

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**STADIUM AREA NO.31 CONSTITUENCY                      APPLICANT**

**V**

<b>MOLAPO QHOBELA</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>TSELISO MAKHAKHE</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>THULO MAHLAKENG</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>NTJA NCHOCHOB</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>SEKOALA TOLOANE</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>JACK MOPELI</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>LEBENYA CHAKELA</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>QOOANE PITSO</b>	<b>8<sup>TH</sup> RESPONDENT</b>
<b>JEREMANE RAMATHEBANE</b>	<b>9<sup>TH</sup> RESPONDENT</b>
<b>MOEKETSI TSATSANYANE</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>‘MOLOTSI KOLISANG</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>NKARENG MASIKE</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>NTSUKUNYANE MPHANYA</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>SEKOALA MACHELI</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>MOLOMO MALEBANYE</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>MACHELI MACHELI</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>NATIONAL EXECUTIVE COMMITTEE</b>	
<b>1999/2000</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>NATIONAL EXECUTIVE COMMITTEE</b>	
<b>2000</b>	<b>18<sup>TH</sup> RESPONDENT</b>
<b>BASUTOLAND CONGRESS PARTY</b>	<b>19<sup>TH</sup> RESPONDENT</b>

**JUDGMENT**

Delivered by the Honourable Mr Justice WCM Maqutu  
on the 20<sup>th</sup> day of November, 2000

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On the 8<sup>th</sup> September, 2000, Mr *Phoofolo* brought an *ex parte* application as a matter of urgency for an order in the following terms:

1. A *rule nisi* be issued returnable on a date and time to be determined by this Honourable Court calling upon respondents to show cause if any, why;
  - (a) An order dispensing with the ordinary modes and periods of service should not be made due to its urgency;
  - (b) The annual conference of the 19<sup>th</sup> respondent which was held on the 21<sup>st</sup> - 23<sup>rd</sup> January, 2000 should not be declared null and void;
  - (c) The election of the National Executive Committee which was done during the above-mentioned annual conference should not be declared null and void;
  - (d) Respondents should not be directed to make arrangements for, and to call an Annual General Conference of the 19<sup>th</sup> Respondent in terms of the

constitution of the 19<sup>th</sup> respondent;

- (e) Eighteenth (18<sup>th</sup>) respondent should not be restrained from holding themselves out as the lawful National Executive Committee of the 19<sup>th</sup> respondent until the final determination of this application;
- (f) Further and or alternate relief should not be granted;
- (g) Respondents should not be directed to pay costs herein.

2. Prayers 1(a) and (e) to operate with immediate effect as interim interdict.

In the Certificate of Urgency made in terms of Rule 8(22) Mr *Phoofolo* (the attorney for applicant) had said:

"I have interviewed applicant and prepared its affidavit. I have therefore considered this matter, and *bona fide* it is a matter for urgent relief because applicant feels prejudiced by the alleged infringement of its rights by having been denied attendance at

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the past annual conference and the election of the 19<sup>th</sup> respondent N.E.C., which was not done in terms of the constitution."

1. **Whether this application ought to be brought *ex parte***

This court has had a number of applications that have been brought *ex parte* that have caused problems. While the court insists that legal practitioners should assess the issue of urgency carefully before they institute legal proceedings of that nature that does not relieve the court of its responsibility on the question of urgency. The reason is simply that the court itself is morally responsible for orders that it issues or which are issued under its authority. Consequently where possible, it must scrutinize the papers to avoid possible harm to the other side that may occur because of an order that is issued before the other side is heard.

In short, courts should issue *ex parte* orders reluctantly because of special circumstances as such orders breach the *audi alteram partem* principle. Consequently in *L. Khoboko v N. Khoboko & 2 Others* 1985-1990 LLR 115 at page 118 dealing with applications brought *ex parte* in the absence of respondent Lehohla J said:

"With regard to what is usually brought before court *ex parte* and on an urgent basis, I find the words of Coetzee J very appropriate in *Lune Maubel Vervaaridgers v Makin & Another* 1977(4) SA at 137, where he said:

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"Practitioners should carefully analyse the facts for the purpose of setting down cases to determine whether a greater or lesser degree of relaxation of the rules is required.... Mere lip service to the requirements of Rule 12(b) (analogous to our Rule 8(22)) will not do, and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter is set down."

The issue before me was why should there be a departure from the rules (as a matter of urgency) and thereby grant applicant a relief (even temporarily) without first hearing the respondents first. The events complained of had occurred in January 2000, and in September 2000 (about eight months later) I was being asked to grant urgent temporary relief without hearing the other side. Lehohla J in *L. Khoboko v N. Khoboko supra* at page 118 further added:

"...I wish to refer to *Republic Motors v Lytton Road Service Station* 1971(2) SA at 518 because I am of opinion that Beck J sums up the position satisfactorily in these words:-

"The procedure of approaching the court *ex parte* for relief that affects the rights of other persons is one which...is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard, and it is to that extent, a

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negation of the fundamental precept of *audi alteram partem*.

"It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of a respondent—who if informed beforehand that resort will be had to the assistance of the court, that course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained."

When I looked at the affidavits and Mr *Phoofolo*'s certificate of urgency, I could find no "perverse conduct" that applicant said respondents might embark upon—if they were served with this application. On the issue of urgency, I took into account the fact that applicant had waited eight months before bringing this application. Nothing unusual or particularly pressing had occurred that called for special curial intervention. Nevertheless I partially accepted that applicant was anxious to ventilate its grievance as a matter of urgency and to have a decision as soon as possible. I therefore made the following order when I refused to grant any order without hearing the respondents:

1. The problems involved have a long history as they began in January 2000. There may be an urgent need for a solution, but nothing ought to be done *ex parte*. This application is consequently to be dealt with on notice, and issues have to be fully ventilated in answering and replying papers.

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2. It is ordered:

- (a) That all respondents be served with the papers.
- (b) The respondents should file their answering affidavits (if they intend to oppose this application) by the 25<sup>th</sup> September 2000.
- (c) Replying papers should be filed by the 6<sup>th</sup> October 2000.
- (d) This application will be heard and finalised on the 16<sup>th</sup> October 2000 at 9.30 a.m. and heads of argument should be filed by the 10<sup>th</sup> October, 2000.

2. **What preceded the hearing**

By the 25<sup>th</sup> September 2000, only first respondent Mr Molapo Qhobela had filed an answering affidavit. In it he agreed with the averments of applicant's deponent, and consequently did not oppose applicant's application. He stated he was the leader of the 19<sup>th</sup> respondent which shall be referred hereinafter as the BCP—an abbreviation of the name Basutoland Congress Party. He stated that as chairman of the National Executive Committee, he should have attended the meeting referred to in annexure "TM7" which is the copy of the minutes of the National Executive Committee. That meeting was unlawful because he is the convenor of meetings of that body. That meeting did not even have a quorum.

First respondent Mr Molapo Qhobela says even the Secretary General

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Mr GM Kolisang had not been available to record the minutes. No agendas had been issued nor had the entire National Executive Committee met in a full plenary session to deliberate on the agenda of the annual conference, therefore the meeting of the minutes "TM7" was illegal. The Annual General Conference was not opened by him, in terms of Article 15 of the Constitution which provides that he should open the conference as leader of the party. He was, as leader of the BCP, in fact precluded from performing that task. The women and youth leagues of the BCP also were not invited or notified of the annual general conference. He, like applicant's deponent, took the view that the holding of the annual conference was *void ab initio*.

Paragraph 2-10 of first respondent Mr Molapo Qhobela's affidavit that caught my attention states:

"Yet another illegality is that which involves contempt of court in that the meeting decided to convene the annual conference when the status of the committee was still sub-judice because Justice Monpathi had at the time directed that the contestants seek a rapprochement."

I was left with the feeling that Mr Qhobela (the first respondent) should have brought this application himself because his affidavit revealed he was in fact the main complainant. The question I asked myself was—why did he not bring this application himself. I became very interested in

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Monapathi J's judgment and the fact that this annual conference was held in contempt of court.

About fourteen days before the 16<sup>th</sup> October, 2000, Mr *Phafane* who claimed to be acting for the respondent came into court with Mr *Phoofolo* for respondent, while I was hearing another matter. Mr *Phafane* said, he probably will ask for a postponement on the day of hearing. I said to him I will await developments, but I want this matter finalised without delay.

