CIV/APN/41/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAMELLO MORRISON — APPLICANT

vs

THABO PITSO	1ST RESPONDENT
LESOTHO EDUCATION PARTY	2ND RESPONDENT
INTERIM POLITICAL AUTHORITY	3RD RESPONDENT
MANCHAFATSO PHILOMENA MOSESE	4TH RESPONDENT
MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	5TH RESPONDENT
ATTORNEY GENERAL	6TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 28th March, 2000

On the 4th day of February 2000 the applicant moved this application ex parte before Lehohla J. In her Notice of Motion the Applicant had prayed for an order in the following terms:-

1. Dispensing with the Rules of Court concerning forms, notices and service of process herein on account of the urgency of this matter;

2. A rule nisi issue returnable on a date and time determinable by the above Honourable Court calling upon the Respondents to show cause, if any, why the following order shall not be made final;

(a) Interdicting Respondents forthwith from proceeding with and giving effect to decisions of Second Respondent dated 12th January and 26th January 2000 in terms of which Applicant is being withdrawn as a Representative of Second Respondent and replaced by Fourth Respondent.

(b) Declaring the purported withdrawal of the appointment of Applicant and her replacement by Fourth Respondent in Third Respondent as being void, illegal unconstitutional and of no force and effect.

(c) Directing First, Second and Fourth Respondents to pay the costs hereof and the other Respondents to pay same only in the event of their opposing this application.

(d) Granting Applicant further and/or alternative relief.

3. Prayers 1 and 2 (a) to operate with immediate effect as interim order.

Lehohla J. having heard Mr Sefako for the applicant and having perused the papers felt not inclined to grant an interim order as prayed but instead ordered that the respondents be served with papers and that the matter be heard as a matter of urgency on the 14th February 2000.

On the 14th March 2000 when the matter was argued Mr Ntlhoki, for the applicant, submitted in the main that the purported withdrawal of the applicant from the membership of the Interim Political Authority was null and void because the **audi-alteram partem** principle had been violated in that when the second respondent took a decision to terminate her membership in the IPA, the applicant had not been given a fair hearing or opportunity to make representations.

It was common cause that the applicant was appointed as a representative of the Second Respondent in the IPA in terms of Section 5 of the Interim Political Authority Act no.16 of 1998. Her name was duly published in a gazette. It reads:-

"LEGAL NOTICE NO.117 OF 1998

Members of the Interim Political Authority Notice 1998

Pursuant to section 5 of the Interim Political Authority Act 1998[1], I,

SEPHIRI MOTANYANE

Minister of Law and Constitutional Affairs hereby publish the list of names of the members of the Interim Political Authority -

	POLITICAL PARTY		**NAMES OF REPRESENTATIVES**
1.	Lesotho Congress for Democracy	-	Mr Kelebone Maope Mr Tom Thabane
2.	Basutoland Congress Party	-	

3.	Basotho National Party	- Dr E. 'Meli Malie Morena Lekhooana Jonathan
4.	Marematlou Freedom Party	-
5.	Sefate Democratic Union	- Mr Bofihla Nkuebe Ms Rethabile Sakoane
6.	National Progressive Party	- Mr Justin S. Ntlhabo - Alex K. Makara
7.	Popular Front for Democracy	- Mr Rakali Khitšane - Mr Lekhetho Rakuoane
8.	Kopanang Basotho Party	- Ms Limakatso R. Ntakatsane - Mr Pheello Mosala
9.	Lesotho Labour Party	- Mr M. Tyhali - Mr Charles D. Mofeli
10.	Lesotho Education Party	- Mr T. Pitso - Mrs Mamello Morrison
11.	Christian Democratic Party	- Mr Phai Fothoane - Mrs Malekunutu Sekonyela
12.	National Independence Party	- Mr Anthony C. Manyeli Mr Motikoe Motikoe

2. The Members of the Interim Political Authority Notice 1998 is revoked.

SEPHIRI MOTANYANE
MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS

NOTE

1. Act No.16 of 1998
2. L.N. No. 116 of 1998"

In my view the gazettement of the names of the members of the Authority under Section 5 (4) bestows legal validity to the appointments made by political parties under section 5 (2). It stands to good reason that the legality of membership to IPA, once gazetted, must stand until the gazette is pronounced null and void (see **Khauhelo Ralitapole and others** vs **Sephiri Motanyane and others** CIV/APN/288/99; **Jajhay vs Rent Control Board** - 1960 (3) SA 189).

