

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEFU LECHESA

APPLICANT

and

THE BASUTOLAND CONGRESS PARTY

1ST RESPONDENT

THE INDEPENDENT ELECTORAL COMMISSION

2ND RESPONDENT

LIPHAPANG MOJAKI

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

J U D G E M E N T

**Delivered by the Honourable Chief Justice Mr Justice
J.L. KHEOLA on the 15th day of May, 1998.**

This is an application for an order in the following terms:

1. The Rules of Court concerning periods of notices and services of process are hereby dispensed with on account of the urgency of this matter;
2. A Rule Nisi is hereby issued returnable on 20th April 1998 at 9.30 a.m. calling upon Respondents to show case if any, why the following order shall not be made final,
 - a) declaring the nomination of Third Respondent as a candidate for First

Respondent in the Mt. Moorosi Constituency as null and void and of no force and effect;

- b) declaring Applicant as the lawfully and duly nominated candidate for First Respondent in the Mt. Moorosi Constituency for the forthcoming Parliamentary elections;

Alternatively to (b) above

directing First and Second Respondents to arrange for and facilitate the nomination of Applicant as a candidate for First Respondent in the Mt. Moorosi Constituency within such time as the Honourable Court may determine;

- c) directing Respondents to pay costs hereof;
 - d) granting Applicant such further and/or alternative relief as may be appropriate.
3. Prayers 2 (a) & (b) to operate with immediate effect as interim orders.

This application was brought **ex parte**.

The events giving rise to this application started on the 31st March, 1998

when the applicant obtained an order in the following terms:

1. The Rules of Court concerning period of notices and service of process are hereby dispensed with on account of the urgency of this matter;
2. A Rule Nisi is hereby issued returnable on 15th April,

1998 at 9.30 a.m. calling upon Respondents to show cause if any, why the following order shall not be made final, to wit,

- a) the decision of First Respondent of 24th March 1998 in terms of which the said First Respondent ordered the re-convening and re-scheduling of the Mt. Moorosi Constituency Conference of members of Second Respondent be declared null and void on account of such decision being illegal, irregular, unconstitutional and being fraught with procedural and substantial injustice and impropriety;
 - b) First Respondent be directed to desist from interfering with, but to accept the decisions, resolutions and recommendations of the Mt. Moorosi Constituency Conference of members of Second Respondent which were arrived at on 21-22 March 1998;
 - c) Respondents be directed to pay the costs hereof;
 - d) Applicant be granted further and/or alternative relief.
3. Prayers 2 (a) & (b) should operate with immediate effect as interim orders.

That order was granted by My Brother Ramodibedi J. and made returnable on the 15th April, 1998. On that day the rule was extended to the 20th April, 1998. On that day the file was placed before me and Mr Phafane, counsel for the applicant, asked that the rule be confirmed on the ground of non-appearance and

failure to file Notice of intention to oppose. I confirmed the rule as prayed without going into the merits.

It appears that opposing papers were subsequently filed on the 24th April, 1998. On the 7th May, 1998 a Notice of Motion was filed in which an application for stay of execution pending rescission of the order by default on the 20th April, 1998 was made. The rule was granted and made returnable on the 8th May, 1998.

The rule was discharged with costs and I indicated that reasons would be given at a later date. Unfortunately I have not yet given such reasons because there are other urgent matters to which I have to attend.

In the meantime on the 22nd April, 1998 the applicant filed another application in which he seeks an order in the following terms:

1. The Rules of Court concerning periods of notices and service of process are hereby dispensed with on account of the urgency of this matter;
2. A Rule Nisi is hereby issued returnable on 30th April, 1998 at 9.30 a.m. calling upon Respondents to show cause if any, why the following order shall not be made final;
 - a) declaring the nomination of Third

Respondent as a candidate for First Respondent in the Mt. Moorosi Constituency as null and void and of no force and effect;

- b) declaring Applicant as the lawfully and duly nominated candidate for First Respondent in the Mt. Moorosi Constituency for the forthcoming Parliamentary elections;

Alternatively to (b) above

Directing First and Second Respondents to arrange for and facilitate the nomination of Applicant as a candidate for First Respondent in the Mt. Moorosi Constituency within such time as the Honourable Court may determine;

- c) directing Respondents to pay costs hereof;
 - d) granting Applicant such further and/or alternative relief as may be appropriate.
3. Prayers 2 (a) & (b) to operate with immediate effect as interim orders.

It is this last application with which I wish to deal. The applicant alleges that he is a member of the First Respondent and holds the position of Secretary of the Constituency Committee of Mt. Moorosi within the First Respondent. He alleges that in terms of an interim order of this Court in **CIV/APN/139/98** this Court ordered amongst other respondents, the first respondent to desist from interfering with, but to accept the decisions, resolutions and recommendations of

the Mr. Moorosi Constituency Conference of members of the First Respondent (B.C.P) which were arrived at on 21st - 22nd March, 1998. One of the resolutions of the Constituency Conference was that he (applicant) be nominated as a candidate for the first respondent in the Constituency of Mt. Moorosi in the forthcoming parliamentary elections to be conducted by second respondent.

