

IN THE HIGH COURT OF LESOTHO

CIV/APN/207/98

In the matter between:

**Basotho National Party
Basotho Congress Party
Marematlou Freedom Party****1st Applicant
2nd Applicant
3rd Applicant****and****Independent Electoral Commission
Attorney General****1st Respondent
2nd Respondent****JUDGMENT****Delivered by the Honourable Chief Justice Mr. Justice****J.L.KHEOLA on the 19th day of May, 1998.**

Like both counsel did yesterday, I am also going to read extensively from the affidavit of the applicants and the respondents, I do not have time to give summary of what these people the deponents have said so what I am going to do

is to read the affidavits of the applicants and the respondents and then later at my

leisure I will try to compile a proper judgment. I don't mean that what I am going to say is not a proper judgment, it is to some extent but it is not as detailed as it ought to be, there is no time for such a detail. So you will excuse me for looking from one document to another in order to read these affidavits.

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

1. The rules of court pertaining to notice and service be dispensed with and the matter be heard on urgency.

2. A rule nisi be issued returnable on the 18th at 2:30 p.m. or a date to be determined by this Honourable Court calling upon the respondent to show cause, if any, why;
 - (a) First and second respondents' refusal to supply the applicants with copies of the provisional electoral lists for the eighty constituencies free of charge shall not be declared unlawful.

- (b) First and second respondents shall not be ordered to provide or supply applicants with each a copy of the provisional electoral list for each of the eighty constituencies.

- © First and second respondent shall not be ordered to delay the elections until such time as the applicants have had a reasonable opportunity to study the electoral list and make objections thereto, should they so wish.

- (d) Respondent shall not be ordered to pay costs in the event of opposing this application.

- (e) Applicant shall not be granted such further and/or alternative relieve.

That prayer 1 operates with immediate effect in the interim. This application was brought as an **ex parte** application on a certificate of urgency. It was granted by my Brother Mr. Justice Mofolo on the 16th April, 1998 and returnable on the 18th April, 1998.

The leaders of the three (3) applicants have filed the founding affidavits which set out the alleged irregularity committed by the Independent Electoral

Commission (IEC). The main affidavit is made by Mr.Molapo Qhobela who is the leader of the 1st applicant, in paragraph 9 of his founding affidavit he alleges that after the dissolution of parliament on the 27th of February, 1998, notification and date for closing of nominations for the election of a new parliament were given in the government gazette on the 3rd March, 1998. In terms of the said gazette, the 23rd May, 1998 was proclaimed as polling day for holding of a general election to return members of the National Assembly for all constituencies of the Kingdom of Lesotho. The notice further decreed that the date on and from which the registration of electors was to be suspended was the 10th of March, 1998 and the date on which nomination of candidates was to close was the 20th April, 1998. He continues to depose that in reply on the 14th April, 1998 the authorized representatives of the applicants met the IEC in a meeting under the chairmanship of the chairman of the IEC namely Mr.Mafisa at the headquarters of the IEC in Maseru. On behalf of the B.C.P. Mr.T.Makhakhe, the deputy leader, and Mr.S.Toloane, the Treasurer General, of the party together with the other authorized representatives of the second and third applicants, jointly submitted a request for copies of the electoral list in respect of the eighty constituencies.

In reply to the aforesaid request Mr.Mafisa told the authorized representatives that he was not prepared to supply them with the said electoral

lists. The reasons given by him were as follows:

1. The computers were broken and he therefore could not physically provide them with the lists.
2. That in terms of his understanding of the provisions of the election order, there was no legal requirement that the I.E.C. provide such lists to the political parties concerned.

In paragraph 14 he alleges that he further wishes to point out that at that stage when nomination took place, request were made on nomination day by Mr.Lebenya Chakela to the nomination court in Maputsoe Constituency Number 15 Mr.Lebenya Chakela pointed out that the list was public document and requested sight of a copy in order to make a photocopy for himself, in reply thereto the returning officer at the nomination court said to Mr.Chakela that the court had instructed him not to release the lists to anybody under any circumstances. At the stage when the nomination court said on the 20th April, the nomination court had in its possession an electoral list, this was seen by Mr.Chakela, it was quite clear that it was electoral list which they did not deny to be the electoral list and it was also clear that they were using the electoral list in order to check for nomination

purposes and in particular that Mr.Chakela who was nominated was a voter in that constituency.

