

IN THE HIGH COURT OF LESOTHO

In the matter between:-

Paul Motlatsi Morolong

Applicant

and

National Executive Committee of the
Lesotho National Olympic Committee
Lesotho National Olympic Committee
Maseru Squash Club

Lesotho Darts Association

Lesotho Squash Association

Lesotho Sports Medicine Association

Lesotho Baseball Association

Lesotho Volley Ball Association

Lesotho Basketball Association

Lesotho Netball Association

Lesotho Olympic Committee of Lesotho

Lesotho Softball Association

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

8th Respondent

9th Respondent

10th Respondent

11th Respondent

12th Respondent

JUDGMENT

Delivered by the Honourable Mrs Justice Hlajoane
Acting Judge on 1st Day of November, 2001

Mr Tšenoli of Ntlhoki and Company approached the Court on the 9th July, 2001 to launch an application ex parte which was couched in the following terms:-

- (1) Dispensing with the rules of Court concerning forms, notices and service of process due to the urgent nature of this matter.
- (2) A rule *nisi* issue returnable on a date and time determinable by this Honourable Court calling upon the Respondents to show cause if any, why
 - (a) The elections of the first Respondent held on the 1st April, 2001 shall not be declared invalid and of no legal force and effect;
 - (b) All persons elected on 1st April, 2001 as office bearers of 1st Respondent shall not be interdicted from exercising the functions of their respective offices pending finalization of this matter;
 - (c) The office bearers of first Respondent who were in the office as at 31st March, 2001 shall not continue to remain therein pending finalization of this matter;
 - (d) Second Respondent shall not be directed to hold fresh elections of the first Respondent within 30 days from the date of finalization of this matter;

- (e) The Respondents shall not be served with this application and put to such terms as the Honourable Court may decide as to the filing of process and the hearing of this matter;
- (f) Directing Respondents to pay the costs hereof;
- (g) granting Application further and/or alternative relief.

After I had read the papers and heard Counsel for Application, I granted the rule in terms of prayers 1(a) and 2 (e) only and ordered that the papers be first served on the Respondents. I further ordered that after service, the Respondents must have served their opposing papers on or before the 13th July, 2001 and the Replying affidavit on or before the 17th July, 2001 and return date fixed at 20th July, 2001 for argument. The papers were duly filed though not timeously and the matter was argued on the 3rd September, 2001.

When the matter was argued Applicant had filed his written submissions whilst Respondents filed their heads some days after the matter had already been argued

Before going into the merits of the case, there were points in *limine* that were raised by the Respondents. The points in *limine* raised were as follows:-

- (i) Lack of urgency
- (ii) Non-joinder and Misjoinder
- (iii) Dispute of fact

Counsel had agreed to argue the points in *limine* at the same time as the merits, so that the case proceeded in the normal way. The point in *limine* concerning urgency fell away as the Court in granting the order has ordered service of the Application upon the Respondents, so that effectively the Application was on notice to the Respondents.

Non-joinder and Misjoinder

The point here was that those who have been joined ought not to have been joined and those who ought to have been joined have been left out.

In terms of Article 14 of the Lesotho National Olympic Committee's Constitution (LDOC) there is a clause showing that "the Committee shall sue and be

sued in its own name and shall have perpetual succession” This clause gives the Committee a full legal status, a ‘*Universitas personarum.*’ Clause 9 show that it can “raise or borrow money from time to time as it feels fit.”

Herbstein and Van Winsen, the Civil Practice of the Supreme Court of South Africa 4th Edition, defines a *universitas* as “a legal fiction, an aggregation of individuals forming a persona or entity having the capacity of acquiring rights and incurring obligations to as great an extent as a human being. The main characteristics being the capacity to acquire certain rights as apart from the rights of individuals forming it, and perpetual succession”. The right to hold property in its own name is often given as one of its features. See **Bantu (allies football Club vs Motlhamme & Others 1978 (4) S.A 486**. So that on the basis of the authorities cited above there was no need to have cited individual Associations as 2nd Respondent is made up of all its affiliate associations as shown under Annexure “BB” annexed to the opposing affidavit. It is an umbrella of all sorts of sporting activities, and 1st Respondent being its executive committee.

