

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**MAJARA JONATHAN MOLAPO**

**And**

**THE EXECUTIVE COMMITTEE, BASOTHO NATIONAL PARTY  
THE BASOTHO NATIONAL PARTY**

**JUDGMENT**

**Delivered by the Honourable Mr Justice WCM Maqutu  
On the 2<sup>nd</sup> day of February, 2001**

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On the 23<sup>rd</sup> January 2001 the application was brought on a certificate of urgency asking for an order in the following:

1. Dispensing with the rules concerning notices, forms and service of process on account of the urgency of this matter.

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2. Directing applicant to cause to be served on respondents this application not later than the close of business on the 23<sup>rd</sup> January 2001.
3. Upon service of the said application on them, respondents be directed to file their opposing papers not later than noon on 24<sup>th</sup> January 2001 and applicant to file his replying affidavit if any, not later than 4.30 p.m. of the same day.
4. The application to be argued at 9.30 a.m. or soon thereafter on the 25<sup>th</sup> January 2001 wherein the following order is sought by applicant:
  - 4.1 a rule nisi returnable on the 25<sup>th</sup> January 2001 calling upon respondents to show cause, if any, why the following order shall not be made final,
    - 4.1.1 Declaring the Special Conference of second respondent of the 26<sup>th</sup> January 2001 and convened at the instance of first respondent null and void on the grounds of illegality, unconstitutionality and breach of natural justice.
    - 4.1.2 Interdicting first and second respondents from proceeding with the said Special Conference on 26<sup>th</sup> January 2001.
    - 4.1.3 Directing first and second respondent to make immediate

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arrangements for the Annual General conference of second respondent and such conference to be held not later than the last day of February 2001.

4·1·4 Directing first respondent not to interfere with applicant except by due process in the discharge of his functions and obligations of his office in arranging the Annual General Conference and the matters pertaining thereto.

4·1·5 Directing respondents to pay costs hereof.

4·1·6 Granting applicant further/and or alternative relief.

5. Prayer 4·1·2 above operates with immediate effect as an interim interdict.

What was clear was that applicant was seeking a final interdict on an urgent basis. He was not seeking an interim interdict. Unfortunately prayers 4·1 of his notice of motion were in the form normally used for interim interdicts. This was later to cause confusion during argument.

Dealing with the abuse of Rule 8(22) on urgent applications, Lehohla J in *L Khoboko v N Khoboko & 2 Others* 1985-90 LLR 115, at page 118 quoted with approval what Coetzee J said in *Luna Meubel Verwoordigers v Makin & Another*

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1977(4) SA 135 at page 136 DE:

"Far too many attorneys and advocates treat the phrase 'which shall as far as practicable be in terms of these rules', .... Once an application contains an element of urgency, they seem to ignore (1) the general scheme for presentation of applications as provided for.... These practitioners feel at large to select any day of the week and any time of the day (or night) to demand a hearing. This is quite intolerable and is calculated to reduce the good order which is necessary for the good functioning of the courts to shambles."

Respondents pointed out this delay of applicant to bring this application timeously and his failure to justify it satisfactorily.

This court has, over the years, gradually shrunk from readily granting orders *ex parte*, however urgent a matter might be. This is because as Lehohla J said in *L Khoboko v N Khoboko* at page 119 quoting from the judgment of Beck J in *Republic Motors v Lytton Road Service Station* 1971(2) 516 at page 518 GH temporary orders granted *ex parte*:

"Although the relief sought when the 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 had not been heard and it

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is, to that extent, a negation of the fundamental precept of *audi alteram partem*. It is accordingly a procedure that should be sparingly employed and carefully disciplined by...well grounded apprehension...that the course of justice stands in danger of frustration unless temporary curial intervention can be obtained."

At the outset therefore I made it clear to Mr *Phafane* that in a matter such as the one he had brought, an order *ex parte* would not be issued. Mr *Phafane* said what they wanted was for this court to dispense with the ordinary rules (on account of urgency) so that this matter could be heard on Notice on the 25<sup>th</sup> January 2001. That being the case, the court granted the following order:

"Application for dispensation from ordinary rules on the grounds of urgency is granted. Papers to be served in terms of the Notice of Motion."

The order with which respondents were served was phrased in terms of applicant's Notice of Motion. That order, though not identical, reflected what the court had granted.

I had remarked to Mr *Phafane* that the periods in the Notice of Motion were

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too short, and that it might be difficult for the parties to keep to that time table.

