

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MASEHLOHO SEHLOHO

APPLICANT

and

NATIONAL EXECUTIVE COMMITTEE
OF THE BASUTOLAND CONGRESS PARTY (NEC)
BASUTOLAND CONGRESS PARTY
INDEPENDENT ELECTORAL COMMISSION
MAMATSIETSO RANKHELEPE

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

REASONS FOR JUDGMENT

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

On the 17th day of April 1998 an urgent applicant was filed ex parte with the Registrar of the High Court. In this application the Applicant, a female adult of Rothe Constituency in the district of Maseru, sought an interim order couched in the following terms-

- “1. Dispensing with the Rules of Court concerning periods and notices and service of process on account of urgency of this matter.

2. **A Rule Nisi issue returnable on the date and time to be determined by the above Honourable Court 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 fourth Respondent's name as the second Respondent's candidate in the Constituency of Rothe No.43 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 Rothe Number 43 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 Rothe Number 43 pending the finalisation hereof;
- (d) The Applicant shall not be declared the lawful and duly elected candidate of second Respondent in the constituency of Rothe Number 43 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."

The ex parte Notice of Motion was supported by the founding affidavit of the Applicant and a supporting affidavit of Makalo Khiba.

An Interim Court Order was granted as prayed for by this court on the 17th April 1998 it being ordered that-

1. The Rules of Court concerning period and notices and service of process on account of the urgency of this matter be dispensed with
2. That a **Rule Nisi** issue returnable on the 27th day of April 1998 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 fourth Respondent's name as the second Respondent's candidate in the Constituency of Rothe No.43 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 Rothe Number 43 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 Rothe Number 43 pending the finalisation hereof;

- (d) The Applicant shall not be declared the lawful and duly elected candidate of second Respondent in the constituency of Rothe Number 43 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.

The Court ordered that Prayer 1, 2 (b) and (c) operate with immediate effect as an interim order pending the finalization of this application. On the 20th April 1998 the First, Second and Fourth Respondents filed their Notice of Intention to Oppose the application and also filed was a Notice of Intention to anticipate the return date. On the 24th April 1998 the said Respondents filed their answering affidavits. On the 27th April 1998 the Applicant also filed her replying affidavit.

When the arguments were heard on the 27th April 1998, Mr Phafane for the Applicant rose to address the Court on the issues that had been raised in limine by the Respondents in their answering affidavits and these were-

- (a) That the Applicant being a married woman, had no locus standi in judicio to bring the present proceedings unassisted by her husband.
- (b) That ex facie there were serious disputes of fact which would not be decided on papers filed of record.
- (c) That certain material facts had not been disclosed by the Applicant such facts being known to Applicant who was then under duty to disclose to the court in her founding affidavit.

It was common cause that the applicant is a married woman. She is married to Austin Sehloho who has filed an affidavit in support of the Applicant's replying affidavit. The marriage still

subsists though it was not clear whether the marriage was in or out of community of property and that marital power was excluded. The Applicant has launched this application proceedings unassisted by her husband.

Mr Phafane submitted however that in electoral proceedings such as the present, a married woman had locus standi to initiate such proceedings unassisted by her husband. In support of this he quoted the South African case of Alufsen vs Klisser - 1959 (3) SA 351 cited by Hahlo and Kahn - The South African Law of Husband and Wife - 4th Edition page 202. This submission was not disputed by Mr Matabane in reply. Hahlo and Kahn postulate that subsequent ratification is equivalent to prior consent (see also Dauids vs Pullen - 1958 (2) SA 405). The Court rules therefore that the Applicant has the necessary locus standi to bring these proceedings.