It was common cause that at the time she was so appointed the applicant was not a member of Lesotho Education Party, but was a member of Basotho National Party.

In her founding affidavit the applicant states that on the 17th January 2000, the first respondent served her with a letter MM1 dated 12th January 2000. It reads (fairly translated) as follows:-

LESOTHO EDUCATIONAL PARTY

(L.E.P.)

P.O. BOX 524 - MOHALE'S HOEK - LESOTHO

"E EA NGOLA"

12.01.2000

FROM: LEP Secretarial Admin. Depart.

TO : Mrs Mamello Morrison
Interim Political Authority
LNDC MALL
Private Bag A86
Maseru

Mrs Mamello Morrison,

As a result of tension within the LEP, the National Executive Committee has found that the leader of the party committed irregularities when the Interim Political Authority was established by going with you therein when you were not a member of the party.

For these and other reasons the Committee and his (the leader's) advisers have advised him that you should be withdrawn from the IPA. party should introduce its member with immediate effect. You are accordingly notified that the party (LEP) hereby withdraws you from the Interim Political Authority.

With thanks

CC.: Minister of Law & Constitutional Affairs
Secretary General IPA

Secretary ---------- Chairman LEP

Signed: T. Pitso"

The purport of this letter "MM1" was to terminate the appointment of applicant in the IPA on the ground that applicant was not a member of the second respondent. It should here be mentioned that a political party listed under Sec.5 (1) of the IPA Act is entitled to withdraw its representative from the Authority.

Section 5 "(3) A political party may, at any time, in writing withdraw its representative from the Authority and such a representative shall forthwith cease to be a member." [of IPA].

It is also relevant to quote section 5 (2) of the Act which reads-

> "Subject to sections 8 and 9, members referred to in subsection (1) shall be appointed by their respective political parties."

The appointment of the applicant as the representative of the Second Respondent in IPA was purportedly made under this section 5 (2) and the applicant avers in paragraph 8 of her affidavit-

-8-

> "At all relevant and material times Applicant was representative of Second Respondent within Third Respondent, having been duly and lawfully appointed thereto by Second Respondent."

Regarding this specific allegation, it must be noted that the answering affidavit of Thabo Pitso, first respondent, did not either admit or deny the same save to state argumentatively that as a result of numerous complaints from the party members, it had become a notorious fact that the applicant was a member of Basotho National Party and that this membership "was irreconcilable with her representation of the Second Respondent in the Interim Political Authority ..... The Applicant by reason of being a member of Basotho National Party is therefore disqualified from being a member (sic. representative) of the Second Respondent in the Interim Political Authority, moreso as she is not a member of the Second Respondent".

It therefore becomes apparent that even though the fact of appointment is not denied, the second respondent contends that the appointment of the applicant be declared a nullity in terms of Section 5 (2) of the Act because the applicant is not a member of Lesotho Education Party.

It is submitted by Mr Ntlhoki that the applicant was not disqualified under law from being a representative of the Second Respondent because, so he argues, ex lege party membership is not a prerequisite and is therefore irrelevant. He submits that in this regard the requirements of section 8 and section 9 of the Act should be the sole considerations. They read -

> "**Qualifications**
>
> 8. No person shall qualify to be a member of the Authority unless he qualifies to be a member of Parliament under section 58(1) of the Constitution
>
> **Disqualification from office**
>
> 9. No person shall qualify to be a member of the Authority if he is disqualified from membership of Parliament under Section 59 (2) of the Constitution".

The crucial words in Section 5 (2) are "shall be appointed by their respective political parties." It is contended by Mr Matsau that a fair and ordinary interpretation of this subsection is that the members of IPA must necessarily be members of political parties who appoint them. He stresses the word "their" and that in the singular this comes out to be "his or her respective political party". He submits therefore that party membership is an explicit requirement in Section 5 (2) and that the clear and ordinary meaning is that each of the listed political parties shall appoint as its representatives two of its party members. This may be so and indeed once a political party appoints any person as its representative in the IPA, it can be safely assumed that the person enjoys the confidence of the party. It is my considered

view that the appointment of the representative is left as the sole prerogative of the political party the only limits being qualification provisions under section 8 and section 9 of the Act. The party membership is an issue which may depend on many factual considerations e.g. payment of party subscriptions, or filling of renewal forms. What happens, one may ask, to an IPA member who forgets or fails renew his party membership? Or one who changes his party membership midstream, or who is a party member but disobeys the orders from the party headquarters? All these are issues which fall under the political arena and prerogative of the party. If party membership was a prerequisite, the legislature should have made a provision which stated:

> "No person shall qualify to be a member of the Authority unless he is a member of any of the party listed under 5 (1) of this Act."