On the 25<sup>th</sup> January 2001 after respondents had filed answering papers, by agreement the matter was postponed to the 26<sup>th</sup> January 2001 and I asked both parties to file heads of argument.

Respondents were able to meet applicant's time table. Applicant could not — with the result that he served his replying affidavit on the 26<sup>th</sup> January 2001, as I was going into court.

On the 26<sup>th</sup> January 2001, before I proceeded with hearing argument, I asked Mr *Mosito* for respondents whether the conference was going to proceed that day. Mr *Mosito* said the conference was already in progress. Having read the papers, I considered the course of justice to be in danger of frustration unless there was curial intervention to enable both counsel to address me and to enable me to give a considered judgment. I consequently ordered it to be postponed to a date after I had made a judgment in this application. My order was in the following terms:

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"It is ordered that the Special General Conference be stayed and postponed pending the court's judgment that will be delivered on the 2<sup>nd</sup> February 2001 at 9.30 a.m. after hearing argument today."

In an endeavour to minimise the inconvenience and prejudice to respondents, I committed myself to giving judgment within 7 days.

As soon as the order had been served, the matter was heard at 2.30 p.m. on the same day (26<sup>th</sup> January 2001).

Applicant's counsel Mr *Mda* abandoned the prayer that the date of the 30<sup>th</sup> March to 2<sup>nd</sup> April 2000 be changed. That being the case, I will confine myself exclusively to the special national conference of 26<sup>th</sup> January 2001. I will not interfere with the ongoing preparations for the annual national conference.

### **Summary of the facts**

Applicant is the Secretary General of the Basotho National Party (herein after referred to as the BNP). A decision to hold a Special Conference of the BNP was taken on the 12<sup>th</sup> December 2000. From respondents' papers it emerges that there

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had been a complaint that applicant had made hostile or disparaging remarks about the leader of the BNP Major General Metsing Lekhanya, the respected leader of that party. Although details and minutes have not be supplied, it appears that this matter had been among issues touched upon at the meeting of the National Executive Committee of the BNP (herein after called NEC) on the 5<sup>th</sup> December 2000. It also appears from the letter of the Assistant Secretary General BNP this complaint about what applicant said about the BNP leader had been the subject of an enquiry as early as November 2000.

From the letter of the Assistant Secretary General BNP, applicant had been invited to a meeting of NEC on the 11<sup>th</sup> December 2000. Applicant in his replying affidavit says he was available for this meeting but it never took place. The leader of the BNP says the meeting took place on the 12<sup>th</sup> December 2000 but applicant did not attend that meeting although he was in Maseru when the meeting took place.

On this issue of the meeting of the 11<sup>th</sup> December 2000, I noted that circulars for the annual national conference and the special national conference give the impression that the NEC did meet. Yet the leader of the BNP in his sworn affidavit

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at paragraphs 7·7 and 9·1 of his answering affidavit says in no uncertain terms that applicant flatly refused to attend the meeting of 12<sup>th</sup> December 2000 although he was in Maseru. Applicant in his replying affidavit says he did come for the meeting of the 11<sup>th</sup> December 2000 but found it could not proceed on account of non-attendance of members. If we go by the sworn evidence of both applicant and respondents - no meeting of the NEC was held on the 11<sup>th</sup> December 2000. If this is so, the circulars dated 12<sup>th</sup> December 2000 calling for the special national conference and the annual national conference that state that there was a NEC meeting on the 11<sup>th</sup> December 2000 are not factually correct.

Nevertheless the upshot of that meeting (whether it was held on the 11<sup>th</sup> December 2000 or not) is that in the circular dated 12<sup>th</sup> December 2000 the NEC resolved to hold a special national conference on the 26<sup>th</sup> January 2000 with the following agenda:

#### PURPOSE

The National Executive Committee wishes to place before the conference an issue that concerns the Secretary General Mr Majara Molapo who appears:

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- (a) making utterances that are hostile against the President of the Party, the respected Major General Justin Metsing Lekhanya
- (b) not willing to obey the instructions from both the President and from the National Executive Committee
- (c) carrying out deeds which are repugnant to the interests and objectives of the party."

Applicant says he was not informed but learned this from somebody at Maputsoe. He wrote a letter to the Assistant Secretary General about this. On the 2<sup>nd</sup> January 2001, he received confirmation of the special Conference and the invitation to that Special Conference of 26<sup>th</sup> January 2000. On the 13<sup>th</sup> January 20001, applicant wrote a letter to the leader of the BNP (Major General Metsing Lekhanya) expressing his lack of confidence in him. Respondents' complained that they are unable to bring an affidavit from a person they sent to applicant about the conference. They claim if there had been time the affidavit would have shown that applicant treated that person rudely.

