

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAMONKI KHALEMA REDEBY

APPLICANT

and

NATIONAL EXECUTIVE COMMITTEE  
OF THE BASUTOLAND CONGRESS PARTY

1<sup>ST</sup> RESPONDENT

BASUTOLAND CONGRESS PARTY

2<sup>ND</sup> RESPONDENT

INDEPENDENT ELECTORAL COMMISSION

3<sup>RD</sup> RESPONDENT

M/S LEHLOENYA

4<sup>TH</sup> RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Acting Mr Justice S.N. Peete  
on the 14th May 1998

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This ex parte application was first placed before me on Saturday the 18<sup>th</sup> April, 1998 as an urgent matter and having read papers filed of court and having heard Mr Phafane for the Applicant, I granted an interim order which was couched in the following terms:-

1. That the Rules of this Court concerning period of notices and service of process are hereby dispensed with on account of the urgency of this matter.

2. That a Rule Nisi be hereby issued returnable on the 27<sup>th</sup> day of April 1998 at 9.30 am calling upon the Respondents to show cause if any why the following order shall not be made final, to wit-

- (a) The purported submission of the Fourth Respondent's name as the Second Respondent's candidate in the constituency of Matsieng Number 44 for the 1998 general elections shall not be declared unlawful, irregular, unconstitutional, null and void and of no legal force and effect as well as fraught with procedural and substantial injustice and impropriety;
- (b) The first Respondent shall not be restrained and interdicted from submitting the name of fourth Respondent as a candidate of second Respondent in the constituency of Matsieng Number 44 to the third Respondent pending the finalisation hereof;
- (c) The third Respondent shall not be restrained and interdicted from nominating and/or confirming the fourth Respondent as a candidate of the second Respondent in the constituency of Matsieng Number 44 for the forthcoming general elections;
- (d) The Applicant shall not be declared the lawful and duly elected candidate of second Respondent in the constituency of Matsieng Number 44 for the forthcoming general elections;
- (e) The first, second and fourth Respondents shall not be ordered to pay costs hereof;
- (f) The Applicant shall not be granted further and/or alternative relief.

It was ordered that Prayer 1, 2 (b) and (c) operate with immediate effect as an Interim Order pending the finalization of this application.

It was common cause that the 20<sup>th</sup> April 1998 had been declared per Gazette 19 of 1998 the Nomination Day for the purpose of the forthcoming General Elections due to be held on the 23<sup>rd</sup> May 1998. On the 27<sup>th</sup> April 1998 the rule was extended by my Brother Maqutu J. to the 28<sup>th</sup> April 1998, on which day it was again extended to the 4<sup>th</sup> May 1998. On the 4<sup>th</sup> May, the rule was again extended to the 5<sup>th</sup> May 1998.

The matter was argued before me therefore on the 5<sup>th</sup> May 1998 and counsel started their arguments at 4.30 pm. and were heard by me until 8 pm or so. On the morning of the 6<sup>th</sup> April, 1998 I made a following order and intimated that my reasons would follow. These now follow. The final Court Order reads:

1. The purported selection and submission of the name of the Fourth Respondent by the First Respondent herein as a candidate of the Second Respondent in the Constituency of MATSIENG No.44 be and is hereby declared null and void;
2. In view of one (1) above, the MATSIENG CONSTITUENCY NO.44 of the Second Respondent be and are hereby ordered to hold elections on the 9<sup>th</sup> May 1998 at Matsieng Pitso Ground at 9.00 am. to elect a Constituency Candidate for the second Respondent for the 1998 General Elections;
3. The elections aforesaid be and are hereby to be conducted under the supervision of PHOKA CHAOLANA of the Maama Constituency, who must forth submit the result thereof to the Third Respondent for processing;
4. This Order be and is hereby to be served forthwith upon PHOKA CHAOLANA, FIRST and SECOND RESPONDENT and upon all branches of the MATSIENG CONSTITUENCY NO.44 of the Second Respondent;
5. The Applicant and Fourth Respondent be and are hereby free to stand for the contest in the aforesaid elections;

6. The First Respondent be and is hereby ordered to make available and provide forthwith all Party Membership lists of the members of the Second Respondent in the MATSIENG CONSTITUENCY No.44 to PHOKA CHAOLANA;
7. The Member Delegates to the aforesaid Constituency elections be and are hereby to be determined in accordance with Article 19.4 of the Constitution of the Second Respondent.

