

CIV/APN/80/2001IN THE HIGH COURT OF LESOTHO

In the matter between:

**NATIONAL EXECUTIVE COMMITTEE
OF THE BCP
BASUTOLAND CONGRESS PARTY**

1ST APPLICANT
2ND APPLICANT

AND

**LAWRENCE MBULI
LERATA LERATA
RALIOTLO PHAKISI
MONYANE ROTO
LIRA ADAM
MAHOLELA MANDORO
PEO MOEJANE
MARTIN THAANYANE
KHOTSANG MOSHOESHOE
KHECHANE SEKOTO
HAPE TSAKATSI
KHAUHELO RALITAPOLE
MOLAPO QHOBELA
REGISTRAR OF SOCIETIES
ATTORNEY GENERAL**

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT
11TH RESPONDENT
12TH RESPONDENT
13TH RESPONDENT
14TH RESPONDENT
15TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 17th January, 2002

On the 16th February 2001 my Brother **Ramodibedi J.** granted an interim order moved for **ex parte**. It was couched as follows:

“IT IS ORDERED THAT:-

1. That the Rules of this Honourable Court pertaining to notice and service be dispensed with and the matter be heard as of urgency;
2. That a **Rule Nisi** issue be returnable on the **26th day of February 2001** calling upon the Respondents show cause (if any) why:-
 - (a) First to thirteenth Respondents shall not be interdicted from unlawfully interfering in any manner whatsoever with the first Applicant in the administration of the affairs of the second applicant pending the determination of these proceedings;
 - (b) First to thirteenth Respondents shall not be ordered to desist forthwith from holding themselves out as members of and/or the National Executive Committee of the second Applicant;
 - (c) The purported election of the first to thirteenth Respondents as members of the National Executive Committee of the Basutoland Congress Party shall not be declared a nullity;
 - (d) The purported amendment of the Constitution of the second Applicant by first to thirteenth Respondents and their followers shall not be declared a nullity;
 - (e) The fourteenth Respondent shall not be ordered to remove and/or expunge from her records the purported amendments and/or any document or record lodged by the first to thirteenth Respondents;

- (f) Respondents shall not be ordered to pay the costs of this application on a higher scale, save that the fourteen and fifteenth Respondents be so ordered only in the event of their opposing the orders sought herein;
 - (g) Applicants shall not be granted such further and/or alternative relief.
3. That prayers **1** and **2 (a)** operate with immediate effect as an interim order.
 4. That Respondents must file their Answering papers, if any, on or before **Friday 23rd February, 2001.**”

It appears from the record that the rule was returnable on the 26th February 2001. For reasons not necessary to delve into this judgment, it seems the rule was on 19th March 2001 confirmed by my Brother **Lehohla J.** against some respondents who had not filed their answering affidavits. But on the 24th July 2001, counsel for applicants and for respondents agreeing, the final order was rescinded by this court and the respondents were directed to file their answering papers within 14 days and the rule was revived and extended to the 13th August 2001. The rule was extended on several occasions till the 18th October 2001 when it was again extended to the 8th November 2001 on which date counsel began to address the court.

The respondents have duly filed their answering affidavits to which the applicants have replied.

Mr Mosito, appearing for the respondents had filed in advance a notice of application in terms of Rule 32 (7) of the High Court Rules 1980, which reads as follows:-

*“32 (7). If it appears to the court **mero motu** or on the application of any party that there is in any pending action a question of law or fact which it would be convenient to decide either before any evidence is led or separately from any other question the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question is disposed of.”*

It is clear that this Rule applies to interlocutory matters in actions and, as I later pointed out to **Mr Mosito**, the more relevant Rule seems to be Rule 8 (21) which reads:-

“(21) Notwithstanding anything to the contrary contained in this Rule, interlocutory and other applications incidental to pending proceedings may be brought on notice accompanied by such affidavits as may be required and set down at a time assigned by the Registrar or as directed by a judge.”

It is however not necessary to decide which of the two Rules ought to have been relied upon, because **Mr Mosito** prudently decided to rely upon the similar points **in limine** as raised by Mr Khachane Sekoto in his answering affidavit. The points **in limine** are-

- “1. Whether the applicants are in law not non-suited by reason of applicants’ failure to join necessary parties in the nature of persons reflected in Annexure “KS1” to the Opposing Affidavit whose decisions applicants seek to have nullified.
2. Whether failure by 2nd applicant to file a resolution of 1st applicant to bring these proceedings is not fatal.
3. Whether regard being had to the material disputes of fact raised in this application, this Honourable Court is not entitled to dismiss this application, more so where no application to refer the matter to oral evidence has been sought, but a common sense robust approach urged for by applicants.
4. Whether of conference once convened, can in law be postponed otherwise than by its own resolution so to do.”

Mr Mosito in his well-prepared heads of argument made his submissions to which **Mr Mdluli** for applicants responded. At the end of the addresses and after due reflection thereon, I made an **ex tempore** decision on these points and indicated that fuller reasons would follow in my main judgment. These now follow.

The first point **in limine** raises an issue of joinder. Our Rule 10 (3) of the High Court Rules (1980) reads:-

“Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of

substantially the same question of law or fact which, if such defendants were sued separately, would arise in each action.”

The ultimate test in this inquiry is whether the parties sought to be joined (some 365 delegates) have a “direct and substantial” interest in the matter, that is a *legal interest* in the subject - matter of the litigation which may be affected prejudicially by the judgment of the court - **Henri Viljoen (Pty) Ltd vs Awerbuch Bros.** - 1953 (2) SA 151 at 168-70 - **See Erasmus** - Superior Court Practice - B1-94 - footnote 3; **Herbstein and Van Winsen** - Civil Practice of the Supreme Court of South Africa - 4th Edition page 172-177; **Amalgamated Engineering Union vs Minister of Labour** - 1949 (3) SA 637; **Harding vs Basson** - 1995 (4) SA 498 where **van Reenen AJ** had this to say:-

“A supreme court will exercise its discretion to order joinder of a party, **inter alia**, to ensure that all persons interested in the subject-matters of the dispute and whose rights may be affected by the judgment of the court are before it to avoid a multiplicity of actions and to avoid a waste of costs.”

In my view the persons listed in “KS1” are party delegates originating from sub-branch structures of the party and indeed are representatives of the party’s rank and file. The interest they have is in my view *political* rather than *legal* and any order of court cannot directly affect or prejudice that interest. They are not in my view necessary parties. **Dunlop SA Ltd vs Metal and Allied Workers Union** - 1985 (1) SA 175 at 189 where it

was held that in an application by an employer to have a strike declared unlawful, it was not necessary to join all the striking employees. To join the 365 delegates would necessitate the inclusion even of all the party members who elected them as delegates at grass-root level. In my view the 13 respondents (all members of the disputed National Executive Committee) can effectively safeguard any party interests. Moreover if joined as respondents, the record would be burdened unnecessarily with some 365 answering affidavits all confirming what has been stated in Sekoto's affidavit. In the case of **Basutoland Congress Party and others vs Director of Elections** - 1997-98 LLR 518 cited by **Mr Mosito** - it was clear that other political parties had direct and substantial interest in the holding of general election and had the right to be heard before the election could be postponed. In the final analysis, the particular circumstances of the case have to be considered in determining whether the party sought to be joined has a direct and substantial interest, and therefore a necessary party. This point **in limine** is dismissed.

In his second point **in limine**, **Mr Mosito** submitted that the failure by 2nd applicant to file a resolution of 1st applicant to bring these proceedings is fatal. In these proceedings the 2nd applicant is a voluntary association which has **locus standi** to institute legal proceedings. (See Rule 13 (2) of the High Court Rules 1980 which reads:

“(2) A partnership, a firm or association may sue or be sued in its own name.”

It lives and can act through its executive organs, namely the Annual General Conference and the National Executive Committee (NEC) upon whom are vested powers and functions as defined in its constitution. Ordinarily, the NEC has power to make resolution to institute or defend legal proceedings on behalf of the BCP.

In his founding affidavit Lebenya Chakela states:-

“1.2. I am the Deputy Secretary General of the applicant herein and I am duly authorized and empowered by the National Executive Committee of the Basutoland Congress Party at its sitting of the 13th February 2001 to represent the Applicants herein, depose to necessary affidavits and to secure affidavits and/or other testimonies from persons who may positively swear to facts and events pertaining to this application.”

In response to this **ex facie** assertion of authorization, the answering affidavit of Khachane Sekoto does not controvert this paragraph issuably. In his paragraph 3 he merely says “the Applicants have not filed a resolution authorizing the institution of these proceedings” and in his para 8 he goes on to say “Deponent cannot therefore truthfully say he is the Deputy Secretary General. He is not.” He questions the official status of

Lebenya Chakela and says nothing about the resolution of the NEC. In my view the respondents have failed to show that the institution of these proceedings was not properly authorised - **Bus Owners Association vs Dharumpal** - 1952 (3) SA 442 where **Shaw J** had this to say:-

“While officers of an association or a company or corporation, acting pursuant to resolution, are to be regarded as agents they are necessarily interposed because a corporation (association) cannot act in its own person or without the interposition of human agency. The officers of an association, company or corporation do not, therefore, act on behalf of a principal capable, without human assistance, of acting alone.”

Shaw J went on to say at 445-C

“In my view there is no duty cast upon the Registrar to examine or investigate the authority of the officers who sign a power of attorney to sue on behalf of such a body.”

In my view, the approach of **Watermeyer J** in **Mall (Cape) (Pty) Ltd vs Merino -Ko-operasie Bpk** - 1957 (2) SA 347 is to be commented. It was there held that where an artificial person, such as a company, commences notice of motion proceedings some evidence must be placed before the court that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Though the best evidence that the proceedings have been properly authorized would be provided by an affidavit made by an official of the company

annexing a copy of the resolution, such form of proof is not necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf; and where the respondent has proffered no evidence at all to suggest that the applicant is not properly before court, minimum of evidence will be required from applicant - **Thelma Court Flats (Pty) Ltd vs McSwigin** - 1954 (3) SA 457 at 460 A; **SWA National Union vs Tjozongoro and others** – 1985 (1) SA 376 at 381.

In my view, **Gauntlett JA.** appositely put it when he stated:-

“Much depends on what a respondents’ own answer to the authority is. If it is a bare denial, or otherwise not such as to cast particular doubt upon the applicant’s assertion of authority, a court will generally not be inclined to uphold the defence that the defence is not proven. It all depends on the affidavits as a whole” -**Wing On Garments (Pty) Ltd vs LNDC** 1999-2000 - LLR 72 at 74.”

This point **in limine** is dismissed.

In his third point **in limine**, **Mr Mosito** submits that the application is so bristling with material disputes of fact such that the court should dismiss this application more so since the applicants’ attorneys have not filed any application to refer the disputed matters to oral evidence but “have urged

for a robust common sense approach.”

It behoves me to refer to Rule 8 (14) our High Court Rules 1980. It reads:-

“If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or may make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issue, or otherwise as the court may deem fit.” (Underlining mine)

This Rule should be contrasted with Rule 6 (2) (g) of South African Uniform Rules of Court (promulgated in January 1965) which reads as follows:-

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other

person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

In my view in Lesotho much more discretion is bestowed upon our court by Rule 8 (14) and proper meaning and emphasis need to be placed upon the words I have underlined. The discretion is much wider than that apparent from the South African Rule 6 (2) (g); that the applicants have not made a formal application “for referral to oral evidence” - in fact **Mr Mdluli** for the applicant insists the matters allegedly in dispute are peripheral and imaginary - does not deprive the court of its discretion to direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact, for example what events precipitated the withdrawal of Mr Makhakhe’s NEC and delegates from the Co-op College Hall on the 27th January 2001. It can be noted here that my Brother **Ramodibedi J.** also directed oral evidence to be heard on specified issues in **Makhakhe vs Qhobela** - CIV/APN/205/99 (dated 6th July 1999) when dealing with almost similar prayers.