It is against this background and sequence of events that applicant brought this urgent application. This has led to a legitimate complaint against applicant that he delayed without good reason in bringing this application for three weeks — and is bringing it at the last minute when delegates to Special Conference could no more be

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stopped. Consequently respondents say this application was not urgent at all — because it could have been brought much earlier.

Applicant had not annexed the Constitution of the BNP to his papers. This was a serious omission because I could not have been in a position to say whether or not there had been a breach of the constitution without referring to that constitution. Respondents pointed out this omission and supplied me with a copy of the constitution. Before argument began, both sides agreed that this was indeed the Constitution of the BNP.

What the papers show was that applicant was very assertive. In his letter of 27<sup>th</sup> December 2000 he wanted to know why there was to be this special conference and why he was not informed. He was demanding the withdrawal of the circular inviting BNP members to a special national conference and that the bismirching of his good name should cease. In his letter of 23<sup>rd</sup> December 2000 applicant accuses the Assistant Secretary General and others of taking the decision of holding the annual national conference without him irregularly because on the 11<sup>th</sup> December 2000, because the sole agenda item was supposed to be the receipt of a report from

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a commission of enquiry on alleged malicious utterances made by him against the Party President. This statement is backed up by the Assistant Secretary General's letter dated 5 December 2000 that was annexed to applicant's replying affidavit.

Papers in this application show serious differences between applicant and the NEC. Both sides have no good word to say about each other. The President of the BNP has shown in his affidavit of 24<sup>th</sup> January 2001 that applicant was incompetent as Secretary General and that he was reprimanded in March 2000 for not keeping minutes of May 1999. In his letter of 13<sup>th</sup> January 2001 applicant has told the President of the BNP that he had no confidence in him because of his lack of vision in the way he runs the party. It is clear from that letter that there is political infighting between the Secretary General and the leader of the BNP.

### **Whether issues involved are disciplinary**

Applicant claims the agenda of the 26<sup>th</sup> January 2001 special national conference is about party discipline. Respondents say they have chosen to treat the matter as an administrative one. Failing to carry out duties may be a matter of competence, but failing to carry out lawful decision can be a disciplinary matter.

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Everything depends on details and circumstances. It is certainly not an administrative issue. It was certainly not a matter for a special national conference.

Attacking the party leadership whether privately or publicly and not going along with colleagues in NEC is a political issue which the BNP itself must sort out. Without any details, it cannot be seen as a disciplinary matter, but it certainly is political. On the political arena, disagreement on policy and its execution are seen from a subjective perspective. Indeed criticising a party leader and even saying he is unfit for leadership can be subjectively seen as treachery by the leader's supporters. Such matters can not be dealt with by courts of law because, they are matters that should be decided upon politically.

The 1972 constitution of the BNP has put the position of the party leader on a pedestal and it makes him the embodiment of the party. Her Ladyship Guni J and Their Lordships Ramodibedi J and Peete J in the case of *T Lelala v Basotho National Party & 2 Ors* CIV/APN/156/98 (unreported), *L Lehohla v National Executive Committee LCD & 4 Ors* CIV/APN/160/98 (97-98 LLR 104) and *M Reddeby v National Executive Committee of the BCP* CIV/APN/159/98 (unreported) refused to

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enforce provisions of the political parties constitutions to the extent that they conflicted with the current Lesotho's democratic constitution and culture of the Basotho people. Peete J captured the essence of (what has so far been) this court's approach to the interpretation of the constitutions of Lesotho's political parties in the following words:-

"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."

The NEC of the BNP has a constitution that was made in a different era when the Party leader and sometimes its NEC were clothed with very extensive powers. I do not have to decide on this issue because I am not seized with such an issue. Sufficeth to say that in this democratic culture, courts would not take kindly to disciplinary proceedings against a member of a political party, unless there is some impropriety for strongly criticising a political leader. The reason being that, as Hiemstra J said in *Waring v Mervis & Others* 1969(4) SA 542 at page 549

"Courts have repeatedly affirmed that people in public life must expect to be on the receiving end of strong language...."

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It is so to speak, no more than would be expected in the hurly-burly of politics. Such criticism may even be extravagant, rude and even mistaken.

