CIV\APN\348\98

IN THE HIGH COURT OF LESOTHO

In the Application of :

MOEKETSI TSATSANYANE	1st Applicant
MARCELLUS BOFIHLA NKOEBE	2nd Applicant
TSIETSI PHENETHI	3rd Applicant
CHARLES LECHESA	4th Applicant
TANKI MAFETHE	5th Applicant
SEKOALA TOLOANE	6th Applicant
H. OMANENG KUTOANE	7th Applicant
TLALA LETSOLO	8th Applicant
RALIOTLO PHAKISI	9th Applicant
TSIEE BENJAMIN PEKECHE	10th Applicant

vs

TJAOANE SEKAMANE	1st Respondent
MOLEBATSI KHAILE	2nd Respondent
SEEISO SEHLOHO	3rd Respondent
LEFELA BOHLOKO	4th Respondent
TEBOHO KHOATHANE	5th Respondent
BANNET SEMAKALE	6th Respondent
MOTHEPU MOTHAE	7th Respondent
MOFELEHETSI MOERANE	8th Respondent
LITHAKONG RAKOTI	9th Respondent
MOTSOAHAE TOM THABANE	10th Respondent
INDEPENDENT ELECTORAL COMMISSION	11th Respondent

HELD AT MASERU
CORAM : M.L. LEHOHLA J
G.N. MOFOLO J
M.M. RAMODIBEDI J

J U D G M E N T

LEHOHLA J.

Though treated in the same proceeding matters which came for consideration

by this Court can be classified into Four categories.

(A) First is the matter of Tsiee Benjamin Pekeche who is opposed to Motsoahae Tom Thabane and the 11th respondent above.

(B) Next are two matters of

(I) the 1st applicant Moeketsi Tsatsanyane who is opposed to the 1st respondent Tjaoane Sekamane and the 11th respondent; and of

(ii) the 2nd applicant Marcellus Bofihla Nkoebe who is opposed to 2nd respondent Molebatsi Khaile. Both these applicants and respondents appear in separate proceedings as petitioners and respondents in civil applications numbered : CIV\APN\275\98 and CIV\APN\274\98 respectively.

© The penultimate category is of applicants third through ninth who are opposed to respondents third through ninth and the 11th respondents. Likewise these applicants and respondents appear in separate proceedings as Petitioners and respondents in civil applications numbered :

(i) CIV\APN\282\98
(ii) CIV\APN\281\98
(iii) CIV\APN\280\98
(iv) CIV\APN\279\98
(v) CIV\APN\278\98
(vi) CIV\APN\277\98
and (vii) CIV\APN\276\98

(D) The last category consists of (I) CIV\APN\254\98 ***Morapeli Motaung vs Director of Elections and 3 Ors*** and (ii) CIV\APN\266\98 ***Michael Phoso Moketa vs Director of Elections and 3 Ors.***

Regarding this last category because of failure in communication the two

matters in question were not called and consequently omitted whereas the Court had expressed the wish to deal with them along with cases in category © all of which are covered in the urgent application being dealt with in the instant application. Consequently the Court invited *Mr Mosito* for the applicants in this Category, and *Mr Matsau* (who appears for respondents in all categories) to point out this regrettable omission whereupon it was decided to postpone the hearing of those matters to 4 - 9 - 98 after delivery of this Judgment.

With regard to applicant 10 Pekeche in Category A which strictly speaking doesn't have to do with grievances relating to the counting of ballots the Court was persuaded to grant the application for its withdrawal from hearing at this stage of the proceedings.

Regarding ***Tsatsanyane*** and ***Nkoebe*** cases in Category B the applications were for leave to withdraw applications for condonation of late payment of security for costs in the respective applicants' petitions.

It was common cause that because payment of security for costs had not been effected timeously *ex lege* i.e. in terms of section 106(3) of Order No. 10 of 1992 (The National Assembly Election Order) the petitions had lapsed. The said

provision reads :

> "If an order under subsection (1) is not complied with within the specified period, the election petition is taken to have been withdrawn"

Mr Phoofolo accordingly prayed for withdrawal of the application for condonation of the delay in paying security for costs in respect of the relevant petitions. The Court's decision on this application shall appear towards the end of this judgment. Suffice it for the moment to note with bewilderment that the applicants have not filed any affidavits in support of their application for the said withdrawal. It is to be assumed that they took it that it is enough that a notice of withdrawal was filed on their behalf by their attorney. Be that as it may. It should however be indicated that *Mr Matsau* did not oppose the application for this withdrawal save that he insisted on the costs because the application for condonation had been opposed thus putting his clients under the necessity to incur costs.

