

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

BASUTOLAND CONGRESS PARTY  
BASOTHO NATIONAL PARTY  
MAREMATLOU FREEDOM PARTY

1ST APPELLANT  
2ND APPELLANT  
3RD APPELLANT

and

DIRECTOR OF ELECTIONS  
INDEPENDENT ELECTORAL COMMISSION  
ATTORNEY GENERAL

1ST RESPONDENT  
2ND RESPONDENT  
3RD RESPONDENT

Held at:  
MASERU

Coram:  
Steyn, P  
Leon, JA  
Van den Heever, JA

JUDGMENT

THE COURT:

The appellants are three political parties registered as such in terms of section 35 of the *National Assembly Election Order No.10* of 1992. We refer to them as the BCP, BNP and MFP respectively.

The second respondent is the Independent Electoral Commission

established by section 66 of the Constitution ("the IEC"). The first respondent is the Director of this body, appointed in terms of Section 90 of Order 10 of 1992 as amended by section 5 of Act 8 of 1997, and the third respondent is the Attorney-General.

Act 8 of 1997 altered Order 10 of 1992 in wideranging and fundamental respects. The purpose was, according to both the headnote and the contents of the statute, i.a. to

"enhance the democratisation of the electoral process through orderly election campaigns, the observation and monitoring of elections, the registering of political parties for purposes of elections as well as an Electoral Code of Conduct for political parties and candidates..."

The Constitution had also been amended, section 68 being repealed, resulting in the former administrative control of elections in the hands of a Chief Electoral Officer being transferred to a new body: the IEC. Important new legislative provisions led to the existing register of electors having to be replaced and countrywide registration effected anew. The electoral base was expanded, since eighteen-year-olds are now entitled to vote. The procedure on application for registration as provided for in section 15 and 16(2)(a)(i) of the Order was to lead in due course to the issue of brand-new registration cards: once the Director after having checked the information in each application is

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satisfied that an applicant is qualified, the latter is issued with an elector's registration card "bearing a distinct identifying number —

(1) to which a photograph of the applicant, taken by the registration officer, is attached; and

(ii) on which is placed...the signature or prescribed mark of the applicant,"

and all the details required to be given in each voter's application for registration—(section --13) are entered in the general register (sec.16(2)(b)).

The IEC came into existence in September of 1997. On the 5th of January, 1998, the registration of voters under this new dispensation commenced.

On 27 February, 1998, Parliament was dissolved. In terms of section 48(2) of the Order, the day or days for the election to reconstitute Parliament, must be determined "not later than four days after such dissolution". This injunction was complied with, the Government Gazette of 3 March publicising the fact that the general election would be held on 23 May 1998. The notice set out, in compliance with the duty imposed on the Director of Elections ("the

Director") by section 48(3) of the Order i.a. the dates on which registration of electors would be suspended and the date on which the nomination of candidates would close. How those dates are to be calculated is also provided for by section 48: the Director has no arbitrary discretion in the matter.

On Saturday the 16th of May, the appellants obtained a *rule nisi* in the High Court returnable on Monday the 18th (therefore four days before the date appointed for the general election) calling on the respondents to show cause why

"2 a) First and Second Respondents' refusal to supply to the applicants copies of the Provisional Electoral lists for the Eighty (80) Constituencies free of charge shall not be declared unlawful;

b) First and second respondents shall not be ordered to provide or supply Applicants each with a copy of the Provisional Electoral lists for each of the Eighty (80) constituencies;

c). ... First and Second Respondents shall not be ordered to delay the Elections until such time as the applicants have had a

reasonable opportunity to study the electoral lists and make objections thereto should they so wish;

d) Respondents shall not be ordered to pay costs in the event of opposing this application."

e) Applicants shall not be granted such further and/or alternative relief".

Presumably the "such" is redundant and should be deleted, or the sentence should be completed in the only manner consonant with basic rules of both procedure and equity: "as the Court in its discretion may be persuaded to grant on these papers."

In terms of the rule granted, respondents were to file their answering affidavits by 11 a.m. on Monday the 18th.

The respondents did indeed oppose, and the application was dismissed by Kheola C.J on the 19th after argument on the 18th, the rule being discharged with costs.

