CIV/APN/259/98

IN THE HIGH COURT OF LESOTHO

In the matter between

TSIE BENJAMIN PEKECHE	**PETITIONER**
and	
MOTSOAHAE T. THABANE	**1ST RESPONDENT**
INDEPENDENT ELECTORAL COMMISSION	**2ND RESPONDENT**
LESOTHO CONGRESS FOR DEMOCRACY	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

Held at Maseru

Coram : LEHOHLA J
MOFOLO J
RAMODIBEDI J

JUDGMENT

Ramodibedi J.

In order to understand the full story of the litigation in this matter it is

perhaps convenient to begin at the beginning namely with certain case number CIV/APN/208/98 which came before the Learned Chief Justice and in which the petitioner sued the Respondents for a ***rule nisi*** calling them to show cause why, ***inter alia,*** :

> "(a) the purported nomination of 1st respondent on the 20th April 1998 general elections within the Abia Constituency No. 36 shall not be declared illegal null and void and of no force and effect.
>
> (b) Second respondent should not be directed to remove the name of 1st respondent from the list of duly nominated candidates for the oncoming general elections."

This application was duly dismissed by the Learned Chief Justice on the 20th May, 1998 on the ground that it had been brought to court prematurely and that the Applicant had "short-circuited the procedure" set out in the National Assembly Elections Order 1992 for complaints relating to electoral process.

It is important to observe then that the effect of the Learned Chief Justice's judgment was to dismiss the petitioner's challenge to 1st Respondent's nomination and in due course the latter stood as a Candidate for Lesotho Congress for Democracy (LCD) at Abia Constituency No. 36 in the General Elections held on the 23rd May 1998. He was returned as the

successful candidate having beaten, amongst others, the petitioner himself.

In view of the conclusion at which this Court has arrived in this matter as will soon be demonstrated in a short while it is strictly unnecessary to determine whether the Learned Chief Justice's decision in CIV/APN/208/98 amounts to ***res judicata.*** It must be stated however that, notwithstanding that decision, the petitioner has approached the Court once again challenging the nomination and "hence" election of the 1st Respondent. The prayers sought are couched in the following terms:-

"(a) Directing the 2nd respondent to produce before the Honourable Court the ballot papers and electoral lists that were used for the constituency of Abia number 36.

(b) Declaring the 1st respondent as not validly nominated and hence no (sic) validly elected as a member of (sic) National Assembly for the Constituency of Abia number 36.

© Setting aside the election of Abia Constituency number 36 and directing fresh elections to be held.

(d) Directing respondents to pay costs of this petition.

(e) Granting further and/or alternative relief."

At the commencement of the hearing of this petition Adv Mosito for the petitioner intimated to the Court that the petitioner was no longer pursuing paragraph (a) of the petition and consequently no addresses were made in that regard. In the same breath the petitioner's complaint contained in paragraph 10 of his petition to the effect that the 2nd Respondent unlawfully transferred and misled voters to cast their votes in the Thaba Bosiu Constituency was likewise abandoned.

Before dealing with the merits of the petition it is necessary to comment on the slovenly state of the petitioner's papers which certainly give rise to grave concern in as much as the petition itself is not accompanied by a verifying affidavit. This, it must be observed at once, is in stark contravention of Rule 5 of the Court of Disputed Returns (National Assembly Election Petition) Rules, 1993 which provides as follows:

"Verifying affidavit.

5. The petition shall be verified upon oath by the petitioner, as nearly as may be in accordance with Form B of the Schedule to these Rules." **(emphasis added).**

The use of the word "shall" in this Rule clearly indicates that the Rule was intended to be peremptory or mandatory.

Because of the importance of the verifying affidavit to an election petition it is necessary to reproduce Form B of the Schedule to the Court of

Disputed Returns (National Assembly Election Petition) Rules 1993. It reads as follows:-

"IN THE COURT OF DISPUTED RETURNS OF LESOTHO HELD AT MASERU

In the matter between:

..... Petitioner

and

..... Respondent

VERIFYING AFFIDAVIT

I, the undersigned (name in full) .....

do hereby make oath and say -

1. I am the petitioner in the foregoing election petition.

2. I have read my petition and say that all the facts and allegations set out therein are to the best of my knowledge and belief true and correct.