It remains now to proceed to deal with the application which forms the real core of this proceeding. As indicated earlier this application falls under Category C.

In terms of the Notice of Motion filed of record on 29th August 1998 the

applicants applied for an order :

(1) Dispensing with the periods of notice provided by the Rules of Court and treating this matter as one requiring urgent attention;
(2) Authorising withdrawal of the (stated) petitions (which at the time included Tsatsanyane, Nkoebe and Pekeche)

(3) Directing that the above mentioned constituencies(*sic*) be included for inspection of the election material in relation to them by the Panel of International Experts.

(4) Granting Applicants further and\or alternative relief.

(5) Prayer 1 to operate with immediate effect.

It should be noted that when a single member of this Court was approached in Chambers by the applicant's counsel on 31st August it was made plain to him that this Court sits as a panel therefore it would require two other members of the panel to decide when the matter can be heard. After consultations with my two Brother Judges the Court fixed 2nd September as the earliest suitable and convenient day for hearing this application. The President of the Pannel communicated the information to the parties' legal representatives on the same day i..e. 31st August. 1998.

The applicants rely on the founding affidavit of their attorney *Mr Haae Phoofolo* who avers that he is authorised by the applicants to represent them in this Court.

In paragraph 2 the deponent avers that

"There is an International Panel of Experts who are investigating the conduct of the last Lesotho General Election of 23rd May 1998. As part of the investigation the Panel will examine the entire election material including the sealed ballot papers. I annex hereto a copy of the terms of reference of the said Panel of Experts as Annexure "A".

However according to law as it stands only constituency result (*sic*) which are not pending in the Court of disputed returns (*sic*) can be dealt with by the panel. In order to facilitate the dealing by the panel with the above mentioned petitions, they must be withdrawn from the above Honourable Court, hence this application. I have therefore for that reason been instructed to withdraw the above mentioned petitions".

In 3 he avers

"The Counting of sealed ballot papers, envelopes and other material started today, and is to be completed tomorrow the 30th August 1998. It is for this reason that this matter is urgent.

I am making this affidavit in support of the prayers in the Notice of Motion".

Mr Matsau for the rest of the respondents stated that his instructions were not to oppose the application made.

Annexure A to the above affidavit constitutes and is styled The Terms of Reference for the Lesotho Group of Experts.

The terms are set out in this document and their purpose is

"to inquire into matters relating to the alleged irregularities in respect of the 1998 national elections of Lesotho, including, but not restricted to

- alleged fraudulent acts in the compilation of the voters roll
- alleged irregularities in the demarcation process
- alleged irregularities in the counting of votes
- any irregularities in the reconciliation of votes cast with the voters roll
- any acts of vandalism in respect of electoral materials

2. To make recommendations of SADC, through its Chairperson, on possible solutions to the impasse within fourteen days of the initiation of the inquiry"

It is common cause that an application for withdrawal as contemplated by the seven applicants is to be with leave of Court. The rationale of this is none other than to enable the public at large to know the truth and receive proper information concerning the fate of serious allegations made about matters of great national interest. Thus Cullinan CJ, as he then was, said

> "I cannot but see therefore that withdrawal of an election petition, whether or not set down for hearing, is a matter for the leave of the Court".

See Civil Applications 148 and 240 of 1993 and Election Petitions 182 to 206 and 208 to 210 of 1993 at page 83. Needless to state leave was refused not only in

respect of the particular case being heard at the time but "in respect of the twenty petitions which (had) not been set down for hearing".

In motivating the application for his clients *Mr Phoofolo* mindful of the above dictum, indicated that facts have to be placed before this Court in order for it to consider whether or not to grant the application. The facts he relied on were an elaboration and the highlighting of the contents of Annexure A taken along with his own averments in paragraph 2 of his affidavit referred to above.

Even generally speaking a matter of serious concern which the Court invited both attorneys to address it on in this application was whether there could be any propriety or indeed prudence in the Court gratuitously ousting its jurisdiction in a matter of such grave national importance as has been alluded to above even if the parties to the application are agreed that there be a withdrawal? A related question was whether in the name of political expediency the power of this Court can be subordinated to that of any informal Commission or Panel?

The answer was in part to be found in Act No.13 of 1998 National Assembly Election (Amendment) Act 1998 amending National Assembly Election Order 1992 foot-noted as Act No.10 of 1992.

