CIV/APN/295/02

IN THE HIGH COURT OF LESOTHO

In the matter between:-

THE BASOTHO NATIONAL PARTY	1ST APPLICANT
JUSTIN METSING LEKHANYA	2ND APPLICANT
AUGUSTINUS BERENG SEKHONYANA	3RD APPLICANT
ABEL MOUPE MATHABA	4TH APPLICANT
PIUS LESETELI MALEFANE	5TH APPLICANT
JOSEPH SEABATA THABISI	6TH APPLICANT
JEANETTE 'MAKHOPOTSO LEBONA	7TH APPLICANT
PAUL RANTHOMENG MATETE	8TH APPLICANT
EMMANUELA LEKHOOANA JONATHANE	9TH APPLICANT
THABANG NYEOE	10TH APPLICANT
VITUS MOOKI MOLAPO	11TH APPLICANT
CLETUS SEKHOHOLA MOLELLE	12TH APPLICANT
ARNOLD MORAPELI MOTAUNG	13TH APPLICANT
THAABE LETSIE	14TH APPLICANT
JEREMIA MORENA LETSIE	15TH APPLICANT
ALEXIS MOEKETSI HANYANE	16TH APPLICANT
GODBER THAMSANGA TYHALI	17TH APPLICANT
PETER MOLAHLEHI LETSOTA	18TH APPLICANT
EMMANUEL MOSOKOTSO LEPHELE	19TH APPLICANT
AUGUSTINUS POLAO LETSIE	20TH APPLICANT
MATSIU KHATHIBE	21ST APPLICANT
MASENATE MOPELI	22ND APPLICANT

AND

THE ATTORNEY GENERAL	1ST RESPONDENT
THE DIRECTOR OF ELECTIONS	2ND RESPONDENT
THE INDEPENDENT ELECTORAL COMMISSION	3RD RESPONDENT

INTERLOCUTORY JUDGMENT ON THE APPLICATION FOR POSTPONEMENT

CORAM : HON. JUSTICE S.N. PEETE
DATE : 25TH JULY, 2002

Late afternoon at 4.15 pm. on Friday June 28th, 2002, **Mr Phoofolo** moved *ex parte* an urgent application. Having perused the bulky papers he presented before me in my chambers and having heard him, this court granted an interim order couched thus:

*"**IT IS HEREBY ORDERED THAT:***

A. *This matter disposed of by way of urgency in accordance with the provisions of Rule 8 (22) of the Rules of Court and the non-compliance by the Applicants with the time periods laid down in the Rules of Court relating to service and notice, is hereby condoned.*

B. *An interim order directing the Respondents to retain in a place of safe custody all election material and election documents held and/or retained in terms of section 84 and 95 of the National Assembly Election order, 1992 (as amended) in respect of the 2002 National Assembly Election (General Election) which took place on 25 May 2002; pending the final determination of this application.*

C. *That a Rule Nisi is hereby granted, calling upon the Respondents to show cause, if any, on MONDAY 8TH JULY 2002 at 09H30 why the following order should not be issued and made final:-*

1. *That the First Respondent is authorized in terms of section 97 (2) of the National Assembly Election order 1992 and section 69 of the Lesotho Constitution:-*

1.1 to open and inspect in the presence of the forensic auditors appointed in terms of paragraph 3.2 below, allow election material and election documents held and/or retained in terms of section 84 and 95 of the National Assembly Election Act. 1992 (as amended) in respect of the 2002 National Assembly Election (General Election) which took place on 25 May 2002 ("the election material and election documents").

1.2 to allow the said forensic auditors inspection of all election material and election documents.

2. That the First Respondent be directed to fulfil his duties as stipulated in section 69. 98 (2) (c) (e) and 98 (4) of the Lesotho Constitution whereby:-

2.1 The First Respondent shall make full enquiries and investigations into the allegations and complaints raised by the First and Second Applicants in the affidavit inclusive of the annexures therein referred to contained in annexure AA hereto.

2.2 The First Respondent shall appoint independent forensic auditors approved by the First and Second Applicants to carry out a scrutiny of votes and conduct a full forensic audit of the election material and election documents referred to in paragraph 2 above in accordance with the terms of reference specified in annexure BB hereto, within 30 days of the date of this order.

2.3 The First Respondent shall report to the above Honourable Court the result of his enquiries and investigations into the allegations and complaints raised by the First and Second Applicants in the affidavit referred to in annexure AA and the result of the full forensic adult within 30 days of the completion of the scrutiny of votes and forensic audit.

3. Directing the First, Second and Third Respondents to retain in a place of safe custody all the election material and election documents referred to in paragraph 2 above pending the report by the First Respondent to this Honourable Court as referred to in paragraph 3.3 above.

4. *Directing the First, Second and Third Respondents to pay the costs of this application jointly and severally, the one paying, the orders to be absolved.*

D. *The order granted in terms of paragraph B above is to operate as An Interim Interdict with immediate effect."*

For clarity about what occurred in my chambers that afternoon, the notes of the court are hereunder cited:-

"In Chambers

On 28/6/2002 – Mr Phoofolo for the applicant
Time: 4.40 pm.