Having read through the affidavits of the applicants and of the respondents, the necessary information on these matters cannot in my view be sufficiently gleaned from the papers. In exercise of my discretion I therefore directed oral evidence to be heard on issues hereunder specified:-

- (a) Who had convened the Annual General Conference of the Basutoland Congress Party on the 26-27th January 2001 at Cooperatives College Hall?
- (b) Did there exist any “parallel” National Executive Committee of the BCP after the judgment of **Ramodibedi J. CIV/APN/205/99** delivered on 6th July 1999?
- (c) Did the persons listed in “KSI” have LM8 credentials on the 26th January 2001?
- (d) Did the agenda of the Conference include the election of a New NEC and amendments of the Constitution?
- (e) Was the entry into the college grounds and hall by the persons listed in KSI peaceful or **vi et armis**?
- (f) Did the conference of Applicants proceed outside the hall on the 27th January 2001?
- (g) Was there any official opening postponement of the Annual General Conference on that day?

In my view **viva voce** evidence on these issues seemed appropriate towards ensuring a just and expeditious decision. In any event I do not think that when applicants launched their application they foresaw that any serious dispute of fact would arise - **Nkhabu vs Minister of Interior** 1993-94 LLR 486. In exercise of my discretion, I therefore directed that applicants and respondents call each a witness to relate to the events of the 27th January and to respond to issues specified. I also ordered that police officers who were on duty at Co-op College grounds be called to testify about the events of the 27th January 2001. I refer to their evidence below.

As regards the fourth point **in limine** I decline to decide it at this stage because it will fall for final determination at the end of the day when final submissions are duly made and a final decision is to be made by the court.

During these proceedings before judgment it came to the notice of the court that the affidavit of Hape Tsakatsi and what it contained had not been fully addressed. Paragraph three of this Affidavit raised a fundamental issue that the first applicant did not possess the necessary **locus standi** (under the party constitution or under common law) to espouse the claim of the office-bearers of the January 2000 NEC consisting of the following:-

Tšeliso Makhakhe
Sekoala Toloane
Thulo Mahlakeng
Ntja Nchochoba
Sekoala Macheli
Lebenya Chakela
Molomo Malebanye
Jack Mopeli
Moeketsi Tsatsanyane
Jeremane Ramathebane
Nkareng Masike
Qoane Pitso
Macheli Macheli

It is not in dispute that the replying affidavit of Mr Lebenya Chakela did not issuably address this point perhaps this being due to inadvertence on the part of new attorneys of record. **Mr Mdluli** for the applicant had no plausible explanation for this save to say that his own record did not contain the affidavits of Lerata Lerata and Hape Tsakatsi date – stamped by the Registrar of this Court on the 2nd April 2001 even though they appear as having been received by the then applicant's attorney, **Mr Matoane**. This court however took these affidavits as part of the record. It was imperative that that the points raised **in limine** by Tsakatsi's affidavit should be considered by the court; the point of **locus standi** of the BCP NEC (January 2000) is an issue very fundamental to this case.

The court therefore duly requested counsel to address it on this issue. The court could not accede to Mr Mdluli's application to reply to this affidavit because (a) the applicants' attorneys had ex facie received these affidavits and they had either inadvertently or negligently failed to respond to them timeously when Mr Chakela filed his replying affidavit and (b) the issue raised in Mr Tsakatsi's affidavit was purely and essentially one of law.

It should also be here noted that **Mr Mosito** had previously addressed this issue in his argument before court and had referred the court to the case of **Ntombela vs Shibe** – 1949 (3) SA 586; **Lewin** – Law of Meetings – page 195; **Bamford**, The Law of Partnership and Voluntary Association – p.147.

Mr Mosito- upon request of the court later again traversed the issue once more stressing that the NEC of the BCP has no authority or **locus standi** under the constitution of the BCP to espouse the claim of the NEC office bearers in any case when those personal rights are assailed or usurped by other people. He cited **Lewin** (supra) where the learned author at page 195 says.

“Office-bearer

If a person is elected to an office under the constitution of a voluntary association like a church or a club, his right to the office is a personal one, and if someone wrongfully usurps the office, the

right of the holder to claim a declaration that he is entitled to hold the office is a personal one against the usurper, and he must sue an individual, not in his capacity as an office-bearer of, and as such representing, the voluntary association. Where the declaration in such an action shows that the defendants acting in concert have deprived the plaintiffs personally of the offices they each hold, from which they derive the right, acting jointly to regulate the affairs of the association, action can properly be brought by plaintiff jointly against the defendants jointly."

In the case of **Ntombela** (supra) **Hathorn J** had this to say:-

"In my view, if a person is elected to an office under the constitution of a voluntary association like a church or club, his right to the office is a personal one and, if someone wrongfully usurps the office and prevents the holder of it from performing his functions, the right of the holder a personal one against the usurper, and he must sue as an individual. Similarly, where there are a number of duly elected officers who in combination have the right to conduct the affairs of the association, then, if their offices are usurped by other individuals who wrongfully claim to hold the offices and wrongfully conduct the affairs of the association, the rights which have been infringed are personal rights, and legal proceedings are properly taken by the persons concerned, as individuals."

This is probably the legal position in the South African common law. The South African authorities either as decided cases or works of jurists are of persuasive import and may – not should – be applied in Lesotho in determining appropriate cases. Circumstances and practice in Lesotho should also be taken into account.

The constitution of the BCP today is a document which has been operating since 1969 (Reg. 10/69). In the original document – and I dare say even today – the drafters seem not to have envisaged institution of legal proceedings by the party. We have therefore to refer to the **Societies Act 1966** and the Rule 13 of the High Court Rules, which vest the power or right to sue upon a voluntary association. This power or right derives from the common law principle that an association which possesses **universitas personarum** can sue in its own name in order to fulfil its objects and protect its interests. See **Bantu Callies Club** (Aka Pretoria Callies Football Club) vs **Motlhamme** 1978 (4) SA p. 486; **Morrison vs Standard Building Society** – 1932 AD 229.

The constitution of the BCP however does not contain a clause on how the party can institute legal proceedings. It stands to reason that the National Executive Committee properly constituted does not derive from this constitution any power to institute legal proceedings **sua nomine**. But logical inference indicates that if an association can under law sue or be sued, the National Executive Committee as the high executive organ elected by the popular annual conference of the party is the only organ or entity in the party structure which can protect the interests of the party in the interim pending the holding of the party conference. If say, BCP is sued by a third party, I do not think it is mandatory that the institution of legal proceedings should await the sanction and resolution of the national party conference. The constitution of an association must be interpreted

benevolently and purposively in order not to defeat the functioning and objects of the voluntary association. Default judgments would be ordered against the party **ad infinitum** for undefended matters and injustice would occur. I therefore hold that the National Executive Committee of the BCP – **de fact or de jure** – can institute legal proceedings on behalf of the party.

The next question pertinent is whether the NEC can espouse the rights of its office bearers – personal as they may be – without these bearers being cited as necessary parties. Here one must distinguish situations as where, take for example, a treasurer of the NEC is, say defamed as being a thief – certainly the NEC has no right to espouse such an action; where, however the NEC as a collective entity is sought to be usurped or ousted, it can legitimately defend its position. Instances of cases where the constitutionality or legitimacy of the Committee is being challenged, come to mind; or where the BCP is being sued upon a breach of contract, the NEC can defend such contractual claim in court proceedings. Practice and convenience demands however that in all cases where the office bearers are sought to be usurped or ousted, they should be cited in their personal capacities – this being necessary because any judgment which the court may make will prejudice their rights as office-bearers.

Though they have not been cited as co-applicants in these proceedings, it is important to refer to the affidavit of Lebenya Chakela. It reads at para 2-

“The first applicant is the current National Executive Committee of the Basutoland Congress Party which was elected in January 2000 and duly registered with the Registrar of Societies. I annex hereunto a certificate from the record of the Registrar of Societies reflecting the Committee and I mark it “AA”.”

The question is : despite being cited in “AA” as office bearers of the NEC as they before this court. I think they are not. They have merely been referred to in this paragraph. It would be wrong for this court to assume this without their intervention or substitution. **Mr Mdluli**’s argument is that the rights being assailed or usurped are not personal but collective in the sense that it is the authority of the whole NEC that is being challenged or impugned. This impels us to reconsider the substance of the relief claimed in the notice of motion and the allegations in the affidavit of Chakela that the first applicant on 13th the January 2001 NEC resolved that the present proceedings be instituted upon the basis that the respondents were usurping their functions as an NEC on the morning of 27th January 2001 at Co-op College Hall by taking over –and they say with impunity – the convening of the party annual conference. The sequence of events at Co-op College Hall was therefore investigated fully

by the court. Issues of credibility came into play. Who convened the party Conference at Co-op College for the 27th January 2001. Was it the respondents? Facts – admitted – indicate that the January 2001 conference was not convened by the respondents but by the first applicant. If the first applicant ignominiously deserted the conference on that day, what does the Party Constitution say? If this constitution is silent about this – it has no rules or regulations, obviously one has to look at the common law. In the conduct of any meeting, there must be chairman and a proper quorum of credentialed delegates. Now at the conference that commenced after the exit of Mr Makhakhe and his people, who remained? Were there any credentialed delegates present to constitute themselves into a conference or a constitutional meeting? Was the conference at Co-op College ever officially opened amidst the confusion that then prevailed? Did the respondents have the right to continue with the conference that was on the brink of collapse?

All these are sadly important questions that have to be answered in an inquiry whether the authority of this NEC was usurped or assailed. One is left to ponder and what would have happened if Mr Makhakhe and his followers did not leave the hall? Would a vote of no confidence be proceeded on? Would a stick fight have ensued? It all leaves me cold. The constitution of the BCP is very silent.

What ensued is that two “Conferences” proceeded simultaneously but with different agendas. The question again is which was a proper agenda? What should have been done when the convened Conference seemed to be aborting? If there were genuine grievances against the then NEC these could have been ventilated within the conference once officially opened. Unfortunately, the court is told that the respondents and their followers were being excluded from the Conference on the sole ground that they were not or no longer recognized members of the BCP. I recognize the their prevailing predicament. My Brother **Maqutu J.** in CIV/APN/340/00 had recently advised that the membership issue be ventilated at the very oncoming conference. This issue of membership, had – for reasons best known to the court not been placed on the agenda at the Co-op College Hall Conference on the 27th January 2001.

I must empathise with my Brother **Maqutu J.** when so recommended. He was indeed genuine and said so with utmost sincerity. This was however not heeded by the incumbent NEC who proceed to the January 2000 and elected a new NEC which now excluded Mr Qhobela as leader. My views about this later.

As it will come later in this judgment, I have, after due consideration of all the facts as alleged upon affidavit and from **viva voce** evidence, found that on the morning of the 27th January 2001, the January 2000 NEC was jettisoned under the circumstances to be addressed.

In the present application for intervention, the court must of necessity be fully conscious of its paramount duty to bring a just and expeditious decision to this matter. It seems it is the law that any person who can allege prove a direct and substantial interest in the judgment which the court might make, can intervene with the leave of court in any proceedings before judgment is delivered. To a lay man it may sound absurd that a person without "*kobo-ea-bohali*" may unceremoniously intervene in proceedings in which he was not originality cited. But under law, the court has a very wide discretion in matters of intervention. The court seeks to avoid a situation where there can occur multiplication of proceedings in the sense that **res judicata** does not come about, and to avoid wastage of costs and ultimately to obviate an occurrence of abuse of court process in which substantially the same issues of fact and law are again traversed. There must, as a matter of public policy, be a finality to legal proceedings, because this will prevent self help and anarchy.

I have a discretion to exercise judicially at this stage of the proceedings. I have to bear in mind that the court should not exclude from the proceedings parties whose rights or interests the ultimate judgment may affect. All that needs to be established is a right **prima facie** which may be prejudiced. If the intervening applicants are not granted leave to intervene, they have all the right to institute in their own capacity afresh application before this court and to again traverse the long track we have hithertofore converged.

The intervention by the office-bearers of the NEC can only be by leave granted by this court. This application was made **Mr Mdluli** at the very late stage of proceedings – but which is derived from Rule 12 of our High Court Rules. What has to be considered is whether the provisions of this Rule have been complied with i.e. whether it is an irregular process which must be struck out.

