

IN THE LESOTHO HIGH COURT

In the matter between:

BASOTHO NATIONAL PARTY
LESETELI MALEFANE

1ST PETITIONER
2ND PETITIONER

and

INDEPENDENT ELECTORAL COMMISSION
THABISO MELATO

1ST RESPONDENT
2ND RESPONDENT

Held at:
MASERU

Coram:
W.C.M. Maqutu J.
M.M. Ramodibedi J.
S.N. Peete J.

JUDGMENT

On the 10th June, 1998, the Basotho National Party (hereinafter called the BNP) and Leseteli Malefane (hereinafter styled Mr. Malefane) filed a joint petition in the High Court (sitting as a Court of Disputed Returns).

This petition had been brought against the Independent Electoral Commission (hereinafter styled the IEC) and Thabiso Melato (hereinafter called Mr. Melato).

The IEC was being sued as the body that was responsible for running the General Elections that had been held on the 23rd May, 1998. Mr. Melato was joined because he was the person that had been elected as the Member of Parliament for Constituency Number 40 of Maama.

In this joint petition, the BNP and Mr. Malefane were asking for an order:-

1. Declaring the election on 23rd May, 1998, in the Maama Constituency No.40 null and void and of no force an effect;
2. Declaring the return of Second Respondent (Mr. Melato) as duly elected member of the National Assembly for Maama Constituency null and void and of no force and effect;
3. Declaring the exclusion of petitioners from contesting and participating in the Maama Constituency No.40 as being illegal, unconstitutional, irregular and a gross electoral malpractice;
4. Directing first respondent (the IEC) to arrange for and conduct fresh elections in the Maama Constituency which will include the petitioners, within such time as may be determined by this Honourable Court.

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5. Directing first respondent (the IEC) to pay the costs hereof on an attorney and client scale and second respondent (Mr. Melato) to pay such costs in the event of opposing same;
6. Granting the petitioners further and/or alternative relief.

This judgment was ready for delivery within two weeks of the date of argument. Unfortunately disturbances made it impossible to deliver it.

The complaint of the BNP and Mr. Malefane is that the BNP was not given an opportunity to have a candidate in the Parliamentary General Elections that were held on the 23rd May, 1998. The IEC in denying the BNP: the right to present a candidate acted illegally and contrary to the Court Order of the 19th May, 1998. The IEC according to the BNP and Mr. Malefane acted in a high-handed and grossly unreasonable manner. The IEC should have postponed the Parliamentary elections for Maama Constituency No.40 if it had problems in including the BNP candidate among the election candidates. There was (according to the BNP and Mr. Malefane) no reason for not postponing the Parliamentary election for that Constituency the IEC had done in respect of Moyeni Constituency where one of the party candidates had died.

The Petitioners (BNP and Mr. Malefane) stated that the IEC refused to

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accept Mr. Malefane as the BNP candidate because the IEC was misinterpreting the Court Order. The IEC was of the view that Mr. Malefane and Mr. Tsolo Lelala who both claimed the right to stand for the BNP at the Maama Constituency had been ordered by the Court to stand as independent candidates. The BNP and Mr. Malefane were of the view that all the BNP had to do was "to pick one of the duly nominated candidates". The BNP settled for Mr. Malefane in preference for Tsolo Lelala.

The IEC contested the joint petition of the BNP and Mr. Malefane. In the view of the IEC the BNP had no *locus standi* to bring this petition as such an application can only be brought by an elector in terms of Section 69(1) of the *Constitution*. Secondly other political parties that had participated in the election at the Maama Constituency were not joined. After raising these points in *limine* the IEC dealt with the merits.

The IEC through its chairman's (Mr. Mafisa's) affidavit began with the following opening words:-

"The IEC's constitutional mandate is to conduct the elections strictly in conformity with the law as set out in the National Assembly Order."