3. The matters contained in the foregoing petition are based on facts within my knowledge, save where it manifestly

otherwise appears and then from information received which I verily believe.

.....
Petitioner

SWORN TO AND SIGNED AT.....on this the..... day of ..... 19.... the deponent having acknowledged that he knows and understands the contents of this affidavit.

BEFORE ME

.....
(PRINT NAME) ➛
COMMISSIONER OF OATHS"

It should be borne in mind that the verifying affidavit as set out in "Form B" contains the following material allegations:-

(1) that the statement of the deponent is made on oath. This is always essential in order to give the Court some measure of confidence to rely on the facts alleged.

(2) the petitioner identifies himself with the petition itself.

(3) The petitioner assures the Court that he has in fact read the contents of the petition and thereby associates himself with them as being true and correct as well as within the petitioner's personal knowledge or as having been received from the information which the petitioner verily believes. This is particularly important where the petition has been drawn by a legal practitioner and the poor petitioner obviously has no inkling of what is contained in the petition unless it is read back to him.

Faced with the problem that the petition lacked a verifying affidavit Adv Mosito sought and obtained leave of the Court to go and investigate whether any verifying affidavit had by chance been filed at all. In due course he returned to inform the Court that no such verifying affidavit had been filed. In fairness to him he conceded, correctly so in the Court's view, that the petition was "inelegantly" drawn. He however sought to persuade the Court that the petition doubled up as an affidavit and for this proposition he referred the Court to the case of Leith N.O. and Heath N.O. v Fraser 1952 (2) S.A. 33 at 36.

A proper reading of this case however suggests that what actually happened in that case is that there was a proper affidavit supporting the Notice of Motion. The Applicants in that case sought to use this affidavit as a petition. Indeed the head note to this judgment contains the following sentence:

> "It appeared that the "petition", the affidavit supporting the Notice of Motion, had been signed by only one of the applicants who had averred that he was acting with the full knowledge and consent of the other....."

To remove any doubt as to the nature of the document filed in Leith N.O. and Heath N.O. v Fraser (supra) Smith J stated the following on page 35:

> "The proceedings were initiated by way of notice of motion and not petition and the petition referred to by Counsel is really the affidavit supporting the notice of motion. The prayer was contained in the Notice of Motion and all that was required in addition was an affidavit stating the facts on which the claim was being made **(Barber and Barber v Flemmer** 1903 TH 266)." (emphasis added).

Indeed it is useful to observe that in commenting on Leith's case Browde JA in Lesotho Telecommunications Corporation and Another v Makhobotlela Nkuebe C of A (CIV) No. 5 of 1998/C of A No. 12 of 1998 (unreported) had this to say at page 19 thereof:-

> "That the Notice of Motion should also be taken into account appears from the judgment in **Leith NO and Heath NO. vs Fraser,** 1952 (2) SA 33. That case concerned an application by the liquidators of an assigned estate to eject the respondent from estate property. Only one liquidator had signed the affidavit supporting the notice of motion and the other liquidator did not file an affidavit at all. In the affidavit the one applicant alleged that he was acting with the full knowledge and consent of the

> other. The point was taken by the respondent that both liquidators should have signed the affidavit or, if the one did not, he should have filed a power of attorney indicating that he was joining in the application. The court found that in the circumstances of the case the sole supporting affidavit was adequate" (emphasis added).

While, therefore, there was a proper affidavit in Leith's case the converse obtains in the instant matter where there is absolutely no affidavit verifying the petition. Leith's case therefore does not assist the petitioner. What this then means is that there is a lack of admissible evidence to make the simple case that was sought to be made. This is fatal in the particular circumstances of this case.

See Matime and others v Moruthoane and Another 1985-89 LAC 198 at 199 C-D.

Nor is this Court persuaded by Adv Mosito's submission that formalism should not triumph over substance in this case. As was succinctly stated by Schutz P (as he then was) in Kutloano Building Construction v Matsoso and others 1985-89 LAC 99 at 103 forms are often important. In his own words this is what the Learned judge of Appeal stated at page 103:

> "I am afraid that my decision may smack of the triumph of formalism over substance. But forms are often important and the requirements of the sub-rule are such."