At that time I was not even aware that respondents had not filed any papers indicating that they would oppose the matter because there was no file before me. On the 16<sup>th</sup> October, 2000, the second to tenth respondents, twelve to sixteenth respondents and eighteenth to nineteenth respondents filed their notice of intention to oppose and the three of their opposing affidavits. In fact these were the affidavits made on behalf of the National Executive Committee of the BCP. It became clear to me that these respondents were deliberately dragging their feet on the grounds that not all respondents could be served timeously.

The chief officials of the BCP in the National Executive Committee such as second respondent Tšeliso Makhakhe, leader of the BCP in terms of annexure "MTM1" of applicant resides in Maseru. The others who reside in Maseru are third respondent Thulo Mahlakeng the chairman, fourth respondent Ntja Nchochoba, fifth respondent Sekoala Toloane the deputy

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leader, eight respondent Qooane Pitso, tenth respondent Moeketsi Tsatsanyane. I was therefore not impressed with the reasons given for the delay in responding to applicant's application. People such as twelfth respondent Nkareng Masike were served in Quthing on the 18<sup>th</sup> September, 2000, while ninth respondent in Mohale's Hoek was served on the 15<sup>th</sup> September, 2000. It was clear that the respondents, for whom Mr *Phafane* was acting, were deliberately delaying the matter. Consequently when the matter had to be postponed to the 23<sup>rd</sup> October, 2000, I ordered them to pay costs occasioned by the postponement.

On the 23<sup>rd</sup> October, 2000, when the matter was supposed to proceed, applicant's attorney informed the court that there was a application for joinder of 23 other constituencies and that this application was opposed. When the court drew his attention to this time wasting manoeuvre, and the fact that this application had been brought before court as an urgent one, these applications for joinder were withdrawn. Respondents asked for costs and the court awarded them to respondents because costs follow the event.

### 3. **Points in limine**

The matter was then argued. Mr *Ntlhoki* for respondents raised some points *in limine* which the court had to deal with before entering into the merits. He raised the following issues:

1. That the constituency committee had no *locus standi* to bring an

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application such as this one as one of the structures of the BCP.

2. It was *ultra vires* of the constituency to bring such an application. Only members could bring such an application because, it is them who have a contract with the BCP and that contract is the party constitution.
3. There had been non-joinder in as much as all delegates to the conference were not joined.
4. There was a serious and material dispute of fact.

Mr *Phoofolo* for applicant, in answering respondents' argument said this court per Mofolo J in the case of *Mokhotlong Constituency v National Executive Committee of the BCP - CIV/APN/86/96* held a branch of an association can sue.

The court reserved judgment on these preliminary issues so as to determine them along with the merits.

4. **Applicant's and respondents' versions of the facts**

Applicant's deponent Mr Martin Thahanyane says he is the deputy secretary of the Stadium Area No. 31 Constituency. He claims he is authorised to bring these proceedings by a resolution of the applicant's

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committee and refers the court to its copy "TM1". The resolution was taken at a meeting attended by seven members. In terms of "TM2" which is the report sent to the National Executive Committee, the members of this Committee are twelve. Applicant has joined the old and the new committee of the BCP as respondents. Only first and second respondents, namely Molapo Qhobela and Tseliso Makhakhe respectively, have been addressed are (leader and deputy leader of the BCP until 23<sup>rd</sup> January, 2000). The other members of the National Executive Committee of the BCP have only been cited by their names and addresses.

Applicant's deponent says the Secretary General of 1999 during April 1999 issued a circular that committees of the BCP organs be elected. In June 1999 a new committee of applicant was elected after a conference and the applicant's deponent became its assistant secretary. It is in that capacity that he submitted a report to the National Executive Committee on the 27<sup>th</sup> July, 1999.

At that time, there were two rival National Executive Committees of the BCP. They had to wait for this court to determine which of these rival committees was the lawful one before submitting their report. The decision of this court was handed down on the 6<sup>th</sup> July, 1999. Applicant's deponent says he handed the report to Mr Mphanya the Secretary General who was found by him at Mr Mahlakeng's (the third respondent's) office.

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Applicant's deponent says he is still the assistant secretary of applicant as a new committee has not been elected to replace the one that was elected in June 1999. In terms of Article 12 of the BCP constitution, the applicant's deponent should have received notification of the annual general conference about a month before it was held. This conference is normally held in December of the current year or January of the following year. On the 21<sup>st</sup> January 2000, it came to his knowledge that an Annual General Conference of the BCP was being held at the Co-operative College hall in Maseru. Despite the fact that he had not been told of it in advance as a deputy constituency secretary, he attended that conference to go and see for himself and to verify that fact. No delegates of the Stadium Area Constituency attended, the applicant deponent annexes the affidavits of constituency secretaries marked "TM3", "TM4", "TM5" and "TM6". The affidavit of Motloang Letele the Constituency Secretary is also annexed.

This January 2000 conference according to applicant's deponent was held unconstitutionally: A meeting of "was held on the 28<sup>th</sup> December 1999 where preparations for the annual conference were discussed and agreed. The said N.E.C. meeting was continued on the 31<sup>st</sup> December, 1999, was irregular due to lack of quorum. In any event these meetings were held less than 30 days from the annual general conference. Furthermore there was no time to comply with procedures laid down in Article 14.3 read along with Article 23.5 to ensure their full participation in the activities of BCP's supreme body. This constitutes a violation of their right of freedom of

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association. There was not even a conference to elect delegates in terms of Article 14.2 of the BCP constitution. The Constituency could not even make nominations of people who will stand for elections of the National Executive Committee at the annual general conference of the BCP. Everything done at the Annual General Conference of January 2000 has been achieved unconstitutionally.

On the 6<sup>th</sup> February 2000, the constituencies of Stadium Area, Motimposo, Mabote, Matsieng, Lithoteng, Maseru Central and Abia resolved not to recognise the Annual General Conference held in January 2000 and to ask for the holding of a new one. The applicant deponent annexed "TM8". What is significant about "TM8" is that it makes no reference to the Annual General Conference of January 2000. It merely asks for an Annual General Conference as if none has ever been purportedly held. "TM8" authorised the people mentioned in it to institute legal proceedings if necessary.

A letter "TM9" was written on 8<sup>th</sup> February 2000 which merely expresses surprise that an Annual General Conference was not held between December 1999 and January 2000. The letter "TM10" like "TM9" also ignores the Annual General Conference held in January 2000 and demands the holding of an Annual General Conference.

The applicant's deponent complains that all these letters to the

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National Executive Committee had to be delivered by hand because the BCP was being run from the Secretary General's (Mphanya's) residence because the National Executive Committee "did not operate from official premises of the 19<sup>th</sup> respondent"—the BCP. Applicant's deponent does not say why. Could it be that these premises were still in the hands of the rival committee to which applicant's deponent earlier referred to? Deponent of applicant does not tell us, nevertheless he adds—when dealing with the delay in instituting these proceedings—that, "another problem is the ongoing dispute among the factions of the party which we had thought would have now been resolved". He concludes the matter by saying the delays should be overlooked for the benefit of the BCP members of his constituency which the applicant's deponent represents.

In conclusion applicant says:

"I have no alternative remedy at its disposal save to approach this Honourable Court in the manner it has done."

There is one other respondent who like first respondent Molapo Qhobela does not oppose this application. The other one who does not oppose this application is 11<sup>th</sup> respondent Molotsi Kolisang, and 17<sup>th</sup> respondent the former National Executive Committee 1999/2000. First respondent has actually associated himself with what applicant deponent says and wants the court to uphold applicant's application.

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The rest of the respondents opposed the application and caused the National Executive Committee of the BCP 2000 and the BCP to file opposing papers on their behalf. Consequently the Secretary General of year 2000 Sekoala Macheli and his predecessor in office of Secretary General Ntsukunyane Mphanya filed answering affidavits. These two affidavits were supported by the affidavit of Mr Thoathoa Makuta, the man applicant's deponent recognises as his chairman.

Sekoala Macheli the Secretary General of the BCP national Executive Committee said he was authorised to make this affidavit on behalf of the BCP National executive Committee and to represent the BCP in these proceedings. He challenged the *locus standi* to sue of the applicant Stadium Area No.31 Constituency because it is not a legal entity capable of suing or being sued. There was according to Mr Macheli non-joinder of other current Members of the National Executive Committee 2000 such as Mateboho Noko, Mphutlale Kuleile, Thoathoa Makuta, Motsoari Motsoari and Mr Mokhethea.