Despite the fact that the first and third respondents were served with the interim order on the 2nd April, 1998 the first respondent ignored the order and nominated the third respondent before the second respondent as its candidate.

The applicant alleges that he filed an objection to the nomination of the third respondent but second respondent insisted that it be served with the Court Order interdicting it.

In its answering affidavit deposed to by one Jack Mopeli who alleges that he is the Publicity - Secretary of the first respondent two preliminary points of law were raised.

The first one is that the interim orders granted in respect of prayers 2 (a) and (b) were erroneously sought and granted in the absence of the other party. These

are not the kind of orders which could be granted **ex parte** and the applicant ought not to have sought them.

Reference was made to the case of **Bernard Moseland and others v. Manager - Bohhonne High School and others** 1991-1992 LLR 132. The headnote reads as follows:

“Maxims - Audi alteram partem - giving a hearing after an adverse decision has been made to be done in exceptional circumstances only.”

I was again referred to **Masechele Khaketla v. ‘Mamohau Malahleha and others** C. of A (CIV) No.18 of 1991 which stressed the need to give notice to the other party except in very exceptional circumstances.

In the present case the applicant had earlier obtained a Court Order which the first respondent ignored and went ahead to elect or nominate the third respondent as its candidate in the coming general elections at Mt. Moorosi Constituency. There is no doubt that the first respondent committed contempt of court. However, the applicant decided not to institute contempt proceedings but

to enforce the Court order by seeking declaratory orders based on the default judgment he obtained on the 20th April, 1998.

The first and third respondents knew that they had defied the court order. They knew that the election day was just two weeks away. The matter is very urgent because the second respondent still has to print ballot papers and has to insert the name of the first respondent's candidate at Mt. Moorosi Constituency. The extreme urgency in this case makes an exceptional circumstance entitling the applicant to make the application **ex parte**.

I must stress that the applicant did not seek a final order. He sought an interim order which required the respondents to appear before Court and show cause why the declaratory orders should not be made.

The matter was urgent because the second respondent had to be stopped from printing papers which showed the name of the third respondent as the candidate of the first respondent.

The granting of the rule nisi has not prejudiced the respondents in any way except that they received the papers late after a default judgment had been

obtained. It was not the fault of the applicant that this happened; it was the absence of their attorney who was out of Maseru at the relevant time.

I agree that the Court of Appeal has in the past expressed dissatisfaction and criticised the practice whereby litigants sought and obtained interim rules in matters which clearly warrant the hearing of the other party before granting orders which affect the rights of others.

In the present case the first and third respondents had no rights at all. They were actually defying the judgment of this Court which was in favour of the applicant.

Mr. Matabane, counsel for first and third respondents, submitted that **ex facie** the papers filed by the applicant in support of his claim, he has not disclosed a cause of action as against respondents in that:

- a) The applicant has not disclosed any irregularity or impropriety warranting the declaration of the nomination of the third respondent null and void.

- b) There is no evidence **ex facie** the applicant's papers that he was nominated as a candidate on the nomination day. There is absolutely no basis for his praying that the Court should declare him as the "lawfully and duly nominated candidate for the first respondent".
- c) First and second respondents do not nominate and/or facilitate the nomination of candidates. In terms of the Electoral Laws the first and second respondents respectively merely endorse and return nominated candidates. Nominations are done by electors.

The first respondent purports to have forgotten that per its Circular Number/Reference NEC - Z/3-98 dated the 26th January, 1998, it (first respondent) in exercise of the powers vested in it by its Constitution issued instructions to its members to elect Constituency Committees and submit names of persons

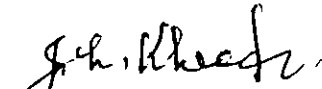
recommended as candidates on behalf of first respondent in the forthcoming elections in Lesotho.

On the 21st and 22nd March, 1998 a meeting was convened by the members of the first respondent within the Constituency of Mt. Moorosi. The new Constituency Committee was elected and the applicant was elected Secretary. He was also nominated and accordingly recommended as the Mt. Moorosi Constituency Candidate without opposition. The trouble started when the National executive Committee of the first respondent refused to accept the results and reconvened and rescheduled the Mt. Moorosi Constituency Conference.

These are the facts which appear in the affidavits.

The applicant has a clear cause of action against the respondents. He was nominated or elected as first respondents's candidate in the Mt. Moorosi Constituency.

In the result the rule is confirmed in terms of prayers (a), (b) and (c).


J.L. KHEOLA
CHIEF JUSTICE

15th may, 1998

For Applicant - Mr Phafane
For Respondents - Mr Matabane