Paragraph 15, after the completion of the registration of voters, computer generated lists of voters became available for public inspection on the 14th April, 1998 in each voting centre in each constituency, these were bulky documents, the list for stadium area for instance, the constituency with the highest voters 21 405 contained for an example 556 pages, this lists were constantly surrounded by voters who had come to examine the list in order to determine whether their names were on the list. It was impossible for anyone seeking to study a list as a whole and deal with it meaningfully to do so in those circumstances.

In paragraph 16 Mr.Makhakhe the deputy president of B.C.P. and acting as duly authorized representative of the first applicant having been duly authorized thereto by way of written authority under the signature of the party secretary approached the Director of Elections and they requested the IEC to make copies available in order that the B.C.P. should be in a position to organize a meaningful systematic study and investigation of each list. This request was made to the aforementioned Director on the 14th April, at the latter's office in Maseru. The aforesaid director, the first respondent answered that the IEC was not obliged to

make copies of the list available to the political parties. Mr.Makhakhe was amazed at that answer, he replied that the law required him to make copies available free of charge to the political parties and that this had been the practice in the past. The director however disputed the contention that the IEC was under any obligation to provide copies of the electoral list.

In paragraph 17 Mr.Makhakhe thereafter went to his own constituency for which he had been a member of parliament namely Maliepetsane and found it impracticable to carry out any meaningful check on the list because of the congregation of persons trying to get access to the list. In desperation Mr.Makhakhe returned to the Director of Election on the same day or the day thereafter and emphasise the absurdity of trying to check the electoral list at the registration centre and renewed this request that the IEC make copies available. This request was rejected by the Director of Elections who then said that the B.C.P. could buy computer discs and have the information copied from discs in the possession of the IEC, when this was reported to us we investigated, so says Mr.Makhakhe the cost of purchasing the discs in question and the cost of employing a firm to copy the information and supply printouts on the list and discovered the cost thereof to be beyond the means of the party.

In paragraph 19, he alleges that it was at that stage to the 17th or 18th of April, and very close to the 19th of April being the day on which the IEC had decreed that the last day on which objections to the electoral list could be allowed.

In paragraph 20 he points out that even subsequent to the 19th of April when the electoral lists were no longer needed for the purpose of public inspection, the IEC despite the fact that there were spare copies available from the constituencies maintained this refusal to make the copies available from every constituency.

In paragraph 21, he further points out that the five days allowed for the making of objections was unreasonably short and that it in any event was not in compliance with the election order, that is order number ten (10) of 1992. In 22 he respectfully submit that there is no other appropriate and meaningful remedy available to the applicants, if the elections were to proceed in the present circumstances the democratic process will sustain irreparable harm. The balance of convenience requires the postponement of election to enable the opposition parties to carry out their democratic duty to scan and verify the correctness of electoral lists. He further submits that there is a probability that potential phantom voters may play a critical role in the election unless the opposition parties are

given a reasonable opportunity to study and object where necessary to irregularities in the electoral lists.

In paragraph 24, he submits that the IEC in breach of the provisions of the electoral order has clearly prevented the fulfilment by the political parties of these obligations to monitor the registration process in terms of section 16 of the election order and has further- more not complied with the IEC's duty to assist the political parties in terms of section 16B to obtain information on activities relating to the registration of electors.

In paragraph 25, he alleges that after the refusal to supply the provisional electoral lists, they decided that they should take legal action. However they were informed towards the end of April that the second applicant had ordered an audit of the electoral lists. They decided to wait until the results of such audit became available.

Now I continue with the affidavit of Mr. Sekara Mafisa the Chairman of the Independent Electoral Commission who avers in paragraph 5, that on the 13th of April, 1998 a provisional version of the general register as contemplated by section 21A of the National Assembly Election Order 1992 was complete and

copies of such lists were displayed at all centres which were used for the registration of electors in 1998. Pursuant to such publication, he, through the medium of radio broadcast, invited all political parties to a meeting at the offices of the IEC. His distinct recollection is that by and large all registered political parties participated in this meeting. At the meeting he informed all who participated therein that a provisional version of a general register had been published as stated and asked all parties to encourage all their supporters to go to the centres and inspect the list and make objections thereto or claims for inclusion therein where names were mistakenly omitted.

