

IN THE HIGH COURT OF LESOTHO

In the matter between:

CHALALE MOROJELE	1ST APPLICANT
MERRIAM SEMATLANE	2ND APPLICANT
LISEMA MOHOANYANE	3RD APPLICANT
CLAURINA PSHATLELLA	4TH APPLICANT
LEHLOHONOLO MOFO	5TH APPLICANT
EPHRAIM MAFIKA	6TH APPLICANT
FORD JOBO	7TH APPLICANT
MAKOANYANE 'NEKO	8TH APPLICANT
MOSIUOA LEBINA	9TH APPLICANT

and

JAMES THEKO	1ST RESPONDENT
MPHONYANE MOFOKENG	2ND RESPONDENT
NQOSA LETSEKA	3RD RESPONDENT
MPITI THEKO	4TH RESPONDENT
FOLI MOLETSANE	5TH RESPONDENT
'MAKHOABANE THEKO	6TH RESPONDENT
'MAKHOLU LETSEKA	7TH RESPONDENT
LEKUNUTUN MOHALENYANE	8TH RESPONDENT
'MA-AZAE MOHASOA	9TH RESPONDENT
'MALESHOBORO THEKO	10TH RESPONDENT
PEETE THAMAE	11TH RESPONDENT
JERRITA MOHOANYANE	12TH RESPONDENT
I.E.C. SCHOOL EDUCATIONAL SECRETARY	13TH RESPONDENT
CHAIRMAN OF THABA-BOSIU PRESBYTERY (REV. MOREKE)	14TH RESPONDENT
THE MINISTER OF EDUCATION	15TH RESPONDENT

THE ATTORNEY-GENERAL

16TH RESPONDENT

R U L I N G

*Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 7th day of February, 2000.*

The applicants have applied to this court for an order in the following terms:-

1. *Dispensing with the Rules and periods of service.*
2. *That a Rule Nisi is hereby issued returnable on the date and time to be determined by the Honourable Court calling on the respondents to show cause (if any) why:*
 - (a) *The 14th respondent as presiding officer for election of members of the members of the Management Committee of Thaba-Bosiu L.E.C. parish shall not within 14 days dispatch to the Honourable Court the proceedings and outcome of the elections held on the 9th June, 1998 for review.*
 - (b) *1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents shall not be interdicted forthwith from exercising the functions of a duly appointed Management Committee pending the outcome of this application.*

- © *The election and subsequent approval of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondent by the 15th respondent shall not be declared null and void.*
 - (d) *The appointment and subsequent approval by the 15th respondent of 1st, 2nd, 9th, 10th 11th and 12th respondents as members of the School Advisory Committee of Thaba-Bosiu L.E.C. Primary School, Boqate L.E.C. Primary School and Ntlo-Kholo L.E.C. Primary School respectively under the aegis of the consistory shall not be declared unlawful.*
 - (e) *The 13th respondent shall not be ordered to submit the names of 1st, 3rd, 4th, 5th and 6th applicants to the Minister for approval in accordance with law.*
3. *Directing respondents to pay the costs of this application.*
 4. *Granting applicants further and/or alternative relief.*
 5. *That prayers 1 and 2 (a) and (b) operate with immediate effect as interim court order.*

Apparently an interim order was granted with immediate effect in terms of prayers 1 and 2 (a) of the Notice of Motion. The application was opposed. After a lengthy and exhaustive address by counsel on either side Mr. Sello for the respondents has said that because the case and addresses have gone on for so long, he can't say

where he started and ended. The parties agree to resume their addresses afresh. Mr. Sello has said he represents respondents 1 - 14.

In his address Mr. Mosito for the applicants has said the factual background is not in dispute because averments contained in founding affidavits have not been denied but merely dismissed as confusing hotchpotch. He says the Court of Appeal case appearing on p.3 of this Heads of Argument is relevant. He says in motion proceedings it's not enough to say you are put to the proof thereof for if evidence is not controverted or explained it has to be accepted by a court for an affidavit provides proof. By the same token, if an allegation is not negatived it holds good. He says facts deposed to by, in particular, 1st applicant are not denied by respondents in their affidavits. He says averments have not been specifically denied. He says the applicants' case is that in terms of the Education Act, 1995 as amended by Education Act, 1996 there are bodies that have to be elected in terms of section 10 of the Education Act, 1995 as amended. He says applicants were duly elected as appears in pages 7 - 8 of the record to serve as an Advisory Committee; he says some represented the proprietor - he says this allegation was not rebutted by the respondents. He says the Minister has been cited as Minister responsible for Education and it is assumed he will abide the court's order. According to Mr. Mosito, 1st applicant is saying at all material times he was minister of Thaba-Bosiu LEC Church attending meetings of Seboka in his capacity as minister of the Church. Mr. Mosito says the application is concerned with schools within Thaba-Bosiu Parish which elected the Advisory Committees which in turn together elected a Management Committee. Advisory Committees were elected in terms of sec.19 (2) of the Education Act, 1995. At Thaba-Bosiu there were 4 schools under Thaba-Bosiu parish and each of these had an advisory committee and it cannot be said that together