At the onset I am of the view that this application is of great importance since it touches upon a fundamental human right guaranteed by the Lesotho Constitution. Section 20 thereof reads in part-

“(1) Every citizen shall enjoy the right -

- (a) to take part in the conduct of public affairs directly or through freely chosen representatives
- (b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot.” (Underlining my own)

Section 2 thereof reads:

“This Constitution is the supreme law of law and if any other law is consistent with this Constitution, that other law shall, to the extent of the inconsistency be void”

To this one may add that the Section also applies to acts, directives done or emanating from any other source or authority in Lesotho.

The Constitution of the Second Respondent and party circulars and directives made by the First Respondent must necessarily therefore be read, considered and interpreted in the light and context of the provisions of the Lesotho Constitution; to do otherwise would be to permit instances of violations of those very sacred fundamental rights which our constitution seeks to protect and guarantee. This court therefore has power to determine the consistency or inconsistency of any act, provision or directive made by any body public or private to ensure that the contents thereof accord with the principles of the Constitution (Constitution -.Section 22; Rivett - Carnac v Wiggins - 1997 (3) SA 80).

It is a fundamental right to be enjoyed by every citizen of Lesotho to engage in elections under a system of universal suffrage and also to choose freely their representatives in Parliament and other public bodies.

In the present application, the Applicant is a female adult whose marital status is not clear from her founding affidavit. It is not clear whether she is a married woman and if so whether she is married in or out of community of property with marital power excluded; we don't know if she is a widow. In their answering affidavit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents raised in limine the issue of locus standi in judicio in that the Applicant being a married woman initiated these proceedings without the necessary assistance of her husband. The matter was however not pursued during argument, since this court had just recently given a ruling on a similar issue in CIV/APN/158/98, wherein after considering all authorities cited by Mr Phafane, the Court was of the view that a married woman had locus standi (sui generis) in electoral proceedings and that this was an exception to the common law principle that a married woman may not sue unassisted by her husband. Even the 18 - 21 age group are regarded as majors for the purposes of the electoral proceedings (Alufsen v Klisser - 1959 (3) SA 351). But the nature of this locus standi of course depends on the Electoral law and its provisions. This court therefore ruled that the Applicant, married as she is like in the instant application, has locus standi in judicio to bring these proceedings as member of the Second Respondent unassisted by her husband and more so

because, as Mr Phafane correctly submitted, her husband later ratified her locus standi in the suit in his affidavit supporting her replying affidavit. There was however no application either on notice or from the bar to have the husband's affidavit struck off as an improper or irregular proceeding (Rule 30).

As regards the issue of dispute of fact - also raised in limine - the court decided not to treat it separately from the main issues of the case. It was submitted on behalf of the contesting Respondents that there were serious disputes of fact which could not be decided on papers filed of record; also raised was the issue of non-disclosure of material facts by Applicant.

As regards the dispute of fact, the relevant rule is Rule 8 (14) which reads:-

“(14) 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.

The leading case which laid the trite principle is that of Room-Hire Company (Pty) Ltd vs Jeppe Street Mansions 1949 (3) SA 1155 (T) where Murray A.J.P. stated at page 1166:

“In my view, once the absence of such dispute is apparent, the Applicant is entitled as of right to have his relief given him speedily and cheaply on affidavits together with the employment of Rule 9 (our Rule 8). The only discretion which

the Court, in my view, has, arises when the dispute of fact is shown (by respondent) to exist and it is called upon to decide upon employing Rule 9, on one hand, and on the other dismissing the application or direct trial.”

Another important decision on this regard matter is Plascon - Evans Paints Ltd vs Van Riebeeck Paints 1984 (3) SA 623 which also laid down the guidelines that is, in deciding whether a dispute of fact exist, the respondent’s answering affidavit must be closely looked at to determine whether such dispute is material, bona fide and genuine; such dispute must be such that the case cannot be determined without resort to oral evidence called in terms of the provisions of Rule 8 (14) - see also Peterson vs Cuthberth & Co (Pty) Ltd 1945 AD 420 at 428 and Soffiatiorno v Mould 1956 (4) SA 150 and Luster Products Inc vs Magic Style Sales CC - 1997 (3) SA 13.

As regards the issue of non-disclosure, the inquiry must be whether the fact that is not disclosed in the founding papers of the Applicant is of a material nature and was wilfully concealed by the Applicant. The accepted rule is that the Applicant stands or falls by his founding affidavit in which he seeks to establish a clear right in the interdict proceedings. The Applicant must hold the court in confidence especially in an ex parte application and, I may add, and disclose even those facts unfavourable to his case.