Assistant Registrar : Ms Mampolokeng Monyakane

Having perused papers filed of record and having heard ***Mr Phoofolo*** *who moves his application thus:-*

The Bulky application papers are only being served to the court at 4.00 pm and the Law Office was served at 3.30 pm. today.

As of now no appearance of Law Office. He informes court that according to law the ballot papers of the last general election may be destroyed within thirty days after the date of election results. Being apprehensive of the such destruction, he moves this application as a matter of urgency because his client wishes the court to order the opening and inspection of all election material/documents and to allow forensic auditors to inspect the same.

Order : (a) Prayer 1 granted dispensing compliance with the Rules on account of the urgency of the matter.

(b) Prayer 5 also granted to operate as an interim order with immediate effect.

Time: 5.00 pm on 28th June 2002.

Return date is 8th July 2002 at 9.30 am".

Mr Phoofolo had assured the court that all the respondents had been served with the urgent application and supporting documents at 3.30 pm that very afternoon. In his Certificate of Urgency, **Mr Phoofolo** states as follows:-

"1.4 The applicants challenge the result of the elections and request that this Honourable Court allows forensic audit of all election material and election documents as set out in the Notice of Motion.

1.5 In the event of an extensive construction of the provisions of section 102 (1) (a) of the (National Assembly Election Order No.10 of 1992 as amended) the thirty day period ever this coming weekend and particularly on Saturday 29 June 2002.

1.6 The Applicants reasonably fear that the Second and Third Respondents will arrange for the destruction of crucial evidence necessary for the forensic audit after 30 June 2002.

1.7 Destruction of the relevant components of the election material and election documents will render any investigation and/or enquiry as envisaged above in terms of the Act obsolete."

The former Major General whom I will herein refer to as **Mr Justin Metsing Lekhanya,**the incumbent President of the Basotho National Party (the first applicant) has deposed to a lengthy founding affidavit in which he informs the court that he has "*been duly authorized to depose to this affidavit and to sign all documentation necessary in order to launch these proceedings by the first Applicant*" and he attaches a "Resolution" passed at the meeting of the Executive of the Basotho National Party at Maseru on the 27th June 2002. Other cited applicants had filed their "confirmatory" ffidavits in support of Mr Lekhanya's founding affidavit.

It is important to note that the prayers in the notice of motion as urgently moved read as follows:

"*1. That this matter be disposed of by way of urgency in accordance with the provisions of Rule 8 (22) of the Rules of Court and that the Honourable Court condone the non-compliance by the Applicants with the time periods laid down in the Rules of Court relating to service and notice.*

2. That the First Respondent is authorized in terms of section 97 (2) of the National Assembly Election Act, 1992 and section 69 of the Lesotho Constitution:-

2.1 To open and inspect, in the presence of the forensic auditors appointed in terms of paragraph 3.2 below, all election material and election documents held and/or retrain in terms of section 84 and 95 of the National Assembly Election Act, 1992 (as amended) in respect

of the 2002 National Assembly Election (General Election) which took place on 25 May 2002 ("the election material and election documents").

2.2 To allow the said forensic auditors inspection of all election material and election documents.

3. That the First Respondent be directed to fulfil duties as stipulated in sections 69, 98 (2) (c), (e) and 98 (4) of the Lesotho Constitution, whereby:-

3.1 The First Respondent shall make full enquiries and investigations into the allegations and complaints raised by the First and Second Applicants in the affidavit, inclusive of the annexures therein referred to, contained in annexure AA hereto;

3.2 The First Respondent shall appoint independent forensic auditors, approved by the First and Second Applicants, to carry out a scrutiny to votes and conduct a full forensic audit of the election material and election documents referred to in paragraph 2 above in accordance with the terms of reference specified in annexure BB hereto, within 30 days of the date of this order.

3.3 The First Respondent shall report to the above Honourable Court the result of his enquiries and investigations into the allegations and complaints raised by the First and Second Applicants in the affidavit referred to in annexure AA and the result of the full forensic audit

within 30 days of the completion of the scrutiny of votes and forensic audit.

4. *Directing the First, Second and Third Respondents to retain in a place of safe custody the election material and election documents referred to in paragraph 2 above, pending the report by the First Respondent to this Honourable Court as referred to in paragraph 3.3 above.*

5. *ALTERNATIVELY, and in the vent that the above Honourable Court declines to entertain this application as a matter of urgency, granting an interim order directing the Respondents to retain in place of safe custody all election material and election documents held and/or retained in terms of sections 84 and 95 of the National Assembly Election order, 1992 (as Amended) in respect of the 2002 National Assembly Election (General Election) which took place on 25 May 2002, pending the final determination of this application.*

6. *FURTHER ALTERNATIVELY, and in the event of the above Honourable Court declining the relief sought in paragraphs 2 to 5 above, directing the First, Second and Third Respondents to retain in a place of safe custody all election material and election documents held and/or retained in terms of sections 84 and 95 of the National Assembly Election Act 1992 (as amended) in respect of the 2002 National Assembly Election (General Election) which took place on 25 May 2002, pending an application to the above Honourable Court to review and set aside the First Respondent's refusal to make full enquiries and investigations into the allegations and complaints*

raised by the First Applicant in the affidavit contained in annexure AA hereto and to the First Respondent's refusal to apply to this Honourable Court for the opening and inspection of the election material and election documents.