In this context he says he should also refer to Legal Notice number 16 of 1998 regulation 5 which sets out procedure if an electors name is omitted from the provisional version of the register. He continues that he admits that a request was made for copies of provisional electoral lists to the said request he responded that his obligations are as prescribed by law and that in terms of section 21(a) there was no obligation to supply political parties with provisional version of the general register, he also pointed out to them that the obligation imposed on him by law was to the effect that such lists should be published within each electoral area or an extract containing that part of the register that relates to the area concerned.

In paragraph 6 he alleges that here he should point out that the deponent on behalf of the B.C.P. had never attended any of the meetings convened by him and the averments in his founding affidavit as to what happened at those meetings constitutes hearsay and should be disregarded by the court.

Nevertheless he does recollect that representatives of B.C.P. requested them to supply them with copies of provisional version of the general register as it would assist them in checking lists in their own area, he says that he must reiterate that they accepted the soundness of his legal position that the IEC is not obliged to supply them with copies of provisional version, however he should reiterate that averments in this paragraph are incorrect, it did not tell them that the computers were broken, he told them that the printer was non-functional and that it was not possible to print the list they requested.

However in the spirit of accommodation he called in their computer expert and he said that if political parties could provide their own diskette, he would try to accommodate their wishes. Mr.Mafisa says that he wishes to point out that the B.N.P. subsequently provided their own diskette and copies of the register were supplied. Mr.Makhakhe brought a diskette for his constituency and there a copy was made and given to him. Mr.Mafisa said he is surprised beyond measure to

observe that an issue which he had hoped that had been consigned to the limbo of oblivion has now been resurrected by the three applicants probably in pursuit of some hidden and obscure agenda.

In paragraph 10 of his affidavit, he alleges that all that can be said about this paragraph, that is paragraph 17 of the applicants is that IEC is supremely happy that the ordinary Masotho displayed a keen interest in checking the list, he fails or discern any rational basis for the complaint about the list bearing in mind that Mr.Makhakhe himself had procured a list for his constituency and one of the co-applicant B.N.P. apparently had no pecuniary problems in procuring a diskette and obtain the list after all charity begins at home.

Paragraph 15, it is submitted that Legal Notice Number 16 of 1998 of the National Assembly Regulations 98 Regulation 15 provide that any person whose name is not on a provisional list but who claims to be registered as an elector shall make an application to the Director to have his or her name included in the final list not later than 5 days after posting of the provisional list. It will be observed that only in respect of claims for inclusion of names which were mistakenly omitted is the shorter period of 5 days provided. It is accepted that section 33 subsection 2(a) of the National Assembly Election order provides that an objection

shall be lodged within 15 days or such longer time as a Director may specify from posting of provisional lists. He says he wishes to point out that in respect of objections, the 15 days time limit allowed in every case though omission of name in register is not an objectnable matter but one which requires a claim for inclusion, he says that he must also state that IEC had devised two separate forms for correcting the provisional register, one dealing with omissions from the register and other dealing with objection for inclusion in the register of the names.

In 16 he alleges that section 9(b) clearly provides that the commission may adapt any of the provisions of the electoral law as maybe required to achieve the purposes of the electoral order to such an extend as the commission consider as necessary to meet the exigencies of particular situation. It must be reiterated however that the 15 day time limit prescribed by section 33, 2(a) of the National Assembly Election Order 1992 for making objections to the provisional version of the general register was adhered to.

Paragraph 17, he alleges that the contents of this paragraph that is paragraph 22 of the applicants are vague and embarrassing, and abound in generalities the applicant seemed to forget that after the publication of the provisional list and after due consideration of claim for inclusion and objections a final electoral list had

been compiled by the IEC after undertaking a massive exercise in which considerable public funds had been used. In terms of section 24 it can be made available to any member of the public on payment of a fee. Section 24 subsection 4 provides that after the printing of the electoral list, the Director of Elections is legally obliged to provide a copy of the list free of charge to the authorized representatives of every political party. He says he wishes to inform the court that in strict compliance with the law copies of the lists have been supplied to all political parties.

It is indeed a matter of some comfort to him that none of the applicants have any complaints about the final product which is the electoral list. It is strange and difficult to understand to say the least that three political parties have concentrated their energies towards an obsolete, a nonfunctional provisional list which was published over a month ago. It is a notorious fact that the electors in this country are getting themselves geared to exercise the democratic and inalienable right to cast their vote and elect the government of their choice which will lead Lesotho into the next millennium.