Mr Phoofolo urged that the spirit of this Act should be given effect to. He submitted that the reason behind the enactment should be preserved. As indicated earlier the amendment was enacted to enable the Panel of Experts in performing their duties to also do the counting of the electoral ballots. Section 97A preceded by the heading "Inspection of election documents by Panel of International Experts" provides :

> "Notwithstanding section 97, the Independent Electoral Commission shall, in the public interest, allow the Panel of International Experts designated to audit the 1998 Lesotho General Elections to inspect ballot papers, ballot envelopes or counterfoils or any other relevant documents used in such elections as the Panel of International Experts may require in respect of any Constituency of the National Assembly except a Constituency of which an election petition is currently pending in the High Court".

Mr Phoofolo if somewhat bearing an expression of puzzlement as to the question put initially did indeed ultimately appreciate that there doesn't seem to be an exception to prohibition or restriction that the above legislation appears to have imposed on the Panel of International Experts in respect of "a constituency of which an election petition is *currently* pending in the High Court" (italics supplied).

It is thus the opinion of this Court that had the legislature intended to have election petitions pending before the High Court removed from jurisdiction of the Court it would have made a further proviso or exception to that effect. But

consistently with provisions of the Constitution and the High Court Act which guarantee the independence of the Judiciary the legislature in the above amendment fought shy of encroaching on any of this Court's powers. It thus behoves the Judiciary itself to jealously guard its powers and in the process view with disfavour any attempts at making inroads on its independence. It would therefore be unwise for the Judiciary to divest itself of the important function that it is enjoined to perform by the Constitution of this country and the sanctity of the Judicial Oath to which Judges of this Court subscribe.

In the light of these considerations it is logical that the two questions posed earlier would have to be answered in the negative.

The Court has taken into account the fact that Act No.13 of 1998 was published on 27th August, 1998 and that as of that date the petitions in Category C were currently pending before it. *Mr Matsau*'s submission therefore had merit that their withdrawal would not put these petitions outside the terms of the prohibition in the above Act. The learned Counsel pointed out that on the basis of what appears to be the plain meaning of words contained in that Act, it would seem that even if the Court were to allow withdrawal of these petitions of 3rd to 9th applicants that would still not assist in bringing those petitions for scrutiny by International Panel

of Experts.

Another point raised by *Mr Phoofolo* was that in effect these petitions are no longer pending before Court as contemplated in the law because it is now more than thirty days since the petitions have been pending before Court. For this proposition he reposed reliance on Section 104(4) of the National Assembly Election Order 1992.

The relevant provisions of subsection 4 read -

"The Court shall take all reasonable steps to ensure that

(a) proceedings in relation to the petition begin within 30 days after the petition is lodged : and

(b) the Courts final orders in relation to the petition are given within 30 days after the end of the proceedings".

It escapes this Court how such a proposition can be contemplated at all. The proposition appears to be self-contradictory in that the applicants have approached this Court for leave to withdraw their petitions. If indeed their petitions are not pending why should such leave be sought?

The Court wishes to adopt *Mr Matsau's* submission for its simple and yet

masterful approach to this rather startling proposition. The Court wishes to quote *Mr Matsau's* submission word for word as follows :

> "I disagree with my learned friend's interpretation of section 104(4). He says since the petitions didn't go on after 30 days of the crucial date then they would have lapsed. Most of these here were lodged on 29-06-98.
>
> I submit: this point wouldn't be taken by a Petitioner. A petitioner cannot be heard to say you haven't dealt with my petition in 30 days so it has lapsed. It couldn't have been the intention that this subsection would be used by the petitioner against the petitioner himself".

The Court attaches due significance to the use of the word *reasonable* as appears in subsection (4) in regard to steps it is required to take in order to ensure acts contemplated in clauses (a) and (b) of the said subsection.

Proper consideration of this subsection with due weight being accorded to the word reasonable would suffice to indicate that this subsection was not enacted to achieve absurdity but rather to avoid it. Consider for instance if in all the 80 Constituencies one or more of the candidates who were not returned lodged their Petitions which are to be heard by one Judge or a panel of Judges constituting one Court; and if those petitions were, with luck, to be heard at the rate of one per day, then this would mean at least 80 days would have to be spent before all such

petitions could be heard. Needless to say on the 30th day there would still be outstanding for hearing at least 50 petitions which if the proposition advanced were to hold would have lapsed. This result surely cannot be gleefully welcomed as what the section contemplated. The submission in support of this proposition is accordingly rejected on the score of absurdity.