As regards the issue of dispute of fact the trite principle has been laid down in the renowned cases of Room-Hire Company (Pty) Ltd vs Jeppe Street Mansion 1949 (3) SA. 1155 (T); Plascon - Evans Paints vs Van Riebeeck Paints - 1984 (3) SA 623 (A.D.) Stellenbosch Farmers' Winery Ltd vs Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (c), to the effect where there is a dispute of fact a final interdict should only be granted in application proceedings if the facts stated by the Respondents together with the admitted facts in the affidavit of the applicant justify such order; any denial by the respondent must be genuine, bona fide, real and not far-fetched or clearly untenable. A dispute of fact, if there is one, must be such that it cannot be determined without resort to oral evidence in terms of the provisions of Rule 8 (14). (See also Peterson vs Cuthbert & Co. 1945 A.D. 420 at 428; Soffiatino vs Mould 1958 (4) SA 150. In the present case there seems to me, to be no real or genuine dispute - what is in issue is principally whether the Applicants' and the Fourth Respondents candidature is supportable under the Constitution of BCP the Second Respondent. As I will presently show, both the Applicant and the Respondents have dismally failed to convince me that they were properly elected.

On the issue of non-disclosure, it is trite principle that such non-disclosure must be material. To quote Ramodibedi J. in Moletsane vs Moletsane CIV/APN/475/96 (Unreported)-

“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 facts which

might influence the court in deciding to grant or to withhold the relief sought.

That is known as the uberrima fides rule.”

A fact not disclosed by the applicant must, however, be of a material nature and not have been wilfully withheld or concealed by the applicant. Schlesinger vs Schlesinger 1979 (4) S.A. 342; Cometal - Momental SARL vs Corrlana Enterprises (Pty) Ltd 1981 (2) SA 412 at 14). The disclosure must be full and frank and, I may add, this may include even those material facts unfavourable to the applicants’ case. Here it should be noted that sometimes the failure to disclose may be the fault of the attorney acting for the party e.g. too brief and general averments or taking things for granted. At the end of the day the court must take a “robust and common sense approach to a dispute on motion and not hesitate to decide an issue an affidavit merely because it may be difficult to do so.”

What are the material facts disclosed by the papers before this court? Which are the facts that are not in dispute? What are those in dispute? What are the Constitutional structures and procedures of the Second Respondent?

It was common cause that on the 26th January 1998 the First Respondent issued a general Circular - NEC Z/3-98 - addressed to all party structures directing them to prepare for the election of candidates to be endorsed for the forthcoming general elections due to be held on May 23rd 1998. The party constitution Article 31.13 provides for the procedure to be followed in the election process from the sub-branch, through branch up to Constituency levels and to the National Executive Committee. Forms LM10 for sub-branch, LM11 for branch and LM12 for constituency were to be used. The purpose of these forms is to provide documentary proof of what transpired at these respective elections. According to the party constitution the pen-ultimate election of a candidate at constituency level is not a final step because the LM12 has to be transmitted to the NEC. The constitution is however silent or at most vague about the powers of the NEC in considering the respective constituency candidate for endorsement. But it can be fairly assumed that under the party’s constitution before a candidate’s name can be considered by NEC, it must have gone through the LM10, LM11 and LM12 procedures. This demonstrates

the democratic nature of the election process which ensures that the BCP members should freely choose their representatives.

It was Mr Phafane's main submission that the Fourth Respondent had merely been "selected" by the First Respondent without having gone through LM12 procedure. This selection was made on the 10/4/98 a day after the ultimatum date. This selection was made solely on the grounds that the Rothe Constituency had not elected a candidate by the 9th April 1998. The Affidavit of Mr Rathala Ramolahloane explains the position -

"Para 4.3: On the 10th April 1998 First Respondent when considering annexures "MRI" and "MRJ", the First Respondent decided to select the name of the Fourth Respondent who had indicated that she only stepped down to give chance to Khiba, otherwise she was ready and willing to stand."

"I submit that the (NEC) committee acted properly and in accordance with the standing instructions of the Party's supreme body, that is the Annual Conference. The NEC has power to act on behalf of the Annual Conference to save the party. The intention of the Annual Conference has always been that the party should stand for elections and endorse candidates. The NEC has no alternative but to accept the Fourth Respondent as the candidate."