The decided case of **Minister of Local Government vs Siswe** 1991 (1) SA 677 states that intervention is a procedure that imports natural justice in that it requires and permits the affected party to be heard – **audi alteram partem**. The non-inclusion of a party who has a direct and substantial interest can violate this natural law principle.

In this inquiry the court must be satisfied upon the papers that there exists a **prima facie** case that applicants seeking to intervene have a direct and substantial interest in the subject matter of these proceedings which may be prejudiced by an order or judgment of the court.

Mr Mosito then decided to withdraw his answering affidavit in the intervention proceedings and confined himself to certain points of law. He firstly submitted that BCP had not been joined as a party in the intervention application. The heading of the intervention application cites “The National Executive Committee and One”. The BCP had been cited as the second applicant in the main application and it is only reasonably to

infer that “one” referred to “The Basutoland Congress Party.” I don’t think that it is proper to say that BCP has not been cited though inelegantly. The application interlocutory as it is seems to have been hurriedly and inelegantly prepared and, as we have it, only Mr Makhakhe has filed a founding affidavit stating that

“For avoidance of unnecessary repetition I have been authorized and empowered to make this affidavit on my behalf and on behalf of the intervening applicants herein.”

It is clear that the other 12 applicants have not filed any supporting affidavits confirming this authorization. The present application to intervene is however incidental and interlocutory to the proceedings before the Court and Rule 8 (21) states that-

“Notwithstanding anything to the contrary contained in this Rule, interlocutory and other applications incidental to pending proceedings may be brought *on notice* accompanied by such affidavits as may be required ...”

It has been held that an interlocutory or incidental matter can be decided without affidavits if such is an appropriate course especially to conserve costs – **Selepe vs Santain Insurance Co. Ltd** 1977 (2) SA 1025; **Chelsea Estates & Contractors vs Speed-o-Rama** 1993 (1) SA 198

where **Mullins J.** said

“There is no doubt that this is an interlocutory application. Furthermore in many interlocutory applications there is no need to file affidavits.”

I also do not think that notice in terms of Rule 12 certainly needed to be supported by an affidavit. All that the Rule requires is that the application must be on notice to all parties. Nor does Rule 12 provide for any form of reply. Respondents were quite entitled to give notice of intention to oppose the application for intervention. But in considering this application the court must have regard only to the pleadings already filed and cannot consider any fresh matter introduced by way of evidence on affidavit or in any other manner – **Viljoen vs Federated Trust Ltd** – 1971 (1) SA 750.

In my view all that is necessary under our Rule 12 application is to give notice that the applicants wish to be granted leave to intervene in the proceedings before judgment. If perhaps, this was a principal or originating application perhaps, and the other applicants were excluded the position could be different Selikane. I hold therefore that applicants 2nd to 13th applicant are not non-suited in that they have not filed supporting affidavits; their affidavits in the first were not necessary in lodging an intervention application.

I say nothing about prayer 3 which seeks to stay these proceedings because it was later withdrawn by **Mr Mdluli**. It was unwarranted as well as misconceived.

Mr Mosito then argued that Rule 12 had not been complied with in that no proper notice was given to the respondent. In the absence of express stipulation of time period under Rule 12, notice should mean a “*formal intimation or warning*” actually delivered (**Vengetsamy vs Scheepers** – 1946 NPD 84.) Interlocutory and other applications incidental to pending proceedings are not intended to be brought by way of formal notice of motion in the same way as applications initiating proceedings – **Yorkshire Insurance Co. Ltd vs Reuben** – 1967 (2) SA 265 where it was held that “notice” under Rule 12 does not mean “on notice of motion” ... “all that is required is a notice advising the other party that an application will be brought.” In these proceedings the notice was by all means made at very short notice but it cannot be struck out as an irregular process.

Mr Mosito lastly brought it to the notice of the court that in the notice of motion Mr Phoofolo’s address had been cited as that of the instructing attorney. It was not signed by him, though, but by **Mr Mdluli** who endeavoured to explain that he had chosen to adopt Mr Phoofolo’s address merely for convenience for receipt of process. Mr Phoofolo had previously been counsel for the respondents some time in 2000 and had

written certain correspondence to applicants over the membership issue. Conflict of interest would arise if he had actually signed the notice of motion; he has not; conflict therefore does not arise. I take this matter as being non-consequential.

In cases of intervention, the court has a very wide discretion under common law – **Hertz vs Empire Auctioneers and Estate Agents** – 1962 (1) SA 558, provided that the intervening party can establish a **prima facie** legal interest which is direct and substantial. See also **Sheshe vs Vereeniging Municipality** 1951 (3) SA 661.

If for any technical or procedural grounds in this case the applicants seeking to intervene are not granted leave to intervene in this case, any order which this court would give would be a *brutum fulmen* because they would not be bound by that judgment and they might resist it without being in contempt. **Amalgamated Engineering Union vs Minister of Labour** 1949 (3) SA 637 at 660; and, as I have already, stated they have all the personal right to initiate proceedings against respondents upon similar facts and law.

Having considered this application for intervention I have come to the decision that even though they filed no supporting affidavits in their own behalf, the applicants are not non-suited on that account because the filing of affidavits was in fact and in law not necessary. I also find that from the

affidavits and viva voce evidence adduced before this court, the applicants as office-bearers of the January 2000 NEC have a direct and substantial interest in the proceedings before the court. I accordingly exercise my discretion in favour of granting leave that the thirteen applicants intervene as co-applicants in these proceedings.

As I have already stated, I granted leave that police officers **None** and **Lenka** be warned to appear to be examined and cross examined as witnesses. These officers gave their evidence under oath; other witnesses, as we shall see presently, also gave evidence under oath. They disagree on certain material issues e.g. forcible entry through the gates and into the hall. Certainly, then someone is telling the truth, and another not. I have to weigh each testimony against certain proven facts and ascertain the probabilities and improbabilities.

Superintendent Thamae Lenka, the Officer Commanding -Central Charge Office - and a holder of an LLB degree - gave evidence on oath about the events at the Co-op College grounds on the 27th January 2001. He informed the court that a permit had been secured by Basutoland Congress Party to hold its Annual General Conference at the Co-op College Hall. He did not know who had personally made the application. He says that upon his arrival he found many people already inside the fence; then one Jack Mopeli approached him and reported that though the conference was theirs, some intruders were also on the grounds and were

congregating at the hall entrance. He asked Mopeli “Are those the people not supposed to be on the grounds?” He replied “Others are not.” He says he again asked Mopeli “How are we supposed to identify the intruders? Do you have any court order singling out the people who are not supposed to be there?” Mopeli: “No man, it is well known because the courts have long declared on this!” Lenka: “I do not see any copy of what you are talking about. Do you have a list of persons you wish me to remove?” Mopeli: - “No”

Lenka says he did not ask him to produce the list of his own people accredited to the conference. The crowd at the grounds were intermingling, singing aloud wearing their party coloured garments - black, green and red. He says he could see that Mopeli was losing patience at his inaction but the latter was failing to identify people he wished ousted.

At about 11am the Conference (scheduled to begin at 10 am) had not started and he decided to refer the problem to the Assistant Commissioner of Police (ACP) None at the Central Charge Office and Mr Tšeliso Makhakhe, Mr Sekoala Toloane, and Mr Mahlakeng were asked by him to go and see Mr None.

He says when he knocked off duty at 1 pm, the problem had not been solved.

Under cross examination by **Mr Mdluli**, for the applicants, he admitted that when he arrived at the College grounds, things seemed not to be going well. Mopeli had explained that he was the party secretary and had been granted permit for the BCP Annual Conference; he agreed that it could not be possible that two permits had been granted to the two groups for the same venue and time; he explained that under the Meetings and Proceedings Act No.2 of 1992 police had power to vary time or venue of the meetings - probably to avoid possible clashes of the congregants.

While it was being insisted by Mr Makhakhe and Mopeli that the intruders be evicted, it was clear that Lenka did not take action because he did not know who to take out. Mopeli and his people were losing their patience ultimately causing Mr Mahlakeng to call the police (“Manashenale”)

He maintained this stance even when **Mr Mosito** was cross examining him and explained that no people confronted or fought each other. He denied that the NEC of the BCP ever requested that the hall be evacuated in order that Credentials Committee could do its job; it was unfair to say that the police were playing delaying tactics: “what interest would we have?” he asked. If they had been given list they had requested, Lenka states he could have acted right away; but he had neither been shown a court order or a list of intruders.

Next called was the Assistant Commissioner of Police Haretsebe None who confirmed that a permit had been granted to the Basutoland Congress Party for the holding of its Annual Conference at Co-op College on the 27th January 2001 possibly by the Senior Superintendent Mahao of the Central Charge Office.

He told the Court that on the 27th January 2001 Mr Tšeliso Makhakhe and his committee arrived at the Charge Office and complained that his police at college grounds were not doing their job properly in failing to evict the intruders. He told them that to facilitate the police in their job they ought to have provided the police with a list of persons entitled and those not so entitled to attend the conference. Failing to provide the list made the police job harder because they could not by themselves identify those who were intruding.

They then complained that the police were refusing to tell everyone to leave the hall and college grounds. The ACP None says he then requested that Mr Makhakhe - being the leader- should speak to the people who would listen to him more favourably than they would heed the police. He advised Mr Makhakhe that any confrontation or intervention by the police would lead to a chaos possibly resulting in bloodshed. Assistant Commissioner of Police says he did not accompany Mr Makhakhe and his encourage back to Coop College at 12 noon when they departed.

He says he then radioed Senior Inspector Letuka warning him to expect Mr Makhakhe who was coming to speak to the people in the hall asking them to vacate. He said Letuka later radioed back to say the hall occupants had ignored Mr Makhakhe's plea and were carrying on their business without incident.

ACP None says Mr Makhakhe did not come back to him again that day; we know now that a complaint was made to the Commissioner of Police a week later after the conference.

Under cross examination by **Mr Mdluli**, ACP None maintained the stance that if a list had been produced, this would have assisted the police in evicting those who were not entitled to be at the Conference that day.

Under cross examination by **Mr Mosito**, ACP None refuted the allegation that he had promised that the police contingent would be reinforced if the people refused to heed Mr Makhakhe's plea; it was not the role of the police to evict people from the Coop College hall because there was a permit for the BCP Conference; the rightful delegates could have easily been listed and the rest "flushed out". On that day and occasion, no list was forthcoming; the applicants expected the police to do work which they had to do themselves. In fact under the party constitution Article 14.8 empowers the chairman of conference to "expel" members of the public (who are not members of the party) who cause trouble at conferences.

Next called was Senior Inspector Mpatloa Letuka - a police officer of 14 years service, two years as a senior inspector. He informed the court that he arrived at the Coop College Hall at 12 noon taking over from Superintendent Lenka. He found people mingling and singing. He says he was then approached by Mr Tšeliso Makhakhe, Mr Sekoala Toloane and other party officials and they told him that the time for the opening of the Conference had arrived and asked him to tell the people occupying the hall to go out “so that the Conference could begin”. They told him that the people who were then occupying the hall did not belong to their Conference.

He then cellphoned Assistant Commissioner of Police None at the Central Charge Office and briefed him about the situation. ACP None then informed him that Mr Makhakhe and his people had already been to see him at the Charge Office. Assistant Commissioner of Police None then instructed him not to intervene in the conference by way of removing any persons from the hall or grounds unless they were disorderly. He instructed him to enter the College Hall and listen to what Mr Makhakhe would be saying to the hall occupants. On entering the hall, he spotted Mr Makhakhe standing conspicuously in the hall and was holding a portable loudspeaker and was requesting everyone should go out so that the annual conference could begin. He was speaking quite audibly and was repeating this announcement several times; he was however ignored and people did not go out and remained seated.

He says he then saw Mr Makhakhe and his people going out of the hall and ultimately going out through the college gates; they then returned and gathered under a tree where several announcements were made, one of which was that the conference was now to be held outside under the tree because there were problems with the hall; he invited people to come nearer so that business could begin. As he waited there he received a report that people were throwing guns over the college security fence. He went to check, but found nothing to substantiate this report.