See: Moletsane vs Moletsane CIV/APN/475/98 where Ramodibedi J. states:-

“Indeed it is trite law that a litigant who approaches the court ex parte has a duty to make a full and honest disclosure to the court of every material fact which might influence the court in deciding to grant or to withhold the relief sought. That is known as the uberrima fides rule. See Seth Lieta vs Semakale Lieta C of A (CIV) NO.5 OF 1987; Philimon Ntoso vs Muso Moahloli C of A (CIV) NO.8 OF 1987. It is also trite law that in the event of the court being apprised of the true facts which had been withheld from it by the Applicant the Court has a discretion to dismiss the application on account of the non-disclosure.”

What are the material facts in the case before this court in the present application? What facts are admitted and not in dispute? What are those facts that are in dispute? What are the structures and procedures in the constitution of the second Respondent?

In the present case, the Applicant avers in her founding affidavit that she is a member of the Second Respondent (the BCP) and a member of the Constituency Committee. To this averment the Secretary General who deposed on behalf of the First and Second Respondent, categorically denied that any party structure in a form of Constituency Committee existed in the Matsieng Constituency and that no such committee has been confirmed by the First Respondent (NEC) in terms of Article 48.3 of the party Constitution. The Applicant alleges that such committee was elected on the 15<sup>th</sup> April, 1998 and that she, the Applicant was elected as a candidate.

It was common cause during argument that the First Respondent issued a general Circular NEC Z/3-98 on the 26<sup>th</sup> January 1998 directing all sub-branches, branches and Constituencies to prepare for the election of candidates for the forthcoming general elections in Lesotho. This process involves election of delegates at sub-branch, branch and constituency levels. Forms LM10, LM11 and LM12 were to be used in the process and were to be forwarded to the NEC for scrutiny and endorsement. This Circular also stipulated that elections at sub-branch, branch and constituency levels be held on 10/3/98, 11-12/3/98, and 14-15/3/98 respectively.

In the Matsieng Constituency, it is quite clear that this party directive was not complied with. The First Respondent - apparently in desperation - issued another general Circular NEC Z/11-98 dated 1<sup>st</sup> April, 1998 addressed to the party structures to get on with the election of candidates and set an ultimatum date or deadline for the 9<sup>th</sup> April 1998 and the Circular stated

“The National Executive Committee will appoint candidates for the constituencies which shall have been unable to elect before this date.”

In her affidavit, the Applicant has failed to prove that she was elected in accordance with the provisions of the Party Constitution Article 31.13 - no Forms LM10, LM11 or LM12 were produced in support of her candidature. She explains this by stating that she was refused LM12



forms after her election on the 15<sup>th</sup> April 1998. She has therefore failed to establish a clear right for this Court to protect (Setlogelo vs Setlogelo 1914 A.D.221). Mr Phafane, correctly in my view, ultimately conceded to this and therefore her claim that she be declared a lawful candidate for the Matsieng Constituency No.44 falls by the wayside.

The important issue to be determined in this application therefore is whether the selection of the 4<sup>th</sup> Respondent as a candidate of Matsieng Constituency by the First Respondent is lawful in being in accordance with the provisions of the constitution of the BCP.

This inquiry involves the following:

- (a) whether the First Respondent has power under the party constitution to select a constituency candidate where the party structures fail or are unable to elect one;
- (b) whether the Circular of the 1<sup>st</sup> April 1998 is consistent with the provisions of the National Constitution of Lesotho which - to repeat - reads:-

“1. Every citizen of Lesotho shall enjoy the right -

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote or stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot.” (My underlining)

The question now is, when the First Respondent was aware that the Matsieng party structures were indolent and sitting on their laurels, did it have authority under the BCP constitution to assume power to select a representative for the Matsieng constituency? Or, if not, did such an inherent power exist? The Secretary General in his answering affidavit (Para 11) states categorically “whether the 4<sup>th</sup> Respondent was elected or not, is immaterial. The NEC was

entitled to select possible candidates after the 9<sup>th</sup> April 1998. The NEC is so empowered to save the Party .....

Assuming for the purposes of argument that the BCP constitution has a specific article vesting in the NEC power so to select, it is my honest view that such a provision would not be held to be consistent with the fundamental provisions of section 20 of the Lesotho Constitution.