Mr Ntlhoki submits that to interpret section 5 (2) as having an additional requirement that the representative should also be member of the party appointing him would be tantamount to legislating and that putting aside qualification and disqualification provisions of the Act and of the Constitution, it is not competent for the court to question the party credentials of the representative. If however it is shown that the representative suffered under these qualification provisions, the appointment of such representative would be declared null and void **ab initio.** It is a mystery why the applicant despite her "notorious" party affiliations got the appointment as a party representative of the second respondent to an important forum like the Interim Political Authority. The credentials for appointment as a party's representative may indeed be multitudinous and party membership may be one of those. It is not unlawful or irrational therefore for a political party to decide to appoint a person as representative who is not a member of the party because the party has absolute freedom to appoint any person it deems fit; and in so doing it makes a conscious and deliberate choice which, of course, it can undo if circumstances so require under section 5 (3) of the Act.

It is not for the court to grant relief not prayed for (**Beck's Theory and Principles of Pleadings in Civil Actions** - (1982) p.63 and p. 79) and in this case the second respondent did not elect to make a counter application as it was indeed entitled to do (Rule 8 (16)) of the High Court Rules (1980) praying for a declaratory order to the effect that the appointment of the applicant to the IPA and her subsequent gazettement be of no legal force and effect upon ground that when she was appointed by the second respondent as its representative in the IPA, the applicant was not a member of the second respondent. It was necessary in my view that since the name of the applicant had been published in the gazette in terms of section 5 (4) of the IPA Act, the second respondent should have lodged this counter-application to have the inclusion of the applicant's name in the gazette declared null and void; it was not sufficient for the second respondent to contend itself in assailing the appointment of the applicant as if it was fraudulently induced. The Court furthermore was not made to fully understand why paragraph 8 of the applicant's founding affidavit was not directly controverted. It reads-

> "At all relevant and material times, Applicant was a representative of the Second Respondent within Third Respondent, having been duly and lawfully appointed thereto by second respondent."

This was a fact that the respondent was called upon to affirm or deny.

The most important issue to be determined by this court is whether the second respondent in exercising its prerogative to withdraw the name of the applicant from IPA under section 5 (3) acted lawfully and in accordance with the audi alteram partem principle. The letter MM1 written to the Applicant on the 12.1.2000 is clear and unambiguous, for it states: "You are accordingly notified that the party (L.E.P.) hereby withdraws you from the Interim Political Authority." It is also apparent from this letter that the Party's National Executive

Committee of the Party must have sat and determined the fate of the applicant - one may add, in her absence. The reason for her withdrawal was that she was not the member of the LEP. What is not in dispute is that before this letter was written, the applicant had not been afforded an opportunity to make representations or to give reasons why her name was not to be withdrawn on the grounds of her party allegiances. Her gazettement on the 1st December 1998 as member of the IPA had clothed her with a clear right to be a member of the IPA until her name had been withdrawn in terms of Section 5(2), even though it may be said that her appointment was seemingly unwise or imprudent.

The letter MMI was hand-delivered to her on the 17th January 2000 by the first respondent and she replied through her attorney on the 20th January 2000. The letter reads-

"20th January 2000

The Secretary General
Lesotho Education Party
C/O The Interim Political Authority
MASERU

Dear Sir,

Re: WITHDRAWAL OF MRS MAMELLO MORRISON

We act for **MRS MAMELLO MORRISON**

On 17th January 2000 you served our client with a letter purporting to withdraw her appointment in the Interim Political Authority. Your said letter is dated 12th January 2000.

You did not give our client a hearing at all in a matter that affects her status in a public office and other attendant rights.

This sort of action has already been declared illegal and of no force and effect by the High Court in a similar incident.

Your reasons for the purported withdrawal of our client's appointment are also invalid in terms of the Interim Political Authority Act.

In the result, withdraw your purported withdrawal of the appointment failing which we shall take appropriate legal action.

By copy hereof the Interim Political Authority is notified accordingly and requested not to give effect to the said unlawful action.