Furthermore the Court derives comfort from the fact that while on the one hand in section 106(3) of the same National Assembly Election Order 1992 the section specifically sets out an adverse consequence to the petitioner for failure to comply timeously, namely that the "election petition is taken to have been withdrawn" on the other hand in section 104 it is not spelt out what adverse consequence would befall the petitioner. Had any consequence been contemplated at all in section 104(4) then likewise it would have been clearly spelt out that if a petition has not been proceeded with within 30 days it would be deemed to have lapsed. If that were the case more than seventy five percent of election petitions heard in 1993 where the Court sat for more than four months wouldn't have been heard as they would have lapsed.

This Court need not belabour the point that it announced on 10-07-98 that the session for hearing election petitions started that day and in a judgment in

CIV\APN\283\98 ***Moeketsi Tsatsanyane and Petitioners as per Annexure A vs Litsitso Sekamane & 3 Ors*** (unreported) at p.4 referred to

> ".....the order made by this Court at the opening of the Petitions Session on 10th July, 1998 covering all Elections Petitions filed before the dateline falling due at the end of June 1998".

For the reason that following from the above extract the actual start of the session was declared as well as this Court making it plain in open Court that all other business scheduled before individual judges would be set aside to give priority to the election Petitions it cannot seriously be contended that the Court should among other things have set these matters down itself, in an attempt to answer the question why the petitioners should have waited this long only to embark at the last minute to seek an urgent relief in a matter where the urgency appears to have been self-inflicted.

Among things minuted in the Court's file on that day i.e. 10th July appear the following : " Parties' legal representatives express fears concerning the likelihood of the Petitions session being interrupted by impending Court of Appeal Session coupled with their wish to brief Senior Counsel". The Court recalls distinctly giving warning that such counsel should accommodate themselves within the Court's programme on account of the priority being accorded to hearing the election

petitions.

In this Court's view when the most important step has been taken by it to render itself available at all times to hear the election petitions the petitioners or indeed parties are not relieved of their obligation to set down the petitions for hearing.

The application in category © to withdraw the election petitions from the High Court is refused there being no order as to costs because there hadn't been any opposition to the application in the first place.

In Category (A) Tsiee Benjamin Pekeche is allowed to withdraw his name from the list of applicants in Category © as it turned out that it was wrongly included. There will be no order for costs as in any case that application was not opposed.

In Category (B) relating to applicants Moeketsi Tsatsanyane and Bofihla Nkoebe the applications for withdrawal of applications for condonation of late payment of security for costs are allowed. But because the condonation applications were opposed there will be an order awarding costs against them.

Section 107(1) of the National Assembly Election Order, 1992 provides that

> "At the end of the trial of an election petition, the High Court shall determine whether the petition should be upheld or dismissed in whole or in part. For that purpose the Court may, subject to this section, make such of the following orders as it considers appropriate
>
> (a) an order declaring the candidate who was returned as elected to have been validly elected.".

Thus because *ex lege* their election petitions are taken to have been withdrawn thus as far as they are concerned this amounts to the end of their trials the Court in exercise of its powers in terms of section 107(1)(a) finds it fitting to make a consequential order declaring Tjaoane Sekamane and Molebatsi Khaile the candidates who were returned as elected to have been validly elected. And it is so ordered.

.....

M.L. LEHOHLA
Judge of the High Court

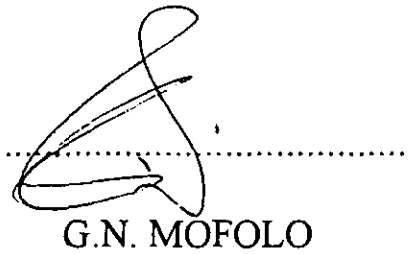
I agree : .....

M.M. RAMODIBEDI
Judge of the High Court

MOFOLO J

I am not in concurrence with my Brothers regarding particularly consequential relief. The reason being that where a Court of law dismisses an action or an application or as in this case an application or petition deemed to have lapsed, for me the consequences are obvious.

I do not think it was or would have been in the circumstances as far as I am concerned prudent to have made a specific pronouncement given the circumstances of these petitions. Otherwise, except for this, I agree with my learned Brothers. My reasons will follow.



G.N. MOFOLO

Judge of the High Court

Dated this 4th day of September, 1998