The deponent of applicant Martin Thahanyane was not authorised to bring these proceedings by Thoathoa Makuta the Chairman of applicant. The matter was not urgent. Furthermore the application was riddled with serious and material disputes of fact. The deponent of applicant was not a member of the BCP because he did not renew his membership of the BCP in 1999. The name of applicant's deponent did not for 1999 appear in the

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register of members of the party annexure "AA". Applicant's deponent had withheld vital information to the effect that he was suspended from the constituency committee, reference was made to "BB" a letter signed by T. Makuta (Chairman of applicant) dated 26/9/99 suspending M. Thahanyane (the applicant's deponent) from the Constituency Committee for five months. Other members were co-opted to fill his place and that of the five suspended members. A letter written to the Secretary General by T. Makuta the constituency chairman marked "CC" was referred to. This letter is also dated 26/9/99.

The letters "BB" and "CC" seem to have been preceded by "EE" dated 13<sup>th</sup> September, 1999. In this letter "EE" written by Thoathoa Makuta the Stadium Area Committee had held a meeting on 11/9/2000, at which it was found the presence of Mr Thakanyane in the Constituency Committee was dangerous to the BCP in that constituency and other constituencies. He writes letters of his invention saying he had been instructed by the Constituency Committee. Copies of these letters had been annexed and the National Executive Committee was asked to act.

According to the Secretary General of 2000 of the BCP applicant's deponent was no more deputy secretary of Stadium Area Constituency. The authority to bring proceedings was also challenged because the affidavit of the chairman T. Makuta denied the meeting of 1<sup>st</sup> July, 2000, which authorised applicant to sue ever took place. Similarly Molapo Qhobela the

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first respondent had not only ceased to be the leader of the BCP but he had ceased to be its member as well.

It was also denied that the Head Office of the BCP is at Mosikong oa Thaba, it is at Market Street and is undergoing repairs. The office of the BCP moved to Hillsvue and then to Ha Hoohlo. The National Executive Committee BCP 1999/2000 does not exist. A new one was elected in January 2000.

Respondents, in terms of Article 12.7 a first circular with a calendar had been sent in the first circular to enable constituencies to know from the beginning dates of conferences. As applicant's deponent Martin Thahanyane was no more an office bearer, he could not expect to have the knowledge he says he should have had. Martin Thahanyane (the applicant's deponent) could not have been elected constituency as deputy secretary as he claims because constituency committees are elected by branch conferences in terms of Article 49.1. It can only operate after approval by the National Executive Committee in terms of Article 49.3. There is nothing in what applicant's deponent said that indicates that he was elected by branches conference.

Respondents' deponent says applicant's deponent Martin Thahanyane aligned himself with the rebel faction headed by Molapo Qhobela. Whatever may have been the case in 1999, there is now a new Constituency Committee for the year 2000. There is no constituency committee in

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existence of which applicant's deponent Martin Thahanyane is a member. The proceedings before court have not been instituted by the year 2000 Stadium Area Constituency committee as they should have been.

Respondents' deponent Sekoala Macheli relies on annexure "FF" dated 29<sup>th</sup> November 1999 to show that more than a month's notice was given before the Annual General Conference of 21<sup>st</sup> to 23<sup>rd</sup> January was held. He denies the authenticity of "TM7". He says although the office of the Basutoland Congress Party was broken into and documents including minutes were stolen, "TM7" is not an extract from the minutes: Sekoala Macheli accuses the applicant's deponent Martin Thahanyane, Harebatho 'Musa, Mandla 'Musa, Roto and others of being responsible for breaking into the BCP office. He accuses the police of failing to act against them because of political bias. The document "TM7" is not known and is not admitted.

In respect of the Annual General Conference Article 12.2 states that Notification of the date of the Conference should reach branches at least one month before the date of the conference. Respondents noted that applicant's deponent knew of the conference of the 21<sup>st</sup> January 2000, but did not tell others of it, as more fully appears in "TM9" that he issued. In fact Martin Thahanyane attended the conference but failed to be accepted as a delegate when he came with Rantso Mantsi and one Janefeke because delegates of Stadium Area had already registered. They were not entitled to attend the

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conference because they were not members. Martin Thahanyane had not renewed his membership by November 30<sup>th</sup> consequently he could not be accorded observer status and be allowed to participate. They tried to disrupt the conference when they were not allowed to enter the Annual General Conference.

According to Sekoala Macheli (the deponent of the respondents), Martin Thahanyane has concealed the fact that in September 1999 he actually opted to work with Molapo Qhobela's faction and distanced himself from the legitimate National Executive Committee. A letter marked "DD" written by Martin Thahanyane (applicant's deponent) was annexed to substantiate what was alleged against him.

In that letter marked "DD", Martin Thahanyane said he was no more going to have anything to do with the National Executive Committee. He was going to work with Molapo Qhobela so that a Special General Conference could be convened to continue the work of the Annual General Conference. He said the existing two National Executive Committees are illegal even though Ramodibedi J ruled in favour of one of the committees. In the meantime, people who continue to work with the National Executive Committee render themselves liable to expulsion from the BCP. It is Molapo Qhobela who, in terms of article 30-3 of the Constitution, remains a member of the National Executive Committee. Should he be sued for convening the Special General Conference, Stadium Area No.31 will support

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him and join in such a case.

Respondents took the view that Martin Thahanyane (the applicant's deponent) "never recognised the lawful National Executive Committee of the BCP because it was imposed by Ramodibedi J and the High Court". Respondents said the delay in bringing this application is wilful. It is intended to destabilise the BCP which is preparing for elections. As he is not a party member, its affairs are not his concern.

The respondents' affidavit was supported by that of Ntsukunyane Mphanya, the twelfth respondent who is the former Secretary General according to respondents. Applicants regard him as Secretary of 17<sup>th</sup> respondent (the National Executive Committee of 1999/2000. Mr Mphanya says he issued a notice of the Annual General Conference annexure "FF" on the 29<sup>th</sup> November, 2000, for a conference to be held on the 21<sup>st</sup> to 23<sup>rd</sup> January 2000. He knows this notice was received by the Stadium Area constituency and that it was represented at that conference of the 21<sup>st</sup> to 23<sup>rd</sup> January 2000, because he was there.

Mr Mphanya denies "TM7" is a copy of the minutes or that there was ever a meeting held on the 27<sup>th</sup> December, 1999, which was continued on the 31<sup>st</sup> December, 1999. He denies that there was failure to comply with the constitution in preparing for the annual conference of January 2000.

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Respondents' averments were further supported by the affidavit of Thoathoa Makuta who is the chairman of Stadium Area Constituency Committee, and is acknowledged as being chairman even by Martin Thahanyane, the applicant's deponent. Thoathoa Makuta says he knows it as a fact that no meeting of the Stadium Constituency Committee was ever held on the 1<sup>st</sup> July 2000. He also disputes the fact that a resolution was ever made that authorises the deponent of applicant Martin Thahanyane to institute these legal proceedings. He is the author of annexures "BB", "CC" and "EE" which he confirms and associates himself with the contents of these annexures to the answering affidavit of Sekoala Macheli. He says Martin Thahanyane was suspended from the stadium Area Constituency Committee in 1999. He has ceased not only to be a member of that committee, but also to be a member of the BCP.

Thoathoa Makuta says he attended the conference of the BCP of January 2000 as one of the delegates for Stadium Area Constituency. He confirms and aligns himself with Macheli's affidavit pertaining to the affairs of and the events of the Stadium Area Constituency.

Martin Thahanyane, the applicant's deponent, made a replying affidavit on behalf of the applicant. He challenged the fact that Sekoala Macheli was Secretary General of the BCP authorised to do anything on behalf of the BCP, because he has never served in the BCP committees. Sekoala Macheli was not properly elected as Secretary General or as a

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member of its executive committee Makuta cannot be a chairman of the Stadium Area Constituency Committee and a member of the Executive. He is not included in the list of elected office bearers marked "MTM1" which was sent to the Registrar of Societies on the 3<sup>rd</sup> February 2000.

In respect of his membership Martin Thahanyane referred the court to "MT11" his current membership card and an extract of the register of the Lower Thamae branch "TM12". He has never seen the register that was placed before court by the respondents. It seems to be in the handwriting of Makuta, the constituency chairman, consequently he denies it authenticity. He insists he never received respondents' annexure "BB" suspending him from membership. In any event the five months' suspension elapsed after February 2000. He has always been an active BCP member, therefore if there was any co-option of members, he should have known. He remains unreplaced in the Stadium Area Constituency Committee.

