selling the property to the second Respondent.

The applicant seeks to deny the Bank the right to execute in terms of that judgment. not on the grounds that it is inherently improper in any way, for example because execution should have occurred by public auction or the price achieved is not the market value of the property, but because she claims a right in conflict with the court order to "buy back" the property or take over the obligations under the bond.

While the judgment and order of executability stand, her claim cannot succeed

The appeal is dismissed with costs.

LEONORA VAN DEN HEEVER
JUDGE OF APPEAL

I agree:

R. N. LEON
JUDGE OF APPEAL

I agree:

C.L.E BECK
ACTING JUDGE OF APPEAL

Delivered at Maseru this Day of January, 1998.

In the Appeal Court of Lesotho C of A(Civ) No 7/98

In the matter between

LESOTHO CONGRESS FOR DEMOCRACY Appellant
and
BASUTOLAND CONGRESS PARTY Respondent

Reasons for the judgment which was granted on 6 April 1998, follow:

The respondent ("the BCP") during December of 1997 launched a successful application in the High Court, as a matter of urgency , for relief against the present appellant ("the LCD"), the Registrar General and the Attorney-General. The order sought was -

> "2. That the [LCD] be interdicted and restrained from resorting to and/or using the horizontal Black, Green and Red colours, whatever sequence, as its colours
> 3. That the resorting and/or use by [the LCD] of the horizontal Black, Green and Red colours, in whatever sequence, be declared illegal as amounting to passing off and or get-up;
> 4. That [the Registrar-General] be directed to cancel and deregister such articles in the [LCD's] Constitution particularly article 1(b) thereof"

There followed a prayer for (indeterminate) "alternative relief", and costs. The latter were sought against the Registrar General and the Attorney-General only should they oppose the application. Neither did. They accordingly fell out of the picture as far as the present appeal is concerned.

In granting the application of the BCP, the learned Judge *a quo* went beyond the relief sought in some respects, and fell short of it in others. He ordered that -

> "(a) The LCD be and is hereby interdicted from using the horizontal or vertical Black, Green and Red colours in whatever sequence as its colours.
> (b) The LCD is restrained from adopting a pattern of red, green and black colours (whatever the sequence) whether horizontal or vertical similar to or resembling the one below
> (and the three broad bars of colour, black, green and red - looking from top down, are reproduced)
> © The LCD is restrained from allowing its members or supporters at political meetings or rallies from carrying umbrellas, wearing garments and blankets which have black, green and red colours in whatever sequence which might be confused with garments and umbrellas that the BCP's members and supporters wear at political rallies and meetings
> (d) The LCD is directed to pay the costs of this application"

The background to the dispute may be summarized thus: -
The BCP has been politically active since its inauguration in 1952. It says it adopted "as its colours" the combination of horizontal black, green and red bars, since clause

34(a) of its constitution, registered in July of 1969 under the Societies Act, provides that -

> "The flag shall have three parallel colours:-
> Top - Black
> Middle - Green
> Bottom - Red"

The BCP however also had, and has, special articles available for purchase by its adherents (presumably to proclaim their membership of and/or loyalty to the party) such as blankets and umbrellas, in these colours. Mr Ts'eliso Makhakhe, Deputy Leader of the BCP, who deposed to the founding affidavit launching the interdict proceedings which are the subject of this appeal, alleges that the combination of black, green and red has long been identified with the BCP, and is recognised as the colours of the BCP, by all Basotho. When political parties were banned in 1970 (by the Basotho National Party, then in power), these colours were also banned "because they were associated, rightly so, with the [BCP] as a political party's colours".

The colours of the Marematlou Freedom Party are black, green and yellow; and of the Basotho National Party, blue, red and green.

In 1986 the Military seized power, and reinstated political parties.

The BCP, founded by Dr Ntsu Mokhehle was in power last year when problems arose relating to the leadership of the party, which led to litigation, resulting in the order granted in Civil Application 75/97. Those proceedings have not been incorporated in those presently before us; but the court *a quo* took cognisance of the fact of the litigation and the terms of the order granted, and was in our view entitled to do so, both as their being matters of local notoriety and ones readily ascertainable from the court's own records. (Cf Hoffmann & Zeffert, Evidence 4th ed. pp 421-3; and the majority of the USA cases cited in Wigmore, 1951 pocket supplement to 3rd ed. *ad* par 2579). That order obliged the BCP to hold an Annual General Conference before 23 July 1997 in order to elect a leader and the National Executive Committee.

That conference must have been held - when, we do not know: there was no challenge against the *locus standi* of those representing the BCP in these proceedings.

