

IN THE HIGH COURT OF LESOTHO

In the matter between

BERENG AUGUSTINUS SEKHONYANA

Petitioner

and

**LEKETEKETE VICTOR KETSO
INDEPENDENT ELECTORAL COMMISSION
ATTORNEY GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent**

Held at Maseru

**Coram: Maqutu J
Ramodibedi J
Peete J**

JUDGMENT

Ramodibedi J

In this matter the petitioner who was a candidate for the Basotho National Party (BNP) at Constituency No.32 Maseru Central for the General Elections held on the 23rd May, 1998 has petitioned this Court for an order couched in the following terms:

“10.1 setting aside the parliamentary election in the Maseru Central Constituency No.32, held on 23rd May 1998, on account of the

legal disqualification of First Respondent;

- 10.2 declaring the return of First Respondent, LEKETEKETE VICTOR KETSO, as having been duly and validly elected a member of the National Assembly for the Maseru Central Constituency No. 32, null and void and of no force and effect;
- 10.3 directing Second Respondent to arrange for fresh elections to be held in Constituency No. 32 in accordance with the relevant legislation in force;
- 10.4 directing Respondents to pay the costs hereof;
- 10.5 granting Your Petitioner further and / or alternative relief.”

It should be noted at the outset that this judgment has been lying ready to be delivered since the 16th September 1998 but due to circumstances beyond the control of the Court caused by the recent spate of disturbances in the country it wasn't possible to deliver it as originally anticipated.

Now for the story of the litigation.

The First Respondent is the current Minister of Finance following his successful election in which he beat the petitioner and other candidates to the post as a candidate for the ruling party namely The Lesotho Congress for Democracy at Constituency No.32 Maseru Central at the aforesaid General Elections of the 23rd May 1998. Admittedly he held this portfolio in the previous Government since June

1996 before the said General Elections having been seconded from the National University of Lesotho where he was or is a lecturer in the Faculty of Social Sciences (as will be shown later it does not matter which).

The bedrock of the petitioner's complaint is that at all material times relevant and prior to the aforesaid General Elections of the 23rd May 1998 the First Respondent held a substantive post of Lecturer at the National University of Lesotho. It is sought to persuade the Court that the First Respondent's post at the University is an office of emolument in the public service and that the University itself is for that matter funded by the Government of Lesotho thus rendering it, so the argument goes, not a private institution. It is the Petitioner's case therefore that at all material times the First Respondent held a public office for which he was disqualified from being nominated or standing as a candidate in the General Elections in terms of Section 47 (c) (ii) of the National Assembly Elections Order 1992 which provides as follows:

- “47. (1) In addition to the disqualifications specified in section 59 of the Constitution, a person shall not be qualified -
- (c) To be elected a member of the National Assembly if, in terms of subsection (4) of section 59 of the Constitution
 - (i) He is a member of the Defence Force, the Police Force, the National Security Service or the Prisons Service; or
 - (ii) or he holds, or is acting in, a public office.”

Now the term “public office” is defined in Section 3 of the Interpretation Act 1977 as “any office of emolument in the public service” while the latter term “public service” is itself defined in the Act as service in respect of the Government.

In the same vein the Public Service Act No.13 of 1995 defines the term “public office” as having the same meaning as in Section 154 of the Constitution of Lesotho which in turn defines this term as “any office of emolument in the public service” while the latter term “public service” is defined therein as “the service of the King in respect of the Government of Lesotho.”

Of singular importance in so far as the instant case is concerned is the fact that Section 137 (1) of the Constitution of Lesotho provides that the power to appoint persons to hold or act in offices in the public service vests in the Public Service Commission. As will become clear in a short while the same thing cannot be said of the employees of the National University of Lesotho who are clearly not subject to the Public Service Commission.

It is necessary at the outset then to examine the enabling statutory provision creating the National University of Lesotho in order to determine whether the First Respondent’s post thereat is a public office within the meaning of Section 47 (c) (ii) of the National Assembly Election Order 1992.

The National University of Lesotho was first established by the National

University Act No.13 of 1975. Section 2 of the Act significantly provided that the University shall be a body corporate.

Then followed the National University Act No. 10 of 1976 Section 4 (1) (a) of which provided as follows:-

“4. (1) The National University of Lesotho established under the first Act is hereby preserved, continued in existence and constituted under this Act as body corporate under the name of the “National University of Lesotho” and by that name shall have perpetual succession and a common seal and be capable by that name of -

(a) suing and being sued” (emphasis added).

Section 4 (1) of the National University (Amendment) Act No. 4 of 1985 also provided for the preservation of the University as a body corporate in exactly the same terms as section 4 (1) of the National University Act No.10 of 1976.

The National University of Lesotho Act 1976 was subsequently repealed by the current National University of Lesotho Order 1992 (Section 57 thereof) which consolidated the laws relating to the university. It is pertinent to bear in mind however that in terms of section 3 (1) of the new Act namely the National University of Lesotho Order 1992 the university was once more preserved as a body corporate in exactly the same terms as Section 4 (1) of the

repealed Act of 1976. Thus the National University of Lesotho is a statutory juristic person capable of suing and being sued in its own name.

Indeed the National University of Lesotho Order 1992 has provided for autonomy of the university by establishing Council whose powers are best described in Section 10 (1) thereof in the following terms:-

“10. (1) The Council shall be the supreme governing body of the University” (emphasis added).

Significantly subsection 2 thereof provides that the Council shall manage and control all the affairs, concerns and property of the University and may act in all matters concerning the University in such manner as appears to it best calculated to promote the interests and functions of the University.