Applicant's deponent says (so far as he knows) first respondent Molapo Qhobela is still a member and leader of the BCP. Molapo Qhobela will be the leader of the BCP for five years. He has never been removed by a annual conference which had such a matter on the agenda. He insists the Head Office of the BCP is officially Mosikong oa Thaba. That is the logical place it should have moved to when renovations were made at its Head Office at the Market Street. Hillsvew was Mphanya's residence, he is not aware that there is another office at Ha Hoohlo. It appears the respondent

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amended its constitution, but those amendments (from advice received) took effect on the 14<sup>th</sup> December, 1999, when the amendment were registered with the Registrar General.

Applicant's deponent refers to "TM13" signed by Ntsukunyane Mphanya dated 4<sup>th</sup> May, 1999, which says when committees for districts, branches and sub-branches should be held. All these dates are in June 1999. "TM13" also warns members that amendments of the constitution have been passed and are now incorporated in the constitution, and can now be properly utilized. The Committee of stadium Area Constituency was examined and confirmed on the 21/9/1999, as more fully appears in "TM14". He denies he was ever suspended by Makuta, in terms of "BB" and says he would have challenged the suspension. He denies there was ever a Stadium Area Committee meeting dated 11/9/1999 as more fully appears in annexure "EE", a letter of Makuta dated 13/9/99 to the national Executive Committee. In that letter "EE" Makuta makes a report to the National Executive Committee about the activities of Martin Thahanyane which the Stadium Constituency Committee had found dangerous to the BCP, because he writes letters of his invention using the committee's name. Applicant's deponent has no knowledge of the letter "EE".

Mr Thahanyane (applicant's deponent) says it mattered not whether he recognised the National Executive Committee, therefore he could send the letter "TM9" to the official address of the BCP while "TM10" from Mr

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Sooknanan (the attorney) was give to respondents by hand. The reason being that this court had declared that National Executive Committee lawful. See paragraph 14.2 of the replying affidavit of applicant's deponent. Dealing with this issue of the whereabouts of the office of the National Executive Committee, Mr Thahanyane says members were never informed that they had moved office. Nevertheless "since the deponent and his committee have their own list of people whom they call their members it is possible that they informed those about the whereabouts of the BCP NEC offices (see paragraph 14.3 of Mr Thahanyane's said affidavit).

Mr Thahanyane (applicant's deponent) has no knowledge of the letter of 29<sup>th</sup> November 1999 notifying members of the Annual General Conference of the dates 21<sup>st</sup> to 23<sup>rd</sup> January 2000. He does not know how Makuta and the nameless delegates attended that conference on behalf of the Stadium Area Constituency. He is unable to challenge Mr Mphanya and Mr Macheli about what was happening within the National Executive Committee, but can only say documents annexed speak for themselves. Makuta (as chairman) was informed of the Stadium Area Constituency Committee meeting of 1<sup>st</sup> July 2000, but failed to attend although he had promised to do so. Mr Thahanyane says he cannot say if Makuta had received the invitation for the conference or not. He does not know that he himself had been suspended as assistant secretary.

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5. **Analysis of the facts on affidavits and papers**

On the 27<sup>th</sup> September, 2000, after this court had reserved judgment on points in limine, argument on the merits began and continued on the 30<sup>th</sup> September 2000. The argument on both sides was vigorous and no quarter was given. Despite the clear dispute of facts that existed, applicant never applied for the hearing of *viva voce* evidence.

I had been left in no doubt during argument that there were two factions fighting for control of the BCP. One faction was led by Mr Makhakhe while the other one was led by Mr Qhobela. In annexure "MTM1" to applicant's affidavit, Tšeliso Makhekhe was shown as the leader, an election which applicant wanted me to declare invalid along with the entire proceedings of that conference. Applicant recognised Mr Molapo Qhobela as leader of the BCP who should continue to be leader. At paragraph 5.1 of the respondents' answering affidavit, their deponent Sekoala Macheli answered by saying Molapo Qhobela had ceased to be a member and leader of the BCP. Mr Molapo Qhobela in his affidavit denied this and insisted he was still the leader of the BCP, but had not challenged his overthrow as leader before any court, but claimed the other respondents were in contempt of court.

Both counsel admitted that there is a judgment of Monapathi J in the matter. What was denied was that there was any contempt of court. Both counsel were very unwilling to come forward about what this judgment was

about. I asked them to produce that judgment for my perusal and they agreed.

Both sides promised to provide me with this judgment of Monapathi J. There is reference to it in the minutes "TM7" dated 31<sup>st</sup> December, 1999. The authenticity of these minutes is challenged by the respondents. Save to insist that the minutes were authentic, applicant could not take the matter further in its replying affidavit. Mr Molapo Qhobela confirms that Monapathi J said the parties should meet and resolve their dispute. If it were so, I was duty bound to avail myself with that judgment. This court ought not to hear the same matter over and over again under false pretences. I had to satisfy myself that issues were in fact different.

Of the existence of the two factions there was no real dispute, but I had to be sure this case was not being brought as a stratagem to evade existing judgments. On the 6<sup>th</sup> November, 2000, after I had begun to write the judgment, Mr *Ntlhoki* for respondent provided me with a copy of Mr Justice Monapathi's judgment in CIV/APN/410/99. By this time I had looked for and provided myself with that judgment, because it came at 10.45 on the 6<sup>th</sup> November 2000, which was the day I had told the parties that I would begin writing that judgment.

It also came to me as a surprise (after I had completed the judgment) to find that CIV/APN/410/99 was taken on appeal. Leon JA had, on the 13<sup>th</sup>

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April 2000, dismissed that appeal of *Molapo Qhobela & Another v Basutoland Congress Party & Another* C of A (CIV) No.8 of 2000 in the following words:

"In the present case no reasons were given by the learned judge *a quo* either for his order or his subsequent ruling.... Despite the absence of such reasons, I am of the clear view that this appeal has no merit and should be dismissed with costs."

But, surely I should have been told of the Court of Appeal judgment, as it forms a background if not the reason this application was brought.

I noted that Monapathi J's judgment did not deal specifically with the reasons for granting the interdict. It nevertheless dealt with the background behind the holding of the Special General Conference of 25<sup>th</sup> September 2000. In so far as his remarks are relevant to the case before me, I have referred to that judgment a great deal. The facts are, of course, different. Even so to quote Leon JA in the above-mentioned judgment of *Molapo Qhobela & Another v Basutoland Congress Party & Another* dated 13<sup>th</sup> April 2000 "This case concerns troubles, disputes and internicine conflict in the Basutoland Congress Party". This is true of this case. Parties like applicant (who come as a matter of urgency) are therefore obliged *bona fide* to disclose what has transpired so far in this internicine wrangling within the BCP.

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As I perused the judgment of Monapathi J, I came to the conclusion that there had been a judgment before the 17<sup>th</sup> January 2000 - which was the day it was delivered. This impression came from the reference to reconciliation in the minutes of the 31<sup>st</sup> December, 1999, purportedly taken during the meeting of the National Executive Committee which were part of the applicant's "TM7". I could not get any enlightenment from the judgment as to date of delivery. I was therefore obliged to call for the file of the application CIV/APN/410/99 which was before Monapathi J. In perusing the file, I found that on the 24<sup>th</sup> September, 1999, the Basutoland Congress Party filed an urgent application in which they were granted an interim order, in terms of which first respondent Molapo Qhobela was restrained from proceeding with a meeting of the Special General Conference which was to be held on the 25<sup>th</sup> September 1999. The court was also being asked to declare what should take place at that Special Conference null and void. On the 29<sup>th</sup> September 1999 this interim order (*rule nisi*) was confirmed. It was only after the interim order had been made final that Mr Molapo Qhobela, the first respondent, filed the Notice of Intention to Oppose on the 30<sup>th</sup> September 1999. It appeared from the affidavits of first and second respondents that, there were two factions of the BCP pulling in different directions. Monapathi J in *Basutoland Congress Party & Ano. v Molapo Qhobela & Ano.* CIV/APN/410/99 found when he went into the merits and said at page 2:

"I have said that others prayers have fallen off except

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that one of declaration. The reason being that the service of the interim order had not been opportune enough to have stopped the conference. This declaration was not a difficult decision to reach. It was because in the background was of a rival National Executive Committee which had been elected and whose validity was later confirmed by this court in that dispute in CIV/APN/205/99 (*Makhakhe & Ors v Qhobela & Ors per Ramodibedi J*)."