On the 20th April, 1998, which was the nomination day five persons had been nominated and endorsed by political parties for the Maama

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Constituency. One person had been nominated as an independent candidate. The BNP had internal disputes and could not nominate a candidate. The IEC says this led to ambiguous court orders in the dispute between Tšolo Lelala and Mr. Malefane in respect of the BNP candidature in Maama Constituency because of the internal wrangling.

The first order to be served on the IEC according to its Chairman was CIV/APN/156/98. It was served on 20th April, 1998, it had been obtained *ex parte*. It interdicted the IEC from filing nominations. Its final judgment was on the 6th May, 1998. The second order was CIV/APN/205/98 which according to the IEC was issued on the 19th May, 1998. It created confusion since absent voters had begun to vote. It was according to the IEC sheer impossibility to include Mr. Malefane and Tšolo Lelala as independents. The order, according to the Chairman of the IEC, said the names of Tšolo Lelala and Mr. Malefane were being forwarded to the IEC as duly nominated candidates for Maama Constituency to stand as independent candidates if they so wished. It was an order obtained by consent and no where was a political party mentioned although the BNP and Mr. Malefane were parties. By this time elections were four days away, the court order was impossible to comply with. Among other problems Mokhibo Matela-Gwintsa, the IEC legal officer in her affidavit says she and the Leader of the BNP could not agree on the correct interpretation of the order.

Thabiso Melato, the second respondent, who was the Parliamentary candidate for Maama Constituency, takes the point that the Petition is defective inasmuch as the following necessary parties have not been joined:-

Mr. Phoka Chaolana of Basutoland Congress Party

Mr. Mahao of PFD

Mr. A.C. Manyeli of NIP

Mr. B. Nkuebe of SDU Party

Mr. Khanyapa Ntoka an independent candidate

Mr. Tšolo Lelala the adversary of Petitioners in CIV/APN/205/98

Thabiso Melato (the second respondent) states that Tšolo Lelala and the Petitioners (i.e. BNP and Mr. Malefane) had consented that both Lelala and Malefane stand as candidates.

Locus Standi

The test whether the BNP has *locus standi* was crisply put in the case of *Rescue Committee DRC v Martheze* 1926 CPD 298 at page 300 as follows:-

“Has the person appearing a direct personal interest in the suit?
In that case it may be considered as his cause.”

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There can be no doubt that the BNP had a direct and specific interest as the elections were intending not only to elect Parliamentary constituency members but also a political party that will form a government or opposition as the case may be. Section 69 of the *Constitution* cannot be read in isolation. It has to be read with Sections 87 and 95 of the *Constitution*. Nevertheless individual members of Parliament and electors are the more important. In a petition challenging the outcome of an election in a constituency, political parties are important, but the individual candidates that political parties endorse are the more important.

The answer to this question is that the BNP has a *locus standi* in this matter.

Non-joinder of necessary parties

There can be no doubt that once an election in which several people and political parties have participated as Parliamentary candidates is challenged, the other candidates and political parties have a specific and direct interest. The Court of Appeal in *Basutoland Congress Party & Others v Director of Elections*, C of A (CIV) No.14 of 1988 (unreported), said where a matter involves other parties they should be given an opportunity to be heard. Non-joinder could be a ground for non-suiting an applicant.

In this particular case, we might not necessarily non-suit the BNP and Mr. Malefane on the grounds that other candidates and political parties were not joined because Thabiso Melato, who has a direct and specific interest as a party in these proceedings has been joined. The matter does not end there because there is Tšolo Lelala, who but for his applications the present proceedings would not be taking place. Tšolo Lelala brought CIV/APN/156/98 and CIV/APN/205/98 in his endeavour to secure nomination for the Maama Constituency as a BNP candidate. He certainly had a specific and direct interest to be the BNP candidate. He had joined the BNP in his applications ostensibly in order to see to it that the BNP leadership do not take Mr. Malefane's side. Indeed the interim order CIV/APN/205/98 on the face of it as granted by Mofolo J in prayer 3 shows that Tšolo Lelala had been elected as BNP candidate in terms of the Court Order in CIV/APN/156/98. Tšolo Lelala's alleged victory was being resisted by the two petitioners. He had brought the petitioners to court to show cause why:-

"The elections of the 10th May 1998 held at Maama in which applicant (Tsolo Lelala) emerged a winner should not be declared lawful."