In his view the people in the hall continued with their business just as Mr Makhakhe did with his people under the tree; he also states that there occurred no physical confrontation between the two groups.

As one stage he says some LDF patrol unit arrived at the college just to check that there was peace and order at the Co-op College.

He goes on to say that at one stage that afternoon the hall occupants then came out singing; they passed by Mr Makhakhe's people and then went back into the hall. All were beaming with happiness. There was no friction at all. At about 5.30 the meeting under the tree was told by its leaders that its business was at end and they could disperse.

He says Mr Sekoala Toloane then approached him saying he wished to lock the hall doors because the conference was over; when Letuka brought

it to his attention that there were people inside the hall, Mr Toloane answered “The hall has been booked by us and were liable to all charges and we do not wish to incur further expenses.”

The issue of hall keys even reached the college management who expressed surprise that their hall was being occupied by people who had not obtained permission or hired the said hall. Letuka says he told Mr Toloane that he could not forcibly grab the keys from whomsoever had them. Letuka then says the hall occupants then came out and went through the gates and one of them then informed him that they were going to camp at Sefika Hall for the night.

Under cross examination by **Mr Mdluli**, Letuka stated that he was not aware of any factions within the BCP; he had learned that the annual conference had been organised by the BCP and stressed that he could not remove anyone from that place unless they were violating the law. It was not his role to remove any people because the conduct of the conference was not his business.

He denied that he ever intervened between an warring groups at anytime.

To **Mr Mosito's** questions, he stated that he came following Mr Makhakhe and did not hear his opening statements in the hall. It was put to him that Mr Makhakhe came into the hall with Jack Mopeli and others

and that Jack Mopeli loudly announced “Leader is about to speak” and the people fell silent.

Answer : I was not in the hall yet

*Question : After he had spoken, Mr Makhakhe then left the hall
Followed by some people?*

*Answer : I heard him invite all people to leave the hall so that the
conference could start afresh.*

He says that under the tree Mr Makhakhe and Mr Mahlakeng both addressed their people, and the meeting progressed though he could not hear to tell what was being discussed by the attendants.

It was put directly by **Mr Mosito** that since Mr Makhakhe’s order or request was quite unlawful, the hall occupants were not expected to obey such order or request. Letuka then replied “It depends upon their discipline.”

From the evidence of these three police officers several points can be gleaned:-

- (a) That on the 27th January 2001 there was an annual conference convened by BCP and that a permit had been obtained therefor.
- (b) That there were two groups of congregants on the college grounds on that day.
- (c) That the hall was occupied for the whole of that day by people other than Mr Makhakhe's, who, it is accepted, had obtained a permit and hired the college hall.
- (d) That supplications to the police by Mr Makhakhe to have those people evicted were not fruitful - police all the while demanding lists of people to be evicted or a list of the accredited delegates.
- (e) Assistant Commissioner of Police None's intervention led to Mr Makhakhe's entry into the hall where he asked the occupants to leave the hall so that screening could be done before the conference could begin.
- (f) The some of hall occupants just ignored Mr Makhakhe and, so it seems, continued with the business of their meeting.
- (g) Mr Makhakhe and his followers then convened their conference and conducted business of the day under a tree but outside the College

hall they had hired.

- (h) There was no satisfactory evidence that there occurred any physical confrontation between the two groups.
- (i) Whether forcible or not, it was clear that other people occupied the college hall originally booked by the Makhakhe's NEC who were made to conduct their business outdoors while the occupiers conducted their business in the hall.

I now come to the evidence of **Mr Mahlakeng** who happens to be an attorney admitted and practising before this Court since 1984; he is also the Chairman in the National Executive Committee of the Basutoland Congress Party having been elected at the Conference of January 2000. He has previously been the president of the BCP Youth League.

Before he could give evidence, **Mr Mosito** rose to submit that they object to **Mr Mahlakeng** giving evidence because somewhere in the court papers he had signed some Court process e.g. notice of set down as attorney of record. Even though **Mr Mdluli** later filed proper process, some comment needs to be made about this issue to remove all doubt.

Under our law an attorney or counsel acting for a party is not an incompetent witness but it is undesirable that he should give evidence on

anything which is a matter of controversy since this might indicate a degree of partisanship incompatible with his duty to the court - see **Caccia vs Muller** 1929 CPP 77; **Middleder vs Zipper No. 1947** (1) SA 545; **Hendricks vs Davidoff** 1955 (2) SA 369; **Elgin Engineering vs Hillview Motor Transport** 1961 (4) SA 450; **Hoffman & Zeffertt - The South African Law of Evidence** 4th ed - p. 378.

In this case **Mr Mahlakeng** is the holder of the portfolio of Chairman of the National Executive Committee (first applicant) of the Basutoland Congress Party (2nd Applicant). The *rationale* behind the caution as stated in the abovequoted cases is that an attorney duly admitted is principally an officer of the Court to which he owes a sacred professional duty to be truthful and candid at all times; as a litigant who gives evidence before the court, such as the attorney risks violating that sacred duty in an attempt to motivate his case. I think no more needs to be said, except to say that Mr Mahlakeng was competent witness in this matter bearing what has been said above in mind.

In his evidence, **Mr Mahlakeng** told the court that he had been elected as Chairman of the National Executive Committee (NEC) of the Basutoland Congress Party at the Annual General Conference held at Sefika Hall in Maseru on the 24th April 1999. This April conference was the continuation of the annual conference of an earlier one held in January 1999 at Sefika Hall had not it completed its business on the agent. He told

the court that at the April Conference 1999 certain amendments were made to the party constitution, the most important of which were amendments increasing the tenure of office of the NEC from one year to two, and one reducing the tenure of office of leader of the party from five years to two. He explained that the purpose and *rationale* behind these amendments were first to render the leadership more accountable to the conference on a more frequent footing and to give the elected NECs more time to implement the party policies. It is common cause that a National Executive Committee (predecessor to the present first applicant) was elected after these amendments to the constitution were made.

He told the court that, despite the amendments, the NEC elections were again held in January 2000 because - so it seems - the amendments were only belatedly registered at the Law Office on the 14th December 1999. I may interpose here to note that even after the election the NEC in April 1999 Mr Molapo Qhobela was still recognised as the then current leader of the Basutoland Congress Party having been previously elected leader of the BCP in 1997 or 1998 for five years..

He says that at the January 2000 conference Mr Tseliso Makhakhe was elected leader of the Party with Mr Sekoala Toloane as his deputy; Mr Mahlakeng as Chairman and Mr Nchochoba as his deputy; Mr Sekoala Macheli as Secretary General and Mr Lebenya Chakela as his deputy; Mr Molomo Malebanye as Treasurer; Mr Jack Mopeli as Publicity Secretary

and his deputy Mr Moeketsi Tsatsanyane. The following were ordinary members Messrs: Macheli Macheli, Jeremane Ramathebane, Nkareng Masike, Tooane Pitso. It is clear that Mr Molapo Qhobela was no longer the leader of this NEC of January 2000. He had been displaced by Mr Tseliso Makhakhe.

Mr Mahlakeng states that it is this NEC which convened the January 2001 conference and according to him, there was no other NEC of the BCP. He goes further to state that at the Sefika Hall on the 25th April 1999, another NEC was elected under the leadership of Mr Molapo Qhobela but maintains that the High Court - per my Brother **Ramodibedi J in Tseliso Makhakhe and others vs Molapo Qhobela and others - CIV/APN/205/99** - effectively nullified the election of the respondents to the National Executive Committee of the BCP and declared that the applicants were the lawfully elected and constituted members of the National Executive Committee of the Basutoland Congress Party. He states that even though the respondents appealed against this decision of the High Court, the said appeal was later withdrawn. This seems a matter of common cause.

He then explained the primary functions of the NEC in the BCP *vis-a-viz* the holding of the annual conference: A annual calendar of events is put in place; circulars are made to all constituencies; party structures are invited to elect and submit the prospective delegates to the Annual

Conference and this exercise to be completed before the 30th November of the current year.

He told the court that a permit had been secured from the police for the holding of the Annual Conference at Cooperatives (Co-op) College hall for the 26-27th January 2001.

He states that a party *caucus* had been held at the college hall on the night of the 26th January 2001 and this proceeded without incident -except that some people went to Mosikong-oa Thaba offices of the BCP during that evening but that these were dispersed by the police who had been alerted. He says that on 27th January 2001 the Annual General Conference was due to kick off at 10 am at the Coop College Hall. Upon arriving at 6 am at Co-op College he found a group of people at the inner gate; on approaching he saw Mr Jack Mopeli and Mr Moeketsi Tsatsanyane of the Credentials Committee inside the yard and were attempting to prevent certain people from entering; amongst these people was Mr Khotsang Moshoeshoe; he heard the latter shout "Don't enter by force"- and that the group relented.

He says he heard one policeman who was then inside the yard call Mr Khachane Sekoto to come into the yard and the two conferred for a few minutes. It was at this juncture that one person called Roto pushed the gate open and all others then streamed in. He described the police reaction

as ambivalent and prevaricating as “they seemed to be having their own agenda” - and could not take a decisive action.

He says he then cellphoned his leaders Mr Makhakhe and Mr Toloane and briefed them about the situation. He thereafter drove to Mr Toloane’s house and fetched him to the Coop College grounds. Upon arrival they found Messrs Sekoala Macheli, Macheli Macheli, Qoane Pitso and they all proceeded to the College hall. Upon entering they proceeded on to the stage and observed that the hall was now being occupied by some of the people whom he had seen entering through the gate. He explained that the College hall keys had been given to them on the previous day and the hall doors had not been locked that morning after the all night’s *caucus*.

He says Mr Makhakhe then arrived and was briefed about the situation then prevailing. They at once approached Superintendent Thamae Lenka - the police officer - in charge at the grounds. He says they asked Mr Lenka to order the people inside the hall to go out in order that the conference could begin.

He says Mr Lenka told them that they should wait so that he could make an informed decision and that he also was demanding a list or court order of the people to be evicted. He says the situation was a bit tense on that day such that - as he put it - a fight even later broke out and one Motlohelo Monne was hit with a knob-kerrie on the chest by someone

from the group which came out of the hall.

He says Lenka then advised them to proceed to the Maseru Central Charge Office and there to see Assistant Commissioner of Police (ACP) None. At the Charge Office, the Assistant Commissioner of Police told them that before the people in the hall could be evicted, Mr Makhakhe had to go into the Coop College Hall and there address all present and request them to leave the hall. He says Assistant Commissioner of Police gave them the assurance that if the occupants did not comply, the police contingent would be reinforced.

When they returned to the college grounds they found Senior Inspector Letuka now in charge and they briefed him about their discussions with Assistant Commissioner of Police None.

He says Senior Inspector Letuka then followed them into the hall where they found Messrs Sekoto, Moshoeshe, Thaanyane and others already on the stage. He goes on to say that they went on to the stage and Mr Makhakhe then loudly spoke using a loudspeaker requesting all the people therein to leave the hall so that the Conference could begin after proper screening of delegates had been done at the gates. He says some people rose and went out some but people remained seated and after Mr Makhakhe repeated his request, it was clear that they were refusing to leave the hall.

Mr Mahlakeng insisted that Mr Makhakhe never declared the Conference open -that function belonging to the Chairman. Mr Mahlakeng contended that it would be “nonsensical” for the leader to declare the Conference open and then march out. He says any meeting that proceeded inside after they had left the college hall was not a BCP Annual Conference but a renegade one. He described it as a “circus”.

He says they then complained to Letuka who told them that he was not going to evict those people from the hall because there were no lists which he could use. He says that after screening their own delegates, they decided to hold their annual conference at another spot under a tree in the forecourt of the College hall; he says that being Chairman of the NEC he opened the conference and dealt with the agenda. He points out that they did not elect any new National Executive Committee, because the elections of a new NEC are only due in January 2002.