It seems to me that the court was seized with the issue of a declaration whether the respondents Molapo Qhobela and 'Molotsi Kolisang had or had not usurped the powers of that National Executive Committee. At page 10 of *Basutoland Congress Party & Ano. v Molapo Qhobela & Ano*. Monapathi J said:

"If litigants complained that their powers have been unfairly wrested from them the court will look into that. So in the end I allow the prayers that the conference of 25<sup>th</sup> September 1999 be declared null and void .... I am merely settling for the decision be that costs shall be ordinary costs."

There is nowhere that Monapathi J ever ordered the parties to reconcile. He only said there are massive problems which can be resolved. "It may surely be political, but there is something that needs to be ventillated by way of a conference that gave the petitions a genuiness about it, apart from the illegality of the appointment of a special conference"—Monapathi J said. I can only say these problems remain, and it is up to members to address them lawfully.

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In this application, during argument as I read the papers filed by both sides, I was left with a feeling that both sides have not told me the whole story. The Stadium Area Constituency is within Maseru city. Yet I was given the impression that facts about what was happening within the BCP and its structures were impossible to ascertain. We are not told why the letter "TM10" dated 21<sup>st</sup> June 1999 written by Mr Sooknanan, the attorney of applicant's deponent and his group and the constituency report "TM2" were sent by hand while the rest of the correspondence was sent to P.O. Box 111. In fact there is not a single letter from the National Executive Committee of the BCP signed by the Secretary General in the applicant's founding affidavit.

They only appear for the first time as annexures to the replying affidavit of Martin Thahanyane, the applicant's deponent. The first one is letter to the registrar of Societies dated 3<sup>rd</sup> February 2000. This letter should have been in the Secretary General's file. We are not told how it got into the hands of applicant's deponent. The other documents that are two official documents of the BCP, are membership cards on "TM11". On both these documents, which I asked applicant's deponents to produce the originals of (i.e. membership cards themselves), I found the membership cards to bear rubber-stamps rather than signatures of the Secretary General. They both bear rubber stamps which by coincidence have the same date except that the years differ (i.e. 1998-12-31 and 1999-12-31).

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In the answering affidavit of Sekoala Macheli (the respondent's deponent at paragraph 13.6 there is an allegation that applicant's deponent (Martin Thahanyane) and others broke into the office of the National Executive Committee "and all documents including membership cards, membership forms, registers and minutes were stolen". The office where these were stolen is not specified. This leaves me with a riddle, especially because this issue of offices of the National Executive Committee is one of the factual disputes in this matter. As I was beginning to doubt the veracity of respondents' allegation, applicant's deponent Martin Thahanyane came to Sekoala Macheli's (respondent's deponent) rescue by admitting he had the minute book of the National Executive Committee - yet he added that he knows nothing about the break in and stealing of documents, minute book, membership cards etc., and claiming allegations are in any event irrelevant. Nevertheless (Martin Thahanyane) at page 17 paragraph 13(b) then said:

"I insist that annexure "TM7" is an extract of the minute book of the N.E.C. I will produce that book for examination by this Honourable Court on the date of hearing hereof."

It is significant that Martin Thahanyane (applicant's deponent) never produced this minute book before me at the hearing. I am left to solve the mystery of how he came by this minute book if he and his colleagues did not break into the office of the National Executive Committee. It is open to me to infer that applicant's deponent did not want to have to explain how he

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me to be in possession of that minute book which he was not supposed to have.

Applicant's deponent (Martin Thahanyane) also produced annexure "TM13" which was addressed to "Mongoli oa Lebatooa Lithoteng No.35" (translated Secretary Lithoteng Constituency No35) It is dated 4/05/1999. This is not written to his constituency of Stadium Area No.31. At that time he was not yet Assistant Secretary Stadium Area Constituency No.31. The only seemingly uncontroversial document that applicant's deponent produced with the replying papers is "TM14", which is a certificate of the National Executive Committee approving the new committee for Stadium Area Constituency Area No.21-09-1991.

Although both applicant's and respondents' counsel failed timeously to provide me with Monapathi J's judgment by the 6<sup>th</sup> November, 2000, I was forced to get one for myself. It was delivered in CIV/APN/410/99. At paragraph 1 of that judgment, I discovered that Mr Molapo Qhobela, who was the first respondent in the CIV/APN/410/99, directed 'Molotsi Kolisang who was second respondent in that application to convene a Special General Conference for the 25<sup>th</sup> September 1999. It appears in that judgment there were a great number of constituencies calling for a special conference, although there is some lack of clarity about how it was convened. It seems from the tenor of annexure "DD" which Martin Thahanyane (the deponent of applicant) does not deny, that Martin Thahanyane says the Stadium Area

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constituency is withdrawing its allegiance from the National Executive Committee because it had requested first respondent Molapo Qhobela to convene a Special General Conference. Unfortunately annexure "DD" is undated. Its possible date can be determined from what Thoathoa Makuta the chairman, has written in the Sesotho original of the letter, just below the words constituencies and provides. The following words appear at the bottom of annexure "DD"—"Ke le amohetse ka la 10/09/99 ka hora ea 07.00 hoseng. T. Makuta 10/09/99. Translated these words mean: I received this on 10/09/99 at 7 a.m. T. Makuta 10/9/99.

I noted that Martin Thahanyane says that Thoathoa Makuta fully associated himself with the writing, and the contents of the letter. This fact T. Makuta denies. But what is clear in the letter is that there was division of opinion in the Stadium Area Constituency about whether they should sever relations with the National Executive Committee as Martin Thahanyane (the applicant's deponent) and his supporters wanted. Consequently Martin Thahanyane's letter 5 threatens the Committee members in the following words:

"4.2. Some members of the Constituency Committee of Stadium Area No.31 may continue working with this National Executive Committee. But such members are placing themselves in danger of being expelled from the party for working with a committee that is not in the

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constitution of the Basutoland Congress Party."

Needless to say that all other evidence indicate that T. Makuta, continued to work with that National Executive Committee (as Martin Thahanyane saw for himself) at the Annual General Conference, which Martin Thahanyane attended. Martin Thahanyane would have us believe that on the 1<sup>st</sup> July 2000, he still believed T. Makuta to be on his side when he invited him to attend the committee meeting at which the resolution "TM1" WAS TAKEN. Probabilities are heavily against accepting the truthfulness of what Martin Thahanyane said. He could simply not have been unaware of what obvious facts show, especially when he and Makuta live in the Maseru city within the same constituency. This does not mean everything that Martin Thahanyane says is untrue. What is clear is that it is not safe to rely on what Martin Thahanyane said under oath in these proceedings and he is applicant's chief deponent. The onus of proof of facts averred is on the applicant as it should be in all court proceedings, because he who asserts must prove. In other words, he who institutes legal proceedings bears the onus of proof Throughout, although the evidenciary burden may shift from time to time during the hearing of proceedings in a court of law.

The respondents also appear on the papers to have been stingy about truth in the matter of the office of the National Executive Committee at Mosikong Oa Thaba. It seems not to be denied by the National Executive Committee that the BCP has an office at Mosikong Oa Thaba. Consequently

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at paragraph 6 of Martin Thahanyane's replying affidavit which is made on behalf of applicant, the following pertinent observation:

"Indeed the Market Street office used to be the Head Office, and when re-construction work started, it could only make sense to move the Head Office to Mosikong Oa Thaba."

That being the case, I am puzzled (like Martin Thahanyane) why the office party was at Hillsvue and then moved to Ha Hoohlo, where it is today. The National Executive Committee did not wish to tell us, although they were aware this is important.

Although the failure of applicant's deponent to produce the minute book of the National Executive Committee might in these proceedings conclusively prove that the "TM7" is not an extract of the minutes of the National Executive Committee as it alleges, that might not be the end of the matter. Assuming in other legitimate proceedings, it transpires that Martin Thahanyane, Harebatho 'Musa, Mandla Musa, Roto and others do produce the stolen property of the BCP that Sekoala Macheli at paragraph 13.6(c) of his respondent's affidavit claims they are keeping at this place that he says police know, what happens? I would not like to give the impression that this court has been given the whole story yet. The truth might yet be told. This application has to be determined, has to be exclusively on its own facts - as all applications of this nature normally are. By so saying I am not

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encouraging unnecessary delayed applications.