Tšolo Lelala had not been joined in these proceedings nor his affidavit sought.

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The Consent Order of the 19th May, 1998, in CIV/APN/205/98 on which the petitioners rely states:-

“The names of the contestants to the Maama constituency namely Messrs. T. Lelala and L. Malefane are to be forwarded to the Independent Electoral Commission as duly nominated candidates of the said Maama Constituency and the candidates to stand as independent candidates in the said constituency if they so wish.”

The plain language seems to indicate that none of the candidates wanted the other to be the BNP candidate. If something had occurred that showed a change of attitude, there should have been an indication to that effect from the other side. It was all the more necessary to join Tšolo Lelala, the applicant in CIV/APN/156/98 and CIV/APN/205/98.

Had Tšolo Lelala been joined at least the most vital party to this application in respect of the petitioners would be there. The papers might be *ex facie* in order. This has not been done therefore serious questions remain. It is doubtful whether this would help the petitioners on the merits because the support of Tšolo Lelala might have been crucial to persuade the IEC that he was abandoning his opposition to Leseteli Malefane's candidature for the BNP.

Consistency of Petitioners' Interpretation in Order in
CIV/APN/205/98 with Judgment in CIV/APN/156/98

Guni J in CIV/APN/156/98 settled the dispute between Tšolo Lelala and Leseteli Malefane (second petitioner) as follows:-

"I have therefore found it expedient to allow the people of Ha Maama Constituency who are the final and ultimate authority as regards the determination of who should represent them to exercise their right...The supreme law of the land "1993 Constitution of Lesotho so demands by enshrining every citizen's right to vote for his or her representative in Parliament."

Court orders are not interpreted by registrars, but by the Courts themselves. The petitioners deposed to facts allegedly communicated to them by their attorney. As they were not before the Registrar, their attorney should have made an affidavit about what transpired before the Registrar.

The Order on which this application is founded is in CIV/APN/205/98. It reads:

It is hereby ordered by consent of the parties

1. The matter is removed from the roll and each party is to bear its own costs.
2. The names of the contestants to the Maama Constituency namely Messrs. T. Lelala and L. Malefane are to be forwarded to the Independent Electoral Commission as

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duly nominated candidates of the said Maama constituency and the candidates to stand as independent candidates for the said constituency if they so wish.

3. The interim interdict granted on the 14th May, 1998, against the Independent Electoral Commission is hereby removed.

This order is not straight-forward. If a matter is removed from the roll, that is normally the end of the matter. Nevertheless the order signifies an agreement to the effect that there is an agreement that the contestants should run as independent candidates. It becomes puzzling in the light of the foregoing for the BNP to take the view that it still had a right to endorse one of the contestants as a BNP candidate.

The history of the dispute between Tšolo Lelala and the BNP shows that he was fighting the nomination of Leseteli Malefane as the BNP candidate in his place. It was precisely in deciding this very issue that Guni J ordered that BNP members elect their own candidate, so that the BNP Executive should not do it for them.

The petitioners say when the application was withdrawn on the 19th May, 1998, this paved the way for the BNP to nominate Mr. Malefane. The fact that the BNP, Mr. Malefane and Tšolo Lelala by consent agreed to the Order that both Malefane and Lelala were to stand as independents is ignored.