Mr Mahlakeng maintains that what Mr Sekoto says in paragraph 5 of his affidavit to the effect that they convened and constituted themselves into a party conference is clearly unconstitutional because since they were not delegates whose credentials had been approved by the NEC they could not constitute themselves into an Annual Conference which could elect a new National Executive Committee of the Party and amend the Constitution of the Basutoland Congress Party as they did. He says Mr Sekoto’s meeting or convocation was not a legitimate BCP Annual

Conference.

Under **Mr Mosito's** cross examination Mr Mahlakeng agreed that the agenda of the Conference of April 1999 was a continuation of the conference held earlier that year in January 1999 at the Sefika Hall and that Mr Molapo Qhobela had continued as leader of the BCP because he had been elected for 5 years in July 1997¹. As already stated Mr Molapo Qhobela's leadership was "terminated" at the annual party conference 23rd January 2000. The constitutionality of this step is another matter which is formally not in issue in these proceedings. More about this later.

Mr Mosito then exhibited to him a green coloured document entitled "*Lengolo la Motheo la Lekhotla la Mahatammoho*" and to which Mr Mahlakeng responded by saying the BCP constitution is usually headlined "*Molao oa Motheo oa Lekhotla la Mahatammoho.*" It was put to Mr Mahlakeng that this document contains the constitutional amendments made in April 1997 - to which Mr Mahlakeng replied.

"Since this document bears no indication that it was ever registered in 1997, I will not admit that it was lawfully registered in 1997."

¹Probably after the late Dr Ntsu Mokhehle broke away from the Lesotho Congress Party and formed the Lesotho Congress for Democracy (LCD)

Mr Mosito again showed him the original Constitution of the BCP.

Question: This is the copy of the original document of the Constitution of the BCP?

Answer: I do not know this document. I only know the “Matalenyane” a green pocket user friendly constitution

Question: The portfolios of Technocrat Secretariat was introduced into the constitution in 1997 when the amendments were made on the 25th April 1999 with immediate effect.

Answer: I was already in the officialdom of the BCP in 1997. I do not know these.

Mr Mahlakeng stated that he knew only the amendments which changed the tenure of office of the leader and of the NEC (Article 30.3 of the Party Constitution).

He states that though these the amendments which they made on the 24th April 1999 they did not have immediate effect because they were only registered belatedly in December 1999. When shown the signature of Mr Ramolahloane in a covering letter addressed to the Registrar General, dated 7th August 1997, Mr Mahlakeng replied-

“I cannot say anything about the authenticity of Mr Ramolahloane’s signature.”

When the cross examination continued on the following day Mr Mahlakeng in response to **Mr Mosito’s** questions informed the court that at the gate, Mr Sekoto was hurling insults saying “*Bo manyonyoba bana; nyoa’ mabona bana conference rea e nka kajeno.*”

He says that even though this insolent conduct was prejudicial to peace and tranquillity, he did not take much notice because he has heard worse insults in his time! “It is the rough and tumble of our party politics” he says.

Question: You are fabricating

Answer: It happened.

Question: Why did you not state this in your affidavit?

Answer: It would be unbecoming to mention such insults in my affidavit.

Question: If it happened, why not state it.

Answer: It was not central or relevant to the issue.

It was put to Mr Mahlakeng that Lenka was never confronted with the allegations he was now mentioning; to which Mr Mahlakeng insisted that Lenka never demanded a list. He agreed however that he did not hear all the testimony of Lenka because he was at all times not present in court. He again could not explain why it was not put to Lenka that the people forcibly pushed the gates. He insisted that havoc broke loose after the policeman had asked Mr Sekoto to enter and the police took no definite action to prevent them.

Question: The pushing in was not put to Lenka?

Answer: It may be so. It was not relevant.

Question: Lenka says he wanted to see the list?

Answer: He was not telling the truth.

Question: There was no breach of peace.

Answer: Lenka had a biased motive to lie about this. They all wanted to give an unfair advantage to Mr Qhobela and to abort our Conference and to end up with a bogus conference.

Question: These aspersions were not put to Lenka that he had an agenda and his own programme of action. You did not state all these in your founding papers.

Answer: I insist so.

He was also asked by **Mr Mosito** why, if Mr Lebenya Chakela had the hall keys all the time, it was not put to Letuka that it was nonsensical for Mr Toloane to approach Letuka saying they wished to close the hall. To this he relied "I think this is not relevant."

He also could not explain why it was not put to Assistant Commissioner of Police None that he made a promise to reinforce his police contingent at the College grounds if Mr Makhakhe's behest was not heeded.

"If it was not put, it was because it was not relevant", he says.

Mr Mosito proceeded to ask:-

Question: Mr Makhakhe did in fact open the conference and then asked the intruders to go out.

Answer: That is not true at all. I remember Letuka only saying Mr Makhakhe made an announcement and was followed by other

people.

Question: Mr Makhakhe and his people marched to the main gates and made a U-turn. There was no screening done.

Answer: I deny this. Screening occurred and took about 15 minutes outside the main gate.

It was put to Mr Mahlakeng that he was fabricating to say that in the college grounds a certain Motloheloa Monne was even assaulted with a knob kerrie on the chest by one of the hall occupants who wanted to disrupt even the conference convened outside the hall, and that this had not been put to Letuka.

Answer: If not put, it was not relevant.

Mr Mahlakeng contends that whilst he heard Letuka say that all was peaceful and tranquil, at Co-op College Hall this was not correct.

Mr Mosito proceeded to put it to him as follows:

Question: The party leader had no power to order people to leave the hall?

Answer: I do not react to a legal submission. What was in the hall was not a BCP Conference.

Mr Mosito then proceeded to the issue of membership in the party.

It was put to Mr Mahlakeng that according to the party constitution and procedures, a person who wished to become a new member of the BCP filled a Form LM1, paid M1.00 subscription at the sub-branch level and that the Form LM1 and the M1.00 are then dispatched to the Constituency committee which in turn transmits them to the NEC headquarters.

Mr Mahlakeng agreed but added that all LM1 Forms are finally screened at the NEC under Article 6.7 of the constitution before a membership card can be issued. Once a member, renewal had to be effected before the 30th November of the current year and that renewal is still processed through the NEC. Accordingly to Mr Mahlakeng renewal process is not completed at the sub-branch level. If, for no good reasons, a member fails to renew his membership before the 30th November, the membership lapses automatically.

As regards the credentials of the delegates, Mr Mahlakeng stated that an LM8 Form had to be filled - not LM13 as **Mr Mosito** suggested - and that no one can go to the Annual General Conference of the BCP without first having been screened by the NEC. He denied that LM8 is for Youth League delegates. **Mr Mosito** then listed about 15 types of LM Forms in

the BCP procedures e.g. LM1 (membership) LM2 (membership card) LM3 - affiliation Card (by union or other bodies) LM4 - Lengolo la kamohelo; LM5 - letter of transfer; LM6 - Delegation of Parliamentarians; LM7- Womens League Delegation; LM8 - Youth League Delegation etc. Mr Mahlakeng insisted that the issue of party membership was not on the agenda for the January 2001 Conference (despite my Brother **Maqutu J's** recommendations in CIV/APN/340/2000). According to Mr Mahlakeng, my Brother **Maqutu J.** never made an order that the renewal of membership be placed on the agenda for the January 2001 annual conference.

Question: At the January 2001 Annual Conference, the election of the NEC was due to be held because its term was expiring having been elected in January/April 1999?

Answer: Our NEC had been elected in January 2000. These people elected the NEC not because of effluxion of time but because they have clearly that stated they had lost confidence in us!

Question: The elections of the NEC in January 2000 were unconstitutional?

Answer: That issue is res judicata after the CIV/APN/430/00.

Under re-examination, Mr Mahlakeng maintained his assertion that in January 2001, the term of his NEC had not expired because it had been elected 23rd January 2000 for two years. It would hold office until January 2002.

Mr Maholela Mandoro was then called by **Mr Mosito** to testify upon the events of the 27th January 2001 at Co-op College. He described himself as a pedigree member of the Basutoland Congress Party. He has held several portfolios in the Party structures as a member of Branch Committee and Constituency Committee in Maseru. In 1999 he was elected a Maseru delegate to the Annual General Conference of the BCP where he was appointed to the Resolutions Committee. At present he is the Publicity Secretary (Propagandist) of the National Executive Committee of the Basutoland Congress Party.

He informed the court that he is familiar with all constitutional documents of the BCP including the original constitution of the party which was registered in 1969 (No.10/69). This original document was later amended in 1993 and in 1997.

He told the court that in April 1997 a new Secretariat (Think Tank) was introduced into the Constitution of the party and was elected by the Conference but that after April 1999 this "Think Tank" was to be

appointed by the NEC under Article 29 of the Constitution.

It was not in dispute that the April 1999 conference was a continuation of the main conference held earlier that year at Sefika Hall which had not completed its business. It was furthermore not in dispute that the items that remained for the April Conference were (a) amendments to the Constitution of the BCP and (b) election of the Credentials Committee (c) election of the Elections Committee and (d) election of the NEC.

There is no dispute that on the 24th April 1999 at Sefika Hall an Annual General Conference of the BCP was held at which (a) certain important amendments were made to the Constitution of the Basutoland Congress Party and (b) a National Executive Committee was elected.

The new Article 30.3 as amended reads:-

“Komiti e Kholo kaofela e tla khethoa lilemo tse peli, setho sefe kapa sefe, ho kenyelletsoa le Moetellipele”

fairly translated -

“The whole National Executive Committee including the leader shall be elected to hold office for two years.” (My underline)

Prior to this amendment, the NEC of BCP (excluding the leader) traditionally and under the constitution held office for one year and the leader held office for five years. By all means, the new amendments were drastic and changed the **status quo**.

It is also not in dispute that another conference was held on the 25th April 1999 at which other amendments were made on the Constitution undoing the previous day's amendments and reinstating the leader's five years in office. These changes were the subject matter in CIV/APN/205/00 in which my Brother **Ramodibedi J.** nullified both the election of the NEC and amendments on the Constitution made on the 25th April 1999.

Mr Mandoro explained that prior to April 1999, the Secretariat or *Think Tank* was part of the NEC and was elected by the General Conference. According to him, the constitutional amendments made on the 24th April 1999 took effect immediately and the NEC elected on the 24th April 1999 would now hold office until January 2001. This runs counter to what Mr Mahlakeng contended when he stated that the NEC elected on the 24th April 1999 held office until January 2000, and that the NEC which organised and convened the January 2001 Conference had been elected on the 23rd January 2000 again at Sefika Hall and not the NEC elected on the 24th April 1999.

It is common cause that the amendments to the party constitution made on the 24th April 1999 were only registered at the Law Office on the 14th December 1999.

According to Mr Mandoro the NEC elected on the 23rd January 2000 was completely unconstitutional because such NEC elections only became due in January 2001 in accordance with the new amended constitution.

As far as the General Conference at Co-op College on the 27th January 2001 was concerned, he says he did not attend officially because his Maseru Constituency No.32 had not been represented. He attended out of his deep zealousness and staunch support to the Basutoland Congress Party - he also went there more to sing political songs and dance to them in jubilation.

He says that when he arrived at the outer gates of Co-op College grounds he met Mr Tsatsanyane and Mr Mopeli. There was happiness alround and people were singing the party songs.

He says that later that morning Mr Makhakhe - whom he took as deputy leader - arrived and entered the hall accompanied by singing supporters. He says Mopeli then loudly announced "The leader is now to speak" after which Mr Makhakhe said greetings to all and formally opened the conference, wished them success and then loudly said "Those who do not

have “*kobo-ea-bohali*” should leave the hall.” He says Mr Makhakhe then went out followed by about 40 people and walked to the gate and then returned to hold his own conference under the tree outside the hall.

Mr Mandoro says he then realized that on that day something was amiss about the happenings at Co-op College Hall and realised that Mr Makhakhe and his committee were afraid to face the music before the general conference. He says since 1999, discord had been simmering in the party circles over the financial affairs and the assets of the BCP. He says Mr Makhakhe and his NEC were afraid to “face the music” in the conference hall.

He says that at Co-op College hall no violent incident occurred on the 27th January 2001.