The other issue that typified Martin Thahanyane's (applicant's deponent's) conduct was the nine months' delay in bringing this application. There applicant's deponent Martin Thahanyane, still displayed the tendency to resent facing the truth. In the founding affidavit of applicant, Martin Thahanyane, says he attended the conference of the BCP of the 21<sup>st</sup> to 23<sup>rd</sup> January, 2000, and saw and heard the unconstitutional things that were done, including the exclusion of the Stadium Area Constituency delegation. When it was said by respondents' deponent that he was excluded from the conference, Martin Thahanyane said he got into the conference without difficulty. In other words he witnessed what transpired in it. In "TM8", "TM9" and TM10", Martin Thahanyane did not tell the representatives of Maseru Constituencies, namely P. Poone, T. Mohaleroe, L. Lesutha, Molise Kolisang, Tsotang Ranyali, James K. Molapo, Litsebe Mothebesoane, Neko Sekhobe and and one Lebohang from Abia (whose names are not clear) that an annual general conference had in fact taken place and that he attended it. To compound the problem, even attorney B. Sooknanan and Associates who on the face of "TM10" was acting for these seven constituencies, was not told that an Annual General Conference had in fact been held. These poor people were kept in the dark about that conference. They had been asking for an Annual General Conference, unaware it had been held already.

In other words, on the face of the papers, between February 2000 and

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to sue to protect its rights. The issue is by no means straight forward. Each case is conditioned by its own circumstances. In the case of *Rescue Committee Dutch Reformed Church v Martheze* 1926 CPD 298, Searle JP dealing with a similar (though far from identical) issue said of a litigant:

"He purports to appear and claims to be heard as representing an unincorporated association, but, in as much as he is a member, and has actually signed the summons as secretary, it seems to me he may be personally liable for costs if the summons is a bad one—This should give him *locus standi* to be heard in this court.

"The general test to be applied as to who may appear, seems to be, has a person appearing a direct personal interest in the suit? In that case, it may be considered as his 'cause'."

The problem I have is not whether the applicant, in this case the Stadium area Committee, has a collective interest that it has. The issue is who pays costs in the event of these proceedings being dismissed. In the case of *Lesotho Human Rights Alert Group v Minister of Justice & Ors.* 1991-1996 LLR 363, Tebutt AJA dealing with this issue said:

"It may well be necessary to join parties as defendants where the court's order may affect them or their rights, but the position is different in regard to plaintiff's and applicants. The joining of a party carries far-reaching consequences for such a party. It may involve him in the protraction of proceedings due to his having been joined, with consequent costs...it involves him in the risk of having to face costs."

In this case there is no clear liability for costs of suit, because all moneys raised by the Stadium Area constituency belong to the BCP whose main organ is the National Executive Committee.

The case of *Van Rensburg & Ors. v Afrikaanse Taal-En Kultuurvereniging* 1941 CPD 179 is entirely in Afrikaans. It was therefore not very helpful. Nevertheless I noted in the summary of the argument of Donges KC at page 182 that a "a branch has no right to appear against outsiders, but it has the right to appear against the society as such". It was according to the rubric of the case held, that a branch has a right to be present at any congress which might be held, it could take steps to protect that right. It seems to me therefore the problem is the manner in which this matter has been brought on behalf of the Stadium Area Committee.

The problem of joinder that impacts on *locus standi* was dealt with by Schutz P in *Matime & Ors. v Moruthoane & Ano*. 1985-1989 LAC 198J and 1999 A where he said:

"The first difficulty which I have with the original application by Moruthane and Sechefo is that it appears the real potential applicant was the said Church. The church is not cited as a party in these proceedings at all, and there is no evidence that the two applicants acted with the authority of the church. Nor does it appear from the papers that the two applicants themselves had a right to bring these proceedings, which, among other things, would have had the effect of thrusting the school in question upon the Church, that Church not having

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been a party."

The facts in this case are the opposite of those in the *Matime* case. Here Martin Thahanyane claims to be authorised by the Stadium Area Constituency Committee, when the rights that have been violated are his in the first place, his and those of the individual members of the committee who were in June 1999 members of the Stadium Area Constituency committee. Yet Martin Thahanyane and his colleagues are not parties to these proceedings. Even the authority of Martin Thahanyane and his June 1999 colleagues to bring this case is seriously challenged by their Chairman T. Makuta. He says they were no more members of the committee from 26<sup>th</sup> September 1999. As if that were not enough the application was brought in September 2000 after a long delay, and at a time there should have been a new Stadium Area Constituency Committee, since the one Martin Thahanyane according to "TM2" was elected on the 6<sup>th</sup> June 1999.

Despite all argument, Martin Thahanyane was aware that T. Makuta attended the January 2000 Annual General Conference and participated. He seems to want this court to accept that he thought all was well. If all was well surely he should have asked his chairman T. Makuta at January 2000 conference - what was going on. Martin Thahanyane did not say a word to him, and yet he continues to have expected on the 1<sup>st</sup> July 2000 Makuta could attend meeting as chairman as if nothing had happened. With that historical background to this application, probabilities are against a *bona fide*

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resolution having been passed to bring these proceedings on behalf of T. Makuta (as well). If he was part of the problem of excluding applicant from participating in the affairs of the Stadium Area Constituency Committee and the BCP, T. Makuta should have been joined as one of the respondents.

On this issue of *locus standi* and joinder of parties there seems to be a dispute of fact that should have been foreseen in the light of what the chairman Makuta did at the Annual Conference of January 2000. Even annexure "DD" acknowledged that some members were co-operating with the National Executive Committee at a time Martin Thahanyane had decided the Stadium Area Constituency Committee members should not do so, hence the threat to expel them from the party which appears on page 5, 4-2 of annexure "DD". It follows therefore that applicant's deponent - Martin Thahanyane was aware that his very title to act for the Stadium Area Constituency Committee would be challenged, even before he brought these proceedings in the name of the divided Stadium Area Constituency Committee. In *Matime & Ors v Moruthane & Ano*. Schutz P, after dealing with non joinder and *locus standi*, said:

"Moreover, it appears very clearly from the papers that there are fundamental disputes of fact. It may well be that the disputes that were raised by the appellants were spurious, but there is no avoiding the conclusion that there are fundamental disputes."

It seems to me that Martin Thahanyane and his colleagues have not

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demonstrated that they act for the Stadium Area Constituency Committee - because from the beginning they knew their title to sue would be challenged. That is why they should also have brought these proceedings in their own names. Their counsel did not ask for *viva voce* evidence to be led on this issue to resolve this foreseeable dispute.

#### 7. The membership issue

I had great problems with the exercise book "TM12" on which the name of Martin Thahanyane now appears. It seemed to have been opened in 1999. It only revealed there were two committees. There was a relatively old hard cover register "AA", that respondents produced. It began in 1998. In it the name of applicant's deponent appears. It was more likely to be genuine and official. From it I observed that in 1998 membership on the BCP the register annexure "AA" was 405 members. In the year 2000 there are presently 69 members. The LMI numbers of the members registered in it are stated. In "TM12" there were no particulars at all. There were several small exercise books registers that were part of "TM12". They did not look genuine to an observer. Their total membership was 347.

The picture of stadium Area Constituency did not look good. I thought there was something wrong with the stewardship of the existing Stadium Area Constituency Committee and I wondered if this was the position throughout the whole Lesotho. During the period between 1998 and 2000, there had been a drop from 405 members to 69 members, despite the

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constituency's constitutional duty of recruiting new members. This represents a drop of 82% in membership. Could it be that the current Stadium Area Constituency Committee were not good shepherds, they gave the impression of scattering the sheep rather than collecting them and looking after them. An executive committee or any official of an organisation are servants of that body. The *Pocket Oxford Dictionary* describes an official as a person holding an office of trust. By this I understand all officials as people entrusted with duties to serve their organisation and promote its interests.

This steep decline in membership and the averment that Molapo Qhobela, Martin Thahanyane and all those who were associated with this application were no more members struck me as exclusion. Was it because they had not paid M1.00 annual subscriptions or they had been expelled from the BCP? The answer I got from Mr *Ntlhoki* (who claimed to have taken instructions) was simply that they did not pay annual subscriptions, because they were ignoring official structures of the BCP. They were welcome to resume their membership by paying fees to the appropriate party officials. They would not lose their standing in the BCP and the right to run for office. The fault was entirely theirs, they were the ones excluding themselves from party membership and participation in BCP affairs. Mr *Phoofolo* said the problem with members of the BCP whose membership lapsed during the internal wrangling and bickering (during which they paid subscriptions to the rival faction) was that they would be treated as new

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members if they paid their subscriptions to the lawful National Executive Committee and resumed their membership. Mr *Phoofolo* quoted what he called Article 69 and read it to me. That Article did not apply to these members, who had been trapped in internal on-going party squabbles. It is only new members that cannot hold office in the party for twelve months from what Mr *Phoofolo* read.

