

In the matter between

LESOTHO CONGRESS FOR DEMOCRACY
and
BASUTOLAND CONGRESS PARTY

Appellant

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 knobkerrie 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 entities; 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 unmistakably 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.