7. *Directing the First, Second and Third Respondents to pay the costs of this application jointly and severally, the one paying, the others to be absolved.*

8. *Granting such further and/or alternative relief as the Honourable Court may deem meet.*

TAKE NOTICE FURTHER that is you intend opposing the relief sought in this application, you must:-

(A) Notify the Applicants' attorneys either in writing or telephonically by no later than 14h00 on Friday 28 June 2002 of your intention to do so. For this purpose, a telefax may be addressed to the Applicants' attorney for the attention of Mr Phoofolo at telefax number 872 1753; alternatively, the Applicants' attorneys may be informed telephonically of your intention at telephone number 325703 or cellular telephone number 872 1753; and

(B) Notify the Applicants' attorneys in writing of an address referred to in Rule 8 (5) of the Rules of Court, at which you will accept notice and service of all documents in these proceedings; and

raised by the First Applicant in the affidavit contained in annexure AA hereto and to the First Respondent's refusal to apply to this Honourable Court for the opening and inspection of the election material and election documents.

7. *Directing the First, Second and Third Respondents to pay the costs of this application jointly and severally, the one paying, the others to be absolved.*

8. *Granting such further and/or alternative relief as the Honourable Court may deem meet.*

TAKE NOTICE FURTHER that is you intend opposing the relief sought in this application, you must:-

(A) Notify the Applicants' attorneys either in writing or telephonically by no later than 14h00 on Friday 28 June 2002 of your intention to do so. For this purpose, a telefax may be addressed to the Applicants' attorney for the attention of Mr Phoofolo at telefax number 872 1753; alternatively, the Applicants' attorneys may be informed telephonically of your intention at telephone number 325703 or cellular telephone number 872 1753; and

(B) Notify the Applicants' attorneys in writing of an address referred to in Rule 8 (5) of the Rules of Court, at which you will accept notice and service of all documents in these proceedings; and

(C) Deliver your opposing affidavit, if any, by no later than 15h30 on Friday 28 June 2002 at the address of the Applicants' attorney, as stated below, and to the Registrar of the above Honourable Court.

If no such Notice of Intention to Oppose be given, the application will be made on FRIDAY 28 JUNE 2002 at 16h30 or so soon thereafter as the matter may be heard.

TAKE NOTICE FURTHER that the affidavit of JUSTIN METSING LEKHANYA and the annexures thereto will be used in support of the Application.

TAKE NOTICE FURTHER that the Applicants have appointed the address of its attorneys as set out below, being an address referred to in Rule 8 (5) at which the Applicants will accept notice and service of all process in these proceedings.

SIGNED at MASERU on this 28th day of JUNE 2002."

In his founding affidavit Mr Lekhanya states firstly that this court has jurisdiction "to hear this application by virtue of section 69 of the Lesotho Constitution read with section 97 of the National Assembly Election Order No.10 of 1992 (as amended)."

Section 69 of the Constitution relevantly reads:-

"69 (1) The High Court shall have jurisdiction to hear and determine any question whether

(a) ... ...

(b) any person has been validly elected as a member of the National Assembly;

(2) ... ...

(3) An application to the High Court for the determination of any question under subsection (1) (c) ***may be made by any by any person registered as an elector in elections to the National Assembly or by the Attorney-General*** *and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings." (my emphasis)*

The import of this constitutional provision is that a person qualified to vote in a national election has locus standi as of right which is not dependent upon that of the Attorney General, who is also competent to challenge in court the validity of election of a member or members in the National Assembly. Qualification for membership of the National Assembly is governed in the first place by Sections 58 and 59 of the Constitution and sections 46 and 47 of the National Assembly Order 1992 as amended. It seems fair to me to state that the Attorney General as a high official of State can only challenge validity of a member's election to the National Assembly only if the provisions of the Constitution of Lesotho and of the Order have

been violated. Any other person qualified to vote also has a similar *locus standi*; I do not think that these two rights are interdependent.