When I looked at the copy of the new Constitution I had (when I wrote judgment) I found it had only 64 Articles not 69. I do not therefore know where Mr *Phoofolo* found Article 69. The new constitution has only 64 Articles. The old one had only 56 Articles. I noted that it was possible for Martin Thahanyane and others to be suspended in terms of Article 63·7 for manifesting behaviour in the service of the BCP that can be proved dangerous and which destroys the work of the BCP. There is annexure "EE" which Martin Thahanyane claims to have not received. It makes allegations of conduct that could lead to suspension. There is a letter "BB" suspending him. But there is no evidence of compliance provisions of Article 63. Nowhere is it shown that Martin Thahanyane was given a written charge in terms of article 63·8 nor was he given an opportunity to be heard. These are matters that cannot be dealt with in this application.

I have been assured that the BCP wants to grow and is about to prepare for elections, it could not exclude members or diminish its membership, and that, these members who followed the other faction are

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free to resume their membership and exercise their democratic right to elect and be elected as before. As Monapathi J said in *Basutoland Congress Party & Another v Molapo Qhobela & Another* CIV/APN/410/99 at page 4:

"I said if one is accused of having disturbed the powers that lie in certain people who have been given the power, it was not very difficult because the constitution tells one whether he has done so regularly or irregularly."

The Court of Appeal in *Molapo Qhobela & Another v Basutoland Congress Party* C of A (CIV) No.8 of 2000 has shown that it is possible to call a Special Conference in terms of Article 13 of the Constitution provided the procedure laid down in it is followed. Constituency committees have to go through the Secretary General and their request has to be referred to the Working Committee, only then can the National Executive Committee call the Special Conference. In finding that in respect of the Special Conference Leon JA said "there was no compliance at all" with the provisions of Article 13. He went on to say at page 16

"If they were dissatisfied with the manner in which the Secretary General or any other official was performing his or her functions and discharging his or her duties, their remedy was to seek relief from the High Court. What they were not entitled to do was to act unconstitutionally in taking the law into their own hands and acting in flagrant violation of the Constitution."

By saying so Leon JA was emphasising what I have said before that the Secretary General, the National Executive Committee and the leader of the BCP or any other official of the BCP are servants not masters of the members. The master of the BCP, who must be obeyed is the Constitution of the BCP. This Constitution has been described by Peete J in *Masehloho Sehloho v National Executive Committee of the BCP & Others* CIV/APN/158/98 as being democratic in nature.

It is in this democratic spirit this court has expected it to pervade all political institutions in this country. The judgments that the High Court per Ramodibedi J, Monapathi J and the Court of Appeal rely on the expectation that the Executive Committee will act democratically in resolving this ongoing dispute in the BCP. Everything internal is left to the political parties themselves as autonomous bodies with constitutions to settle as their members see fit. No person or structure is allowed by the courts to misuse the constitution or violate it to impinge on the rights of association of any person or structure within the party. As Cullinan CJ in *Ramoreboli & 2 Others v Ntsu Mokhehle & 6 Ors.* CIV/APN/139/91 expressing this attitude of the court said:

"I do not see why the court should be at pains to construe any document so as to favour a derogation from freedom of association."

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In a case of the Labour Party in Britain, Megarry J dealing with interference with membership rights said in *John v Rees* [1979] 2 All ER 274 at page 305:

"I cannot believe the principles of natural justice can be ousted by the simple process of describing expulsion by another name, or rating it on alternative theoretical basis."

On this membership issue courts will lean towards protecting existing membership rights. In interpreting clauses of the constitution that seek to exclude the full participation of members whose membership lapsed because of the leadership factional strife, the court will be vigilant towards any committee or constituency committee or even the Executive Committee that claims power "to act unfairly in derogation of common and universal expectation".—vide *John v Rees (supra)* at page 308.

The court has to take this attitude because the BCP members have to be allowed to settle their own party affairs as Monapathi J has said in *Basutoland Congress Party and Another v Molapo Qhobela*. The court will not do it for them. It is up to members at all levels of their party to return to the lawful structures of their party so as to put things right.

The issue of membership is crucial to the settlement of this application and others that are likely to follow. This court has to be alive to potential problems of this kind and to the principle that there must be finality to

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litigation. Consequently it will not take kindly to exclusion of members of the BCP merely because they lost a case before this court, because of procedural and constitutional violations of the BCP constitution. Peete J dealing with a conflict between the National Executive Committee of the BCP and a constituency candidate in the case of *Masehloho Sehloho v National Executive Committee of the BCP & Others* CIV/APN/158/98 said of the BCP Constitution:

"According to the party constitution the pen-ultimate election of a candidate at constituency level is not a final step.... The constitution is however silent or at most vague about the powers of the NEC in considering the respective constituency candidates endorsement.... But it can be fairly assumed that under the party's constitution..., it must have gone through LM10, LM11 and LM12 procedures. This demonstrates the democratic nature of the election process which ensures that the BCP members should freely choose their representatives."

I have underlined the words that emphasise the democratic nature of the BCP and the fact that this court has in the past recognised and protected that right. By the same token this court can be expected to protect their membership rights from violation or exclusion. This court has noted that there are two warring factions within the BCP. These are the current lawful National Executive Committee led by Mr Tseliso Makhakhe and the other 1999 National Executive Committee led by Mr Molapo Qhobela (that was declared unlawful by Ramodibedi J in CIV/APN/205/99 because it was improperly elected). The Molapo Qhobela group tried to seize the party

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structures of the B.C.P. illegally, but was restrained/prevented from doing so by Monapathi J in CIV/APN/410/99. The writing of annexure "DD" by Mr Martin Thahanyane had been part of this campaign. In this strife, the rank and file of the members were trapped in this fight of elephants. When they realised they have been used by leaders they followed to stick to unlawful methods, they should not be prevented from taking the lawful route by having their membership rights taken except by due process of law and party procedure.

If there are procedures in the BCP constitution that violate or impinge on the right of association, membership and participation in the conduct of public affairs of Lesotho they cannot stand. This was the ruling of Peete J in *M.M. Raddeby v National Executive Committee of the BCP & 4 Others* CIV/APN/159/98 (unreported) where he said:-

"Supreme as it is, the Constitution of the party is however 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 NEC power to assume the basic right to select a representative for a constituency. To endorse such a selection would be to make a sham of free elections in a democratic country."

Each case that will come before this court in future has to be judged on its merits. Nevertheless it is necessary to make potential litigants (among whom of late are BCP members) aware of how this court has recently dealt with

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political party cases up to now. This became necessary because of Mr *Phoofolo*'s argument in respect to the issue of membership and the fears of his clients of exclusion from holding office merely because they supported the wrong faction during the leadership contest. It should therefore be observed that what happens in political parties is important to the country because political parties are now an important constitutional organ of the State—See Section 87(5)(b) of the Constitution. Not only must a Prime Minister be selected from a political party, political parties are seen in Section (16)(1) and Section 20 of the Constitution as mechanism for political association and participation in Government. Therefore they should no more be seen as just any ordinary association. They are a bulwark of democracy in the State.

#### 8. Delay in instituting legal proceedings

This question of delay in the institution of these proceedings gave me considerable worry because as C.B. Prest has said in the *Law and Practice of Interdicts* (1996) at page 48:

"Mere delay in applying for an interdict in defence of a right is no ground for refusing an interdict. Before a delay can be a valid obstacle to the claim for an interdict, it must be shown that in the circumstances of the particular case, the grant of the interdict would cause some great inequity and would amount to unconscionable conduct on the part of the applicant."

It has to be borne in mind that applicant and its deponent are only two

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among many of the organs and members of the BCP. This National Executive Committee has done many drastic things in its capacity as the supreme organ of the BCP. There should have been a new constituency Committee already. Among other things it has removed Dr Khauhelo Raditapole from the Interim Political authority. See *Khauhelo Raditapole v Sekoala Macheli & 8 Others* CIV/APN/204/2000. At the end of this year or the beginning of the new year an Annual General Conference is going to be held in three to four months' time. It was a conference of this nature Monapathi J had suggested problems of the BCP ought to be solved - see page 10 of *Basutoland Congress Party & Another v Molapo Qhobela and Another* CIV/APN/410/99. In a case of a delay in an application for an interdict as Mahomed JA observed, the balance of convenience was a factor to take into account. Consequently in *Motlalentoa v Monyane and Another* 1985-1990 LAC 244 at 246 said:

"No averment was made that the balance of convenience favoured the appellant and no facts were alleged which should enable the court to assess where the balance of convenience was, in considering the alternative contention. The facts on which the appellant relied were in dispute."