According to the answering affidavits of the LCD, on 7th June 1997 at a conference it was resolved to form a new party, the Lesotho Congress for Democracy. Who called that conference and who attended it, is disputed, but irrelevant. According to the LCD it consisted of "delegates from all constituencies of the BCP". This is denied in reply on behalf of the BCP. It is common cause that Dr Ntsu Mokhehle resigned from the BCP and so became "a founder member and leader" of this new political party, and that it is presently in power by virtue of the fact that the majority of the BCP members of Parliament defected and followed his example. It registered its constitution two days later. On the 22nd it held a national rally attended by "well over twenty thousand people", at which

> "the colours and the flag of the Party were announced and made public. The colours of the party lie horizontally as follows: green on top, red in the middle and black on the bottom. Right in the middle of the colours there straddles

from the middle of the red colour and its wings extending to the top of the green colour a flying black eagle"

This allegation is misleading in so far as it refers to "the colours **and** the flag of the Party" as though the two were distinct concepts. Clause 1(b) of the constitution of the LCD reads:

> "**Flag**" (emphasis added) - "it will be green, red and black colours horizontal in the same order; on the red colour will be a black eagle flying up, the wings extended onto the green"

There is no provision in the Societies Act for the registration of any exclusive right to the use of a colour or combination of colours, nor was it alleged that either the BCP or the LCD had staked a claim in terms of that or any other legislation (such as that dealing with trade marks) to any particular combination of colours as something akin to a logo or emblem, an identificatory feature. Nor is there any provision in the National Assembly Election Order, 1992 (as amended), by which a political party, or an unendorsed candidate, is able to lay claim to such privilege. We return to this statute below.

The grounds advanced in the founding affidavit with its supporting documents as justifying the relief sought, are the following. (The square brackets after each numbered paragraph enclose the comments of this court under each head)

1. The colours of the BCP have always been horizontal (bars of) black, green and red.and are registered as such under clause 34 of the constitution of the BCP, together with its symbol of a "knobkerrie". Those colours have become associated in the minds of the general population over many decades, with the BCP

[It has already been pointed out that clause 34 deals with the design of a flag, not any claim to the use of colours for any other purpose. And the knopkierie obviously differs *toto caelo* from an eagle taking off, as an identificatory symbol]

2. The LCD has reproduced most, if not all, of the clauses of the constitution of the BCP, in its own registered constitution.

[This is denied, but seems to be irrelevant, except that it undermines the argument advanced to us by Mr Khauoe who appeared for the BCP, that people may be misled at rallies where BCP blankets and/or umbrellas feature, as regards the principles of the party they decide to favour with their vote: thinking the principles propagated by the two to be the same, they may be misled into voting for principles - and so a party - they would not otherwise have supported.]

3. The LCD membership cards are the same as those of the BCP, save for the party name on each.

[The BCP's own annexures reveal marked differences in appearance. The names of the parties and abbreviations for those, as well as the mottos of the parties and the very colour of the paper on which the cards are printed, differ.]

4. The LCD "through its agents and/or members are all out canvassing that it is the same political party with the [BCP} **except that the [BCP] is run by a pressure group"** (emphasis added)

[The BCP on its own founding papers therefore makes it clear that there is indeed a material difference between the two parties which is stressed at the rallies of the LCD]

5. Members of the LCD wear BCP colours, and "no person, without being told that the person wearing those colours belong to the [LCD] can ever make any difference as between the [BCP's] and [LCD's} members". In terms of clause 34 of the constitution of the BCP, "these colours, subject matter of this application, are legally and exclusively the colours of the [BCP]" so that "if the LCD is not restrained from using the same....there is a reasonable likelihood of confusing the public and the world at large..... especially when canvassing has already started"

[This seems to have been the main cause of complaint of the BCP and we deal with it immediately below by way of more than a comment in parenthesis].

The supporting affidavit of the teacher Mr Tsita annexed to the BCP's founding affidavit, says the umbrellas of the LCD cannot be easily distinguished from those of the BCP. The LCD in its answering affidavits denies that it has commissioned any umbrellas at all. Should it do so, it will ensure that the rising eagle features as part of the pattern imprinted on whatever it may order. In terms of decisions such as Stellenbosch Farmers' Winery Ltd. v. Stellenvale Winery (Pty) Ltd, 1957((4) S A 234 © and Plascon-Evans Paints v Van Riebeeck Paints 1984(3) S.A. 623 (A), where the BCP did not ask for the issue to be determined on oral evidence, the denial of the LCD must hold good, were it a matter of any importance. It is not, however: Mr Tsita does not suggest that the umbrellas may confuse him so as to lead to his casting a vote on polling day for a party he has no intention of supporting. The only confusion wrought by the umbrellas, was as to the identity of the party which had organized the particular rally he arrived at on a particular day. So too Mr Makhetha complains of confusion as to who organized a rally, because of LCD members wearing BCP clothes; but confirms that at such rallies mention is made of a material difference between the two parties: its leadership. And the affidavit of Mr Sehobai is to the same effect:

> "I am always confused by these colours to the extent that once I see them I have to ask which party is holding a rally as indeed they are the same".

