CIV/APN/152/97

IN THE HIGH COURT OF LESOTHO

In the matter between

BASOTHO NATIONAL PARTY **APPLICANT**

and

ATTORNEY-GENERAL **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 28th day of April, 1998

This case raises the question of set-off. The Applicant which is a political party has applied for an order in the following terms :

"1. Dispensing with the forms and period of service of this application on the grounds of its urgency.

2. That Rule Nisi be issued calling upon the Respondent to show cause if any, why the following orders should not be made final and absolute.

(a) That the execution of the various warrants of execution against the Applicant's candidates for the costs, issued

by the Respondent should not be stayed until the final determination of prayer 2(b) below.

(b) The Respondent should not be compelled to accept an amount of R60,000 plus its interests, as set off to satisfy the various warrants of executions issued against its candidates.

(c) The Respondent be ordered to pay the costs of this application. '

3. Granting such further and/or alternative relief.

4. That prayers 1 and 2(a) should operate as an Interim Order."

Without doing violence to essential detail the main facts which give rise to the litigation can be briefly recorded as follows:

Following the 1993 General Elections which were won by the BCP the Applicant's candidates brought various petitions before the Court of Disputed Returns challenging the outcome of the elections in question. In due course all these petitions were dismissed and the Applicant's candidates were all ordered to pay costs on attorney and client scale. A subsequent review by the Applicant's candidates to this Court was dismissed with costs on the 30th August 1996.

Pursuant to the said order of costs on attorney and client scale awarded against Applicant's candidates in the Court of Disputed Returns the Respondent

duly issued out a warrant of execution against each of the Applicant's candidates. The amount claimed in each warrant of execution varied from petitioner to petitioner but the total amount as gleaned from such warrants is well in excess of eighty thousand maloti (M80,000).

As against this background the Applicant contends that on the 13th August 1985 General Elections were held at which all its candidates were returned. The Applicant alleges that it had paid a deposit of sixty thousand Maloti (M60,000.00) for its candidates in terms of the Electoral Act No.23 of 1968.

Now in terms of Section 27 of the Electoral Act No.23 of 1968 the sum deposited by or on behalf of a candidate shall be returned to the depositor. Thus the Applicant contends that the M60,000-00 in question should operate as a set-off against the Respondent's costs ordered by the Court of Disputed Returns.

The Respondent has raised a point in limine to the effect that the Applicant has no locus standi in judicio to institute these proceedings by virtue of the fact that the execution in question is not directed against the Applicant itself but against the Applicant's candidates.

At the hearing of the matter before me on the 6th April, 1998 I ruled that the question of locus standi be argued together with the merits of the application. I did this in the interests of justice in case I found myself unable to make an immediate and informed ruling on the point in limine which might have the effect of concluding the matter in favour of either party without the necessity of going into the merits.

Dealing with a similar situation in **Basotho National Party v The**

Management Board, Lesotho Highlands Revenue Fund and 2 Others CIV/APN/335/95 (unreported) at page 3 I had occasion to state the following remarks which I should like to repeat in this matter:-

> "I find myself in very good company in this approach as it has become increasingly common for the question of locus standi to be considered together with the merits of the claim. See **Kendrick v Community Development Board 1983 (4) S.A. 532.** See also **The Administrator, Transvaal and the Firs Investments (Pty) Ltd. v Johannesburg City Council 1971 (1) S.A. 56(A)** in which the question of locus standi was raised for the first time in the appeal."

It also seems to me that the question whether the Applicant has locus standi in judicio to bring these proceedings is closely intertwined with the question whether the Applicant paid the said deposit of M60,000-00 at all hence the need to determine both issues together.

The bedrock of Applicant's case, as I see it, is that it paid the deposit of M60,000-00 in 1985 as earlier stated. But I observe however that there is a serious dispute of fact on this issue. More importantly I have no doubt in my mind that the Applicant was aware of this dispute of fact at least as far back as the 30th April 1997 yet it chose to proceed by way of notice of motion rather than by action. This is so because on that date namely 30th April 1997 the Respondent wrote to Applicant's attorneys in terms of Annexture ER10" to the founding affidavit of Evaristus R. Sekhonyana as follows:

"30 April 1997

Messrs N. Mphalane & Co.
17 Bedco Centre
P O Box 1000
Maseru
Dear Sirs,

ELECTION PETITIONS COSTS OF 1993-RECOVERY THEREOF

We acknowledge receipt of yours dated 29th April, 1997 in connection with the above.