What Guni J said in CIV/APN/156/98 was reinforced by what Peete AJ (as he then was) said in *M.K. Radebby v National Committee of the Basutoland Congress Party*, CIV/APN/159/98. In that case, the Basutoland Congress Party Constitution gave the National Executive Committee the final say in the selection of candidates. Peete AJ said:

“The party constitution is supreme...Supreme as it is, the constitution of a party is to be interpreted in a manner which is consistent with the provisions and principles of the Lesotho Constitution. Even if there was an inherent power “to save the party” this power cannot give the National Executive Committee power to assume the basic right to select a representative for a constituency.”

Ramodibedi J in *Lesao Lehohla v National Executive Committee of the Lesotho Congress for Democracy*, CIV/APN/160/98 faced with a similar provision in a constituency said:-

“There is no room for appointment or nomination in those circumstances as suggested by the respondents or at all.”

It would seem the IEC in not agreeing with the BNP's interpretation of the agreement it made with Lelala and Malefane was consistent with democratic principles as understood by this court. It also correctly refused to read into the tripartite agreement between the BNP, Lelala and Malefane) words that were not there.

Whether the IEC could still accept the Nominations of
Lelala and Malefane

The IEC was correct when it said it is bound by the *Constitution* and the *National Assembly Order* of 1992.

Fundamentally, two things must be made and settled on time.

These are:-

1. The registration of voters. The checking and correction of the voters roll. Then a final voters roll must be issued.
2. Nomination of voters must be done and finalised timeously.

In terms of the *Constitution*, parliamentary candidates at elections represent people of constituencies. They are nominated by the people who live in the constituencies. Political parties are mere national associations formed by people with the similar ideas, principles and political objectives. They were initially informal bodies

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as British history discloses. As time went on, they became highly organised political machines that dominate parliamentary government. The *Constitution of Lesotho* has recognised political parties as a reality, but like British constitutional practice they have stuck to the principle that each constituency should vote for one parliamentary representative. During this process, any person may stand if duly nominated. Political parties may field or endorse candidates but they enjoy no special rights.

It seems to me the electoral process is designed to be fair to all candidates. If the time frame is not observed, the other candidates have a right to object as this is likely to prejudice them. They have a direct and specific interest. In other words, a person or candidate who exercises his rights to see that those rights are not violated must not thereby violate the rights of others.

It seems to me that political parties displayed a tendency to ignore other candidates who according to law were even more important. The Court of Appeal in *Basutoland Congress Party & Others v Director of Elections & Others* C of A (CIV) No.14 of 1998 (unreported) therefore emphasised this fact. It is precisely for this

reason that in Section 69 of the *Constitution* there is no reference to political parties. It is the duty of the IEC to enable electors to elect freely candidates of their choice in efficiently run elections. By the same token, electors have a right to enforce their right to participate in government through properly nominated and elected members. For this reason, they can challenge anybody and any practice that impedes an election. They can also unseat any person in Parliament through judicial proceedings. It is therefore wrong for any political party to treat an election as if it is for it alone or for political parties only. The duty of the IEC is to organise an election in such a way that all candidates are dealt with fairly and evenly. In this way it enables every elector to exercise his or her right to elect a representative in Parliament.

Unless an election timetable is adhered to within the guidelines specified in Section 48 of the *National Assembly Elector Order 1992*, electors will not be able to vote. In other words nomination of candidates cannot go on indefinitely. The candidate whether belonging to a political party must be given sufficient time to campaign in a constituency. The electors must also be given time to learn and scrutinise the candidate so that they can exercise their

right to elect knowledgeably and responsibly. The time limits set out in the *National Assembly Election Order* are not only for the benefit of election candidates, they are for the voters as well.

The BNP did not have unlimited time within which to field candidates. The IEC for the best of motives tried to accommodate the BNP. On the 8th May, 1998, they warned the attorney of the BNP of the internal problems the BNP and other political parties were causing in the following words:

“You will appreciate the impact which the delay in the finalisation of these applications will have on the IEC with the election date only two weeks away. The obvious example is the timeous printing of ballot papers which must show the names of the candidates.”