It should here be noted that in her letter dated 22nd March 1998 "MRI" the Fourth Respondent solemnly withdrew her name because "the constituency had shown whom it preferred as its candidate in Parliament". She however queried the LM11 for Khutlo-Peli ("MRF") Branch. After Mr Makalo Khiba had also withdrawn his candidature on the 29/3/98, the Fourth

Respondent never formally indicated her willingness to re-enter the race in the constituency elections. It is a bit far-fetched to contend that since Makalo Khiba had pulled out, therefore the Fourth Respondent automatically qualified "to be selected". It however appears that when Makalo Khiba wrote the letter "MRG" dated 14th April 1998, the name of the Fourth Respondent featured amongst the prospective candidates for the Rothe BCP constituency. It seems that in selecting the Fourth Respondent as a BCP Rothe candidate, the NEC relied on Forms LM10 - "MRA", "MRB", "MRC", "MRD" and "MRE" which are for sub-branches and on LM11 - "MRF" a branch nomination. There is no LM12 which supports the Fourth Respondent's election at Rothe constituency level. The sub-branches conducted their elections on the 11th March 1998 and Khutlo-Peli branch conducted its elections on the 12th March 1998. One may also ask - what was the effect of the letter of withdrawal made by the Fourth Respondent on the 22nd March 1998 - upon the sub-branch and branch elections of the 11th and 12th March 1998? I make no definite decision on this problem, because I am of the view that the selection of the Fourth Respondent in the circumstances of this case cannot be supported because the procedures under the Party constitution had not been followed.

From the facts of this applications it was quite apparent that the BCP Rothe Constituency was facing practical problems in fielding its own candidates timeously in accordance with the party constitutional provisions and in abiding by the party circulars and directives. These can be exemplified as follows: On the 11th March 1998 a Constituency committee was elected only to disband and another committee was allegedly elected on the 29th March 1998 and this committee never obtained endorsement by the NEC as required under Art. 48 of the Party constitution. It can be said therefore that the committee of the 29th March 1998 had no constitutional blessing under the constitution of the party. The purported elections held on the 16th April 1998 cannot therefore be held to be constitutional and were clearly held in defiance to the Circular NEC Z/11-98 addressed by the NEC to all party structures in Lesotho and in particular it intimated that the closing date for submitting constituency candidates was the 9th April 1998. The circular went on further to warn that the NEC would nominate candidates for the constituencies which failed to field their own candidates.

The constituency of Rothe was also beleaguered by the withdrawals by the Fourth Respondent on the 22nd March 1998, and of Mr Makalo Khiba on the 29th March 1998 and of Mr Monoang Thabo Lekatsa on the 8th April 1998. Admittedly, the withdrawals precipitated a panicky situation for the First and Second Respondent for it meant that the Second Respondent would not field any candidate for the Rothe Constituency in the General Elections. On the other hand there was no provision in the Party Constitution which was shown to the Court entitling the First Respondent to redeem the situation by selecting any person as a constituency candidate. In as long as this can be done without the matter coming before court, the nominating of candidate of the party are for internal governance. Even the Independent Electoral Commission will not question the validity of endorsement of candidates presented by a political party.

What is important, now that the application is before court, is to determine whether the approach or reaction of the NEC to this situation was a proper one in the circumstances; it is also important to decide whether the ultimatum circular of the 1/4/98 went against Article 31.12 and 13 of the party constitution which stipulates the procedure to be followed in the intra-party nomination process.

In my view, the proper approach in the circumstances was for the NEC and to cajole exhort the recalcitrant constituency of Rothe and may be others, into putting their houses in order in time for the Nomination Day of the 20th April 1998; it was not wise in the circumstances to put an ultimatum or deadline prior to the 20th April 1998 because such would have the effect of going against the spirit of section 20 of the Lesotho Constitution which guaranteed freedom of choice in Parliamentary elections and it would also go against the letter of the Article 31.13 of the Party Constitution. In my view the affairs of the second Respondent must be conducted in accordance with the party constitutional provisions, and other lawful circulars and directives of the party organs like the Annual Conference and the National Executive Committee. The party organs must however act within parameters of the party constitution otherwise an act or directive may be ultra vires the constitution. In the present case I don't hold nor have I been convinced by the Respondents papers and argument of their counsel that the NEC has a constitutional authority

or an inherent power to select a candidate for a recalcitrant constituency as Rothe. In the circumstances I hold that the selection of the Fourth Respondent was not constitutionally or regularly made - hence it is null and void. Prayer 2 (a) of the Interim Order is therefore confirmed.