Mr Mosito then referred him to various LM Forms of the BCP and he explained that even though the LM Forms were not specially created by the constitution of the Party, he was certain that LM8 was a Youth League Delegation Form and not for Constituency Delegation. In his view LM13 was the current form for delegates to the Conference and not LM8. According to Mr Mandoro the several LM8 Forms attached or annexed as “HH” were haphazardly and improperly filled.

Under cross-examination by **Mr Mdluli** he denied that he was embellishing his evidence with exaggerations. He agreed that since the April 1999 it was clear that in his beloved Basutoland Congress Party there existed two groups each claiming legitimacy as leaders of the party. He conceded that in several cases the High Court had often recognised Mr Makhakhe's group as the lawful NEC of the BCP (see CIV/APN/205/00.)

He also conceded that in 2000 there arose an acute problem over the renewal of the party membership after the decision of my Brother **Maqutu J.** in CIV/APN/340/00 (dated 20th November 2000) and this resulted in the launching of an application CIV/APN/13/01 which unfortunately and regrettable (still pending before this court).

According to him, at all Annual General Conferences of the BCP the election of the National Executive Committee is always the last item on the agenda and he reasons therefore that this practice should have been followed on the 24th April, 1999. He could however not say with all certainty whether the NEC was elected before or after the amendments on the constitution were made because he personally did not attend the conference proceedings on the 24th April 1999.

According to him, the Annual General Conference of the 27th January 2001 could be properly convened only by the NEC that had been elected in April 1999. He did not recognise the January 2000 NEC as shown in

Annexure “AA”, as a constitutional body of the BCP. This NEC consists of:

Leader	:	Tšeliso Makhakhe
Deputy Leader	:	Sekoala Toloane
Chairman	:	Thulo Mahlakeng
Deputy Chairman	:	Ntja Nchochoba
Secretary General	:	Sekoala Macheli
Deputy Secretary General	:	Lebenya Chakela
Treasurer	:	Molomo Malebanye
Publicity Secretary	:	Jack Mopeli
Deputy Publicity Secretary	:	Moeketsi Tsatsanyane
Members	:	Jeremane Ramathebane Nkareng Masike Qoane Pitso Macheli Macheli

Mr Mdluli then referred him to a specific resolution of the Conference made on the 27th January 2000 to the effect that the Conference “had lost confidence” in the NEC and was therefore electing a new NEC - and put it to him that an existing NEC was therefore being voted out of office.

The evidence of Mr Mandoro is important in that it raises the fundamental question i.e. the constitutionality of the election of the

National Executive Committee on the 23rd January 2000. That also raises the issue of **locus standi** of the first applicant to be a party in these proceedings:

The Article 30.3 as amended reads:

“Komiti e Kholo kaofela e tla khethoa lilemo tse peli, setho sefe kapa sefe, ho kenyelletsoa le Moetellipele.”

The Cautionary note at the end reads:-

“LIHLOMATHISO MOTHEONG ONA KANTLE HO METHEO EA MAFUMAHALI LE BACHA LE KAROLO EA BONE, LI FETISITSOE LA HO QETELA KE SEBOKA SE SEHOLO SA LEKHOTLA LA MAHATAMMOHO KA LA 24TH ‘MESA 1999.’”

It appears to me that on the 24th April 1999 the BCP Conference passed no special resolution or dispensation that the NEC elected on that day would not be affected by the amendments approved by the party conference. Let it be noted that a conference being the supreme organ of the BCP can express its intentions by passing a resolution expressing that intention.

It therefore became very important to determine whether on the 24th April 1999 and as matter of fact, the then National Executive Committee of the BCP was elected by the General Conference before or after the amendments to the constitution were made. This necessitated a special scrutiny of the Minutes of the General Conference of the 24th April 1999. I therefore ordered that these Minutes be searched for and produced before the court.

After a recess of the few days this court was informed that the Minutes of the Annual General Conference held on the 24th April 1999 are missing—apparently the BCP offices were burgled and documents were stolen in 1999. By consent, Mr Mahlakeng was recalled to testify on the issue of what occurred at the conference on the 24th April 1999 at Sefika Hall.

He informed court that in April 1999 he was the deputy chairman of the NEC and that Mr Molapo Qhobela was still leader of the BCP since January 1998 when had been then elected to hold office for five years.

At the conference of the 24th April 1999 four items (carried over from the January 1999 Conference) namely: proposed amendments of the constitution, report by the Credentials committee, election of the elections committee, election of the National Executive Committee were on the agenda.

He candidly confirmed that according to the practice of the BCP general conferences, the election of the NEC is always the last item on the agenda mainly because such elections are a tedious exercise. As always on the 24th April 1999 the NEC was elected after the amendments to the constitution had been made. One of the amendments read as follows:

Art 30.3 "Komiti e Kholo kaofela e tla khethoa lilemo tse peli, setho sefe kapa sefe, ho kenyeletsoa le Moetellipele."

Fairly translated

"All members of the National Executive Committee-inclusive of the leader-shall be elected for two years."

He agreed that this was radical amendment by all means because it curtailed the tenure of office of the leader and increased that of the NEC.

Mr Mahlakeng then went on to say that despite the amended article 30.3 the NEC elected on the 24th April 1999 held office for only nine months till January 2000 when another NEC-the present first applicant-was elected at the Annual General Conference.

He says that before the January 2000 conference Mr Molapo Qhobela was still the official leader the BCP but was not elected leader at that

conference because he did not run for the elections having distanced himself from the then current NEC after the judgment of my Brother **Ramodibedi J.** in CIV/APN/205/99 – dated 6th July 1999.

He says the April 1999 NEC continued to function until January 2000 under the old constitution as unamended moreso because the amendment were only registered on 14th December 1999.

Mr Mosito only briefly cross examined Mr Mahlakeng to confirm that on the 24th April 1999, the NEC was elected only after the amendments to the constitution had been passed by the conference. It is also clear that at this latter conference of April 1999 at Sefika Hall, no resolution was taken by the conference to suspend the coming into operation of the newly amended Art 30.3. The crucial questions then are:

- a) what was the effect of the new Article 30.3 of the BCP Constitution on the new NEC elected on the 24th April 1999 at the end of the Conference?

- b) what was the constitutional validity of the election of another NEC on the 23rd January 2000 in view of the new Article 30.3?

- c) Did the new January 2000 NEC have the constitutional authority to convene the annual conference for the January 2001 at Coop College Hall?

It is quite clear that the general meaning of the amended Article 30.3 is that after its passing the officer bearers of the NEC of the BCP could only be removed from office only on the expiry of a term of two years at a biennial general Conference. See **Padayichie vs Paradai NO. and Another** – 1994 (1) SA 662 where it was held that the duly elected committee should remain in office until the holding of such biennial conference. The election of the NEC may be done only in conformity with the terms of Constitution. In my view where the Constitution – the contractual foundation in the party – dictates that the election of NEC can only be held biennially, any election of the NEC which is held before two years have elapsed cannot be constitutionally valid by stretch of any imagination. It has not satisfactorily been made clear to this court why, despite the new Article 30.3, the election of the NEC was held the 23rd January 2000. It has been authoritatively stated that the constitution of a voluntary association constitutes a contract amongst the members **Bamford-Law of Partnership and Voluntary Associations** (19820) p25; **Constantinides vs Jockey Club of SA** 1954 (3) SA 35 (c), it therefore means that the members of the BCP had agreed through their conference that the NEC hold office for two years.

The fact that the delegates to the January 2000 concurred in the non-observance to the Article 30.3 of the Constitution cannot validate a premature election of the NEC. **Khan vs Louw**– 1951 (2) SA-194.

In my view, the Annual General Conference of the Basutoland Congress Party, supreme organ as it is, is itself bound to comply with its party constitution as it stands amended or until amended. It is not *omnipotent* or above the constitution of the Party. It must be properly constituted because it is representative of the rank and file; it must obey the constitution because the constitution is the contractual foundation of the party.

The finding that the holding that the election of the National Executive Committee in January 2000 may seem to have violated the provisions of Article 30.3 of the party constitution, does not however appear to be the end of the matter. In civil proceedings, the court may only grant a relief which has been sought by a party in its summons, application or counter-application. In these proceedings, the respondents upon receiving the interim court order, duly filed their notice of intention to oppose but elected not to make any counter-application under Rule 8 (16) attacking or questioning the **locus standi** of the NEC elected in January 2000 (i.e. the present first applicant) to convene and hold the Annual General Conference on the 26-27th January 2001. **Mr Mosito** on the other hand chose to submit that since there could be no *vacuum* in the governance of

the BCP, the **de facto** existence of the National Executive Committee was recognized by the respondents. The issue of constitutional validity of the NEC of January 2000 therefore becomes again merely academic in these proceedings - and I therefore make no definite decision on that important but fundamental issue.

Mr Mdluli, for the applicant, has submitted in the main that the **locus standi** of the first applicant is not in doubt especially after the judgment of my Brother **Maqutu J.** in CIV/A/340/2000 in which the learned judge dismissed with costs an application one prayer of which read-

“(c) That the election of the National Executive Committee which was done during the above- mentioned annual conference (i.e. 23rd January 2000) should not be declared null and void: ”

In dismissing the application, the learned judge made no definitive finding in regard to the constitutional validity of the election of the National Executive Committee elected on the 23rd January 2000 upon the reasoning that:-

- a) there had been an undue delay in challenging the proceedings and the elections that took place on the 23rd January 2000 at the Annual General Conference; and

b) restoring the old National Executive Committee (of April 1999) which would have virtually the same members as the present one (except for three out of fifteen members) would be a futile exercise (*brutum fulmen*).

Mr Mdluli submits that dismissal of the application preserved the *de facto status quo ante* existence of the January 2000 NEC and that this latter NEC was competent to convene and hold the January 2001 annual general conference.

In his affidavit Mr Lebenya Chakela at paragraph 2 states that the first applicant is the “*current National Executive Committee of the Basutoland Congress Party which was elected in January 2000 and duly registered with the Registrar of Societies.*”

The answering affidavit of Mr Khachane Sekoto does not issueably controvert this averment and in fact addresses itself only to paragraph 19 onwards of Mr Chakela’s affidavit. Mr Sekoto merely submits that Mr Chakela cannot claim to be the Deputy Secretary General because he was not elected to be one in the conference of January 2001 at Coop College Hall.

Coming to the merits of this application, it seems clear that by coming to Coop College Hall on the morning of 27th January 2000, the respondents

were aware of and recognized the fact that an annual general Conference of the BCP had been convened and, according to them, by the NEC which had been elected on the 24th April 1999 at Sefika Hall and it now seems they did not recognize the existence of the NEC elected in January 2000. The events of the 27th January 2001 at Coop College must be viewed against the constitution of the BCP. It must be reiterated that the Annual General Conference, supreme body it is, is still bound to comply with the existing provisions of the party constitution until these are amended. It is not disputed that the first applicant, being the current NEC of the party, had convened this annual conference at Co-op College. Anyway there was no other NEC of the BCP at the material time which could have made arrangements for the conference under the constitution of the party.

The applicants allege that they were jettisoned out of the conference hall by the respondents and their followers who then had staged a sit-in. The respondents on the other hand allege that the applicants deserted the conference hall and held their own outside the hall under a tree.

The pertinent issue is whether the respondents – rightly or wrongly – had proper credentials as delegates. Article 14.1 of the party constitution states that “*the conference shall be attended by delegates only*”. It stands to reason that under the BCP constitution only delegates with credentials can constitute a party conference. It is necessary to determine whether the persons who remained in the hall could properly constitute themselves into a party conference, which could make amendments to the party

constitution and elect a National Executive Committee as it did on that day.