Here the Learned Judge of Appeal was dealing with the mandatory

provisions of sub rule 29 (1) (b) of the High Court Rules 1980 which stipulates that the ground upon which the exception is founded must be clearly and concisely stated. The remarks of the Learned Judge of Appeal are indeed apposite to the instant case in so far as the mandatory provisions of Rule 5 of the Court of Disputed Returns (National Assembly Election Petition) Rules 1993 are concerned. The message needs to be sent out loud and clear that anyone who disregards forms and/or peremptory Rules of the Court does so at his own peril.

Locus Standi

The Respondents have specifically challenged the petitioner's **locus standi** to bring these proceedings. They rely on Section 69 (1) (b) and (3) of the Constitution of Lesotho which provides as follows:-

> "69. (1) The High Court shall have jurisdiction to hear and determine any question whether -
>
> (a) .....
>
> (b) any person has been validly elected as a member of the National Assembly;
>
> © .....
>
> (2) .....
>
> (3) An application to the High Court for the determination of any question under subsection (1) (b) may be made by any person qualified to vote in the election to which the application relates or by the Attorney-General and, if it is made by a person other

> than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings." (emphasis added)

It should be observed at the outset that in terms of this section two essential requirements must be satisfied before a petitioner (the onus rests on him) can be said to have **locus standi** to bring an application to the High Court for the determination whether any person has been validly elected as a member of the National Assembly namely:

(1) that the petitioner is a person qualified to vote. In this regard, although Section 20 (1) (b) of the Constitution of Lesotho provides that <u>every citizen</u> of Lesotho shall enjoy the right to vote or to stand for election at periodic elections under a system of universal and equal suffrage, that right is however qualified in subsection (2) thereof in the following words:

> "the rights referred to in subsection (1) shall be subject to other provisions of this Constitution."

Now Section 57 (2) of the Constitution of Lesotho in turn provides as follows:-

> "Subject to the provisions of subsections (3) and (4) every person who -

(a) is a citizen of Lesotho; and

(b) has attained the age of eighteen years; and

© Possesses such qualifications as to residence as may be prescribed by Parliament shall be qualified to be registered as an elector in elections to the National Assembly under a law in that behalf; and no other person may be so registered."

Subsection (3) provides that no person shall be qualified to be registered as an elector in elections to the National Assembly if at the date of his application to be registered he is by virtue of his own act, under acknowledgement of allegiance, obedience or adherence to any foreign power or state or is under sentence of death imposed on him by a competent court in Lesotho or is, under any law in Lesotho, adjudged or otherwise declared to be of unsound mind.

Subsection (5) of section 57 of the Constitution of Lesotho in turn provides for qualification of a person to vote in express positive terms as follows:-

"Subject to the provisions of subsections (6) and (7), every person who is registered in any constituency as an elector in elections to the National Assembly shall be qualified to vote in such elections in that constituency in accordance with the provisions of any law in that behalf; and no other person may so

vote " (emphasis added).

It follows from the wording of this section therefore that unless a person is registered in a Constituency as an elector in elections to the National Assembly he shall not be qualified to vote.

Sections 10, 11 and 12 of the National Assembly Election Order 1992 in turn provide for qualifications of a person to be registered as an elector in the same vein as the Constitution of Lesotho provides as fully set out above.

(2) The second requirement that must be satisfied in order to establish a petitioner's **locus standi** to bring an election petition to the High Court is that such petitioner is qualified to vote in the election to which the application relates. In other words the petitioner must make the running and show that he is qualified to vote in the particular constituency to which the election petition relates. A global allegation that he is qualified to vote in general terms without any reference to the Constituency forming the subject matter of the election petition will therefore not suffice. This is the natural meaning that must flow form subsection 57 (5) of the Constitution of Lesotho which expressly uses the words "qualified to vote in such elections in that Constituency."

It remains then to determine whether the petitioner has, on the papers before us, succeeded to establish that he has locus standi to bring the petition in the instant matter to this Court. In this regard the petitioner states as follows in paragraph 1 of his petition:-

> "Your petitioner is **TSIE BENJAMIN PEKECHE** a male Mosotho adult and a candidate of the Basotholand Congress Party in the **Abia** Constituency No.36 in the district of Maseru. The facts to which I depose herein are, unless the context otherwise indicates, within my personal knowledge and are to the best of my belief and recollection true and correct. I am therefore entitled to bring this application."

