IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/ APN / 534 / 002**

In the matter between:

BERENG SEKHONYANA AND 13 ORS **Applicant**

And

THE ATTORNEY GENERAL AND 85 ORS **Respondents**

For the Applicant **Mr. Mosito**

For the Respondents **Mr. Griffiths**

Mr. Putsoane

Mr. Phafane

JUDEMENT

Delivered by the Honourable Mr. Justice T. Monapathi

on the 5th day of December,2002

The background in this application is about nine election petitions concerning the last elections of May 2002.

It is correct that soon after the results were announced these petitions were filed. The result is that however by July 2002 not all of them had been served. It was to the extent that in September when there was a need to have the petitions heard some Respondents had still not been served.

Apparently the directive in the papers had been that the respondents be served on the offices of Mr. Phafane. Consequently Mr. Phafane wrote back to the Applicant's Attorneys. It appears that no steps were taken until the petitions were in fact set down and Judges panels assembled.

In one way this delay in serving those respondents or some of them persisted until the present application was filed on the 18th November 2002. It is correct that the present application itself was postponed on more that one occasion because service had not been effected on all the Respondents. Mr. Phafane even spoke of a situation where he even had to belatedly settle the answering affidavits of the remainder of the Respondents.

This case was postponed to today the reason being that Mr. Phafane seriously felt that he should settle the related affidavits. This has in addition brought delay in having Mr. Mosito's reply completed. But the situation that we have before us is where two points in limine have been taken, the understanding being that they should be dealt with separately.

The two points are as follows: The first point is lack of urgency and the second one is non-joinder

While the question of the need to file election petition's within a number of days is stipulated and while the need to have the petitions set down is also stipulated, any flaws or irregularities concerning those would normally be dealt with in the petitions proper. What concerns us here is the circumstances regarding urgency in the present application. It is this application that has four main prayers starting with prayer 2. prayer 3 (a) prayer 3(c) and prayer 3(d). The circumstances about urgency

can only relates to two prayers; firstly it is that prayer that speaks about payment of security prayer (2) and (3c).

Mr. Phafane submitted that the Applicants' delay in coming to court when he did despite that he knew as long ago as the 25th October that the High Court or a Judge has fixed security in the amount of M1000.00 which petitioners should have paid in, not later than the 8th November, their coming to court on the 18th November 2002, means that there was no longer any sense of urgency in the matter in respect of that prayer that speaks about the need to pay in security.

Indeed there was correspondence that went to and fro between Counsel and the Registrar, which makes one fail to understand why the petitioners did not appreciate the risk involved which was that in terms of the law the issue of the petitions in which security has not been paid would have been regarded as withdrawn. Mr. Phafane cited the case of **Phai Fothoane & another v President CD P, C of A,(CIV) / 48 /2000.** Per Steyn P. 12th April 2001 where the Court of Appeal dismissed the application for lack of urgency precisely because the applicant had approached the court belatedly. Applicant therein was citing the very same reasons such as those cited such as the correspondence which was on going or negotiations.

Incidentally these is also provision for variation of security on notice of motion in terms **Rule 12 OF DISPUTED RETURNS RULES** 1993. While agreeing with Mr. Phafane on this aspect. I would even add that this is a matter that properly should have been reserved for address before the Judges' panel which should amongst other things have to address this aspect. It is that panel which would finally have to address this matter. In any event as I have already ruled that this matter is not urgent on this aspect.

The circumstances surrounding the disputed appointment of Mr. Justice Ramodibedi

as Judge of Appeal (prayer 3(d) are on the facts on a different footing in that it was hardly not more than six days after the leaned Judge was sworn that Applicants approached this Court. Indeed this matter on its own would be regarded as being urgent mainly on the aspect of absence of delay. But there are other things that make the whole thing conceptually difficult to conclude on in the circumstances of the pending petitions.

Firstly, there is no reason why the matter of appointed of the leaned Judge could not be approached by addressing it during the bearing of the petitions themselves where it would be akin to requesting the learned Judge to recuse himself in the petitions in question.

Secondly, there is no reason of convenience or otherwise why this important constitutional and extremely arguable matter should be connected with the hearing of these petitions. If this matter is to receive the glare of the judicial light it has to do so independently and as a substantive matter.

Thirdly, it could be as Mr. Griffiths has pointed out that the learned Judge could not even be on any of the panels for reasons that are known only by the Chief Justice or the Registrar. I refuse to accept that this matter is urgent even if it is related to petitions which are by their nature urgent.

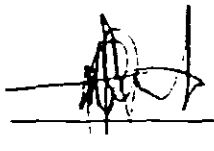
The second point was this of non-joinder. I did not accept that strictly, speaking the Speaker of National Assembly is the necessary party even though he has to be served . Indeed the absence of service of the speaker cannot be fatal to this application, that service being strictly one of convenience in this application. It might be different when the petitions proper are being argued. It might even come out that there is a whole policy, or explanation for joinder of the Speaker which is found in the constitution, the Election law and the Petition Rules. Here we are not dealing

with an election petition.

Much as this matter has been raised in order to be dealt with in the petitions themselves it is in that forum where the problem will conveniently be ventilated. I do not accept therefore that in the premises the non-joinder of the Speaker is fatal for decision of this application. The argument raised in this point might well be good in the petitions themselves .

Going back to the issue of urgency, is the whole question of filing an application of this kind which being called interlocutory seeks to stay the election petitions and seeks to decide issues that will arise in the petitions against the rule of " First things First" Secondly there seems no eminent wisdom or convenience for that matter why this application has been filed to deal globally with the matters arising in all the petitions while there is still room in the Petition Rules which still allows for consolidation.

In the circumstance of this case this application ought to be dismissed on the aspect of lack of urgency. The petitions referred to in the application will still have to be dealt with in each of the petitions to which these issues redate petition by petition or after consolidation allocated to Judges panel as the High Court will be constituted to deal with petitions. This application is dismissed with costs.



T. Monapathi

Judge