Mr Matabane was unable to point out an article in the new BCP constitution which vested such power in the NEC. Nor was the Court shown any resolution of the Annual conference endorsing such procedure. Whilst the Courts of law should not and must not interfere in the governance of constituted societies like a political party, the Courts of law have a sacred duty to see that the fundamental rights and freedoms of the citizen are not abridged or compromised. The third Respondent had lawfully appointed the 20<sup>th</sup> April as the Nomination Day on which all political parties intend on contesting general elections were to present their respective candidates. How these candidates are to be elected within the party structures is an internal party matter but - I must emphasise - such selection or election is not a "closed house" and out of bounds when the fundamental provisions of the Lesotho Constitution are imperilled, or when principles of fairness and natural justice are compromised. According to the ultimatum date or dead-line of the 9<sup>th</sup> April 1998, the party structures were afforded unilaterally only 8 days to put their houses in order. Was this fair? I make no decision on this except to say that its tantamount effect was to abridge the right to vote of the BCP members of Matsieng constituency. In my honest view, the best that the First Respondent could do in the circumstances was to cajole and exhort its party structures - indeed - till the early hours of the morning of the 20<sup>th</sup> April 1998! Is a selected representative a freely chosen representative? Honestly, not. The party constitution is supreme indeed a instrument which must be respected as it presently stands by all party structures - NEC included - until amended by the Annual Conference of the Second Respondent. Supreme at it is, the Constitution of the party is however to be interpreted in a manner which is consistent with the provisions and principles of the Lesotho Constitution. Even if there was an inherent power "to save the party" this power cannot give NEC power to assume the basic right to select a representative for a constituency. To endorse such a selection would be to make a sham of free elections in a democratic country.

The Secretary General in his affidavit also states that “..... the NEC can reject a recommendation if it is satisfied that the person so recommended cannot uphold principles, aims and objectives of the Party.” He also denies that in selecting the Fourth Respondent, the Party constitution has been violated. But - let me point out - there was no such provision to violate. In my considered view, if an unacceptable candidate has been elected at the Constituency level, the NEC certainly has all right and indeed a duty - to order a re-election of an appropriate person but not to select such a candidate. I posed an hypothetical situation to Mr Matabane as follows: Assume a majority of the party constituencies become recalcitrant and elect and recommend candidates who are unacceptable to the majority in the NEC, can the NEC then assume power to select candidates as done in the present case? Will such candidates indeed be representatives freely chosen by the people? Common sense, democracy and section 20 of the Constitution of Lesotho hold otherwise.

Indeed, and this was common cause that since January 1998 all was not well in the Matsieng Constituency. The Secretary General succinctly catalogues the so-called bogus and free-for-all conferences at sub-branch, branch and constituency levels and he attributes this to the absence of officially recognised party structures. It was a sad situation at a crucial time wherein the party constitution was sidelined with impunity by party members who in their eager race to be elected, ignored the party constitutional provisions, circulars, and directives. He attached Forms of LM10, LM11 and LM12 which seemingly had forged signatures and dates. The whole scenario was riddled with fraud and chicanery. See Annexure “C”, “D”, “E”, “F”, “G” and “H”.

To illustrate this, in one amazing instance, the LM12 for ‘Neko Sekhobe is dated 6<sup>th</sup> April 1998 and LM11's are dated in some cases 7/4/98. This could not be possible. No one could be elected at constituency level before being elected at branch level. This only points to concoction and fabrication which was perpetrated in sheer haste by the contestants in Morija Constituency.

It is clear that even in these sad circumstances, the name of the Fourth Respondent did not feature at all. She stands as a “selected candidate” who was selected in order to save the Matsieng Constituency. As I have already pointed out, this Court cannot hold her candidature as lawful and proper for reasons outlined above. I therefore ordered that Prayer 2 (a) be confirmed.

Since this Court had given an interim Order on the 18<sup>th</sup> April, 1998 restraining the Third Respondent from processing the name of the Fourth Respondent on the 20<sup>th</sup> April 1998, it seems to me that the Second Respondent would stand finally deprived of the Constitutional right to field its own candidate in the Matsieng Constituency, this court is of the view that in order to remedy this situation an additional order must be made to give a practical effect to the fundamental provisions of Section 20 of the Lesotho Constitution which guarantees to every citizen of this country that basic right “to take part in the conduct of public affairs directly or through freely chosen representatives” and “to vote and to stand for election at periodic election under this constitution under a system of universal and equal suffrage and secret ballot”. Paternalistic selection of such representatives shall not be endorsed by our Courts of law.

In the result I directed a reconvening of a re-election of the Matsieng Constituency to be processed soonest within the party structure under conditions that would ensure fairness and justice to all concerned.