Apart from the fact that, as earlier stated, there is no verifying affidavit to the petition and that accordingly there is no admissible evidence to make the simple case that was sought to be made, paragraph 1 of the petition does not say that the petitioner is a person qualified to vote in the election to which the application relates namely Abia Constituency No. 36. There is no evidence that he is registered as an elector in that constituency or at all. The Petitioner has made no attempt altogether to comply with the provisions of Section 69 (3) of the Constitution of Lesotho which expressly sets out the **locus standi** of a petitioner to an election petition as fully demonstrated above. The fact that the petitioner alleges that he is a Mosotho adult and a candidate of the Basotholand Congress Party in the Abia Constituency No. 36 falls far too short of the requirements set out in Section 69 (3) of the Constitution of Lesotho on **locus standi** to bring election petitions. This is more so since the petitioner was, as earlier stated, specifically challenged on

the ground that he has no **locus standi** in terms of Section 69 (3) of the Constitution. Despite this challenge the petitioner did not even bother to file a replying affidavit to deal with the issue even at that late stage. Amazingly nowhere does the petitioner say that he is a Lesotho citizen. Adv Mosito has tried to overcome this fatal omission by belatedly stating the following in his heads of argument:-

> "It being accepted that petitioner is a male Mosotho adult, it is clear that like every citizen of Lesotho, he mandotorily (sic) has an entrenched constitutional right to vote or to stand for election at periodic elections under the Constitution of Lesotho."

What is obvious in this passage is that Adv Mosito is in effect giving evidence from the bar that the petitioner is a citizen of Lesotho. This, it has to be said, is totally unacceptable and indeed highly improper. It is not the function of counsel to give evidence from the bar and thereby try to patch up a limping case.

It would indeed appear that the petitioner has proceeded on a wrong assumption that every Mosotho adult who happens to be a candidate for a party in unspecified elections (no reference has been made by the petitioner to the General Elections of the 23rd May 1998) automatically qualifies to bring an election petition to the High Court. As has been demonstrated above this is an incorrect approach. To hold otherwise would open the door to a disqualified person or to any Mosotho adult who happens to be in this country but who is not a Lesotho citizen to cast his vote contrary to the letter

and spirit of the Constitution of Lesotho. Alternatively this wrong approach would in effect amount to a recognition of the **actio popularis** which has long become obsolete.

See Lesotho Human Rights Alert Group v Minister of Justice and Human Rights & Others 1993-94 Lesotho Law Reports and Legal Bulletin page 264.

In the result therefore the petitioner has failed to discharge the onus of proving that he had **locus standi** to bring this petition.

See Kendrick v Community Development Board and Another 1993 (4) S.A. 532.

It follows from the aforegoing therefore that this petition falls to be dismissed with costs on this ground alone.

Non-Joinder and/or Non-Suiter

At the commencement of the hearing of this petition the Court **mero motu** raised the question whether the other political parties which took part in the general election at Abia Constituency No. 36 more especially the Basotho National Party (BNP) and its sponsored candidate who admittedly polled more votes than the Petitioner himself ought not to have been joined as parties to these proceedings in as much as they obviously have direct and substantial interest in the matter.

That the Court is perfectly entitled to take the point of non-joinder or non-suiter of its own motion admits of no doubt.

See for example the leading case of Amalgamated Engineering Union v Minister of Labour 1949 (3) S.A. 637 (A).

See also Basutoland Congress Party and 2 Others v Director of Elections and 2 Others C of A (CIV) No. 14 of 1998 (unreported) where Steyn P, writing the unanimous judgment of the Court of Appeal, had this to say at page 23:

> "In the first place appellants were not the only parties involved in the election. It is inconceivable that a Court could have considered postponing the election without at least involving the other parties in these proceedings and giving them an opportunity to be heard. The appellants should therefore have been non-suited on this ground alone."

That decision is binding upon this Court and accordingly the remarks of the Learned President of the Court of Appeal quoted above apply with equal force to the instant matter. It follows therefore that by failing to join the other interested parties in these proceedings the petitioner is non-suited. On this ground alone the petition falls to be dismissed with costs.