they cannot form a management committee; he says the formulation that they cannot is misconceived and the question was whether applicants had a direct interest in the result of the litigation. He says it is not respondents' case that people who were elected should not have been elected for respondents are saying all this was hotchpotch. Mr. Mosito says it was never necessary for Seboka to elect for their's was merely to authorise by standing resolution certain agencies for the purpose of electing an Advisory Committee. He says applicants are holding office by virtue of having been elected as such so that the representation is pseudo-quasi public. He says it is not correct to say applicants have no locus stand in judicio. He concedes that concerning the proprietor respondents might have a point if the proposition in this context is the Church. Mr. Mosito has cited principles governing a non-joinder and quoted *Africa Sun Mpumalanga v. Kunene and Others*, 1999 (2) S.A. 599 at 610. He says authority of the Church has been delegated to parishes to be managed by the leadership of the parishes. He says it is the Consistory which ensures that decisions of the Seboka are carried out several parishes forming a presbytery. He says the right to elect was handed down to the 'balumeli' (parishioners) and functionaries of the Church are part and parcel of the Seboka itself. He says any argument to the contrary is like wind rustling in the reeds and amounts to triumph of formalism over substance. He says the joinder of Lesotho Evangelical Church would not change anything. He says if the court finds the joinder was necessary the court should so order. He says Seboka is the repository of power and there are several authorities in support of the joinder proposition. He says once Seboka has handed down power, it is parishes that take decisions.

In his address Mr. Sello for respondents 1 - 14 has said the court has been told the Church delegated its power to subordinate organs i.e. 'balumeli'. He says the non-

citation of the church cannot be technical. He is saying respondents are unable to answer charges against them for only the Church can for the Church is a full entity. He says the non-joinder is a basic irregularity. He says a party which has omitted to sue the right party and offers to rectify the situation by joinder amounts to introducing a new cause of action. He says there is a limit to a court allowing an amendment. He says the determination is always whether on paper the allegations are correct, the reason he has abandoned whether 1st applicant is a minister of the Church. That respondents have not traversed the facts as is said does not mean that they have admitted the same. He says facts as deposed to by applicants don't entitle them to relief and that the relief sought is a non-starter.

This court has decided to dispose of the question of non-joinder notwithstanding that the merits of this application have been gone into albeit no finality having been reached.

It would seem the fact that respondent(s) have different defences against different applicants does not preclude joinder. Indeed this was so under the Union rule 11 (1) proclaimed on 28 June, 1940. It would also seem 'substantially' means that what the rules are concerned with are the essential features of the right of relief that join plaintiffs or join applicants' claim, including the fact that a defendant or respondent may have special defences that he has raised against certain of plaintiffs or applicants. Indeed respondents have raised such defences against applicants though it would appear this is a matter that can and is regarded as 'peripheral' to the central relief - see Dreyer and Others v. Tuckers Land and Development Corporation (Pty) Ltd, 1981 (1) S.A. 1219 (T) at 1225B.

*In this case since Mr. Sello has abandoned the issue whether 1st applicant was still a Minister of Religion at the material time, it would seem 1st applicant has locus standi and accordingly there would be no cause not to allow a joinder of a third party namely, the Lesotho Evangelical Church for a joinder cannot be refused if, amongst other things, the court has found that an applicant has locus standi. Indeed an applicant has no such locus standi if he has no substantial interest in the matter. Otherwise it would seem as soon as the third party becomes aware of the action he must make up his mind whether he wishes to join as a co-applicant and if he decides to do so he must apply at the earliest opportunity so that the court can hear the matter as a whole and deal with all the claims simultaneously - see *Kinekor Films (Pty) Ltd. v. Drive in Home Movies*, 1976 (2) S.A. 87 (0).*