The main reason, so the applicant alleges, why he has chosen to cite the Attorney General of Lesotho as the first respondent is that:

> *"The Applicants have previously approached the (Attorney General) with request to investigate allegations to the effect that serious offences against the Order (sic) had occurred."*

He alleges that the applicant had previously requested the Independent Electoral Commission *"to carry out a scrutiny of votes by way of a full forensic audit of all election material and election documents held or retained in terms of section 84 and 95 in respect of the General Election which took place in Lesotho on the 25 May 2002."*

He states that the second and third respondents later reneged on their original undertaking *"to subject the election material to forensic audit in conjunction with auditors nominated by the Attorney General."* The affidavit does not rely upon any statutory authorization or obligation cast by law upon the Attorney General, nor it is being alleged that the Attorney General was a party to the said undertaking to subject the election material to forensic audit. His affidavit states categorically *"The Applicants do indeed challenge the result of the elections and request this Honourable Court allow the forensic audit of all election material and election documents as set out in the Notice of Motion."*

In his Affidavit requesting the Attorney General to launch an urgent application in the High Court of Lesotho for access to the electoral paper in respect of 2002 elections, he alleges that some **1, 474,215** ballot papers were printed-allegedly corruptly- in excess of the registered voters' numbers and that *".... An excess of approximately 637,215 ballot papers which they managed trace found their way illegally into the electoral system under irregular and suspicious circumstances. It is these and other ballot papers which the IEC had the ability to print at will in order to manipulate and engineer the outcome of the election results which were employed to favour the LCD. We are seeking access, through the Attorney General, to the electoral papers in order to have a full forensic audit conducted."*

By all means, these are serious allegations being made by the applicants that the IEC had acted corruptly, fraudulently and nefariously in the conduct of the May 2002 General Elections in Lesotho. Justice requires that the other side be heard (*audi alteram partem*).

These proceedings today being interlocutory, it is not necessary at this stage to go deeply into the merits of the application except to state that in the interim relief which operated with immediate effect the following were orders granted:

(a) dispensation of the rules and (b) that the respondents retain in a place of safe custody all election material presently held by the second and third respondents in terms of sections 84 and 95 of the National Assembly Election Order 1992.

Mr Pretorius for Applicants submitted that the relief sought in (b) above is somewhat akin to the **Anton Pillar** order whose main aim is to preserve evidence necessary for the establishment of a party's cause of action; of course, in this case whether the ballot papers have to be scrutinized will be determined at the end of the day after the respondents have had opportunity to be heard – see **Eisser v Vuna Health Case Pty (Ltd)** – 1998 (3) SA 139 at 146. The applicants must however establish a *prima facie* cause of action and this relief should not be abused to invade respondents' rights under law. nton Pillar **relief is intended to achieve justice in pending contemplated proceedings** (Sun World International Inc v Unifruco – **1998 (3) SA 151.**

As I have pointed out the return date was the 8th July 2002 at 9.30 am.

The events that preceded this return date are important to refer to because on the 8th July 2002 **Mr Pretorius** for applicant and **Mr Viljoen** for second and third respondents disagreed in material issues and **Mr Pretorius** was now opposing the extension of the rule and postponement of the matter in order to enable the respondents to file answering papers. It was common cause that none had been filed with the Registrar and that only five court days had passed since the interim order had been granted *ex parte* in chambers at 4.40 pm. on the 28th June 2002.

From perusal of the correspondence between counsel it seems that the applicants had originally agreed that on the 8th July the matter would be postponed but had subsequently changed their stand on this promise when the respondents refused or could not accede to additional terms which were

being suggested in **Mr Phoofolo's** letter dated 3rd July 2002. These proposed additions amount to an amendment of the original interim order. These are-

"1 The respondents are directed to:

1.1 Secure the election material and election documents in safe custody and to notify the applicants and the Registrar forthwith in writing of the exact location and physical address of the premises where the election material and election documents are kept in safe custody.

1.2 Hand over the keys to the premises where the election material and election documents are kept in safe custody to the Registrar of the Court. The Registrar shall not allow any person access to the premises, except in presence of all the parties in order to give effect to this order.

1.3 Prepare within 48 hours of this order, a complete list or index of all the election material and election documents, in the presence of the applicants or their representatives, and provide the applicants and the Registrar with a copy thereof.

1.4 Save for the purpose of preparing a complete list and index of all the election material and election documents held by the respondents in safe custody, and as may be ordered by this Court, neither of the parties or their agents or representatives

or any other person or body may have access to the election material or election documents for whatever reason or purpose.

2. *The election material and election documents may not be removed from the premises where the same is held in safe custody without an order of Court.*

3. *The applicants are entitled to post security on a 24-hour basis at the premises where the election material and election documents are kept in safe custody by the respondents."*

No formal application was being made by **Mr Pretorius** on the 8th July to amend original interim order granted by this court on the 28th June. By their very nature and scope, these "*amendments*" somewhat **post facto** change the complexion of the original order and place even more intensive restrictions and burdensome duties, according to **Mr Viljoen,** on the respondents whereas these were not included in the original prayers. Ordinarily the court cannot grant relief not sought or one which is of a different nature from that primarily sought - **Isaacs'** *Becks Theory and Principles of Pleadings in Civil Actions* – 5ed 1982 – Para 31 page 61. Whether these amendments can qualify to be described as "amplification" or "clarification" or "expansion" is neither here or there. What is clear is that these suggested amendments do to some appreciable extent affect the rights of the respondents. (See **Petre and Madco Ltd – Sanderson Kasner** – 1984 (3) SA 850 at 851-852 – **Prest** – *The Law and Practice of Interdicts* – 1996 – p172. As **Prest** opines, an interim remedy is an essential part of our legal system intended to produce a speedy relief to a pressing problem. Interim Order must be

effective rather than pedantic; it must not be emasculated or rendered impotent; its must not be defeated by manoeuvre, ruse or stratagem – because it can lose thereby its effectiveness and become totally futile. On the other hand the applicant who seeks an urgent relief must do so clearly in unambiguous terms.