The present appeal, noted the following day, is against that judgment. Since provisional electoral lists were scrutinized, amended

and finalized and the general election is part of history, the only benefit the appellants can hope to achieve by a successful appeal, would be a reversal of the adverse order for costs which accompanied dismissal of their application.

However, in view of the fact that the appellants called into question the credibility and impartiality of the IEC and allege that it and its officials thwarted the appellants' attempts to exercise what they allege to be their rights, we propose dealing with the matter more fully than would ordinarily occur in a matter such as the present which was brought so belatedly and without joining the other vitally interested political parties. One is also struck immediately by the fact that the appellants made no attempt to satisfy the elementary requirement for obtaining an interdict: i.e. to establish that without such relief they would suffer irreparable harm.

### THE FACTS

We summarize the allegations by the applicants as succinctly as possible. The founding affidavit commences with a list of events, some of which have already been noted above, to which further events are added

3 March notification was given in the Government Gazette

proclaiming: 23 May the polling day for all constituencies of the Kingdom;

10 March the date on and from which the registration of voters was to be suspended;

20 April the date on which nomination of candidates would close.

The papers go on to say that the registration of voters did cease on 10 March. The IEC prepared provisional electoral lists. ~~These became~~ available for public inspection on 14 April. Where they were posted up, they were constantly surrounded by voters coming to see whether their names were on the list. "It was impossible for anyone seeking to study the list as a whole and deal with it meaningfully". Representatives of the three appellants therefore on the same day went to the headquarters of the IEC in Maseru and met that body under the chairmanship of Mr. Mafisa. They asked for copies of the electoral lists for all 80 constituencies, without success. They were told the computer had broken down and that they were in any event not entitled to copies in terms of the Order. The Director, when approached on behalf of the first appellant told the BCP man he could provide his own computer discs and have the information on the IEC's discs copied and their own printouts then made from those. The BCP decided that the expense involved would be prohibitive.

A subsequent request for copies to one of the electoral

commissioners was also refused. So too were requests made after the 19th of April, the last day "on which objections to the electoral lists could be filed".

The second appellant on the 22nd of April took advantage of the Director's offer, had the information on the IEC's computer discs transferred to discs of its own, and submitted those to statisticians for a forensic audit. An affidavit by a Mr. Van der Berg, who does not set out his qualifications but who is employed by "OF & A cc" of Johannesburg as a "forensic investigator" is annexed to that of the BNP deponent:

"We conducted an analysis....on constituency 57, which was selected at random and an analysis of constituencies 56, 57, 58 and 60 which were analysed collectively. These tests specifically concentrated on the very unusual multiplicity of voters who, according to the lists, had been born on the same day of the year."

Nine times more than the expected average registered voters, were recorded as having been born on the first of January.

In Constituencies 56, 57, 58, 59 and 60, taken collectively, the same



picture emerged. On average 86.8% more voters had been born before the 12th of the month compared with those born after the 13th. Random tests on the lists of 31 constituencies found 88 voters enrolled who were younger than 18 years. Tests on eight numbered constituencies revealed 73 voters "with precisely the same particulars registered more than once." Clusters of voters allocated registration numbers in sequence, had the same birth date, ~~"indicating that the~~ details of the clustered voters had been invented". He concludes by expressing the opinion that what has been extrapolated by his limited analysis of the mass of information available, is "a very serious pointer to the likelihood of invented or phantom voters being found on a massive scale"; and that "we have only touched on the extent of the problem and that numerous fraudulent practices could have taken place with regards to the registration of voters without being detected by the IEC."

We interpose at this stage already, that it is common cause that this deponent was working from information contained in the provisional voters' lists of the IEC. There is no indication that Van der Berg had made any inquiry as to, nor had any idea of, the processes those lists would be subjected to by the IEC to finalize them for purposes of the actual election. We do not know on what his view is based that fraudulent practices might remain undetected by the IEC.

The third appellant proffered testimony relating to a different kind of alleged pre-election irregularity. Its leader, Mr. Malebo, says he also declined the offer of the information requested - unless, of course, the applicants were after mere paper, not information - because obtaining it at his own expense would apparently be "prohibitively expensive". However, in the final lists there are serious discrepancies between "the number of voters as shown in the Constituency Delimitation gazette and the number of voters in the final lists." He quotes two examples to illustrate this point.