The final order of this Court therefore stands thus:

IT IS ORDERED THAT:

1. The purported selection and submission of the name of the Fourth Respondent by the First Respondent herein as a candidate of the Second Respondent in the Constituency of MATSIENG NO.44 be and is hereby declared null and void.
2. In view of one (1) above, the MATSIENG CONTITUENCY NO.44 of the Second Respondent be and are hereby ordered to hold elections on the 9<sup>th</sup> May 1998 at Matsieng Pitso Ground at 9.00 am. to elect a Constituency Candidate for the Second Respondent for the 1998 General Elections;
3. The elections aforesaid be and are hereby to be conducted under the supervision of PHOKA CHAOLANA of the Maama Constituency, who must forth submit the result thereof to the Third Respondent for processing;

4. This Order be and is hereby to be served forthwith upon PHOKA CHAOLANA, FIRST and SECOND RESPONDENTS and upon all branches of the MATSIENG CONSTITUENCY NO.44 of the Second Respondent;
5. The Applicant and Fourth Respondent be and are hereby free to stand for the contest in the aforesaid elections;
6. The First Respondent be and is hereby ordered to make available and provide forthwith all Party Membership lists of the members of the Second Respondent in the MATSIENG CONSTITUENCY NO.44 to PHOKA CHAOLANA;
7. The Member Delegates to the aforesaid Constituency elections be and are hereby to be determined in accordance with Article 19.4 of the Constitution of the Second Respondent.
8. No order as to costs.

I am fully aware that the Nomination Day was the 20<sup>th</sup> April 1998 when nomination of candidates of all parties contesting general elections were supposed to close. The elected candidate of the Matsieng Constituency will therefore be formally presented to the Third Respondent for processing i.e. to despite the fact that the nomination have legally closed. It is my view that the effect of the interim Court Order dated 18<sup>th</sup> April, 1998 was to suspend the operation of Section 48 (3) (c) of the National Assembly Election Order No.10 of 1992 till this court finalised this urgent application. It should also be noted that the said section must be interpreted in such a manner as not to abridge the fundamental provisions of the Section 20 of the Constitution. That is, section 48 (3) (a) of the Electoral law cannot be interpreted as to be inconsistent with the Constitution of Lesotho. The closing of nomination is, in my view primarily intended to enable the processing of data by the Independent Electoral Commission. Indeed if the Mastsieng Constituency had failed through internal prevarications to field a candidate timeously and there had been no intervening interim court order made by the High Court as a

superior court of record, the IEC would be entitled to reject any belated nomination - regardless of reasons or causes therefor.

It is common cause that a constituency re-elections were held on the 10<sup>th</sup> May 1998 under the supervision of Mr Phoka Chaolana (a BCP official a Maama Constituency). His report which was presented to me by the Registrar on the 11<sup>th</sup> May 1998, shows that the Matsieng branches were represented as follows:-

Morija	=	10 delegates
Mahloenyeng	=	5 delegates
Toloane	=	1 delegate
Raphoka	=	2 delegates
Matsieng	=	6 delegates

It also shows that both the present Applicant and the Fourth Respondent stood as candidates and that the result in these Matsieng Constituency elections are as follows:

Mamonki Khalema Redeby	-	17 votes
(Present Applicant		
Mamahao Lehloenya	-	7 votes
(Fourth Respondent)		

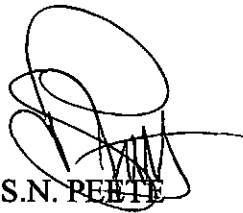
The Applicant is therefore the lawful candidate for the Second Respondent in the Matsieng Constituency, and Mr Phoka Chaolana had also been directed to transmit forthwith to the third Respondent the said results for processing.

For clarity and avoidance of doubt and bearing in mind the decision my Brother Ramodibedi J. in a similar case of Lesao Lehohla vs NEC - LCD and others - CIV/APN/160/98 (the judgment delivered on the 6<sup>th</sup> May 1998) where he declared the Applicant therein as the lawful and duly elected candidate of the Second Respondent in the Mafeteng Constituency in the forthcoming general elections and that the IEC shall reflect the same in its register of candidates,

I also hold similarly and direct that the Applicant Masehloho Sehloho is the lawful and duly elected candidate of BCP the Second Respondent in the Matsieng Constituency No.44 in the forthcoming general elections and that the Third Respondent (the IEC) shall forthwith reflect the same in its register of candidates.

By agreement of counsel, there is no order as to costs.

I lastly must commend Mr Matabane and Mr Phafane for their admirable professionalism in the handling of the rather delicate issues which were involved in the two successive applications that were often heard at untimely hours of the night.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

S.N. PEELE

ACTING JUDGE