It will make the IEC a laughing stock not only to people in this country but even internationally especially in view of the much publicized fact of the arrival

of international observers who are here to observe and evaluate the conduct of the elections, evaluate the conduct of the elections. He goes on to say that he should add that the postponement of the elections will have the effect of dampening, the spirit of the Basotho people and create problems of instability, insecurity and chaos in this country. No court of law would in anyway contribute to create such a disastrous situation in any country. The balance of convenience demands that in the public interest the election be held as scheduled. He goes on in other paragraphs to show that all parties were given money instalment of M11 875.00 to assist in their expenses.

That is about all regarding the evidence in the affidavits. I now come to the law and try to interpret it as best as I can. There are two interpretations of the same section by the applicants and the respondents. It is my onerous task to give a final interpretation which is the correct one.

I begin with section 21A(I) of the National Assembly Election Order 1992 which reads as follows;

“Immediately after the dissolution of the National Assembly and at any other time when it appears to the Director of Elections that a general

election is to held, he or she shall -

- (a) prepare a provisional version of the general register ;
and

- (b) as soon as practicable afterwards, ensure that there is published within each electoral area either -
 - (I) that provisional version; or

 - (ii) an extract containing the part of that provisional version that relates to the area concerned.

That is the section which deals with what is called the provisional version of the general register.

I shall not deal with section 22(I) and (3) of the National Assembly Election Order 1992 (The Order) which reads as follows:

- (1) The Director of Elections may, whenever he or she considers it necessary to do so, and shall, as soon as practicable after the registration of electors is suspended in accordance with section 19 (1), prepare -
 - (a) in the case of a general election - an electoral list for each constituency: or
 - (b) in the case of a by-election or a fresh election for a constituency - an electoral list for the constituency.

- (3) The Director of Elections shall provide a copy of each of the lists prepared under this section, without charge -
 - (a) to the authorized representative of each political party; and
 - (b) to each area electoral officer.

That is the section which deals with the electoral lists for each constituency.

Another section which deals with electoral lists is section 24(1) and (4) of the order which read as follows:

“(1) The Director of Elections shall arrange for the printing of -

(a) in the case of a general election - an electoral list for each constituency not later than 30 days before the polling day, or if there is more than one polling day, the first polling day for the election.

(4) As soon as practicable after an electoral list is printed under this section, the Director of Elections shall provide a copy of the list, without charge -

(a) to the authorized representative of each political party; and

- (b) to the area electoral officer of the electoral area concerned.”

In their application the applicants were requesting that they be provided with the provisional electoral lists in terms of section 22(3) of the Order. It is very clear from the reading of this subsection that it is written in mandatory terms that the Director of Elections shall provide a copy of each of the lists prepared under this section, without charge, to the authorized representative of each political party and to each electoral officer.

It is quite clear to me that Mr.Mafisa, the Chairman of the IEC misconstrued the law when he said that the IEC is not under any obligation to provide the applicants with the electoral lists free of charge. That is clearly stated in subsection 3 of section 22 of the Order.

In his affidavit Mr.Mafisa seems to use the terms “provisional version of the general register” under section 21A(1) of the Order and the term “electoral list” under section 22(1) (a) of the Order interchangeably. I do not agree with him that those two documents are the same. I think what the applicants were applying for is an electoral lists. His first reaction to the applicants’ request was that the IEC

was under no obligation to supply them with such lists. It seems to me that he subsequently discovered that he was wrong. He then said that he was unable to print copies of the lists for them because his printer was out of order.

I criticise Mr.Mafisa for having relied on one printer without any spare printer to be used in case of an emergency similar to the one he had. I disagree with the submission that was made that Lesotho is not like South Africa where they have lots of money. I am quite sure that the Government of Lesotho can provide IEC with two or several printers if IEC made such a request. Elections are a very important event in any country. The programme for elections is very tight and has many dead lines. In order to observe such dead lines Mr.Mafisa ought to have been provided with adequate equipment.

Be that as it may he was unable to provide the applicants with what they were entitled to in law. It was not because he was hostile to them but because he did not have the right equipment at the right time. Mr.Mafisa seems to have had a very good working relations with all the political parties until this incident when there is a confrontation between him and the applicants and unpleasant words are used.

That the representatives of the parties have to be provided with electoral lists without a charge is repeated in two sections of the Order - sections 22(3) and 24(4). So the applicants have a cause for complaint.

Now I come to the critical question. Was the irregularity committed by the IEC so serious that the elections should be postponed? Does this Court, the High Court of Lesotho, have the power to postpone the elections? Has it ever happened in this country that the High Court ever postponed general elections? His Majesty The King has fixed the polling day. I shall answer all the questions I have posed above.