The events of the morning of the 27th January 2001 were again a culmination of internecine leadership and membership dispute within the Basutoland Congress Party. Since April 1999, the party seems to have been split into two and the respondents systematically withdrew their allegiance and support to the NEC that had been elected on the 24th April 1999. This resulted in them being unable or failing to renew their membership in the party timeously. The decision of my Brother **Maqutu J.** in CIV/APN/340/00 dated 30th November 2000 did not ameliorate the already deteriorating and worsening situation within the party. Thus it is quite clear that when the annual conference was held in January 2001, most of the respondents had in fact not as yet renewed their membership as required by Article 8.5 and hence could not be delegates in the proper sense. The respondents argue that renewal of membership is done only at sub-branch level. There is merit in this contention, but the applicants state that most of the respondents lost their membership to BCP because they had not renewed the same by the 30th November 2000. I do not decide this issue. It would be wrong to say or even to assume that the respondents can maintain that they were delegates with credentials without negating or belying the historical facts just narrated. It seems more probable that the respondents – I regret to say – went to the Coop College grounds on the morning of the 27th January 2000 intent on

participate in the conference that had been convened by the first applicants. The respondents did not have in their possession either LM8 or LM13 to show as their credentials the court was not shown any. That the respondents had been unjustly excluded from the party structures by the first applicants is a matter which should have been decisively determined long before the conference of January 2001 was held; the issue is sadly still pending before this High Court. This is a very sad, sad situation where the crucial party membership is being bandied about. In my view this intransigent conduct directly impinges upon the individual's political freedoms under the Lesotho Constitution (sections 16 and 20). But as **Maqutu J.** commented it is for the BCP as a political party to put its house in order; and the learned judge went on to say that the National Executive Committee, under any pretext, has no right to unilaterally exclude or deprive other members from the ranks of the party. A political party should, in other words be nobody's fiefdom but a public domain. A political party – though seemingly a voluntary association-is an important institution recognized by our 1993 Constitution of Lesotho and democratic and natural law principles must be guaranteed at all times in the governance of a political party.

In this case the respondents believed that they had been unjustly deprived of their membership in the party, they felt that they had the moral right to participate in the annual general conference; it should however be stated that since theirs is a voluntary association, the legality or otherwise of

their acts on the 27th January 2001 must be gauged against their party constitution and upon nothing else.

The crux of the issue is whether the respondents, when according to them, the applicants had deserted, had the right under the Constitution of the party to constitute themselves into a party conference, amend the Constitution (Art. 16) and elect the National Executive Committee of the party. (Art 46 and 51)

Article 26 of the Party Constitution reads:-

“26.1 Morumuoa e mong le e mong o tla tlatsa fomo ea borumuoa ka letsoho la hae ha a ea sebokeng se seholo sa selemo. LM8

26.2 Fomo li tla hlalosa morumuoa e mong le e mong ho mo fa boemo bo lebeletsoeng ho morumuoa e mong le e mong sebokeng.

26.3 Fomo li tla tlatsoa ka bobeli kopi e 'ngoe e tla leba Ntlo-kholo, e 'ngoe, e sale Lebatoeng.

26.4 Lifomo e tlabo LM6, LM7, LM8, LM13, LM18 boemeli ba mekhatlo e ipopeletseng ho Lekhotla.”

In my view a member of the Basutoland Congress Party, regardless of how long standing and stalwart, cannot participate as a delegate at the Annual General Conference on the 27th January 2001 at Co-op College Hall unless he had proper credentials. It is principally a question of fact.

It seems to me that the people who gathered in the hall on the 27th December 2001 did not have any credentials to support their delegation; to the annual conference convened by the first applicant. KSI is a mere list of persons and does not satisfy the requirements of Article 26.1 of the Constitution which reads:-

“Morumuoa e mong le e mong o tla tlatsa fomo ka letsoho la hae ha a ea sebokeng se seholo. LM8”

In all probability, the people who assembled in the Coop College Hall did not have such forms because of the wrangling within the party. This was the most unfortunate state of affairs to have existed within the BCP as a political party. In the leadership war, the rank and file in the party seem to have been made to forfeit their membership under spurious circumstances.

It has been stated that the annual general conference at Co-op College Hall had been convened by the first applicant. The court directed that **viva voce** evidence be called on certain specified issues the crucial of which

was whether the respondents thereupon gained access into the College grounds forcibly **viet armis** and remained in the hall despite being requested to leave hall by Mr Tseliso Makhakhe.

Mr Mahlakeng's evidence was mainly to the effect that early that morning he had arrived only to find Mr Sekoto and Mr Moshoeshoe at the gates insisting to be let through. He states that Mr Sekoto was allowed in by the police officials and others just rushed in. The tense situation followed because the police contingent there present was unwilling to evict the intruders because there was no list of such people nor was any court order presented to them. This necessitated Mr Makhakhe and some of his committee members to go to the Central Charge office to seek the assistance of the Assistance Commissioner of Police None. ACP None's response was that Mr Makhakhe should return to the College Hall and request the people not entitled to beat the conference to leave hall.

The evidence shows Mr Makhakhe proceeded to the Coop College hall and was accompanied by Senior Inspector Letuka – who told the court that, -

“Mr Makhakhe stood at distinct spot. He was holding a portable hailer. He was saying “Everyone should go out of the hall so that the conference can begin”

... After repeatedly making this announcement, no one seemed to go out. They ignored him.

... After about a few minutes he left the hall in the company of his followers.

... They proceeded to the gate and then returned and assembled under a tree This meeting under the tree lasted till about 4pm that day after conclusion of its business.”

Senior Inspector Letuka says that he realized that another meeting progressed in the College hall simultaneously. He says everything was peaceful and tranquil. This is however disputed by Mr Mahlakeng who told the court that the atmosphere was quite tense and in fact at one stage his colleague one Motloheloa Monne was hit with a knob-kerrie on the chest by one of the respondents' followers. I find in favour of the fact there was no physical violence on that day—otherwise Senior Inspector Letuka could have witnessed such an occurrence. I do not believe that Letuka, Lenka or ACP were biased in favour of respondents and condoned any illegality at College grounds. What is of greater importance is whether the respondents – without proper delegation processed under the Constitution– could validly constitute themselves into a party annual general conference. As I have already pointed out this question can only be meaningfully addressed by recognising that during 1999 the

respondents and applicants had gradually drifted apart and that this resulted in the respondents and their followers being unable or failing to renew their membership in the BCP (see **Qhobela and Another vs Basutoland Congress Party** – C. of A. No.8 of 2000) and it is not in dispute that some of the respondents were not attending the meetings of the National Executive Committees elected in April 1999 and in January 2000. Since the membership issue in the BCP has ever since remained *in limbo* and has up to this moment remained unresolved, it is hard to comprehend how in the circumstances then prevailing the respondents could have renewed their membership in accordance with the provisions of Article 8.5 which fairly translated reads:

“Renewal of membership shall be made every year through payment of membership fee/subscription before 30th November of the year. Any member who shall be unable to pay the membership fee before the 30th November of any year without good reason shall lose his membership rights in the Party, and his name removed from the books.”

In these proceedings, the court is not being asked to determine the reasonableness or otherwise of this Article or whether the respondents were unjustly deprived all avenues to vindicate their case. Nor is it necessary to decide whether the renewal is done at the sub-branch or head office level. It is more equitable to hold that once a card holding member

has paid his membership fee at sub-branch, his membership is probably thereby renewed. It does not require the formal approval of the National Executive Committee like in the case of a fresh application (Article 6.8 of the party constitution).

It seems the respondents and their followers renewed their membership within their own party structures which boycotted the first applicant and its predecessor.

The facts of this case indicate that an annual general conference had been validly convened by the first applicant, and that the respondents and their followers sought to participate in the said the said conference without credentials processed by the first applicant, it is the evidence that the chairman of conference along with other members of the first applicant (NEC) had left the hall before the conference began and that the first applicant and respondents held two separate meetings that proceeded simultaneously at the college grounds.

According to the applicants, the conference in the hall was never officially opened by Mr Makhakhe. Mr Makhakhe did not however give evidence. Interestingly, could Mr Makhakhe then as leader officially open the conference? The functions of a chairman in a meeting were aptly discussed in **Berman vs Chairman, Cape Provincial Council** 1961 (2) SA 412 at 416 where de Villiers A.J. said-

“... some regard is to be had to the nature of the functions of chairman of meeting in general. At any formal meeting the maintenance of order is essential: the transaction of the business of the meeting would be impossible without it.”

Could the conference at the Co-op College hall have been opened amidst such confusion and tension? Probabilities point to the negative.

Indicators point to an irresistible conclusion that Mr Makhakhe and his followers, in seeing that they could not use the hall then being occupied by some of the respondents, decided to hold their conference outside the hall.

In this case, the first applicant and their followers seem to have left the Coop College hall before the conference was officially opened so there was no adjournment or postponement to think of. That a new conference began after Mr Makhakhe left the hall is confirmed by the fact that a completely new agenda was put in place i.e. amending the party constitution and electing a new NEC which excluded all members of the first applicant. Indeed the strange events of that day compare rather closely to those which occurred at Sefika hall on the 24-25 April 1999 except that in January 2001 the “two” conferences conducted their businesses simultaneously within the same college grounds.

It is also quite clear that the conference conducted in the hall without the proceeded presence of the NEC which had convened the conference.

Article 14 of the party constitution reads:

“14.1 The annual general conference shall be attended by delegates only.

Every recognized branch shall have a delegation to the annual general conference of the Party....”

14.2 Moreover, the following “shall” attend the general conference

(a) All members of the National Executive Committee.

(b)

In my view the word “shall” in article 14.2 is merely directory and not peremptory. Furthermore, the facts of this case make it imperative to decide before everything else whether the “conference” in the college hall was validly constituted. I find myself unable to hold that the meeting inside the hall constituted the annual general conference that had been convened by the first applicant –functions of the first applicant. I am not convinced that the people who attended the meeting inside the hall had proper credentials under Article 14 of the party constitution. This does not mean that they had no documentation whatsoever. They could have been in possession of forms or documents which had however not been processed by the first applicant.(Art 26.3)

What occurred inside the Coop College hall is perhaps captioned by the affidavit of Mr Khachane Sekoto who states therein that after Mr Makhakhe had declared the conference open and requested those without proper credentials to leave the hall, says Mr Makhakhe then left the hall and never returned. After about 30 minutes the first resolution was passed declaring that:-

“(a) The conference has lost confidence in the National Executive Committee and it resolves to amend Article 30.3.

(b) After that amendment, the Conference resolves to elect another (National Executive) Committee which shall strive to achieve party unity, increase of party membership, and to prepare for the coming elections.”

It will be recalled that Article 30.3 as amended had the effect of reducing the tenure in office of leader to 2 years and increasing that of the NEC to two years. The former regime of one year for NEC and five year for leader was restored by amending the said Article 30.3, and a new NEC consisting of the following was thereupon elected:

Leader	:	Molapo Qhobela
Deputy Leader	:	Dr Khauhelo Ralitapole
Chairman	:	Hape Tsakatsi

Deputy Chairman	:	Khachane Sekoto
Secretary-General	:	Khotsang Moshoeshoe
Deputy Secretary General	:	Martin Thaanyane
Treasurer General	:	Peo Moejane
Propagandist	:	Maholela Mandoro
Deputy Propagandist	:	Lira Adam
Members	:	Monyane Roto
	:	Ralietlo Phakisi
	:	Lerata Lerata
	:	Lawrence Mbuli

As we can observe these are the respondents in the present main application in their reverse order.

It was not clear whether the new NEC was being elected because the biennial elections were then due or because the then current NEC was being voted out of office after a vote of no confidence. It is not necessary to decide this if a primary decision is made regarding the constitutional authority of the meeting inside the hall to do certain acts and conduct the proceedings as an annual general conference of the BCP. Reality of the situation sadly indicates a volatile scenario where the two hostile camps in the BCP confronted each other within the College grounds.

According to Senior Inspector Letuka he did not hear Mr Makhakhe opening the conference but he says he heard Mr Makhakhe requesting those not entitled to be present in the conference to leave so that the conference could begin. In their neutrality, the police contingent did nothing to persuade the people to comply with Mr Makhakhe's request. **Mr Mosito** put it to the Senior Inspector Letuka that Mr Makhakhe's request was an unlawful one perhaps in that he did not have authority to so request. The constitution of the party would come into operation once the conference had been declared open. According to ACP None, he had requested Mr Makhakhe to address the people in the hall and to ask them to leave the hall so that proper screening could be done. The conference was not being adjourned or postponed because it had not yet started.