Joinder of Necessity

*This court considers the joinder to be necessary in that the LEC as proprietor has direct and substantial interest in any order this court might make in these proceedings in that the order cannot be carried out without prejudicially affecting the proprietor LEC nor do I think that the L.E.C. waived its right - see *Amalgamated Engineering Union v. Minister of Labour*, 1949 (3) S.A. 632 (A); *Van der Walt and Another v. Saffy*, 1950 (2) S.A. 578 (0) at 581; *Henri Viljoen (Pty) Ltd. v. Awerbuch Brothers*, 1953 (2) S.A. 151 (0) at 165-71; *Toekies Butchery (Edms) Bpk en andere v. Stassen*, 1974 (4) S.A. 771 (T); *Erasums v. Fourvills Motors (Edms) Bpk*, 1975 (4) S.A. 57 (T); *Harding v. Basson and Another*, 1995 (4) S.A. 499 (C). According to the judgment in *Licences and General Insurance Co. Ltd. v. Van Zyl and Others*, 1961 (3) S.A. 115 (D) at 110 'such a person is entitled to demand as of right that he be*

joined as a party and cannot be required to establish in addition that it is equitable or convenient that he should be joined as a party. It was also said in *Khumalo v. Wilkins and Another*, 1972 (4) S.A. 470 (N) that 'in fact, when he is a necessary party in this sense the court will not deal with the issues without a joinder being affected and that no question of discretion or convenience arises.' Indeed in the instant case this court does not think that a question of discretion or convenience arises hesitant as Mr. Mosito is of whether the proprietor, the L.E.C. should be joined.

Closer home and in so far as our uniform rules are concerned, Rule 10 (although wrongly numbered) allows joinder of parties provided the right to relief of persons to be joined depends upon the determination of substantially the same question of law or fact. In so far as the L.E.C. is concerned, it's right to relief depends upon the determination of substantially the same question of law or fact. Were the L.E.C. not co-joined, these proceedings would be defective having regard to the judgment in *Matima and Others v. Moruthoane and Another*, L.A.C. 1985-1989 where it was held failure to join the potential applicant the Church rendered the proceedings defective. At p.200 Schutz P. had said:

'This is a matter that no court, even at the latest stage in proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who have no opportunity to present their case'.

Needless to say the LEC is an interested party.

Also, according to the judgment in *Amalgamated Engineering Union and Other* and cases quoted therein including *Singh v. Textile Workers' Industrial Union* (S.A.)

Durban Branch and others, 1962 (4) S.A. 693 (D) at 694; Selborne Furniture Store (Pty) Ltd. v. Steyn NO, 1970 (3) S.A. 774 (O); Nqewase and others v. Terblanche NO and others, 1977 (3 S.A. 796 (A) at 806 H, the reason for the power of the Supreme Court to order the joinder of parties in an action which has already begun is that the court is enabled to ensure that persons interested in the subject matter of the dispute and whose rights may be affected by the judgment of the court are before court as this enables the court to avoid unnecessary costs. It was said the power is not derived from any rule of court but is part of the inherent or common-law jurisdiction of the court for, if it appears ex-facie the papers that a person has direct and substantial legal interest in the matter before court entitling him to be heard, the court may mero motu take steps to safeguard his rights.

In several cases including Henri Viljoen's case above 'a direct or substantial interest' has been held to be 'an interest in the right which is subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.' Concerning this application it would be begging the question and splitting hairs ever to imagine that the LEC has no interest in its vested right of schools under its administration and a corresponding right to ensure that those who run its different committees are properly elected and appointed.

Mr. Mosito has told the court it is in the discretion of the court to decide whether joinder of the Lesotho Evangelical Church is necessary. I have not gathered from Mr. Sello's address that he resists LEC being joined in the proceedings for he says respondents have not been able to answer meaningfully to allegations raised in view of the fact that any meaningful responses from the respondents can only be directed at the

proprietor, the LEC.

Accordingly Mr. Mosito is directed to apply for joinder of the Lesotho Evangelical Church within fourteen (14) days of this ruling and Mr. Sello is to join issue in the normal way and in accordance with the Rules of this Court regarding applications. Costs will be costs in the application.



G.N. MOFOLO
JUDGE

2nd February, 2000.

For the Applicants: Mr. Mosito
For the Respondents: Mr. Sello