It should however be noted that (a) no formal application has been made to amend the original interim order, (b) the respondents oppose these additional relief. **Isaacs** (*supra*) submits that "*where the opposite party does not consent to an amendment and there is a necessity for the party desiring to amend to apply to court for leave to amend, it is submitted that the courts will exercise their discretion on whether to amend, on similar principle as they did under the rules of court*" (See our Rule 33 of the 1980 High Court Rules). It seems the applicant now desires to amplify the prayer in their notice of motion (and not their founding affidavit); and this procedure for leave to amend the notice of motion as a pleading and the interim order ought to have been followed. But it has not been followed; and as we know, such amendment can only be allowed if no prejudice is likely to be caused to the respondents.

In casu, I do not think it would be in the interests of justice to grant amendment upon an application from the Bar and no notice has been given to the other side. The applicant is however at liberty to make a formal application for leave to amend under Rule 33 of the High Court Rules 1980 (*supra*). This court is concerned that the proposed amendments are being rendered into a "*price tag*" – so to speak – for postponement. All respondents have the right to answer all the serious allegations raised in the

founding affidavit of applicants. They cannot be deprived that fundamental right even if compliance with the rules is being dispensed with. It is "*fair hearing and justice*" and is guaranteed under Section 12 (8) of our Constitution. It reads as follows:-

> "*Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil rights or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a* ***fair hearing*** *within reasonable time.*" (my underline)

Similarly, the applicants also have the right, too, to reply, to the respondents' answering affidavits.

It is no doubt clear to both parties that the founding documents and all attachments thereto constitute a bulky file which requires meticulous, studious consultation before response is made and by all means, it was not humanly possible for the respondents to have dutifully and timeously responded to the same.

Postponement of court proceedings and indeed extension of **rule nisi** is a matter for the judicial discretion of the court which should take into account the circumstances of each particular case. Cogent reasons must however be shown why a postponement should be granted and that the postponement is proper in the interests of justice and that the other party will not thereby be

prejudiced. The courts usually award costs to the party who suffer prejudice or inconvenience that is occasioned by the postponement.

Refusal to allow postponement in the particular circumstances of this case and indeed to confirm the *rule nisi* without allowing the respondents to answer the serious allegations would certainly amount the most grotesque injustice unparalleled in the annals of this court.

In exercising its discretion, towards the application for postponement, the court also must have regard to the degree and propriety of each party's contribution towards the dilemma of postponement – **Ferreira v Endley** – 1966 (3) SA 618 at page 623 where **Eksteen J** said

"...It is has been held that the general rule is that unless these is serious prejudice to the other litigant which could not be cured by an award of wasted costs, a matter will be postponed more so where there are special reasons" – **Panigel v Kremetart Kliniek** – 1976 (4) SA 387 and in the case of **Madnitsky v Rosenberg** 1949 (2) SA 392 **Tindall J.A.** had this to say-

> *"No doubt a court should be slow to refuse to grant a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case."*

These learned words could not be more apposite than to the facts of this case. See generally **Herbstein and Van Winsen** – *The Civil Practice of the*

Supreme Court of South Africa (1997) 4ed – p. 666-7. In the long run the court has a judicial discretion to exercise.

It is quite clear that the extension of the *rule nisi* and postponement of the proceedings to a latter date to enable respondents to furnish their answering affidavits is being strenuously opposed by the applicants mainly, in my view, because the respondents could not accede to the amendments to the interim order as proposed by the applicants in their correspondence – "perhaps in confidence". It is however pertinent to refer to these letters which are also attached to the affidavit of **Mr Molyneaux**.

A letter dated 3 July 2002 from **Webber Newdigate** (for respondents) reads in part-

"As you are aware, we act for the Second and Third Respondents herein.

The papers were served upon our clients late on the afternoon of 28 June 2002 and thereafter you obtained an interim order in terms of prayer 5 thereof, together with a Rule Nisi returnable on 8 July 2002.
The only urgent aspect of the application relates to the destruction of documents. Now that relief has been granted, there is, it is submitted, no good reason why the matter should be heard during the Court vacation. Furthermore, it is wholly unreasonably to expect our clients to react to an Application of this length and complexity by the 8th July 2002. The Application itself runs to more than 180 pages and it is quite impossible for our clients to do justice to a reply to the various far-reaching allegations contained therein and the extraordinary legal relief sought.