We interpose again at this stage already, that flaws in two constituencies would hardly seem good ground for postponing the country-wide general election. Moreover once the final lists became available - free of charge, and that - the Order provides how alleged defects in those lists are to be dealt with. Rushing into court is a last resort, not a first port of call.

The appellants' attorney filed and served a further affidavit on the return day itself, the 18th of May. How appellants envisaged that, if it were material, the respondents could deal with that in the impossibly short time granted them by the court's order, is difficult to conceive. That affidavit is by a person who at least qualifies himself as an expert by setting out the degrees he has obtained, and that he is a Senior

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Lecturer in statistics at the University of the Witwatersrand. He merely comments on the findings of Mr. Van der Berg as set out in his affidavit; for example that the odds of 230 out of 9196 people in constituency 57 having been born on 1st January, are "substantially less than 1 in 100,000"; and that the chances of 86% of the voters in the constituencies listed by Van der Berg having been "born in the period the 1st to the 13th of the month and the remainder in the latter 60% of the month is substantially less than one in one million."

Respondents filed two answering affidavits. Mr. Mafisa, the chairman of the IEC, stresses what is already apparent from the appellants' own papers. The IEC was in the process of preparing provisional electoral lists, and only provisional lists existed when free copies were demanded on behalf of the three appellants.

(The minutes of the meetings of the BCP, BNP and MFP held on 13th, 14th and 14th May respectively annexed to appellants' papers, record identical resolutions "that legal proceedings be initiated against the Director of Elections and the Independent Electoral Commission to release copies of Provisional Electoral lists and related further and alternative relief".)

Mr. Mafisa says 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 registration of electors in 1998. Pursuant to such publication I, through the medium of radio broadcasts invited all political parties to a meeting at the offices of the IEC. My distinct recollection is that by and large all registered political parties participated in this meeting. At the meeting I informed all who participated therein that a provisional version of the general register had been published as stated and asked all political parties to encourage all their supporters to go to the centres and inspect the lists and make objections thereto or claims for inclusion therein where names were mistakenly omitted. In this context I should also refer to Legal Notice No.16 of 1998, Regulation 5 which sets out procedure if an elector's name is omitted from provisional version of register."

He admits that he was asked for copies of the provisional lists; says that he answered that in terms of Sec.21A of the Order and that there was no obligation on him to supply copies of those lists to the parties; that he was obliged to publish the provisional version of the register or an extract from that relating to the area concerned, within each such area, which he had done; and that the provisional register had to be amended on receipt of "objections and applications for inclusions by members of the public".

Those objections which related in terms of regulation 5 of the 1993 National Assembly Regulations promulgated in Legal Notice No.16 of 1998, to those persons who claimed that they were entitled to be

registered but whose names were not on the provisional register, had to be lodged with the Director not later than five days after the posting of the provisional lists to obtain inclusion. In respect of other objections, the fifteen-day limit provided for by section 33(2)(a) of the order was adhered to in every case.

~~He says the representatives of the appellants accepted his averment that~~  
 in law the IEC is not obliged to supply them with copies of the  
~~provisional~~ version of the register. He told them, not that computers  
~~were broken but the printer was not working. "Mechanical failures are~~  
 not a phenomenon unique to Lesotho. However in the spirit of  
 accommodation I called in our computer expert and he said that if  
 political parties could provide their own diskettes, he would try to  
 accommodate their wishes."

The BNP obtained copies of the provisional register in this fashion: so  
 did the Deputy President of the BCP in relation to his own constituency.

He continues by saying that

"Following the publication of the provisional version of the  
 general register as prescribed by law and following the keen  
 interest displayed by Basotho voters, a fact acknowledged by

the applicants, the IEC gave itself the opportunity to amend, rectify and correct the entries in the provisional register.

Apart from the fact that there was no specific request from anyone for supply of spare copies of the provisional register, in any event it would have been a singularly unproductive and sterile exercise in that these so-called lists would have undergone a metamorphosis based on the objections and claims for inclusion which were forthcoming from members of the public."