I shall now deal with the gravity of the irregularity committed by the IEC. It is not actually alleged that it was a deliberate act on the part of the IEC to commit this irregularity. It was because their printer was out of order making it impossible to print the lists. It must be pointed out that these electoral lists were published in every electoral area where voters were given the chance to inspect them in order to find out whether their names were not omitted. In their own affidavits the applicants allege that at these electoral there were large groups of voters who were checking the lists.

The case before me is not that large numbers of voters who are followers of the applicants, found in dismay that their names had been omitted. Even the leaders of the applicants do not complain that their names were omitted in that list. I say this because the IEC provided them with diskettes from which the leaders of the second respondents produced copies of the electoral lists. They do not complain that their names were omitted. They complain of the possibility of the so called phantom voters. How they were going to establish from the lists that certain registered voters were phantom voters, is beyond my understanding.

What is important as far as I am concerned is that the voters including the applicants' supporters were properly registered and their names appeared in electoral lists. That was the reason why there were no long queues of people complaining that they had not found their names in the lists. The applicants and their Senior Counsel, **Mr.Soggot**, are of the opinion that the irregularity complained of goes to the root of the elections and that once it has been proved their application must succeed. I do not agree with that submission because it is the voters who are going to cast their votes because their names have been included in the lists. The suspicion by applicants about the so called phantom voters is neither here nor there. It is an unsubstantiated suspicion. They have not filed a single affidavit from a voter that his or her name has been excluded from

the electoral lists.

I find that the irregularity committed by the IEC is not so serious that the general elections have to be postponed.

The evidence of Mr. van der Berg is found in his supporting affidavit. He describes himself as a forensic investigator. The audit which was conducted under his supervision and the analysis of the electoral lists disclosed that an analysis on Constituency 57, which was selected at random and an analysis of Constituencies 56, 57, 58, 59 and which were analysed collectively, they found an inexplicable high number of voters, up to ten times the average, who were born on the specific days of the year; for example:

In constituency 57 consisting of 9196 voters, whose full dates of birth were recorded, 230 voters were recorded as having been born on the first of January. This amounted to approximately 9 times the expected average.

In constituencies 56, 57, 58, 59 and 60, taken collectively and consisting of 38646 voters whose full dates of birth were recorded, 1100 of these were recorded as having been born on the first of January. This amounted to approximately 9

times the expected average.

The evidence of Mr. van der Berg is not helpful to the Court because the averages which he relies on are based on the findings in developed countries in which registrations of births is a regular practice and all the people born in such countries have accurate birth certificates. In Lesotho the majority of people do not know the dates of their births. They do not have any birth certificates. It is not surprising that many people are recorded as having been born on the same date. It is a date they probably decided that it is good enough for them. Or they were told by their parents or even older friends that they were born on that particular date. Those voters have no birth certificates and I do not see how the applicants can disprove those dates of birth. It seems to me that the voters/followers of the applicants who live in the same villages with the people whose dates of birth are causing some concern, ought to have raised objections.

The evidence of Mr. van der Berg is not conclusive. The voters concerned may have lied about their dates of birth but he is in no position to refute those allegations.

I now answer the most important question I posed above whether this Court

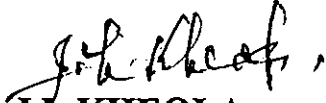
has the power to postpone the polling day that has been proclaimed by His Majesty The King. In terms of section 119 of the Constitution of Lesotho the High Court has unlimited original jurisdiction to hear various matters stated in the section. Certain statutes can limit the jurisdiction and confer jurisdiction on other bodies.

The National Assembly Election Order 1992 provides in section 99A that The King can postpone the elections.

The powers of the High Court are set out in section 100 to 112 (inclusive) which deal with election petitions. There is no provision in the above Order giving power to this Court to postpone the polling day. 'Furthermore I say that even if this Court had the power to postpone the polling day, in the present case the irregularity complained of is not so serious that it would entitle the applicants to a postponement.

I disagree with the allegation that the applicants have no other remedy. They have the right to bring election petitions after a specified period after the elections.

For the reasons stated above the rule is discharged with costs.


J.L. KHEOLA
CHIEF JUSTICE

19TH MAY, 1998

For Applicant - Mr. Soggot
For Respondents - Mr Tampi