There can be no doubt therefore that the BNP was out of time after the 20th April, 1998. There was nothing strictly speaking that obliged the IEC not to close the door on the BNP because it was not a party to CIV/APN/156/98 that had been brought before that date by Tšolo Lelala. The BNP and Mr. Malefane should have taken this point against Mr. Lelala and got Tšolo Lelala's application dismissed or stayed on grounds of non-joinder.

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Effect of the Lenience of the IEC on Time Limits

When CIV/APN/205/98 was finalised on the 19th May, 1998, it should have been clear that only three days were left. In the light of what I have said above therefore, it seems the IEC was unnecessarily subjected to harsh criticism for telling the BNP that it was too late to accept the BNP candidate who was selected contrary to the agreement which had been made an order of court, and on which the BNP was relying.

The IEC was also not free from blame for standing aloof in court proceedings that had the effect of impeding the electoral process contrary to the *National Assembly Election Order* 1992. Although the IEC was not originally a party in CIV/APN/156/98, it had been served. It should have intervened and applied for joinder and showed that the problems of these political parties were leading to breaches of the provisions of the *National Assembly Elections Order* and obstructing its constitutional duty of organising general elections. The IEC should have made its concerns clear to the court by seeking appropriate relief from the court instead of writing to attorneys for political parties which had problems. Courts do what

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litigants persuade them to do. A party who does not choose to be heard is often deemed to be consenting to any order the court might deem fit to make.

While the IEC did not act wisely in not pushing the courts to finalise applications brought by members of political parties seeking party nomination, I am of the view that the vitriolic attack that was directed at the IEC was unjustified. To project the difficulties that political parties have internally on the IEC which was doing its utmost to accommodate such political parties, seems to be punishing the IEC for its accommodating attitude.

In the end it was the BNP that made it impossible for any of its members to stand by demanding (contrary to the order it was relying upon) that one of the candidates be registered as a BNP candidate. If proceedings had been brought by Malefane alone, claiming his nomination as independent had been refused, the IEC would have been in difficulty because of its lenience in permitting court proceedings to be brought at leisure contrary to the *National Assembly Order* of 1992 and contrary to any ideas of convenience.

Court's Finding

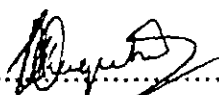
It was argued that the court order CIV/APN/205/98 should be interpreted as meaning that by seemingly ordering the IEC to register, Tšolo Lelala and Mr. Malefane as duly nominated so that they could stand as independents, this entitled the BNP to nominate Mr. Malefane as its candidate. In the first place, the order did not order the IEC to do so in specific terms. Nevertheless the IEC refused to do so because the BNP wanted Mr. Malefane to be registered as a BNP candidate contrary to what the court order seemingly said. I agree with the IEC that the BNP was acting contrary to the consent order of the 19th May, 1998, this the BNP could not be allowed to do.

The BNP internal problems are responsible for its failure to field a candidate. This is plain to all sides, the BNP's behaviour of assassinating the character of the IEC in this manner, blaming it for what are really BNP's internal problems did not create a good impression. What was really disturbing was insisting on nominating one of the contentious candidates contrary to the very order that was being interpreted as directing the IEC to register the two contesting litigants in CIV/APN/205/98.

There is therefore no option but to dismiss the petitioner's petition with costs. It follows automatically, therefore, that in terms of section 107(1)(a) the second respondent Thabiso Melato has to be declared as

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having been validly elected. It is so ordered.


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W.C.M. MAQUTU
JUDGE

I agree:


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M.M. RAMODIBEDI
JUDGE

I agree:


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S.N. PEETE
JUDGE

Delivered on the 16th day of September, 1998.

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| For petitioners | : Messrs. <i>Musa & M. Ntlhoki</i> |
| For 1st responden | : Messrs. <i>D. & S. Kuny</i> |
| For 2nd respondent | : Mr. <i>M.T. Matsau</i> |