Members of a party such as the BNP, at an annual national conference are free to judge and reject the person who criticise their leader together with such criticism. Such a judgment is a purely political matter. It is on this basis that in terms of Article 17(b)(i) of the BNP constitution provides that:

"The Annual Conference is the supreme organ of the Party, and its word is final in all matters."

This court has often said politicians should fight their battles on the political arena both within and outside their political parties. These courts will not interfere so long as whatever is done is done within the constitutions of these political parties.

## **Annual National Conference**

On the 12<sup>th</sup> December 2000 a circular convening the annual national conference was issued. This Annual National Conference was to be held on the 30<sup>th</sup> March 2000 to the 2<sup>nd</sup> April 2001. This is the very day that the NEC issued a circular for a special conference to be held on the 26<sup>th</sup> January 2001 whose agenda was to discuss applicant's behaviour towards the leader, the NEC and the effect of his behaviour on the party as a whole.

Article 17(c)(i) of the constitution provides:-

"The annual conferences shall be held in the month of December, and the exact dates shall be announced not later than 90 days before they are held."

It is significant that on this occasion the annual conference was not being held in December; a period that was 108 days from the 12<sup>th</sup> December 2000 was being selected beginning from the 30<sup>th</sup> March to 2<sup>nd</sup> April 2001. The issue that bothered applicant was the holding of a special conference that is being held with him alone being the subject on the agenda. Applicant's submission was that this special

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national conference was intended to demonise him.

At this annual conference among the issues on the agenda was:

"The conference will deliberate on the following issues:

- (i) It will renew the National Executive Committee - in the Sesotho original this item is as follows "seboka...se tla nchafatsa komiti ea phethahatso."
- (ii) It will hear reports from the Secretary General, National Treasurer, National Organiser, Chairman of the BNP Youth League, and the leader of the BNP Women's League.
- (iii) It will make resolutions."

What the constitution expected this annual national conference to do was the following:

- "(i) It shall elect the President and the National Executive Committee in accordance with Article 15(a)."

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I note this discrepancy between what the agenda for the annual national conference has put and what the constitution provides. Applicant as Secretary General was to have a special national conference of his own where his fate could be decided while with the rest of the NEC there will simply be a renewal. This would not conform with the constitution which stipulates that there should be actual elections.

When I asked respondents' counsel about this convening of a special national conference for applicant alone, I did not get a clear answer. His answer was that he could not be disciplined like any other member of the party in terms of Clause 8 of the Constitution because only the annual national conference made him Secretary General. A special national conference is not a political organ of the party nor is it a quasi judicial one. Its role is exactly the same as that of the annual national conference. It is called when an annual national conference cannot sit. On this occasion the annual national conference is overdue.

Mr *Mosito* for respondents said the case of respondents is summarised at paragraph 12 of General Metsing Lekhanya's affidavit which states:

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"12.1 Even if there were such remedies (which issue I do not agree with), there was no way in which the NEC would suspend applicant unheard. He refuses to attend when called by the NEC. He ought to have been grateful that the NEC insists he appears before the SNC which is an administrative body, and explain himself."

I do not accept that an individual however elevated can be allowed to refuse to attend the NEC summons to hear and answer allegations against him. If he has been duly summoned, action can be taken by default and then after he has been suspended, his case can be taken before a disciplinary committee for a full hearing. The NEC is an administrative organ of the BNP. The special national conference is an alternate to annual conference. It is the supreme political legislative and policy making body with full powers over the BNP in the same way as a Parliament. It only sits when the annual national conference is not due - in the same way as a special sitting of Parliament.

It seems abundantly clear that from the papers, that in-fighting had begun in

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the party. Applicant has come out clean in his letter of 13<sup>th</sup> January 2000 that he has no confidence in the BNP leader, it is a matter that an annual national conference has to constitutionally decide. If it was during the year, then at least ten members of the National Executive Committee could requisition a special national conference in terms of Article 17(c)(ii) of the BNP constitution. It is for that annual conference to reconcile applicant and the party leader if it so desires - and if such a reconciliation is possible. Everyone in the NEC is due for re-election - including the party leader if BNP members so desire.

### **Special National Conference**

In the circumstances of this case, respondents were aware that they bore the onus of putting before this court all the facts that *ex facie* showed that this special national conference was constitutional. The reason being that its constitutionality was being questioned.