Whether the 1st Respondent was a public officer

The crux of the Petitioner's case as set out in paragraph 4 of his petition is that the 1st Respondent was disqualified from nomination for election as

a member of the National Assembly as at the 20th April 1998 and that consequently he did not qualify to be so elected by virtue of the fact, so it is alleged, that he was at that stage still a holder of a public office. This version is hotly disputed by the Respondents who are adamant that the 1st Respondent was not employed in the Public Service (hence he was not a public officer) and that even if he was so employed he duly resigned his post before nomination day.

Although the Petitioner has not referred the Court to any specific section on which he relies in this matter it may be assumed in his favour that he relies on Section 47 (1) (b) - © of the National Assembly Election Order 1992 which reads as follows:-

> "47. (1) In addition to the disqualifications specified in Section 59 of the Constitution, a person shall not be qualified -
>
> (a) .....
>
> (b) to be nominated for election as a member of the National Assembly if, in terms of subsection (3) of section 59 of the Constitution -
>
> (I). at any time prior to the date of his nomination, he has been convicted or reported guilty by a court trying an election petition, of any offence under Part 2 (except sections 114 and 118), Part 3 or Part 4 of Chapter 9 of this

Order; and

(ii) at the date of his nomination, a period of five years following his conviction or the report of the court has not elapsed; or

© to be elected as 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 Prison Service; or

(ii) or he holds, or is acting in, a public office."

It is indeed salutary to note that the disqualifications specified in Section 59 of the Constitution of Lesotho do not include public office as such. It would seem therefore that the petitioner's case rests squarely on Section 47 (1) (b) © of the National Assembly Election Order 1992 which spells out public office as being one of the disqualifications from election as a Member of the National Assembly.

It is further important to note that disqualification from election as a member of the National Assembly in terms of Section 47 of the National Assembly Election Order 1992 is divided into two categories namely -

(1) Disqualification from nomination

(2) Disqualification from election.

The importance of this distinction is that Parliament, in its own wisdom, has seen fit to prescribe different grounds of disqualification to each category as for example the disqualification relating to public office does not appear in the first category relating to nomination but appears under the category relating to the election itself.

It follows from the above distinction therefore that by using public office as a ground for disqualification from nomination the Petitioner clearly misconstrued his remedy in as much as public office is only a ground for disqualification from election as a member of the National Assembly. The conclusion is inevitable therefore that the 1st Respondent was not disqualified from nomination as a member of the National Assembly as at the 20th April 1998 even assuming that he was a public officer. He would only be disqualified at polling day from being elected as a member of the National Assembly if at that stage he was still a public officer. But was he ever a public officer during the material time?

The terms "public officer" and "public service" were considered by this Court in Bereng Augustinus Sekhonyana v Leketekete Victor Ketso and 2 Others CIV/APN/273/98 (unreported) and it is strictly unnecessary to go through the same exercise again in these proceedings. Suffice it to say that in terms of Section 137 (1) of the Constitution of Lesotho the power to appoint persons to hold or act in offices in the public service and the power

to remove such persons from office vest in the Public Service Commission.

Section 6 of the Public Service Act 1995 is in identical terms to Section 137 (1) of the Constitution of Lesotho. It vests in the Public Service Commission the power to appoint persons to hold or act in the public service and the power to remove such persons from office.

The Petitioner relies on Annexture "B" for the proposition that the 1st Respondent was a public officer. This Annexture is a contract of employment between the Government of Lesotho and the 1st Respondent. It is signed by the Government Secretary on behalf of the Government. The 1st Respondent has also signed.

Now the passage that the Petitioner lays much stock on is paragraph 1 of the Contract in which the following sentence appears :-

> "1. The person engaged undertakes that he will diligently and faithfully perform the duties of Advisor in the Public Service of Lesotho for the term of his engagement, and will act, in all respects according to the instructions and directions given to him by the Government through the Head of Department or other duly authorised officer....."

It will be observed however that this Annexture is a proforma which was obviously not designed to suit the 1st Respondent's special

circumstances. The word "Advisor" has simply been inserted in a pre-existing form.