Non-disclosure of Facts

The issue here is that the Applicant did not disclose his role in the election of

the new committee and subsequent thereto. It is the Respondents case that had the Applicant indicated his role thereto, it would be seen that his conduct was not of an aggrieved party, as he even chaired the said meeting and participated fully in the inauguration of the new committee. Further, he even sought the new committee's assistance in his attempt to get elected to the Association of National Olympic Association of Africa (ANOCA)

It was stated in **Schlesinger vs Schlesinger 1979(4) S.A 342**, that "if any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, the Court may on that ground alone dismiss an ex parte Application." But the Court in **Trakman NO vs Livshitz and Others, 1995 (1) S.A 282**, pointed out that "there was no authority for extending to motion proceedings the principle applicable in ex parte Application that they can be dismissed solely on the ground that the Applicant failed to disclose fully and fairly all material facts known to him, nor was there any sound reason for so extending it.

I have already earlier on in this judgement shown that the Application was on notice, so that the principle in Trakanan's case applies to this application. Material non-disclosure, *mala fides*, dishonesty and the like in motion proceedings should only

be dealt by making an adverse or punitive order as to costs, but could not therefore serve to deny a litigant relief to which he would otherwise have been entitled.

Dispute of Fact

Defendants here submitted that there are serious dispute of fact which Applicant should have foreseen and which evidently stand in the way of granting the orders sought. The determination of the question whether a real and genuine dispute of fact exist is a question of fact for the Court to decide. The Respondents' allegation of existence of such a dispute is not conclusive, see **Ismail and Another vs Durban City Council 1973 (2) S.A 362**. Also in **Stellenbosch Farmers, Winery Ltd vs Steelenvale Winery (Pty) Ltd** it was stated that a final interdict should be granted where there is a dispute of fact, and facts as stated by the Respondent together with admitted facts in applicant's affidavit justify such an order. The parties had agreed that the points in *limine* be argued at the same time as the merits of the case, so that the case in effect started in a normal way.

On the Merits

The Applicant who is the ex-president of the 1st Respondent is challenging the elections of the 1st Respondent by alleging essentially that the elections were marred

by irregularities which rendered the elections a nullity. Applicant was a candidate for the elections.

The second Respondent, Lesotho National Olympic Committee, (LNOC) has a written constitution, a copy of which was availed to the Court for assisting the Court. The 2nd Respondent is therefore a legal persona. It is trite law that every organisation with a constitution written or not written is to be governed and guided by that constitution in all its operations.

It is the Applicant's contention that the conference of the 1st April, 2001 held for purposes of electing the new executive committee was unconstitutional as non-members were allowed to attend the conference, and not only attended but even participated in the conducting of the elections.

Though the Respondents seemed to deny the allegations of the anomalies in the elections, their opposing affidavits and annexures thereto supported the Applicant's contentions.

I have already stated that I was availed a copy of the LNOC Constitution. It

is a nicely bound copy with all the guidance amongst others, in the holding of LNOC Annual General Meeting.

In accordance with the standing order of the 2000 Rules of the International Olympic Committee, it has been stated that, prior to the commencement of any General Meeting, each Association represented shall name the delegate who will cast its vote at the meeting.

The standing order on the issue of Scrutineers, stated that, at the beginning of each General Meeting three Scrutinisers shall be accepted from any association represented but that no association may put forward the name of more than one candidate.

The supporting affidavits of one Motebang Mofo to the answering affidavit, is to the effect that, he had been at the Conference as an observer. There is an annexure to the opposing affidavit, styled attendance list at the 2001 Annual General Meeting of the LNOC, Annexure "HHI". In that list, the name of Motebang mofo does not appear, showing that in fact he is telling the truth when he says that he was just an observer, as deposed to in his affidavit.

In his own words in his affidavit, Mofo says, the meeting decided to elect scrutineers from among the people who were in attendance but who were neither candidates nor delegates. The function of the elections scrutineers being to conduct the elections fairly and properly. This in effect was contrary to what is envisaged by the standing order I have shown above, which clearly showed that as a matter of must by using the word shall, that nominations shall be accepted from any association represented. Mofo did not belong to any association, he was just an observer. It was therefore irregular to have allowed him participate in the running of the elections of 2nd Respondent.

As if this was not enough at Paragraph 7.8 (b) of the opposing affidavit by Monethi Monethi; who has been elected vice-President, Administration for the 2nd Respondent, there is an Annexure styled “JJ” which sets out the quotas for the various sporting disciplines’ delegation to the meeting of the 1st April, 2001.

Quota for LNOC according to annexure “JJ” was supposed to be 9, but annexure “HHI” attendance list reflects eleven names for LNOC. There was clearly an over representation.