What Mahomed JA said in *Motlalentoa v Monyane* applies in this case. The balance of convenience favours the resolution of the problem of the BCP at a conference which is in about three months' time as Monapathi J observed in *Basutoland Congress Party v Molapo Qhobela*. Furthermore

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there is a serious dispute of fact in the mandatory interdict that applicant's deponent seeks. Reasonableness of delay depends on circumstances—*Gouws v Secretary for Transport* 1973(4) SA 423 confirmed by the Appellate Division in 1974(3) SA 124.

I have no doubt in my mind that this delay was deliberate. Martin Thahanyane and others decided to boycott the lawful structures for reasons of their own. I found Martin Thahanyane's pretence that he should still be in the Stadium Area Constituency Committee waiting to be replaced by a new one rather dishonest. This is because through annexure "DD" he dissociated himself from the official and lawful National Executive Committee, and never found out from Thoathoa Makuta what was going on. He paid his subscription to a committee which used new exercise books, thus showing that there are two BCP structures in the Stadium Area Constituency. If indeed he always regarded T. Makuta as his chairman and all was well, why did he have to know for the first time that he is alleged by Makuta to be no more in the Committee or the party before this court? Why did he not find out from Makuta who lives in the same constituency?

If I am to overlook this delay, I have to be told the truth and not be subjected to what amounts to a cat and mouse game. Courts do not want to be used in bad faith. I find both sides to be playing game of poker in which this court is one of their cards.

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9. **Where the balance of convenience lies**

There can be no doubt that in a country in which there is freedom of association, members of a political party are expected to deal with their own organisational affairs. Courts only briefly intervene to keep law and order and to make rulings where interpretations of the party constitutions differ. Consequently Monapathi J in *Basutoland Congress Party & Another v Molapo Qhobela & Another* CIV/APN/410/99 at page 3 said:

"Our upper most concern is the highest calling of maintaining law and order in the justice we dispense. That there must be order according to law.... We try as much as possible to avoid being involved in the administration of parties."

With these words of Monapathi J, I agree. Let me also add that political parties have constitutions that are in most cases meant to settle problems democratically. It is for this very reason that Article 13 of the BCP Constitution (both old and new) provides that a Special General Conference may be called by the Executive Committee at the request of a constituency, if the Executive Committee is satisfied of its importance and urgency.

Article 12.1 of Basutoland Congress Party Constitution (both the old and new constitution) provides:-

"The Annual General Conference shall be held in December/January on a date and place that shall be chosen by

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the Executive Committee."

When this application was brought in September 2000, there were only three months left before the Annual General Conference that must be held every year. Monapathi J in *Basutoland Congress Party & Another v Molapo Qhobela & Another* CIV/APN/410/99 has noted that a conference is the place where a solution might be looked for to overcome the problems that have beset the BCP, and I quote from page 10 of that judgment:

"I was persuaded that there must have been something wrong that urged the petitioning of a special conference. It may surely be political, but there is something that needs to be ventillated by way of a conference.... Indeed the respondents may have been over-zealous or got into a rush to do unconstitutional things...."

It seems to me that in terms of Article 20·6 of the Constitution the constituency conference has a duty of passing on decisions that go to the Annual General Conference and by resolution mandate delegates that go to the Annual General Conference. It will be seen that the new constitution speaks of decisions while the old one spoke of recommendations. In short, constituency committees can send their delegates with resolutions to the Annual General Conference to put forward on behalf of the constituency before the Annual General Conference. It seems therefore that there are internal mechanisms for the BCP to deal with its present problems.

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To reinstate the 1999 National Executive Committee and remove the present one, strikes me as achieving nothing, because it is virtually the same as this one except for three members. It does not even mean Mr Molapo Qhobela will be reinstated as leader because he himself has acquiesced to his removal from leadership and membership of the BCP. He has not challenged what has happened up to now, his matter remains unventilated and its full particulars remain unknown.

The courts act under definite constraints and limitations, they cannot have all the wisdom and capability to run political parties. Indeed the law would not permit it. The problems that beset the BCP are by no means new. In *G.P. Ramoreboli & 2 Ors. v Ntsu Mokhehle & 6 Ors.* referred to earlier, Cullinan CJ was faced with a similar factional strife, and he said:

"It seems that a struggle for leadership ensued between those in Maseru and those in exile, and again between two factions in the exiled leadership."

That was in 1991. In April 1997 this court referring to events in 1996, said:

"This court was aware of these two factions within the party when it made the order of the 18<sup>th</sup> October 1996, referring the matter to applicant as leader of the BCP to settle this dispute amicably.... It is, time to go strictly by the Constitution."—*Ntsu Mokhehle v Molapo Qhobela & 15 Ors.* CIV/APN/75/97.

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There still was instability in the BCP, consequently Maqutu J in this court was obliged to tell party members the following:

"It is not proper for courts to impose their views of what is best or retrograde for a political party. Everything should be governed by its constitution, for better or for worse. Courts have to see that the National Executive Committee does not infringe the rights of the BCP constituency committees or BCP branches or abuse its constitutional powers. See *R.T. Hoohlo v K.M. Matela & National Executive Committee B.C.P.* CIV/APN/29/93 (unreported). Courts have to see that the annual conference is not used in a manner that is unfair and contrary to the spirit of the BCP constitution."-See *Ntsu Mokhehle v Molapo Qhobela & 15 Others* CIV/APN/75/97.

In 1999 there was another fracas-see *Tseliso Makhakhe & 13 Ors v Molapo Qhobela & 22 Ors* CIV/APN/205/99. It was another wrestling match between two factions. Ramodibedi J put this situation as follows:

"This case involves a dispute between two committees, each of which is claiming to be the lawfully elected National Executive Committee (NEC) of the 14<sup>th</sup> Applicant BCP."

This tussle continued although Ramodibedi J had made a ruling as to which one was the lawfully elected National Executive Committee. The faction that lost would not co-operate with the lawful executive committee, leading Monapathi J to remark in *Basutoland Congress Party & Another v Molapo*

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*Qhobela & Ano.* CIV/APN/410/99 to say the constitution exists:

"So that one may clearly see a situation where there is impatience, intolerance and everything that has to do with people who no longer understand each other and are therefore unprepared to co-operate in a common endeavour."

Mr *Phoofolo*'s main worry was that (because the tenure of office of the National Executive Committee was in terms of Article 30-3) two years, problems in the BCP could not be overcome. But members can do whatever is necessary to solve problems within their party at an Annual General Conference. I could therefore not understand the pessimism of the faction behind this application. They do not have faith in democracy. It is up to members of the B.C.P. to neutralise this "impatience, intolerance and everything that has to do with people who no longer understand each other and are therefore not prepared to co-operate". The court will not do it for them. The doors are open for them to resume membership and reactivate their party if they still wish to do so. The existing committees are their servants. Monapathi J had correctly said in the case that was before him that as judges "we try as much as possible to avoid being involved in the administration on parties", because that is what the law expects of us.

10. **Order of the court:**

My findings of fact and their reasons in a nutshell are the following:

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- (a) The *locus standi* of applicant to institute these legal proceedings is not only unclear, it is highly disputed by the chairman of applicant. This dispute was foreseeable.
- (b) There has been (in the circumstances of this case) an undue delay in challenging the proceedings and the elections that took place in the presence of applicant's deponent eight months ago at the Annual General Conference of 21<sup>st</sup> to 23<sup>rd</sup> January 2000 of the BCP.
- (c) Restoring the old National Executive Committee which would have had virtually the same members as the present one (except for three out of fifteen members) would be a futile exercise (*brutum fulmen*).
- (d) The Annual General Conference at which the problems of the Basutoland Congress Party ought to be properly ventilated is in terms of Article 12.1 of the constitution is to be held in December 2000 or January 2001. This forum provides a far better means of domestically and internally dealing with grievances than nullifying proceedings of the last Annual General Conference and removing the existing National Executive Committee by court order. This should rather be removed through the ballot box at the Annual General

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Conference, if members so desire.

- (e) The aggrieved people behind this application have a far more effective alternative means of redressing their present grievances by reviving their lapsed membership of their political party by paying annual subscriptions to the lawful party structures and pursuing their ends democratically through the lawful Basutoland Congress Party structures.

Consequently, I dismiss this application with costs.

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WCM MAQUTU  
JUDGE

For applicant : Mr EH *Phoofolo*  
For respondent : Mr M *Ntlhoki*