Once more the Petitioner relies on the 1st Respondent's letter of resignation Annexture "C" which reads as follows:-

"THE RIGHT HONOURABLE THE PRIME MINISTER

MY POSITION IN YOUR OFFICE

IT WOULD APPEAR THAT MY HOLDING OF A PUBLIC OFFICE COULD DISQUALIFY ME FOR ELECTION TO PARLIAMENT, INCLUDING NOMINATION AS A CANDIDATE.

I THEREFORE, WISH TO TENDER MY RESIGNATION WITH IMMEDIATE EFFECT; AND REQUEST 3 MONTHS PAY IN LIEU OF NOTICE.

M.T. THABANE
SPECIAL ADVISER TO THE PRIME MINISTER

Ntsu Mokhehle (signed)
APPROVED

17TH APRIL, 1998"

That the 1st Respondent may have erroneously considered himself a public officer does not necessarily make him one. It is therefore the function of this Court to interpret the relevant statutory provisions and determine whether or not the 1st Respondent was holding a public office at the material

time notwithstanding Annextures "B" and "C". In doing so one must perforce consider both the facts and the law.

The 1st Respondent deals with the factual position extensively in paragraph 5 of his answering affidavit. It should indeed be noted at once that what he states therein has remained uncontroverted by virtue of the fact that the Petitioner has not only failed to file a verifying affidavit to his petition as earlier stated but he has also failed to file any replying affidavit at all.

In a nutshell the 1st Respondent makes the telling point that he was not appointed by the Public Service Commission. Indeed his contract of employment Annexture "B" has not been signed by any member of the Public Service Commission and there is no evidence that the Commission delegated the power to appoint the 1st Respondent to anybody. The 1st Respondent avers that when he was nominated as a candidate on the 20th day of April 1998 he was no longer in the employment of the Government of Lesotho. More importantly he further makes the telling point that he resigned from his employment as a Special Advisor to the Prime Minister on the 17th April 1998. He personally delivered the letter of resignation Annexture "C" to the Prime Minister on the same day and the latter signed his approval there and then. Indeed it is not disputed that the 1st Respondent's resignation was approved by the Prime Minister. The latter has in fact filed a supporting affidavit to that effect and so has the present Prime Minister Professor Mosisili who was Deputy Prime Minister then. These affidavits remain unchallenged.

On the authority of Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd 1984 (3) S.A. 623 at 634-635, this Court accepts the version of the Respondents as fully set out above.

Accordingly the Court finds as a fact that the 1st Respondent was not appointed by the Public Service Commission in terms of Section 137 (1) of the Constitution of Lesotho read with Section 6 of the Public Service Act 1995. That being the case it follows that the 1st Respondent was not a public officer.

Indeed since in terms of Section 154 (4) (a) of the Constitution of Lesotho the office of Prime Minister is not a public office it would be absurd if not illogical for the office of Advisor to the Prime Minister to be a public office. It is common cause for that matter that this office does not even appear in the Establishment List. It is not recognised as a public office in any of the statutes of this country.

1st Respondent's Resignation

As stated above, it is not disputed that on the 17th April 1998 the 1st Respondent tendered his resignation in writing in terms of Annexture "C" and that this resignation was approved by the Prime Minister. That being the case the conclusion is inevitable then that the Court has to accept the unchallenged version of the Respondents on this issue.

See Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd (supra).

Indeed the Court was informed during the course of the hearing of this petition that the 1st Respondent has since his successful election in Abia Constituency No. 36 in the general elections of the 23rd May 1998 been appointed a Minister of Foreign Affairs. That is further proof then of his resignation as a fact. For reasons that have fully been set out above the Court cannot accept the Petitioner's submission that the 1st Respondent's resignation should have been addressed to the Public Service Commission. As stated above he was not a public officer.