The constitution of the BNP does not say much about the Special Conference. Reference is made to it as one of the main organs of the BNP in the following words:

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"Article 11(a)      Main Organs

- (i)      The annual National Conference/Special National Conference.

The other reference to the special national conference is at Article 17 which has the heading ANNUAL NATIONAL CONFERENCE.

Article 17(c)(ii) simply provides:

"There can also be a special national conference which can be convened at the request at least ten members of the N.E.C. or two thirds of people qualified to attend the ordinary annual conference as delegates."

A proper reading of this article shows that a special national conference is called as an extra-ordinary measure during the year to deal with emergencies and issues that should ordinarily be dealt with by the mandatory annual national conference. There is no difference between it and the annual national conference. It is an alternative emergency device to the annual national conference, but it is not meant to usurp the functions of the annual national conference at a time when it is already overdue - as it is in this case.

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I noted that the NEC is not, as a matter of course, expected to convene a special national conference. But General Metsing Lekhanya seems to think it can. In the ordinary course of events, a special national conference may not be convened by NEC - but in special circumstances there can also be a special national conference which can be convened at the request of at least ten members of the N.E.C. Nowhere is it specifically shown in the papers before me that at least ten members of NEC requested that this special national conference should be held on the 26<sup>th</sup> January 2001. No minutes or requisition document is before me that shows at least ten members of the National Executive Committee resolved that a Special National Conference be held. This appears to be a major flaw in the manner this conference was convened. All we have is the circular of the 12<sup>th</sup> December, 2000.

In short, as I have already stated, there is no sworn evidence that a meeting of the NEC was held on the 11<sup>th</sup> December 2000 as the circular of the Assistant Secretary General dated 12<sup>th</sup> December 2000 has alleged. Major General Justin Metsing Lekhanya (the Party Leader) says in his affidavit that a meeting of the NEC was held on the 12<sup>th</sup> December 2000. That circular is not (because of this sworn evidence) factually correct. In any event even if such a meeting was held (on

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whatever date it might have been held) nowhere is it alleged by the Party Leader in his affidavit that a special national conference was asked for by 10 members of the NEC in terms of Article 17(c)(ii) of the BNP constitution. For this reason, the holding of the special national conference of the 26<sup>th</sup> January 2000 clearly violated the constitution.

It seems to me that it is constitutionally improper to hold a special conference at any time when an annual national conference is over-due as respondents sought to do in this case. It was in my view an abuse of this constitutional provision on the 12<sup>th</sup> December 2000 to call both the annual national conference and the special national conference - on different dates when the special national conference is an alternative of the annual national conference. The special annual conference should only be called when it is not possible to call an annual national conference because it is not due, but an emergency situation attested to by at least ten members of the NEC has arisen.

### **Costs**

Applicant told the respondents to cancel that special national conference as

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early as the 27<sup>th</sup> December 2000. He even told them that the meeting that decided on it was not properly empowered to do so in his letter of the 23<sup>rd</sup> December 2000 because its agenda of the 11<sup>th</sup> December 2000 did not include the item of the annual national conference. It was solely to receive a report on the investigation into the allegations made against him to the effect that he had made hostile allegations against the party leader. Respondents chose to proceed with a special national conference regardless of applicant's objections. They should at least have followed procedure that is stipulated in the constitution for calling a special national conference. The BNP National Executive Committee did not check the veracity or correctness of applicant's allegations that they had acted unconstitutionally. They should not fail to take the consequences of their actions.

Applicant on his side (in my view) does not deserve a favourable order as to costs. He waited until three days before the day of the special national conference before challenging its constitutionality. He created an embarrassment to respondents and to the court itself which was legitimately reluctant to grant an order *ex parte* without hearing the other side (vide *L Khoboko v N Khoboko supra*). The result of this conduct was that the court found itself compelled to stop a conference that was


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already in progress. While respondents have themselves to blame for being headstrong and proceeding with the special national conference regardless of applicant's warning, I do not think courts should take this conduct sitting. I seriously considered making applicant to pay costs but when I weighed other issues in the case, I decided against such a step. Nevertheless I have to discourage these last-minute urgent applications.

### **Order of the Court**

- (a) The Special National Conference of second respondent of the 26<sup>th</sup> January 2001 is declared unconstitutional.
- (b) First and Second Respondent are restrained from holding the Special National Conference when the annual conference is overdue and has already been convened.
- (c) There will be no order as to costs.

  
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WCM MAOUTU  
JUDGE

For applicant : Mr Z Mda  
For respondents : Mr KE Mosito