The LCD opposed the application on a number of grounds. Mr Kuny, who appeared before us for the LCD, conceded - correctly, in our view - that the order in which the three colours appear is irrelevant as regards the blankets and umbrellas. As soon as the three-colour- bar pattern is repeated indefinitely, it becomes impossible to distinguish whether black is intended as the top, or the bottom one, of the trio. The main defence advanced, was that there is no prospect that the blankets and/or umbrellas in the colours to which the BCPs claim an exclusive right, could or would confuse voters in regard to exercising their votes at the polls.. Nor can the LCD dictate to those attending its rallies, as to what they may or may not wear.

The matter was argued before the High Court as though the law applicable to trade marks and passing off were applicable. The crux of the case advanced by the BCP was that

> "the use of the [BCP's] colours, in a political atmosphere are but harmful to the [BCP's] political agenda in that people may think that the [LCD] is but the same political party with the [BCP]"

On that basis, the learned Judge of first instance held that there was a likelihood of confusion and deception; although he was not exactly decisive in his view. Since the present matter is one analogous to providing a service, rather than the sale of goods, he sought guidance from i.a. P P I Makelaars v Professional Provident Society, 1998(1) S A 595 (AD) where it was held at p 603E that since services are ephemeral, not offered side by side, and are more indefinite than goods , the likelihood of confusion may be more easily established in regard to service marks than in a comparable goods marks case. Nevertheless, despite a number of points of difference between the logos in question being listed in that matter, Harms J.A. (at p 604 D-H) placed emphasis on the dominant features of the marks in issue there and agreed with the assessment of the Judge of first instance that "the likelihood of deception and confusion is apparent even in the absence of actual confusion". Here Mqutu J held that the colours of the two parties are confusing when viewed at a distance, but as soon as a person comes closer he should be able to see the eagle and realize that the two flags differ. The only question was whether altering the sequence of the colours and the design by placing the black bar at the bottom and superimposing a black eagle on the red and green , changes the flag sufficiently to obviate confusion. He then went on to say that since it is not disputed that members of the LCD who have garments, blankets and umbrellas which they used as members of the BCP, continue to use them as before,

> "[t]here can be no doubt that to an outsider and even to members of both parties this must cause confusion at a distance. When those people come nearer they can be expected to discover their mistake. A member of the LCD on the way to the LCD's rally dressed in old colours of the BCP can be mistaken for a member of the BCP".....[T]he colours the LCD have chosen will always cause temporary confusion. This will happen even with people who should know better because there is nothing to stop members of the LCD from using their old garments, blankets and umbrellas which they used when they went to the BCP's meeting. While what members do can be passing off but the LCD's flag would only be identifiable when a person comes nearer. I am not sure if the LCD really falls within the wrong of passing off. What seems to be difficult to dispute is that the LCD causes or facilitates passing off among its members who still wear or are in a position to use garments, blankets and umbrellas which they used while they were members of the BCP"

He then went on to find that the BCP had a protectable interest as envisaged in *Hyperama (Pty) Ltd v OK Bazaars (1929) Ltd* 1991-2 Lesotho Law Reports and Legal Bulletin 183; that the principles applicable to passing off should be extended to protect political parties also, as they have been to other non-trading entitites.; and that the requirements for the grant of an interdict had been established.

The order made underlines the confusion in the application, carried over into the arguments advanced in the court of first instance and its judgment, between the conduct and (officially recognized) symbols of the political parties aimed at obtaining a free and fair election, and the conduct of individuals during the run-up to the election. No order was granted in terms of prayer 4 as sought - *ergo* the **flag** of the LCD as registered under the Societies Act remains so registered It seems that what the court *a quo* wished to put a stop to, was the use of the three colours in articles other than the registered flag, else why refer to vertical as well as horizontal bars?. There was never any suggestion that the BCP used vertical bars, but it comes readily to mind that when you use the three colours on material, the draping or cut of that could result in

horizontal bars, or even diagonal ones. Was that intended by the prohibition against the use of anything "similar to" the composition of the BCP flag? (paragraph (b) of the order granted). The issue whether one design is sufficiently "similar to" another to offend, lies at the heart of the present dispute, so that this paragraph of the order as granted is pregnant with possibilities for future conflict. As regards paragraph ©, I can think of no legal basis on which a court can dictate to individuals what they may and may not wear on any particular occasion unless some rule of positive law would be breached thereby. One thinks of statutes relating to indecency, or perhaps in protection of the flag of a country. Short of such positive prohibition, people can wear clothes belonging to them as they wish . Recognising this, the court burdened the LCD with an impossible task in an attempt to prevent its interdict from being an order incapable of enforcement. The learned Judge said-