Surely your client B.N.P. must have been issued with a receipt (original) for the alleged payment of M60 000 election deposit. You simply need to produce that to substantiate your claim. It is our instructions that no such payment was ever made and your client is put to the proof thereof. In the meantime, we are further instructed that it has taken too long for your client/clients (B.N.P.) to settle the 1993 election petitions costs and that we should proceed to recover the ninety thousand or so maluti (M90 000+-) in settlement of those costs. We are taking firm steps to execute your clients' property and, where need be, contempt proceedings where such become necessary, ALTERNATIVELY, insolvency proceedings. We are just waiting to hear from the messengers of court as to the progress they have so far made.

Yours faithfully

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T. Makhethe

F/ATTORNEY GENERAL."

This was followed by yet another letter of 2nd May, 1997 Annexure "ER11" in which the Respondent did not mince his words about the fact that Applicant's claim was "strongly" disputed. That letter reads as follows:

"2nd May, 1997

Messrs N. Mphalane & Co.
17 Bedco Centre
P O Box 1000
Maseru
Dear Sirs,

ELECTION PETITIONS COSTS OF 1993-RECOVERY THEREOF

We do not accept that your clients could have remained dormant for over ten years + without reclaiming the alleged M60 000 allegedly paid as election deposit in 1985. Thus we strongly dispute payment by your clients of the money. They have to prove that. ALTERNATIVELY, if they paid, (and we do not concede that) and never reclaimed the money for over ten years, surely they are barred to do so at this point in time.

It is for the above reasons that we do not consider that there is any question of set-off arising. Consequently, we are proceeding with execution of your clients' property and depending on the messengers' return of service, we also have in mind taking further legal action as earlier conveyed to you. Our intention is to ensure that the judgement creditor enjoys the fruits of his judgement, which he was awarded almost four years back. Nothing more, nothing less.

Yours faithfully,

_____

T. MAKHETHE

F/ATTORNEY GENERAL."

I consider it to be settled law that a litigant who elects to proceed on notice of motion runs the risk that a dispute of fact may be shown to exist thus entitling the Court in a proper case to exercise its discretion to dismiss the application. Indeed where facts are in dispute a Court has a discretion as to the future course of the proceedings including dismissal of the application or referral to trial or oral evidence as the case may be.

See **Adbvo Investment Co. Ltd. v Minister of the Interior 1956 (3) S.A. 345 at 349-350.**

In this regard it is necessary to bear in mind the provisions of Rule 8 (14) of the High Court Rules which reads as follows:

> "If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or may make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issues, or

otherwise as the court may deem fit."

I find it inexcusable that despite the fact that as far back as the 30th April 1997 the Applicant was fully aware that there was a serious dispute of fact as to whether it had in fact paid the alleged deposit of M60,000-00 nevertheless the Applicant deliberately chose to institute motion proceedings as opposed to an action. In my judgment this application stands to be dismissed on this ground alone. I consider it to be abuse of court process.

SET-OFF

As earlier stated Applicant's claim is based on set-off. Now INNES CJ in **Postmaster-General v Taute 1905 T.S 582** stated the following:

> "Set off, like payment, should be pleaded, and proved, so that the court may give effect to it."

I respectfully agree.

The onus of proof is certainly on the person claiming set-off to prove it on a balance of probabilities.

There is a wealth of authority that before a debt can qualify for set-off it must be easily ascertainable or calculable and must be such that it can be established summarily or without prejudice. As Mason J succinctly put it in **Hardy, N.O. and Harsant 1913 T.P.D. 433 at p 447:**

> "..... the debt should not be one demanding for its establishment a prolonged investigation or delay or involved in difficulties and Judges are not to be too ready to admit compensation."

These remarks are apposite to the claim of set-off before me.

Set off is a matter of judicial discretion. See **Adjust Investments (Pty) Ltd. v Wild 1968 (3) S.A. 29 at 32.**

Applying these principles to the present case I remain unpersuaded that the set-off alleged by the Applicant is capable of easy ascertainment and that it can be established summarily without a prolonged investigation or delay. On the contrary and from the perusal of the papers before me as fully set out below I am satisfied that the Applicant has failed dismally to prove the alleged set-off. It has for that matter failed to produce a receipt evidencing the alleged payment of M60,000-00 deposit.