Your faithfully

_____

M. NTLHOKI & CO.

CC: INTERIM POLITICAL AUTHORITY"

On the same day the second respondent wrote another letter "LEP1" whose fair translation reads-

FROM: LEP Secretarial Depart

TO : Mofumahali Mamello Morrison

Mofumahali Mamello Morrison

I am directed by the leader of LEP on behalf of the National Executive Committee of the party to ask you to give reasons before 25.01.2000 why you say you should not be withdrawn from IPA as the party intends to appoint its member in the IPA with immediate effect.

With thanks

Secretary General
Signed: Mosese

CC: Co-Chairperson IPA".

Once a decision had been made to withdraw applicant from the IPA, this letter appears to be inconsequential. It is not clear whether this letter was written after the receipt of MM2 (from Ntlhoki & Co.). It is not clear whether it superceded MM1 - but what is clear is that the fourth respondent (who incidentally happens to be the new appointee of the second respondent) wrote the letter as the Secretary of the Second respondent. I am not going to impute any ulterior or base motive or design on her part. The applicant replied this letter per hers dated 24.1.2000. Fairly translated it reads thus-

P.O. Box 7066,
MASERU 100
24.01.2000

Secretary of LEP,
P.O. Box 524,
MOHALE'S HOEK

Sir/Madam,

I have received your letter dated 20 January 2000, and I annex hereto copy of the letter of Ntlhoki & Co., in case you have not received it, and it replies your allegations.

I thank you

M. Morrison

CC.: M. Ntlhoki & Co.

To complete her assignment, the fourth respondent wrote yet another letter MM3 on the 26.01.2000. It reads-

Transiation

Lesotho Educational Party

(L.E.P.)

P.O. Box 524 - Mohale's Hoek - Lesotho

Lesotho Educational Party

Date stamp

26 Jan. 2000

From: LEP Secretarial Administration
Depart

To: The Chairpersons - IPA
Maseru

By this letter I request you to forward the name of a member of LEP to be sworn in as a member of IPA. She is 'MANCHAFATSO PHILOMENA MOSESE. This letter has been jointly issued by the National Executive Committee and the leader of L.E.P.

With thanks

Date stamp
Interim Political
Authority
26 JAN 2000

Secretary (sgd) .....Chairman (sgd) L.E.P.

T. Pitso (sgd)

Under the Interim Political Authority Act, the second respondent is recognised as a political party (section 5 (1) (j) though it is cited as Lesotho Education (not "Educational") Party). As such, the second respondent had power to appoint two representatives into the IPA; it also had power to withdraw, at any time, its representative from the Authority whereupon such representative ceases to be a member of IPA.

To the central inquiry whether the applicant was entitled to be heard before her name was withdrawn from IPA by the second respondent, a trite principle applies, namely, that whenever a statute empowers a public body to do an act or give a decision prejudicially affecting an individual in his or her liberty or property or existing rights, then unless the statute expressly or by implication indicates the contrary, that person is entitled to the protection of the **audi alteram partem** rule (**Matebesi vs Director of Immigration** C of A (CIV) 2/96. In this case a political party listed under 5 (1) of the Act is an appointing authority which can make decisions to withdraw one or both its representatives in the IPA or to substitute other persons at its discretion. (**Sekautu vs Minister of Law & Constitutional Affairs, IPA & AG - CIV/APN/448/99 dated 28/2/2000.**

Assuming the lawfulness of her appointment, it is not in dispute that the letter MM1 purporting to withdraw her from the IPA affected her status and other appurtenances of office including remuneration, which, the court was reliably confided in from the bar, is quite seizable. The applicant also had a legitimate expectation that she would remain in the IPA until the Authority was dissolved or her name withdrawn after due process (**Koatsa vs National University of Lesotho** - 1991 - 1992 LLR (LB) 163; **Van der Merwe and Others vs Slabert No and others** - 1998 (3) SA 613 (N).