> "I think the LCD can stop its members from doing this. Although the BCP has not specially asked for the court to compel the LCD to do something about these confusing garments, blankets and umbrellas, I think I am obliged to give the BCP some further relief. The LCD must be made to do something about this mischief"

The order however deals with the run-up to elections, and the LCD would have the same problem to comply with the order, as the court would have in attempting to enforce it, even assuming it were equitable. How would the BCP be able to establish that those within the LCD organizing a rally, know whether persons wearing striped blankets are not BCP members come to hear what speakers from the rival party have to say? There is in a democracy, as Lesotho is, no bar to who may attend political meetings, which are indeed aimed at converting more adherents to a particular fold, not limited to preaching to those already converted. And this in turn underlines the flaw in the reasoning that wearing the colours in issue, to political rallies, is somehow harmful or potentially harmful to the opposition or indeed to anyone. The clothes one wears are not necessarily a true indication of one's constant allegiance to a particular party. And how one votes, is one's own secret, protected as such by law: See section 128 of the National Assembly Election Order, 1992. If so, there can be no obligation in law on any voter to declare or withhold his intention in regard to a future election, nor to be bound by any decision apparently arrived at according to visible symptoms such as becoming a member of a particular party or waving a particular flag, when the crunch comes and the ballot paper has to be put into the ballot box.

To summarise:
Accepting that there may be cases in which the law in regard to passing off could be applicable to a matter such as the present, and were we to accept that the complex of facts recorded here created a situation where it might have been appropriate to apply that law, the BCP did not establish the requirements for the relief it sought.

On the BCP's own papers, it contended for possible and temporary confusion during the run-up to the elections. It did not establish that there was a reasonable likelihood of any such confusion persisting to the stage where it matters: in the polling booth. The two parties have different symbols, different flags, different party newspapers, differently coloured membership cards. The court *a quo* correctly did not order the LCD to abandon its flag or the Registrar General to delete it from the registered constitution of the LCD, on its finding that the large black eagle sufficiently distinguished that flag from that of the BCP.

in a passing off application, some right or interest worthy of protection by the law must be established. Mere confusion or potential confusion at some or other stage in the minds of the general public as to the number of supporters of a particular political party at that particular stage, was not suggested as being an infringement of any interest at all, let alone one relevant so as to require protection by the courts.

There is no suggestion in the papers of any pre-election impropriety such as those listed in the statute referred to above under the general description of "undue influence", or of the dissemination of misleading information likely to influence the manner of election, by any body or person which or who has been joined as a party to the present proceedings. (See e.g. section 125)

Section 129 describes conduct that may not be indulged in on election day. We are nowhere near that date yet, and there is no suggestion that individuals are likely then to contravene that section, assuming that such suggestion could be remotely relevant in these proceedings.

The statute provides for the registration of a distinguishing symbol, in black and white, as the individual mark of each party and each independent candidate; and that the symbols must appear on ballot papers against the names of all candidates in alphabetical order, along with the name of the party endorsing a particular candidate (or the word "independent " against the name of an unendorsed candidate.)

The papers of the BCP itself allege only temporary confusion, during the run-up to the election, moreover which falls away soon; and only as to who has arranged a particular rally, not as to anything which would not be eliminated then and there already, and even more so by the precise details to appear on the ballot papers with the very dissimilar symbols adopted by the two parties.

The BCP was on those papers not entitled to the relief it sought, aimed at compelling the LCD to alter its flag as well as prohibiting it - not any named individuals - from using the three colours "as its colours" - whatever that may mean, divorced from the colours of the flag as defined in its constitution; and in the face of a denial that it used anything other than the flag as such. The order granted was one in effect aimed at individual apostates from the BCP rather than at the LCD as a political party, which cannot be justified on the papers before the court. No rule of either law or morality was suggested according to which it is unlawful or reprehensible that the LCD, in choosing to make its flag consist of black, red and green bars (though differing unmistakeably from the flag of the BCP by reason of the addition of the large eagle on these), may have enabled a large number of people to create the impression that they are still BCP supporters whereas they may in fact be apostates. That would not constitute the kind of "harm" that calls for protection by the court. What matters, is how voters in due course vote.

For the above reasons, the appeal was allowed in terms of the order made on 6 April 1998.