Our instructions are that, at no stage, has our clients had any intention of destroying such documents, nor has it now. If our clients had been approached and requested to provide an undertaking not to destroy the

documents, it would immediately have given that undertaking, pending the Honourable Court's decision in the dispute set out in the Application.

In the light of the above, we requested that you agree to a postponement of the matter, to a date early in August, either the 6th, 7th, 8th, or 9th August. We also suggested that Answering Affidavits be filed by 22 July 2002 and that the Applicant's Replying Affidavits be lodged by 29 July 2002. You undertook to take instructions from your clients.

You have, today, informed us that your clients agree to the matter being postponed to the date suggested as well as Affidavits being filed within the times as proposed by us. You have requested that Mr Justice Peete be approached in Chambers tomorrow, 4 July 2002, so that these matters can be brought to his attention and we have agreed to meet at his Chambers at 09h30, for this purpose. As the other interested party herein is the office of the Attorney General, we are faxing a copy of this letter to them and we trust that someone from that office will attend tomorrow, as well.

Yours faithfully

Signed: **Molyneaux**"

To which **Mr Phoofolo** responded as follows on the 5th July 2002 -

"Sirs,

CASE NUMBER CIV/APN/295/02: BASOTHO NATIONAL PARTY AND OTHERS / THE ATTORNEY GENERAL AND OTHERS

We refer to discussions with your Mr Molyneaux on 4 July 2002 at court when you advised that the second and third respondents intend to oppose the application.

In the course of our discussions you sought an extension of the return date to enable you client to file answering affidavits. In order to accommodate the indulgence sought and to preserve vital evidence, we were instructed to agree to such extension on the basis that the following order is granted by consent:-

1. *Pending the final determination of this application all election material and election documents held and/or retained by the respondents in terms of section 84 and 95 of the National Assembly Act. 1992 (as amended) in respect of the 2002 national election (general election) which took place on 25 May 2002 ("the election material and election documents") referred to in order of 28 June 2002 and as contemplated in annexure BB to the founding affidavit of the second applicant, the respondents are directed to:-*

   1.1 *Secure the election material and election documents in safe custody and to notify the applicants and the registrar forthwith in writing of the exact location and physical address of the premises where the election material and election documents are kept in safe custody.*

   1.2 *Hand over the keys to the premises where the election material and election documents are kept in safe custody to the Registrar of the Court. The Registrar shall not allow any person access to the premises, except in the presence of all the parties and in order to give effect to this order.*

   1.3 *Prepare, within 48 hours of this order, a complete list and index of all the election material and election documents. In the presence of the applicants or their representatives, and to provide the applicants and the Registrar with a copy thereof.*

2. *Save for the purpose of preparing a complete list and index of all of the election material and election documents held by the respondents in safe custody and as my be ordered by this court, neither of the parties or their agents or representatives or any other person or body may have access to the election material or election documents for whatever reason or purpose.*

3. *The election material and election documents may not be removed from the premises where the same is held in safe custody without an order of court.*

4. *The applicants are entitled to post security on a 24 hour basis at the premises where the election material and election documents are kept in safe custody by the respondents.*

5. *The respondents are directed to file their answering affidavits, if any on 22 July 2002.*

6. *The applicants are directed to file their replying affidavits, if any on 31 July 2002.*

7. *The matter will be set down for hearing on a date to be arranged between the parties and the Registrar.*

You will notice that we have made an amendment to the proposed order in paragraph 2 above in order to avoid any misunderstanding.

In view of your outright rejection of the proposed consent order, we are instructed not to agree to any indulgence and to apply for confirmation of the rule nisi on Monday 8 July 2002.

Yours faithfully,"

Signed: **Mr Phoofolo**

Although this correspondence is *extra-curial*, the amendments as proposed to the original interim order indeed are material and change the complexion of the interim order as granted originally. It amounted to a reassessment or revision of this order because the applicants were now, upon further reflection entertaining apprehension that the ballot papers and other election documents might secretly be interfered with by the second and third respondents who under the Electoral law are the legal custodians of such ballot papers and election documents. These amendments are made *post facto* and the basis of the applicant's fear (which was not apparent when they moved the urgent application) that these ballot papers might be interfered

with seems to be speculative (**Hall v Heyns** – 1991 (1) SA 381. Anyway there is no affidavit sworn to found the probability that the second and third respondents were planning to interfere with the ballot papers after the interim order had been granted by this court.

In my view the second and third respondents would face or risk real and serious trouble if they destroyed or interfered with election material in any manner whatsoever! Section 95 of the Order reads:-

> *"95. The Director of Elections shall*
>
> *(a) retain in a place of safe custody the packets delivered to that Officer in accordance with sections 64, 84 and 94 and containing ballot papers, ballot envelopes and counterfoils of used ballot papers until the election can no longer be questioned; and*
>
> *(b) then, unless in the meantime a court of competent jurisdiction otherwise directs, arrange for those packets to be destroyed.* (my emphasis)

This court, without cogent averments stating that since the granting of the interim order, the second or third respondent was engineering plans to interfere with the papers which he is under statutory duty to keep safely, cannot vary the order as it stands unless a formal application is made to that effect.

