

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/259/98

In the matter between:

TSIE BENJAMIN PEKECHE

APPLICANT

and

MOTSOAHAE T THABANE

1ST RESPONDENT

INDEPENDENT ELECTORAL COMMISSION

2ND RESPONDENT

LESOTHO CONGRESS FOR DEMOCRACY

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

1ST, 2ND AND 3RD RESPONDENT'S HEADS OF ARGUMENT

1.

**PUBLIC OFFICER NOT PROHIBITED FROM NOMINATION BUT IS PROHIBITED
FOR ELECTION**

- 1.1 Disqualifications for nomination as a candidate are contained in Section 59(1), (2), (3) of the constitution. Section 59(2) of the Constitution states that Parliament may provide that a person, who at the date of his nomination for election holds any office that is specified by Parliament and the functions of which involve responsibility for and in connection with the conduct of any election to the National Assembly shall not be

qualified to be elected as a member of the National Assembly. Pursuant to such aforementioned powers Parliament has enacted Section 47(1)(a) of the National Assembly Election Order 1992 (as amended); which states that a person shall not be qualified to be elected as a member of the National Assembly if at the date of his nomination for the election in which he seeks to be elected he holds an office which involves responsibility for the conduct of that election. Sub-Section (b) of the same Section of the Order disqualifies a person who at any time prior to the date of his nomination has been convicted of a serious offence mentioned in the Section.

It should be emphasised at this stage that the disqualifications referred to above refer to a time factor being “as at the date of nomination of a candidate.”

1.2 **DISTINCTION BETWEEN NOMINATION AS CANDIDATE AND ELECTION AS MEMBER OF THE NATIONAL ASSEMBLY**

Section 59(4) of the Constitution provides that Parliament may provide that a person shall not be qualified to be elected as a member of the National Assembly if he holds or acts in any office or appointment that is so prescribed, or he is a member of the Defence Force or he is a member of the Police Force or he is a member of the National Security Service or he is a member of the Prison service. Pursuant to the aforesaid powers Parliament passed Section 47(1)(c) of the National Assembly Election Order of 1992 as amended which states that a person shall not be qualified to be elected as a member of the National Assembly if he is member of the Defence Force, the Police Force, the National Security Service or the Prison service or holds or is acting in a Public Office.

It is to be noted that the prohibition here is to election as a member of the National Assembly which should be contra-distinguished with nomination for election. It is submitted that it is clear from the wording of the constitution and the National Assembly Election Order itself that the prohibition in certain instances starts at the time of nomination but in the case of persons prohibited by Section 59(4) of the Constitution the prohibition will only commence at the date of election. It is therefore submitted that without conceding that the 1st Respondent is holding such a position he would only be disqualified for membership to the National Assembly if at the time of the election (polling day) he holds a public office.

2.

EXPRESSIO UNIUS EXCLUSIO ALTERIUS

Mention of one or more things of a particular class may be regarded as silently excluding all other members of the class - **MAXWELL ON THE INTERPRETATION OF STATUTES - 12TH ED. P.293.** The exclusion of a “public officer” amongst persons disqualified for nomination by Section 59(1)(2)(3) of the Constitution and Section 47(1)(a)(b) of the National Assembly Election Order, 1992 (as amended) was by design.

3.

1ST RESPONDENT’S APPOINTMENT NOT A PUBLIC OFFICE

3.1 A Public Office has not been defined in Section 47 of the National Assembly Election Order of 1992 or in the interpretation section thereof. It is submitted that for definition of Public Office we should have recourse to other pieces of legislation, namely the

Constitution and the Public Service Act of 1995. The interpretation Section of the Constitution defines Public Office as any office of emolument in the Public Service. Public Service has been defined as the service of the King in respect of the Government of Lesotho. Public Officer means a person holding or acting in any public office. It is submitted that a public service would therefore mean a service by appointment of the Public Service Commission. The Public Service Act 1995 defines public office, Public Officer and the Public Service in similar terms to that of the Constitution above. See: Section 4 of the Public Service Act.

- 3.2 In terms of Section 6 of the Public Service Act an appointment to Public Office shall be made by the Public Service Commission. Annexure “B” to the Applicant’s Affidavit shows that the appointment of the 1st Respondent was not made by the Public Service Commission. It is submitted therefore that his contract doesn’t fall under the Public Service Act and at such it is not an appointment in the Public Service as contemplated by the Constitution and the Public Service Act. See:- the judgment of the Hon. Mr Justice M M Ramodibedi to which Maqutu and Peete J.J. concurred in **BERENG AUGUSTINUS SEKHONYANA vs L.V. KETSO AND OTHERS - CIV/APN/273/98** (delivered on 17th November 1998) at page 4:

“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.”

- 3.3 It is common cause that the 1st Respondent was a Special Advisor to the Prime Minister of Lesotho. The office of Prime Minister is not a public office as defined in the Public Service Act. It is therefore not surprising that a Special Advisor to the Prime Minister should be on a special contract whose appointment has not been made by the Public Service Commission. In the case of Sekhonyana above the Court did not accept a broadening of the definition of Public Office notwithstanding that the funds that pay the employee emanate from public funds. See- page 7 of the judgment:

“In fairness to Advocate 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 is a Public Servant. In other words it is safe to persuade the court to broaden the term Public Office to include lecturer of the National University of Lesotho. Advocate Moosa however was unable to refer the Court to any authorities in the matter. In the Court's view Advocate Moosa's submission is, with respect, seriously flawed both factually and legally."

4.

RESIGNATION A UNILATERAL ACT

- 4.1 1st Respondent's resignation is a unilateral act. Any suggestion that an employee may be forced to render services against his will militates against Section 9(2) of the Constitution of Lesotho which provides that no person shall be required to perform forced labour. It is submitted however, that even if it were held that the 1st Respondent was a Public Officer part 4 (Retirement of Officers) of the Public Service Act 13/95 would not apply to the 1st Respondent because he was not employed on permanent terms - Section 29 of the Act.

Furthermore, the contract (annexure "B") does not restrict the 1st Respondent from resigning but merely stipulates a penalty which he will pay if he fails to give a three (3) months notice of his intention to terminate his services (Clause 7(3)).

4.2 It is further submitted that the 1st Respondent resigned from his position on the 17th April 1998. It is however submitted that even if it could be said that he resigned on the 22nd April 1998 he was no longer employed in that capacity on polling day and he was therefore not disqualified by Section 47(1) (c)(ii) of the National Assembly Election Order.

It is submitted that this application ought to be dismissed with costs.

DATED AT MASERU THIS 27th DAY OF NOVEMBER, 1998.



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1ST 2ND & 3RD RESPONDENT'S ATTORNEYS

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