Regarding the question of appointment of staff it is necessary to bear in mind the provisions of subsection 10 (2) (f) which gives power to the Council to appoint, dismiss or remove from office any member of staff of the University. This, it must be observed, clearly distinguishes the National University of Lesotho from the Public Service.

Indeed subsection 10 (2) (n) of the National University of Lesotho Order 1992 proceeds to give power to the Council to provide for the welfare of all persons in the employment of the University including the provision of pension and retirement benefits. Thus they earn these benefits not as public servants but as employees of the University in its private capacity as a

statutory juristic person or body corporate.

In fairness to Adv. Moosa for the Petitioner he has conceded, and rightly so in the Court's view, that the National University of Lesotho is indeed a body corporate. He submits however that the Court should take a broad view of the matter and consider that in reality a lecturer of the University is someone paid by the Government and as such he is a public servant. In other words it was sought to persuade the Court to broaden the term "public office" to include a lecturer of the National University of Lesotho. Adv. Moosa however was unable to refer the Court to any authorities in the matter.

In the Court's view Adv. Moosa's submission is, with respect, seriously flawed both factually and legally. The following few examples should suffice to highlight this:

- (a) In terms of Section 10 of the National University of Lesotho Order 1992 as shown above the appointment of lecturers to the University and payment of their salaries is the sole responsibility of the University itself and not the Government.
- (b) Lecturers of the National University of Lesotho are employees of the University and not the Government. Accordingly it is incorrect to call them public servants in as much as they do not administer the business of the

Government within the meaning of Section 2 of the Public Service Act 1995 whose object is to develop and maintain a public service that will administer the business of the Government of Lesotho. In the same breath, and in the light of the above mentioned statutory provisions, the post of lecturer at the National University cannot by any stretch of the imagination be termed a public office. Any other interpretation of the University Statute would lead to an absurdity or result which the Legislature could never have intended.

- (c) As earlier stated the National University of Lesotho, as a statutory juristic person exercising autonomy, as it surely must, is a private separate legal entity from the Government. Unlike Government institutions it exists not as a public body but as a private one.

In dealing with a substantially similar situation, Jourbert AJA had occasion to state the following in **Ngcwase and Others v Terblanche NO and Others 1977 (3) S.A. 796 at 803-804:**

“According to reg. 54 (1) fourth respondent school is a body corporate with corporate personality. As a statutory juristic person (*persona juris*) it is in law considered to be an abstract legal entity which exists as a juristic reality in the contemplation of the law despite the fact that it lacks physical existence” (emphasis added).

With respect, these words are apposite to the instant case.

It should indeed be borne in mind that even at common law the position of corporations has always been that of private persons with individual rights of private persons for as Voet puts it at 3.4.2.:

“But corporations generally exercise the rights of private persons, and are held to be in the position of private persons, with the reservation that on the analogy of a state they are said to have their own individual estate, a common chest and property in common. Hence they can both owe and they can be owed. They can sue and be sued in private actions.”

In the result it must follow from the foregoing that the First Respondent’s post as Lecturer at the National University of Lesotho is not a public office but a private one serving the needs of a private corporation or a statutory juristic person namely the University. Accordingly this petition falls to be dismissed on this ground alone in as much as the First Respondent does not hold or act in a public office by the mere fact that he is an employee of the National University of Lesotho.

There is a further reason why this petition cannot stand. It is this:

In terms of Section 47 (2) (a) of the National Assembly Elections Order 1992 a person who is a Minister is exempted from the disqualification to be nominated or to stand for elections as a member of the National Assembly in

as much as the term “public office” as used in the section specifically excludes the office of a Minister or Assistant Minister.

Now, it is common cause that at the time of his nomination as a candidate for election as a member of the National Assembly the First Respondent was indeed the holder of the office of Minister of the Government of Lesotho the position he held right through to the General Elections of the 23rd May 1998 when, as earlier stated, he was duly elected as a member of the National Assembly thus paving the way for his further appointment as a Minister.

Faced with Section 47 (2) (a) which definitively exempts a Minister from disqualification as set out above Adv. Moosa did not, in fairness to him, feel able to assert that the First Respondent was, as a Minister, disqualified from standing for election as a member of the National Assembly at the General Elections of the 23rd May 1998. Indeed the exemption provided for in favour of a Minister in the section sticks out like a sore thumb. It must therefore beat anybody’s imagination how the Petitioner or indeed his legal representatives could have failed to spot it.

The exemption in question is sufficient to dispose of this case and it is therefore strictly unnecessary for the Court to determine the effect of the fact that the First Respondent unsuccessfully sought “leave of absence” from the National University of Lesotho in order to stand for the General Elections in question. There can be no doubt that he unduly panicked and that for reasons

fully set out above it was not necessary for him to obtain leave of absence from the University in order to stand for elections.

In all the circumstances of the case therefore the petition falls to be dismissed with costs as being ill-founded and misconceived and it is so ordered.

In terms of Section 107 (1) (a) of the National Assembly Elections Order 1992 it follows automatically that the First Respondent Leketekete Victor Ketso has to be declared as having been validly elected as a Member of the National Assembly for Constituency No. 32 Maseru Central and it is so ordered.


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M.M. RAMODIBEDI
 Judge of the High Court

I agree :

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W.C.M. MAQUTU
 Judge of the High Court

I agree :

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S.N. PEETE
 Judge of the High Court

Delivered at MASERU on the 17th Day of November 1998.

For the Petitioner: Adv Moosa (instructed by Messrs Ntlhoki & Co)
For the First Respondent: Mr. Matsau