On the 8th July 2002 – the return date – it was clear that-

(a) the respondents had not as yet filed any answering affidavits;
(b) The respondents were not consenting or acceding to the amendments proposed by the applicants;
(c) The respondents were requesting a postponement to enable themselves to file their answering papers;
(d) The applicants were opposing the application for postponement.

It was in this *scenario* that **Mr Pretorius** and **Mr Viljoen** appeared before this court on the 8th July 2002. This *impasse* or deadlock – if I may call it that - precipatated the filing of a notice of application of postponement and its motivation before court by **Mr Viljoen**. It should therefore be understood that had the applicants had not opposed the postponement of the matter and extension of the *rule nisi*, **Mr Viljoen**'s presence and argument in court on the 8th and 9th July 2002 could have been obviated and been made unnecessary; the rule could have been extended "in chambers" by local counsel for both sides as is the practice. That was not to be! It should be understood that no aspersion at all is being levelled at **Mr Phoofolo** – who is an honourable officer of this court of high standing and caliber! He was merely following professionally clear instructions of his clients, or if he did not feel them appropriate he could have withdrawn his services.

In my view the bulk of the applicants' papers in support of their application show that they were not hurriedly prepared over-night but should have been a laborious task and exercise; indeed much credit should go to Mr Phoofolo for his meticulously prepared file. That the notice of motion contained

prayers which the applicants now seek to amplify or amend, is however a circumstance that should not be placed at the door of the respondents – in our law, "*the applicants stand or fall by their founding affidavits*" – **Van Winsen** (*supra*) p. 366. The affidavit of Mr Justin Lekhanya does not make any allegations necessary to found the fear now being apprehended post facto. If however, new facts or events or information came into existence only after the granting of the interim order, procedure under Rule 33 of the High Court Rules 1980 ought to have been followed. Perusal of the new terms as amended create new prejudices, burdens and obligations and may be granted only after the respondents have been granted an opportunity to respond to the same.

It appears to me that the matters reached a head and climax when **Mr Phoofolo** wrote and faxed a letter on the 5th July 2002 to **Mr Molyneaux** which ends by saying-

> *"You will notice that we have made an amendment to the proposed order in paragraph 2 above in order to avoid any misunderstanding.*
>
> *In view of your outright rejection of the proposed consent order we are instructed not to agree to any indulgence and to apply for the confirmation of the rule nisi on Monday 8 July 2002."* (my underline)

Under our law and practice, the relative blameworthiness of the litigant must be taken into consideration in deciding (a) whether or not to postpone a matter and (b) who should be awarded the wasted costs – **Sanvido & Sons (civil Engineering) Pty Ltd vs Aglime (Pty) Ltd** 1984 (4) SA 339; **Pullen**

vs Robert Williams 1941 (1) PH F32; **Van Winsen** (supra) page 669-670. Where it is found by the court that another litigant has been willfully fraudulent, dishonest, or guilty of malicious or other grave misconduct, and I am not saying as of now that they were the court may award costs against that guilty party as between attorney and client. There must be special grounds justifying that punitive order. – see **Pohl v De Marillac** –1941 WLD 35 at 37; **Van Dyk v Conradie Insurance** 1978 (2) SA 396.

The notice of application for postponement prays that

> *"(a) The rule issue on 28 June 2002 be extended to a date to be determined by the abovementioned Honourable Court.*
>
> *(b) that the respondents file their affidavits on a date to be determined by the abovementioned Honourable Court.*
>
> *(c) that the applicants furnish their replying affidavits on or before date to be determined by the above Honourable Court.*
>
> *(d) that applicants pay the costs of this application on a scale as between attorney and client."*

The founding affidavit of **Mr Denis Molyneaux**, an attorney of this Court, is attached and without quoting it *verbatim* it is perhaps important to list its salient allegations.

These are-

(a) that whereas the interim application papers were served upon respondents at about 3.30 pm of the 28th June 2002 the application was moved *ex parte* in chambers at about 4-5 pm of that day.

(b) The interim order itself was received by **Mr Molyneaux** on the 2nd July 2002.

(c) Due to the bulky application documents and the serious allegations therein made, the respondents could not humanly respond to the same before the 8th July 2002.

(d) The applicants had never formally requested the second and third respondents to give an undertaking not to destroy the election material pending the anticipated application.

(e) Now that the court had nonetheless granted an interim order interdicting the second and third responded from destroying the election material, the urgency now no longer exists and the matter could be postponed and the *rule* extended to enable respondents to answer.

(f) Against the undertaking he had made previously agreeing to a postponement **Mr Phoofolo** suddenly "reneged" -upon instructions from his clients and now stated that he could agree to the

postponement only if the respondents acceded or consented to certain amendments to the interim order.