In the election timetable originally prepared by the IEC, polling day had been scheduled to be 29 August 1998. A meeting with interested parties including the three appellants, had been held on 18 February. The appellants had urged that the election be held earlier: in May. From then on, once Parliament was dissolved, there was a schedule prescribed by the King, which gave parties an opportunity to attack the final lists. Copies of these had been supplied to all political parties as enjoined by sec.24(4). Before they were printed, errors in the provisional register had been discovered and rectified.

In regard to the discrepancies adverted to by Mr. Malebo on behalf of the MFP, Mr. Mafisa explains that such discrepancies arose because

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the registration of voters took place before the delimitation exercise was finalized.

"At the time of registration the electors of Stadium Area, for example, gave their residential address as Thamae. The delimitation exercise however, determined that Thamae be divided by a constituency boundary into Upper and Lower Thamae. In the circumstances, ~~there is no way of~~ determining which of the registered electors should be assigned to either Upper Thamae or Lower Thamae since ~~they were all registered as residing in Thamae. At a meeting~~ between the IEC and all registered political parties on the 11th May 1998 this matter was drawn to the attention of the political parties, including the Applicants, and a proposal as to how to deal with the problem was put to them by the IEC. There was no objection to the solution proposed by the IEC from any political party in attendance."

And he underlines what hardly required to be spelled out: that there had been a massive exercise in which considerable public funds had been used to prepare the final lists; that the entire Lesotho was anticipating the opportunity to vote for a democratically chosen government; and that postponement of the election would have international as well as local repercussions which the Kingdom could ill afford. He says that the

applicants had received through the IEC a first instalment of M11 875 towards their expenses, (so that pleading poverty was no excuse for not having themselves acquired the information they alleged they required). At the registration centres political parties were invited to monitor registration and were present, without any complaint having been lodged with the IEC. To grant an order "postponing the elections indefinitely" would create a constitutional vacuum, and neither the Director nor the IEC "have any legal powers to delay the elections".

He concludes: ~~"This application is destitute of any bona fides and~~ constitutes an abuse of the judicial process".

The second affidavit was deposed to by Mr. Michael Potts, who sets out his expertise as follows:

"I am the computer services manager of the Australian Electoral Commission. I have ten years' experience in the computerization of electoral rolls in Australia. My duties included the production and management of electoral rolls in South Australia. I have been assigned to the IEC as a computer consultant under the sponsorship of United Nations Development Programme (UNDP) and the Australian Electoral Commission."

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When he came to Lesotho in April 1998, the provisional electoral lists had already been published.

"My assignment was to make corrections to those lists as a result of voter input and returning officers' input also to assign villages to the correct polling division and then produce the final electoral register. I can confirm that based on my work the final electoral lists have been produced. During that month I was working, I received the inputs from individual voters and Returning Officers and that data I fed into computer system. I received approximately 17,000 of such inputs and I entered those corrections into the system..... The provisional list contained details of all persons entered into the electoral system regardless of their eligibility to vote on any particular date. This was produced in this fashion to enable all persons registered the opportunity to validate their details. Upon production of the final lists, the date of the election was applied to the database and records of all those persons ineligible due to age were suppressed."

As regards Mr. v.d. Berg's suspicions, Mr. Potts says:

"In my short experience which I found for myself and after discussion with knowledgeable persons I have concluded that in

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a developing country where the literacy rate is not as high as in developed and sophisticated societies, it could happen that people may not have precise knowledge of their dates of birth. It is not uncommon that they might have an inkling as to their year of birth sometimes by a reference to some important event which occurred in their area. It may well be that on many registration forms the month of birth may be stated to be January. ~~I had no~~ reason to suspect that any of these registrations were unlawful..... As a result of my work with the lists I can safely say ~~I have no reason to suspect the genuineness of the registration~~ process and the resultant voters lists”

And as regards the alleged duplicate or multiple registration of voters, he says that—

“It is considered that there are two categories of duplicate registration within the electoral system. The first concerns those persons who having already registered, either forgot or lost their registration card and registered again. The second category are those persons who registered only once but due to errors at the data capture stage, their details were entered into the system twice. A duplication check carried out by the IEC revealed approximately one thousand persons in both categories together

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throughout the whole country. That percentage is not inconsistent with periodic duplication exercises carried out in Australia. The IEC, as an ongoing exercise, is continuing in its investigation of duplicate registrations. This factor cannot affect the integrity of the electoral process because no voter can vote more than once without being detected, notwithstanding the inclusion on the list more than once. I also know that as part of the exercise of ensuring the integrity of the electoral process in the matter of registration of electors there is requirement that witnesses be present to identify prospective electors."

