CIV/APN/448/99

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAKARA AZAEL SEKAUTU	**1st Applicant**
UNITED PARTY	**2nd Applicant**

vs

THE MINISTER OF LAW &CONSTITUTIONAL AFFAIRS	**1st Respondent**
THE INTERIM POLITICAL AUTHORITY	**2nd Respondent**
THE ATTORNEY-GENERAL	**3rd Respondent**

JUDGMENT

Delivered by the Honourable Mr Justice M.L. Lehohla on the 28th day of February, 2000

The two applicants approached this Court by way of a notice of Motion seeking an order against the three respondents in the following terms.

(a) Directing the respondents in their different capacities to facilitate the gazettement, recognition and acceptance of 2nd applicant as a member of the 2nd respondent.

(b) Directing the Respondents to remunerate such members of the 2nd

applicant accordingly as shall be presented to 2nd respondent with effect from the 8th December 1998 until 2nd respondent is lawfully dissolved.

(c) Directing the respondents to pay the costs of this application only in the event of opposing same.

(d) Granting both applicants such further and/or alternative relief as this Honourable Court deems fit and just.

The applicants rely on the facts set out in the founding affidavit of the 1st applicant who is also the president of the 2nd applicant.

The applicants' averments enjoy the support of Mamello Morrison's supporting affidavit.

The respondents have not reacted to the applicants' averments by way of affidavits. Suffice it to say they sought to rely only on points of law raised *in limine.*

Consequently despite the interesting history elaborated on by the 1st applicant in his founding affidavit the issues to be decided in this application would tend to fall within a very narrow compass.

In points (b) and (c) raised *in limine* the respondents contended that :

(i) The first applicant has no *locus standi* to institute these proceedings in his name on behalf of the 2nd applicant seeking prayers as appear in the notice of motion

(ii) The deponent to the founding affidavit has no authority to file papers on behalf of the 2nd applicant in this matter as there is no resolution passed by 2nd applicant giving him authority to act on its behalf.

While these contentions in a proper case could carry the day, in the instant matter they stand to be thrown out on the following grounds -

(1) that there is ample evidence in the founding affidavit to provide the Court with sufficient confidence that the 1st applicant is indeed acting in representative capacity *vis-a-vis* the 2nd applicant of which he is the president;

(2) if there was any contention that the 1st applicant has no authority to represent the 2nd applicant then it would have been appreciated if such contention was set out in opposing papers. As things stand I am under no illusion that it is the 2nd applicant which is litigating and not some unauthorised person on its behalf. See ***Mall(Cape) Pty Ltd vs Merino Kooperasie Bpk*** 1957(2) SA 347;

(3) though this 3rd ground does not serve as grounding any basis for dismissing the respondents' contentions raised above it is worth mentioning that though they have been multiplied into two they are essentially two sides of the same coin namely that the 1st applicant has no authority to represent the 2nd applicant because there is no resolution to show for it.

It would thus be fruitful to have regard to the dictum of Mahomed J.A. as he

then was in : ***The Central Bank of Lesotho vs E.H. Phoofolo*** C. of A. (CIV) No.6/87 (unreported) at page 15 where the learned Judge said :

> ".............There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts..........".

I agree with the learned Appeal Court Judge's statement of the law set out in the above phrase.

The last two points raised *in limine* being thus decided in favour of the applicants I should make haste to deal with point (a) which forms the core of the objection and in some sense the barrier that the applicants wish this Court to break in order to enable them realise their objectives.

In point (a) the respondents contend that :-

> "In terms of the Interim Political authority Act No.16 of 1998 (The Act) only representatives of the political parties mentioned under section 5 of the said Act shall compose the authority. The 2nd applicant is not one of the political parties mentioned and as such has no right in law to be a member of the authority".

The political parties listed as composing the Authority in the Interim Political

Authority Act 1998 do not include the 2nd Applicant.

Mr Fosa for the applicants raised the point that the Act is discriminatory of his clients and therefore does not accord with Section 18 of the Constitution.

Section 18(1) says :

> "Subject to the provisions of subsections 4 and 5 no law shall make any provision that is discriminatory either of itself or in its effect".

The argument raised in this regard would in my view have relevance if it could be shown that although the 2nd applicant appears in the list composing the Authority it has nevertheless been excluded by some other law from participating or enjoying benefits that each party which is similarly listed is entitled to participate in and enjoy. In the instant matter it seems to me that the applicants and nobody else stood in the way of their own interests by failing to take such steps that every one else took to ensure their inclusion in the process that led to the passing of the 1998 Act. It is common knowledge that the law could scarcely be of assistance to those who sleep on their rights. Just by way of a random example I may correctly contend that I have a Constitutional right to obtain University education. But I cannot enforce that right

through courts of law if I didn't apply for admission to study at University. Thus I shouldn't be heard to complain that those with whom I passed Pre-University entrance examination were admitted when I made no effort to meet the requirement that in order to be admitted I should go a step further and apply - a condition which my compatriots have satisfied while I haven't. It surely would not amount to a breach of my Constitutional right to education at University if I am denied entrance to pursue my studies at such Institution in those circumstances.

Furthermore the function of this Court is to interpret the law and ensure that its judgments are enforced. It is not its function to legislate. I cannot see the applicants' grievances redressed on papers as they stand without the Court in effect amending the law that only Parliament is entitled to amend.

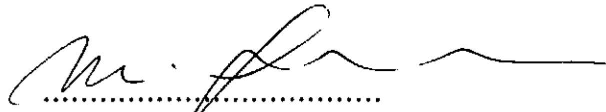
In ***The Manager-Tebellong L E C Schools and L E C Educational Secretary vs Godfrey Lekhanya*** C. of A (CIV) 1 of 1977 Milne Acting President sitting with Smit J A and Isaacs A J A in a more or less similar situation to the instant matter granted leave to withdraw the appeal with costs when it became apparent that contentions by the appellants were on moral and not in the least on legal grounds. In order for the appellants to succeed there would have been the necessity to have the

law in point amended and the Court of Appeal was not the rightful authority to make amendments on that law.

Another unwholesome feature that would possibly result were the court to uphold the applicants' claim would be that no matter how many more political parties would mushroom after the 1998 Act was passed and confined the composition of the Authority to a distinct number each such party would thereby be entitled to draw on the public purse regardless of budgetary constraints which should go hand in hand with sane and good governance. Such is the state of affairs that logic and proper thinking dictate should not be encouraged. It is my considered view therefore that good sense and indeed the position of the law as it stands do not countenance what is prayed for by the applicants. It could not augur well for this Kingdom if advantage being sought to be taken of political expediency were allowed to serve as an invitation to make indiscriminate and limitless inroads on the public purse.

I would therefore dismiss the application. But because of the substantial success the applicants had in the disposal of part of the points raised *in limine* costs payable by them would be reduced by 25% of the respondents' costs.

Accordingly the application is dismissed with 75% costs only.



JUDGE
28th February, 2000

For Applicants : Mr Fosa
For Respondents : Mr Putsoane