The facts of the case show that the letter MM1 dated 12.1.2000 was never withdrawn or superceded by any party decision. It should therefore stand as unrepudiated in itself and its effect under the provisions of section 5 (3) of the Act. The question that arises is whether the applicant had been given a fair hearing before the decision it was communicating was made. The letter "LEP1" dated 20th January 2000 asking the applicant to give reasons why her name was not to be withdrawn from the IPA was written eight days after the decision to withdraw her name had been made. The case of **Morapeli Motaung vs Principal Secretary, Ministry of Tourism, Sports and Culture and Others** - C of A (CIV) No.29/97 quotes **Baxter**: **Administrative Law** p.587 where the learned author says:

> "Since natural justice seeks to promote an objective and informed decision, it is important that it be observed prior to the decision. One a decision has been reached in violation of natural justice, even if it has not yet been put into effect, a subsequent hearing will be no real substitute : one has then to do more than merely present one's case and refute the opposing case - one also has to convince the decision- maker that he was wrong. In a sense the decision-maker is already prejudiced."

In my view, it does not help the situation that the applicant replied this letter also annexing a letter written by her attorneys; her reply cannot be taken as a waiver of the right to make representations with regard to the withdrawal itself.

Mr Ntlhoki then raised an ingenious submission to the effect that assuming that party membership was a pre-requisite to appointment under section 5 (2) then, so he submits, the second respondent by appointing the applicant in full knowledge of her party allegiances, waived the right or benefit under Section 5 (2) . In the case of **Eagle Insurance Co. Ltd vs Bavuma** - 1985 (3) SA 42 it was held that :-

> "It is a well established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms. This rule is expressed by the maxim "**quilibet potest renuntiare juri pro se introducto**" - anyone may renounce a law made for his special benefit. It is for the individual or body intended to be benefited by the statutory provision in question to waive its performance and it is not open to another person (not intended to be benefited) to insist that the statutory provision be observed."

In the case of **Sekautu** (supra), Lehohla J. has most wisely put it thus:-

> "It is common knowledge that law could scarcely be of assistance to those who sleep on their rights."

Lastly, the court must make it very clear that matters political are suitably ventilated in the political fora and the courts of law are not always appropriate channels in this regard because a political convenience and justice do not often go hand in hand. To invite the courts of law into what is in fact a political tussle or debate is both unfair and intrinsically bad because these courts could end up attracting partisan labels. Politicians have a duty to put their houses in order and not rest their hopes in the courts to solve their political problems. A matter such as the suit before court could indeed have been timeously inquired into and the problem remedied by the National Executive Committee of the second respondent. One can even go on to say that it was not the function of the Minister of Law and Constitutional Affairs or the IPA to have questioned the party credentials of the applicant without risking interfering with the internal affairs of the second respondent.

Without denying them fundamental access to justice and protection of the law (Constitution, section 19), political parties are the best judges and guardians regarding their own interests. It would be officiousness for the courts to decide who should represent a particular political party in the Interim Political Authority when a deliberate party decision has been made to appoint a particular person as representative. The court has not been told how the applicant came to be appointed representative of the second respondent- for example, who moved her name, who seconded, whether the executive committee of the second respondent sat and approved her name, or whether her appointment was surreptitiously made; we only have the uncontroverted statement by applicant in her founding affidavit that she was "duly and lawfully appointed thereto by second respondent", we also have a Lesotho Government Gazette no.117 of 1998 which is still extant.

In passing it should be mentioned that the "no difference argument" has not been considered at all by this court in deciding the considerations which underpin the audi rules (see Gauntlett J.A. in **Matebesi vs Director of Immigration** - C of A (CIV) 2 of 1996. The second respondent, despite the decision in this proceedings, has ultimate power to withdraw applicant's name from the IPA after having afforded her a hearing.

The issue of mis-joinder of first respondent was raised **in limine** by Mr Matsau in relation to costs. It is common cause that the first respondent is the president and part of the National Executive Committee of the Second respondent and whatever acts he performed, he did so in his official capacity. Once the second respondent had been cited, the president of the party was necessarily by implication also cited. The act of appointment of applicant is alleged to have been performed by the second respondent and his Committee as well as performance of the purported withdrawal. In my view it would be unconscionable and inequitable to burden the first respondent personally with costs. In the circumstances, I hold that the first respondent ought not to have been joined as a party to the proceedings in his personal

capacity. The position would be otherwise if the decision to appoint a representative and that to withdraw rested upon the leader or president of the second respondent. The application against him is dismissed with costs.

The rule is however confirmed in terms of the Prayer 2(a) and (b) in the Notice of Motion with costs against the second respondent only.

S.N. PEETE

JUDGE

For Applicant : Mr Ntlhoki

For 1st, 2nd and 4th Respondents : Mr Matsau