The standing order that gives the guidelines in the holdings of LNOC Annual General Meeting, clearly indicates that prior to the commencement of any General Meeting, each Association represented shall name the delegate who will cast its vote(s) at the meeting. Annexure “HHI” as shown earlier has given names of those who attended the conference, and it is the very list which has eleven members for LNOC instead of 9 according to Annexure “JJ”. It has not been stated as to who were to cast their votes out of that eleven and the two that were not supposed to vote.

Article 5 of the LNOC Constitution, styled the Executive Committee, clearly shows that the Executive Committee shall (My emphasis) be elected at the general meeting. The article goes further to show the composition of that committee. It is a Committee of nine (9) members. Annexure “CC” to the opposing affidavit by Monethi Monethi, gives out names of those members who were elected in the general meeting of April 2001 as the Executive Committee of LNOC. There are ten members in that committee. I have already shown that in terms of the Constitution of LNOC, the committee must be elected at the general meeting. According to Annexure “MM”, which gives out names and positions of those candidates who contested in the LNOC executive elections for 2001-2004, and Annexure “MMI” which is the publication of Candidates contesting for 2001 LNOC Executive Elections

respectively, eight names were given or contested for positions of two members of the committee. Annexure “MMI” shows that Mokebe Maketela and Tlali Rampooana were elected to the two positions, with 31 votes each.

It is the contention of the Applicant that the appointment of the third member, Nkalimeng Makhube was irregular. The Respondents on the other hand argued that, in fact three members were elected as opposed to the two members under article 8 (9) of the constitution, but that according to the LNOC charter attached to the constitution there has to be three members elected.

I have already shown that members of LNOC executive according to the constitution have to be elected at the general meeting.

The name of Nkalimeng Makhube does not appear under Annexure “MM” for members to be elected, neither does it appear under Annexure “MMI” showing publication results of candidates who contested and those who were elected. Makhube’s appointment is thus unconstitutional as he seems to have been nominated, as Respondents say, in order to increase representation of women. Makhube’s name only appears under Annexure “HHI” which is the attendance list

at the 2001 Annual General Meeting of the LNOC. Her appointment was therefore unconstitutional.

In their affidavits in support to the Respondents case, Motebang Mofo and Seleke Seakhoa showed that in that meeting approved delegates who took active part in the deliberations of the meeting and eventually voted sat separately from those who had not been approved. But Annexure “HHI” showing the attendance list does not make any distinction of the two groups. It is a list of 60 people representing their various Associations and styled attendance list at the 2001 Annual General Meeting of LNOC. From that list Zongezile Dlangamandla who ended up being elected to position of Vice Secretary General was just an observer. It has not been explained as to why and how he was elected yet he was not representing any Association. It would therefore mean that he was not just an observer but was in fact taking an active part in the elections. He was participating and his name was printed on the ballot paper.

The Respondents have not denied the fact that there were many more other people who attended the meeting whose names did not appear in Annexures “HH” and “HHI”. It would not be known what role those others played save the allegation

by the Respondents that mere presence alone did not mean participation. He who alleges must prove, but it has not been proved that observers did not take any active role in the meeting. Dlangamandla, an observer ended up being elected to the committee.

It has also been the Respondents case that Applicant is *estopped* from complaining about the meeting because he had been there in the meeting and saw all what happened and even congratulated the new members for their appointments. The Applicant on the other hand contended that his presence in the meeting could not change the colour of the meeting. The presence of the Applicant in an unconstitutional meeting could not legalize the meeting as was shown in the case of **Ntsoebeca vs Basotho National Party CIV/APN/75/94** (unreported) where my brother Monapathi J quoted with approval the case of **Mistri & Son vs Natal Cigarette & Tobacco Distributors Association Ltd 1988 (1) PWF (2) D** where it was clearly stated that participation does not *per se* constitute a waiver of an irregularity.

On the papers, it appeared that in order for one to represent Lesotho Sports Medicine Association (LSMA) as a member must first be medically qualified, Takatso Ramakhula who ended up being elected Treasurer was not in fact

representing LSMA as alleged because he is not qualified in medicine. This has not been denied by the Respondents.

On the basis of the irregularities shown above, the Court finds that the conference of the 1st April, 2001 was unconstitutional as the proceedings were marred with malpractices and irregularities. In the result, the Application succeeds with costs.


A.M. HLAJOANE
ACTING JUDGE

For Applicant: Mr Ntlhoki

For Respondent: Mr Mohau