According to Mr Mahlakeng, the police were prevaricating and failed to take decisive steps to remove the so called intruders and this resulted in them visiting ACP None. He goes on to say that when Mr Makhakhe returned to the Coop College Hall, he went into the hall and requested everyone to leave the hall and its gates in order to permit screening to be done at the main gates. He says that some people rose up and followed Mr Makhakhe out of the hall and through the gates while others – whom he recognized as respondents – remained seated. It was clear that they were refusing to go. Mr Mahlakeng contended in his evidence that it would none sensical for Mr Makhakhe to open the conference and then desert or abandon it unceremoniously as he is alleged to have done.

He says they decided to convene their conference outside the hall because the respondents and their followers were adamant in refusing to leave the hall. He says – as chairman – he opened that conference under the tree. He says the meeting inside the hall was not the BCP annual general conference but “a circus” or a charade. He says that what Mr Sekoto says in his paragraph 5 of his affidavit namely that-

“There being no chairman and/or his deputy, the conference after about 30 minutes decided to convene and elected persons to conduct the conference. ... Mr Khotsang Moshoeshoe was elected chairman of the said conference. He was deputized by me.” – is completely unconstitutional because the people who remained in the hall were not delegates and could therefore not be able to constitute themselves into a BCP conference. He says all acts done by the gathering such as elections of a new NEC and amendment of the constitution were all a nullity, in that Articles 16 and 51 were not complied with. He goes on to say that since, as from January 2000 there was no NEC of the BCP other than theirs, the annual conference could not have been legitimately convened by other body or committee at Coop College on the 27th January 2001.

It is however clear from Mr Mahlakeng's evidence that despite the earnest exhortation by my Brother **Maqutu J.** in CIV/APN/340/99 that the membership issue in the BCP be discussed at the forthcoming annual general conference, this issue was not on the agenda for the January 2001 conference. This seems to be the most unfortunate part of this case but one about which this court can do nothing! He categorically goes on to state that his NEC did not fall to be elected at the January 2001 conference.

Question: At the January 2001 conference the election of the NEC was due because its term of office was expiring having been elected at the January/April 1999 conference.

Answer: Our NEC was elected in January 2000. They said they had lost confidence in us and not because of the effluxion of time.

Question: In January 2000, the elections of the NEC of BCP were held unconstitutionally?

Answer: That matter is res judicata – CIV/APN/340/00.

According to Mr Mahlakeng the term of office of the NEC did not expire in January 2001 because his NEC had been elected in January 2000.

This line of questioning in these proceedings indicated that the respondents were now directly attacking and testing the constitutional validity of the NEC elected in January 2000; The respondents have however not made any counterclaim on this issue.

For any amendment to the constitution to be effective and enforceable inter partes it is not necessary that such amendment be registered (**Morrison vs Standard Building Society** 1932 AD 229). It has also become clear that after these amendments were passed, no resolution was made by the conference suspending their operation or coming into effect.

According to Mr Mandoro the Co-op College Conference on the 27th January 2001 was convened by the National Executive Committee of April 1999 pronounced constitutional by my Brother **Ramodibedi** in CIV/APN/205/00 – Mr Mandoro seems not to recognize as validly elected, the NEC elected on the 23rd January 2000. He agrees however that after the judgment of the 6th July 1999 (per **Ramodibedi J.** (supra) there existed no parallel National Executive Committee in the BCP. Upon this basis it is difficult to find how the respondents and their followers (hitherto denied membership – rightly or wrongly) could have secured credentials for the Conference scheduled for the January 2001. If they did not have any credentials as approved by the Credentials Committee, how then could they constitute themselves into

a party conference in the Co-op College Hall? It seems to me that the desparate course of action chosen by the respondents participate at over the conference at Co-op College Hall on the 27th January 2001 cannot be justified under the party constitution as it stands and as Leon JA in **Qhobela & Another** C.of A (CIV) No.8 of 2000 said:-

“If they were dissatisfied with the manner in which the Secretary General or any other official was performing his or her functions and discharging his or her duty their remedy was to seek relief from the High Court – what they were not entitled to do was to act unconstitutionally by taking the law into their own hands and acting in flagrant violation of the constitution.”

If they did not recognize the NEC elected on the 23rd January 2000 the present respondents could have urgently sought an interdict from the High Court upon ground that this NEC was elected in violation to Article 30.3 of the party constitution. This they did not do. In my view, however, and despite the apparent delay, respondents were still entitled to challenge even in these very proceedings the **locus standi** of the first applicant to organize and convene the January 2001 annual general conference of the BCP. They however did not file any counter application as they were entitled to do under Rule 8 (16) of the High Court Rules 1980, when in fact the evidence of Mr Mandoro directly attacks the constitutional validity of the NEC elected in the 23rd

January 2000.

Apparent as this unconstitutionality may seem, this court cannot and should not intervene- **mero motu** – in the proceedings of a voluntary association on the mere ground that non-compliance with (or violation of) the provisions of the constitution has occurred without allegation and proof of prejudice. (**Jonker vs Ackerman and Another** – 1979 (3) SA 575). Any constituency of the BCP could rightly complain that there had been a flagrant violation of the constitution of the party itself – **SWA National Union vs Tjzongoro and others** – 1985 (1) SA 376.

To reiterate, in the present proceedings the court is not being asked to decide whether the January 2000 NEC could validly convene the annual general conference. There is no such allegation or a point raised **in limine** in the answering affidavit of Mr Sekoto. The allegations, serious in my view, made by Mr Mandoro in his oral evidence before this court are not supported by any counter application and the court is unfortunately unable to grant relief in that regard.

For purposes of completeness of record, it should be noted that when Mr Mahlakeng was later recalled to testify as to the sequence of events at the April 1999 conference and he candidly admitted that the amendments to the constitution were passed before the election of the

National Executive Committee. It is not necessary in these proceedings to decide upon the correctness of Mr Mahlakeng's reasons for holding the NEC elections in January 2000 (just nine months after the amendments were passed).

In his submissions based on his well-prepared heads of argument, **Mr Mosito** contended that the issue of the constitutionality of the January 2000 NEC was not **res judicata** as claimed by **Mr Mdluli**. I tend to agree with Mr Mosito who also cited the case of **Sechele** 1985-88 LAC 297 at 301 where the requisites under the **res judicata** principle were discussed. I agree with Mr Mosito that despite the prayer 1 (c) in CIV/APN/340/00 seeking to nullify the election of the NEC on the 23rd January 2000 my Brother **Maqutu J.** dismissed the application and leaving this very important issue undecided stated that to nullify that NEC of January 2000 that "*would be an exercise in futility*" and left this matter and that of membership to be sorted out by the on coming conference of January 2001. We know that nothing has been done after that.

Mr Mosito also argued that where an organ has no manifest jurisdiction to do what it purports to do the court will interfere – **Mr Mosito** did not go as far as to say- **mero motu**. In my view however a distinction has to be made between a flagrant violation of an Act of Parliament and non-compliance with the provisions of a constitution of a voluntary association. In the former case, the court can take cognizance of a

violation of a statute but in the case of non-compliance with a constitution of a voluntary association, one has to begin upon a premise that a constitution of a voluntary association is a contractual foundation of the association and one between its members (**Bamford** (supra) p. 132); then if a provision of such a contract has been violated, this must be alleged and proved in the usual way. See also **Jonker vs Ackerman** 1979 (3) SA 575 where it was held that non-compliance with the rules of a voluntary association is ordinarily not sufficient justification for a court to intervene in the proceedings of such an association.

Mr Mosito contended that the amendment made upon Article 30.3 of the constitution (without any special resolution expressing an intention to the contrary) operated with immediate effect and the biennial elections to elect a BCP NEC could not be held until two years had expired after Jan/April 1999 conference. He therefore submitted that the election of the NEC on the 23rd January 2000 was “*an outright illegality*.” But, despite the substance of this argument, sight must not be lost of the fact that in these proceedings before me there is no counter-application upon which these submissions are based and, in my view, the court cannot and should not adopt them **mero motu**. All I can say is that in my view matter is not *res judicata* and indeed may be adjudicated in separate proceedings. I will not say anything more to prejudice such proceedings.

Having perused all the papers in this application and having heard all evidence **viva voce** on certain specified issues and having heard submissions from both counsel I find that the following factual situation determined-

1. On the 24th April 1999 certain amendments were passed by the annual general conference of the Basutoland Congress Party at Sefika Hall, and that one amendment on article 30.3 increased the tenure in office of the National Executive Committee from one year to two years and reduced that of the leader from five to two years;
2. That despite the amendments abovementioned a new NEC was elected on the 23rd January 2000 – some only nine months after the said amendments.
3. That was no resolution made by the party conference either on the 24th April 1999 or on the 23rd January 2000 suspending the coming into operation of amended Article 30.3 of the party constitution.
4. That as at January 2001 there was no “NEC” of the BCP existing parallel to the NEC elected on the 23rd January 2000.

5. The constitutional validity of the January 2000 NEC has not been challenged save in CIV/APN/340/00 where Maqutu J. in November 2000 left the matter undecided but at the same time exhorting the matter including that of membership to be discussed at the oncoming annual general conference due to be held in January 2001.
6. The NEC elected in January 2000 organized and convened the BCP annual conference on the 27th January 2001 at Co-op College Hall.
7. On the morning of the 27th January 2001 the first applicant and its supporters assembled at the Co-op College grounds.
8. On the same day, place and time some of respondents and their followers also congregated at the Co-op College grounds, and some already were in the College hall.
9. Later that day, after having been to see ACP None at the Central Charge Office concerning some intruders who were alleged not to be entitled to attend the conference, Mr Makhakhe using a loudspeaker loudly requested those in the College Hall to leave so that the Conference could begin.

10. Some of the respondents and their followers who were then occupying the hall refused to leave the hall.
11. Mr Makhakhe, his NEC and followers then left the hall and later convened their conference under a tree outside the hall.
12. In addressing the people in the hall, credible evidence shows that Mr Makhakhe did not officially open the conference but requested people to leave the hall so that proper screening of delegates could be done at the outer gates.
13. It is most improbable that the respondents and their followers were in possession of proper credentials regard being had to the bitter history of feud and conflict between the two groups. (See **SWA National Union** (supra) at p.387)
14. It is difficult to come to a finding that the respondents and their supporters were delegates with proper credentials without belying the past events.
15. After the first applicants and their followers exited the hall, the people inside the hall then constituted themselves into a party conference.

Mr Sekoto says

“There being no regular chairman and/or his deputy, the Conference after 30 minutes decided to convene and elected persons to conduct the conference.”

16. A completely new meeting or conference thereby came into being with its own completely new agenda and business.
17. On the factual issue whether Mr Makhakhe officially opened the conference, the probabilities point to the negative upon the reasoning that no sensible person could deliberately declare a conference open and then leave the said conference and convene his own elsewhere.
18. Though the atmosphere at a Co-op College was tense, I believe the respondents when they say that no violence occurred – probably so, because of the visible presence of the police contingent at the college grounds.
19. It is not in dispute that the annual general conference on the 27 January 2001 was organized and convened by the first applicant who seem to have enjoyed at least a **de facto** recognition.

20. The conference convened within the Co-op College Hall was not properly constituted and possessed of credentials as delegates in terms of the constitution of the party the important Articles being the following:

Article 12.1 reads

“The Annual Party Conference shall convene once a year in December or January: date and place shall be selected by the National Executive Committee.”

Article 14-

“The Annual Party Conference shall be attended by delegates only

Article 26.1:-

“Every delegate shall fill in the form with his own hand when going to attend the Annual Party Conference LM8”.

The conclusion I come to in this proceedings is a very sad one indeed – and a most difficult decision I have had to make. Upon the facts I find proven, I hereby confirm the rule nisi granted by this court on the 16th

February 2001 with costs on the ordinary scale. I also order that the 13 applicants who intervened in these proceedings bear the costs occasioned by their joining. The Order on costs also exonerates the 14th and 15th respondents.



S.N. PEETE

JUDGE

For Applicants : Mr Mdluli

For Respondents: Mr Mosito