Mr. Matsau for the Respondents submits that resignation is a unilateral act and that no person may be forced to remain in employment against his will. This submission is sound in law having regard to the provisions of Section 9 of the Constitution of Lesotho subsection (2) of which expressly provides that no person shall be required to perform forced labour. It follows therefore that it is the constitutional right of any employee to tender his resignation at any time and leave the employer with the remedy of damages as the case may be. It is precisely for this reason that 1st Respondent's employment contract Annexture "B" provides in Section 7 thereof as follows:-

> "7. (1) The Government may at any time determine with no reason assigned, the engagement of the person engaged by giving him three months' notice in writing or on paying him three months' salary.
>
> (2) The person engaged may at any time after the expiration of three months' (sic) from the commencement of

> any resident service determine his engagement on giving the Government three months' notice in writing or paying to the Government three months' salary and shall forfeit all rights and advantages reserved to him by this Agreement.
>
> (3) If the person engaged terminates his engagement otherwise than in accordance with this Agreement he shall be liable to pay to the Government as liquidated damages, three months salary and thereupon all rights and advantages reserved to him by this Agreement shall cease" (emphasis added).

The words "otherwise than" appearing in this section are wide enough to include unilateral resignation regardless of the provisions of the Agreement between the parties relating to notice.

It would seem beyond question therefore that the 1st Respondent was fully entitled to resign at any time without giving notice in terms of Section 7(3) of the employment contract Annexture "C". More importantly there is no evidence that his employer ever queried the resignation which is entirely a matter between the two of them. The Petitioner has no direct interest in the resignation.

Declaration of Rights

It is trite law that a declaration of rights is a matter within the discretion of the court. In this regard Section 2 (1) © of the High Court Act 1978 provides as follows:-

"The High Court of Lesotho shall continue to exist and shall, as heretofore, be a superior court of record and shall have,

(a) .....

(b) .....

(c). In its discretion and at the instance of any interested person, power to inquire into and determine any existing future or contigent (sic) right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination" (emphasis added).

The word "discretion" used in this section indicates quite clearly that the High Court has a discretion in the matter which must however always be exercised judicially and not arbitrarily or capriciously.

In Morapeli Motaung and 2 others v Director of Elections and 5 others CIV/APN/254/98 / CIV/APN/266/98 / CIV/APN/271/98 / CIV/APN/353/98 (unreported) this Court expressed the following principle which merits repetition herein:-

"It is salutary to state that the question whether or not a declaration of rights should be granted in terms of this section must of course be examined in two stages namely:

(1) the jurisdictional facts such as the requirements that the applicant must have a direct interest in the matter and a clear right capable of legal enforcement (either existing, future or contingent) or obligation which becomes the object of inquiry, must first be established.

(2) After the jurisdictional facts have been established the Court must then decide whether on the facts, the case before it is a proper one for the exercise of its discretion.

See for example **Family Benefit Society v Commissioner For Inland Revenue 1995 (4) SA 120 at 124."**

As has been stated above the Petitioner lacks **locus standi** to bring the petition to this Court. It follows therefore that he has no direct interest and a clear right capable of legal enforcement in the matter.

Regarding the question whether this case is a proper one for the exercise of the Court's discretion in favour of the declaratory order sought it is necessary to bear in mind the slovenly state of the Petitioner's papers as stated above. It will be recalled that there is virtually no verifying affidavit to the petition. This is a factor that weighs heavily against the exercise of the Court's discretion in favour of the Petitioner. As earlier stated, the message has to be sent out to the legal practitioners and litigants generally that slovenly case presentation will no longer be tolerated. Regrettably this is exactly what this Court said in Morapeli Motaung and 2 others v Director of Elections and 2 others (supra) in which the same legal representatives as in the instant matter were involved. There is therefore need to adopt a firmer stand even if in doing so the court has to sacrifice the importance of the case.

The time has arrived for the Court to mark its displeasure at slovenly case presentation and it is hoped that this judgment will help upgrade standards in case presentation.

It follows from the aforegoing therefore that this case is not a proper one for the exercise of the Court's discretion in favour of the declaratory order sought.

In sum therefore the application is dismissed with costs.

The Court is enjoined by Section 107 (1) (a) of the National Assembly Elections Order 1992 to make the following consequential order:-

It is hereby declared that the 1st Respondent Motsoahae T. Thabane has been validly elected as a member of the National Assembly for Abia Constituency No. 36.

M.M Ramodibedi
JUDGE OF THE HIGH COURT

I agree:

M.L. Lehohla
JUDGE OF THE HIGH COURT

I agree:

G.N. Mofolo
JUDGE OF THE HIGH COURT

Delivered at Maseru on the 17th day of December 1998.

For the Petitioner : Adv. Mosito
For Respondents : Mr. Matsau