As regards the Prayer 2 (d) of the Applicants' notice of motion, it is quite clear that the Applicant is seeking a declaratory order by way of final interdict. It is generally undesirable to resolve apparent dispute or conflict of fact on affidavit without the benefit of hearing viva voce evidence. (See Minister of Health vs Drums and Pails Reconditioning Co. - 1997 (3) SA 867 and cases cited by Moodley J. therein). The Applicant in this Prayer bears the onus to be discharged on a balance of probabilities to establish a clear right and irreparable harm she may suffer and absence of alternative remedies. (Setlogelo supra - p 221).

In this case the Applicant has not been able to establish a clear right. She has not attached the necessary Forms LM10, LM11 to support her candidature at sub-branch and branch level; secondly the mathematical additions or calculations on Form 12 leave one with a lurking doubt. Total number of delegates on the 16/4/98 is revealed as 35; the Applicant is supposed to have been supported by 29 delegates to Fourth Respondent's 17; no abstentions are recorded; the total number of delegates must have been 46 and not 35 unless eleven delegates voted twice. The Fourth Respondent denies ever participating in the election on the 16/4/98. It seems to me that there may be a serious dispute of fact as to whether the Fourth Respondent participated in these elections of the 16/4/98. We cannot say she did because there is no where on the LM12 where a contesting participant attaches his or her signature. It is also clear that the elections of the 16/4/98 had been organised by the committee of the 29/3/98 which had not been confirmed by the First Respondent in accordance with the provisions of the party constitution (Art. 48). The constitutionality of the elections of the 16/4/98 is to say the least most doubtful; the First Respondent, it seems, could not countenance any constituency electing its candidate after the ultimatum date of the 9th April 1998. Though the Applicant says that she won by her 29 to Fourth

Respondents 17, I am not able to rule in her favour that these elections were constitutional and valid. Indeed Mr Phafane, candidly, conceded at the end of his submissions that his argument under Prayer 2 (d) was weak and untenable. I therefore order that Rule Nisi - Prayer 2 (d) be and is hereby discharged.

Having dispensed with the Rules of Court, the Order of Court which was made on the 30th April 1998 read thus:-

It is ordered that:

- (a) The purported submission of Fourth Respondent's name as the Second Respondent's candidate in the Constituency of ROTHE NO.43 for the 1998 General Election be and is hereby 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 be and is hereby restrained and interdicted from submitting the name of Fourth Respondent as a candidate of Second Respondent in the Constituency of ROTHE NO.43 to the Third Respondent;
- (c) The Third Respondent be and it hereby restrained and interdicted from nominating and/or confirming the Fourth Respondent as a candidate for the Second Respondent in the Constituency of ROTHE NO.43;
- (d) The ROTHE NO.43 Constituency of the BCP is hereby ordered and directed to hold elections on the 8th May 1998 to elect a BCP candidate for the 1998 General Election and Constituency committee.

- (e) These elections are to be conducted by PHOKA CHAOLANA of the MAAMA Constituency, who must submit the result thereof to the above Honourable Court either on the 8th or 9th May 1998 for onwards transmission to the First, Second and Third Respondents for processing;
- (f) The Applicant and the Fourth Respondent are the stand for and contest these elections;

It is common cause that a constituency re-election was held at Mahuu in the Rothe Constituency No.43 on the 8th May 1998 as ordered by this Court. Mr Phoka Chaolana supervised these elections. The elections results were hand-written on an ordinary sheet of paper and not on the usual Form LM12. These results show that Masehloho Sehloho - the present Applicant - won by 28 votes to 15 abstentions. The results Report show that the Constituency committee had been re-elected as directed by the Court and the Fourth Respondent was elected Deputy Secretary and the Applicant as Treasurer. Certified copies of these results have also been transmitted to the Third Respondent for processing.

For clarity and avoidance of doubt and in view of what was said by my brother Ramodibedi J. in a similar case of Lesao Lehohla vs NEC of LCD & others - CIV/APN/160/98 (Judgment delivered on the 6th May 1998), where he declared the Applicant 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 is the lawful and duly elected candidate of the second respondent in the Rothe Constituency No.43 in the forthcoming general elections and that the IEC shall reflect the same in its register of candidates.

By agreement between counsel there is no order as to costs.

S.N. PEËTE —
ACTING JUDGE