The Applicant relies on Annexture "ER 1" for its alleged payment. This annexure is however not a receipt but a Sub Accountant's Cash Book. The entry that the Applicant relies upon records that on 13/8/85 an amount of M60,000.00 was received from the "Electoral Office" as per receipt No. 776164. It is clear therefore that on the face of it this annexture does not even attempt to prove that the payment of M60,000-00 was made by the Applicant itself. (There is no mention of the Applicant's name at all). On the contrary such payment was clearly made by the Electoral Office. There is no affidavit from that office to show that the money in question was paid by the Applicant at all. The deponent Evaristus R. Sekhonyana himself does not even claim to have been present when this money was paid. Nor

is there an affidavit of a person who made the entry in the Sub Accountant's cash book or anyone who saw him effect the entry in question. Mr. Makhethe for the Respondent has argued in the circumstances that the contents of the entry in question are no more than inadmissible hearsay. The contention seems to me to be both sound and unanswerable. Indeed the common law, as I have always conceived it to be, is that mere production of a document is not evidence of the truth of the contents thereof. It is merely evidence of the fact that the document was written by the author and that the latter said what the document contains. Authorities are legion in this respect.

See for an example **Weintraub v Oxford Brink Works (Pty) Ltd. 1948 (1) S.A. 1090 at 1093**

Selero (Pty) Ltd and Another v Chauvier and Another 1982 (2) S.A. 208 (T) at 216.

There is again the aspect that it has taken Applicant more than ten (10) years to claim a refund of the alleged deposit of M60,000.00. I consider it to be highly improbable that the Applicant could have sat back for such an inordinate length of time without claiming such a substantial refund if its story that it had paid is to be believed at all. It is true the Applicant has attached Annexture "ER 2" which is a letter dated 29th November 1985 addressed to the Chief Electoral Officer and purporting to claim a refund of M60,000.00. That letter is however unsigned and its authenticity has not been proved. There is no evidence that it reached the Respondent at all. For the reasons stated earlier in this judgment it seems to me that, this letter is inadmissible as hearsay.

The Applicant has tried to overcome the problem of its apparent failure to

claim a refund of the alleged deposit of M60,000.00 by belatedly attaching a "supporting affidavit" of one Mahlabe Malefetsane Jane to the replying affidavit of Evaristus R. Sekhonyana. The said Mahlabe Malefetsane Jane states as follows in paragraph 2 thereof:

> "As I have indicated I was the Councillors (sic) in charge of the constitutional affairs, the claim of a refund of M60,000.00 came to our attention but the attitude of the Military Government was that it would not involve itself in the matters pertaining to the political parties which were then suspended. Therefore the Applicant had to wait until the democratic Government was elected."

There is however no explanation why this "supporting affidavit" was only used at the replying stage when the Respondent could no longer be in a position to react to it. Accordingly I perceive prejudice to the Respondent here.

In any event I find the "supporting affidavit" glaringly lacking in essential detail. It is not clear as to who made the claim of a refund and when. Moreover I fail to understand how the Applicant could reasonably have agreed to wait "until the democratic Government was elected" before getting its alleged refund. There was simply no knowing at the time when that would be. In any event courts of law were always open and I consider that the Applicant would have resorted to them if its story is to be believed.

LOCUS STANDI IN JUDICIO

The allegation upon which the Applicant's locus standi rests is that the

Applicant has paid the M60,000.00 deposit in 1985 as "Sponsor" of its candidates. I have already rejected this claim for reasons fully set out above. Accordingly Applicant's locus standi based on payment must also fail.

There is another reason, perhaps a better reason, why Applicant's claim on locus standi must fail. It is indeed common cause that the Applicant was not a party to the petitions in the Court of Disputed Returns resulting in the warrants of execution in question. The Applicant's candidates sued in their own personal names. Thus the order of costs in question was not directed against the Applicant itself, but against its candidates. I suspect that if such order had been made against the Applicant itself the Applicant would have raised a hue and cry. It would no doubt have claimed lack of locus standi in judicio.

The point I wish to make here is that the Applicant may, at best, have an indirect interest in the matter but it certainly does not have the necessary direct and substantial interest capable of legal enforcement.
See **Basotho National Party v The Management Board, Lesotho Highlands Revenue Fund** (supra) at p 14.

What I think is happening here is that the Applicant is seeking to bring a representative application on behalf of its members which in my view it is incompetent to do. To hold otherwise would open the door to the Roman Law "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 264.**

Ahmadiyya Anjuman Ishaati - Islam Lahore (South Africa) and Another v

Muslim Judicial Council (Cape) and others 1984 (4) S.A. 855.

In all the circumstances of the case I am satisfied that the Applicant has failed to make out a case for the relief sought.

Accordingly the Rule is hereby discharged and the application dismissed with costs.

M.M. Ramodibedi

JUDGE

28th day of April, 1998

For Applicant : Mr. Mphalane

For Respondent : Mr. Makhethe