#### THE JUDGMENT OF THE COURT A QUO

After summarizing the contents of the parties' papers perhaps more generously than we have done, the Chief Justice held that Mr. Mafisa had misconstrued the law in holding that the IEC is not under any obligation to provide the applicants with the (self provisional) electoral lists free of charge. Section 22(3) obliged it to do just that, and section 24(4) repeats the injunction. That irregularity was however not a deliberate one evincing any hostility towards the appellants. "Mr. Mafisa seems to have had very good working relations with all the political parties until this incident..." Nor was it sufficiently serious to merit postponement

of the election. Moreover, the Order provides in section 99A that the King can postpone elections. The jurisdiction of the High Court is limited to that set out in section 100 of the Order. But even were the Court empowered to postpone the polling date, the appellants had not established that the grounds advanced by them entitled them to such postponement. The rule was accordingly discharged with costs.

### THE LAW

Mr. Soggott who appeared before us for the appellants, supported the finding of the court *a quo* that it was obligatory for the IEC to provide a free copy also of the provisional lists they had demanded, to each of the political parties that asked for them.

He conceded that if he - and the appellants - were wrong in this view, then he would be out of court.

It is clear that the Order in its present form needs to be honed. Mr. *Tampi* in his lucid heads of argument, pointed to an example that will require the attention of the IEC by reason of one of its functions and duties: "to continuously review legislation and other matters relating to elections and referenda and to make appropriate

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recommendations thereon" (section 4(c) of the Order, which falls in its Chapter 2). The definition of "electoral area" contains an inappropriate cross reference to section 6, which deals with party delegates. That merely by the way.

When interpreting a statute, words and sections must be read in their context.

Sections 21 and 21A are in Part 2 of the Order which deals with ~~"Registration and Register of Electors"~~. ~~Only in section 21A is any~~ mention made of a provisional version of the general register which is to be published for public viewing" in such manner and form as the Director...considers appropriate". No provision is made for supplying parties with free copies of this or these where only extracts appropriate to the area are made available in the manner prescribed.

Part 3 of the Order (sections 22 to 34) deals with what was regarded as a different topic by the legislature: "Electoral Lists".

The process set out above, the historical context as well as the way in which the patchwork quilt of legislation has been stitched together, has produced an inelegant and structurally imperfect end product. However if regard is had to the requirements of section 21A in its

contextual setting and that of sections 22 and 24 in theirs, it seems clear to us that the legislature was dealing with two clearly distinct and separate phases in the electoral process. Moreover, it confines the applicability of the provisions of section 21A to the "provisional version of the general register". By way of contrast, section 22 - the first provision of Part 3 - deals with "Electoral lists" and more particularly with supplementary lists as an ongoing process to update the register.

Section 24, as is indicated below, in turn deals with the printing of electoral lists. Nowhere in its provisions is any reference to be found to "the provisional review of the register" to which clear and explicit reference is made in section 21A.

As Mr. *Tampi* has pointed out in his heads, the philosophy behind section 21A is to provide potential electors with an opportunity to check the provisional list which is to be displayed in each area and to lodge complaints concerning omissions or incorrect inclusions. It is only once all the objections have been received, evaluated and determined, that an electoral register is compiled. This is the printed (final) list which the I.E.C. is obliged in terms of the provisions of section 24 of the Order to have printed and copies of which have to be supplied to the political parties. A similar provision is operable in respect of the supplementary electoral list referred to in section 22.

It follows that the claim by the appellants that the respondents were obliged by law to provide them with copies of the provisional version of the general register (the provisional lists) was unfounded in law.

As we have indicated above, Counsel for the appellants conceded that if this were the view of this Court, the appeal could not succeed.

~~However because of the view this Court takes of this matter, it would~~ seem right to deal with some other patent defects in the appellant's misconceived application.

In the first place appellants were not the only parties involved in the election. It is inconceivable that a Court could have considered postponing the election without at least involving the other parties in these proceedings and giving them an opportunity to be heard. The appellants should therefore have been non-suited on this ground alone.

In the second place the appellants have failed on these papers to establish that they would have sustained irreparable harm in the event of the election proceeding. Of significance in this regard is the unchallenged statement of the Director of Elections that no objections were forthcoming from any of the parties in respect to the final electoral lists on which the country went to the polls. The evidence of the witness Potts as to the integrity of these electoral lists is the most cogent

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indicator that appellants' application, aimed merely at free provisional lists to enable the applicants to check them, which is the function of the IEC, was devoid of merit and that the granting of the relief sought would have had no practical impact on the electoral process.

In the third place, it would also seem clear that the Court could not have granted the relief sought in view of the fact that the respondents would not lawfully have been empowered to carry out any injunction the Court might decree. We could certainly not find any provision in the order that authorised the respondents or for that matter any person, body or entity other than the King to postpone an election.

Even the authority of His Majesty is confined to be exercised within the parameters of section 99A of the Order. This provision reads as follows.

"The King may extend time limits in certain cases

99A (1) The King may, by notice published in the Gazette either before, on or after any day specified in a proclamation or an election notice published under section 48 or 146-

(aa) subject to subsection (1A) - provide that a general election is to be postponed from the day or days specified in a proclamation or an election notice published under section 48 or 146 and is to be held on a day or days to be specified in a notice to be published under paragraph (a): or

(a) subject to subsection (2) - specify that a later day or days is to be substituted for the day or days specified in a proclamation or an election

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notice published under section 48 or 146, is to be substituted for any such day either generally or in respect of a specified constituency or specified constituencies: or

- (b) provide for anything to be done to overcome any difficulty that might otherwise affect the election concerned.

(1A) The King shall not publish a notice under subsection (1)(aa) more than 90 days after the day or days specified in a proclamation published under section 146 fixing the date of a by-election or fresh election for a constituency.

(2) The King shall not substitute a day for polling that is more than 125 days after the day or days specified in a proclamation published under section 48 fixing the date of a general election or published under section 146 fixing the date of a by-election or fresh election for a constituency.

(3) A notice published in the Gazette under this section has effect according to its tenor, irrespective of any other provision of this Order to the contrary."

The power to impugn the outcome of an election is contained in Chapter 8 of the Order. Sections 100 and 101 are the empowering sections and they read as follows:

"100. The power to determine questions, in an election petition, relating to membership of the National Assembly is, in accordance with section 69 of the Constitution, vested in the High Court.

How and by whom an election may be disputed

101. An election may be disputed, in accordance with section 69 of the Constitution and the provisions of this Order by means of an application to the High Court and as may be prescribed by rules made under section 112 of this Order."

Whilst we would not for present purposes want to be seen to hold that the Court would never have the power to postpone an election, it would

seem obvious that in view of the specific power conferred on the King in section 99(A) a Court would be most reluctant to exercise such a power, if indeed it did possess it, until the King has exercised the discretion conferred upon Him by the provisions of the Order. On this basis alone, the application could also have been rejected.

The vesting of a democratic culture is a process, not an event. It is clear from the amended National Assembly Election Order that the Kingdom of Lesotho has committed itself to embarking upon this process. It has done so with appropriate emphasis on full participation and transparency with the goal of universal suffrage being achieved through a free and fair electoral process.

Whilst therefore parties must always feel free to challenge any material deviation or departure in the process from the prescribed procedures, they must do so with great circumspection. Non-meritorious and ill-conceived applications such as the present, cast an undeserved shadow over the integrity of the electoral process. Unfounded doubts can be created in the minds of a populace who have only recently been freed from oppressive military rule. Moreover, as we have pointed out above, the credibility and impartiality of the I.E.C. have, on the facts before us, been unjustifiably called into question.

For these reasons, the appeal is dismissed with costs.

Signed: .....

*J.H. Steyn*  
J.H. STEYN  
PRESIDENT OF THE COURT  
OF APPEAL

I agree: .....

*R.N. Leon*  
R.N. LEON  
JUDGE OF APPEAL

I agree: .....

*L. van den Heever*  
L. VAN DEN HEEVER  
JUDGE OF APPEAL

Delivered at Maseru this 31<sup>st</sup> day of July 1998.

For appellants :

For respondents :