It should here be noted that there new amendments being made *post facto* should at least have been supported by additional sworn affidavits specifically dealing with those new facts or apprehensions explaining their purport. "Statement from the Bar to that effect is not sufficient" – **Van Winsen** (*supra*) page 361; **Hersman v Jacobeg Brothers** – 1931 EDC 284. The ultimate test is whether no prejudice is thereby caused which cannot be remedied by an appropriate order as to costs. **Transvaal Racing Club v Jockey Club** (SA) – 1958 (3) SA 599; **Cohen v Nel** – 1975 (3) SA 963.

In my view once granted, an interim order becomes an order of court and should be respected as it stands. It cannot be varied at the instance or convenience of any party without leave of court See Rule 45 of the High Court Rules. It reads-

"45 (1) The court may, in addition to any other powers it may have mero motu, or upon the application of any party affected rescind or vary

(a) .....

(b) an order or judgment in which there is ambiguity or patent error or omission but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as a result of a mistake common to the parties.

(2) Any party desiring any relief under this Rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed. (my underline)

On the 8th July 2002 **Mr Viljoen** also raised several points *in limine* although not on notice as required by Rule 8 (10) (c) of the High Court Rules. It reads

"8 (10) Any person opposing the grant of any order sought in the applicant's notice of motion shall:

(a) ... ...

(b) ... ...

(c) if he intends to raise any question of law without any answering affidavit, deliver notice of his intention to do so, within the time aforesaid, setting forth such question."

The following points *in limine* are :-

Non-joinder of necessary parties

Mr Viljoen submits that the *rule nisi* must be discharged with costs on the main ground that the necessary parties have not been joined by the applicant. This is fatal to the application, he contends, because the final relief which this court might grant, could prejudice the legal interests of such parties especially those who have won seats in the present National Assembly. He cited the case **Theko v Morojele** – CIV/APN/27/2000 and the **BCP v Chief Electoral Officer** – 1997-98 LLR 518 in which it was held than a non-joinder of an essential party can be fatal to the application. In the case of **Sheshe v Vereeniging Municipality** 1951 (3) SA 661 it was held that the right which the respondent has to demand that another person or persons be joined as a party or parties be joined the proceedings is limited to a situation where such person has or have *direct* and *substantial* legal interest which might be prejudiced by the order of court. What is "*direct*" and "*substantial*" is relative to the particular circumstances of each case. Indeed here one has to be careful to distinguish a "*legal*" from "*political*" interest.

In the instant case, do the present members of National Assembly belonging to different and many parties have the "legal right" to be joined upon the reasoning that the final order might prejudice their rights as Parliamentarians? In the case **BCP v Director of Election** – 1997-98 LLR 518 (*supra*) it was held that where the applicants had sought to apply for the postponement of the 1998 General Elections, their case was fatally defective in that they had failed to join other parties who had to be heard before the court could consider whether or not to order postponement of general elections. It is **Mr Viljoen**'s submission that not only the honourable

Members of Parliament of the first applicant, but other honourable members who presently hold seats in the National Assembly ought to have been joined because the ultimate relief which this court might award can possibly even invalidate their election to Parliament. There is great weight to be attached to this submission but I have advisedly decided not to come to a definitive decision on this important issue of joinder at this interlocutory stage – because if this submission is upheld here and now, the application stands to be dismissed and the rule discharged forthwith.

Mr Viljoen has also raised the important point *in limine* submitting that this court lacks jurisdiction to hear what is in fact "a camouflaged election petition", procedure for which has not been followed. He has referred to the case of **Basotho National Party vs Principal Secretary of the Ministry of Law, Parliamentary and Constitutional Affairs** – CIV/APN/240/93 where a full Bench of this High Court (**Cullinan C.J.**, **Molai**, and **Kheola JJ**) ruled that the High Court (then Court of Disputed Returns) had no jurisdiction to confer custody of relevant electoral material upon the Registrar, because the lawful custodian of such material is the Director of Elections who is under a statutory duty to retain the same in a place of safe custody. The Order does define what "*safe custody*" means. I should mention *en passant* that under Section 5 of 1992 the Order every member and every officer of the Independent Electoral Commission is enjoined perform his functions "*impartially and independently, in good faith and without fear, favour or prejudice*". The office of the Attorney General is also an office of special impartiality under the Public Service law.

Having obtained an interim order on the 28th June 2002 drafted by the applicants, it is my considered view that custodianship reposed by the law on the Director of Elections can only interfered with only if there are cogent reasons that the incumbent is currently corruptly or fraudulently interfering with such ballot papers. There is no sworn affidavit except statement from the Bar. This matter will however be more fully canvassed at the end of these proceedings. Also to be decided then will be the principal question whether it is competent for this court to order the Attorney General to erform the tasks as requested in the notice of motion. I will say nothing at this stage concerning these issues until final argument. Indeed under section 98 of 1993 the Constitution of Lesotho the Attorney General has the duty "*to take necessary legal measures for the protection and upholding of this Constitution and other laws of Lesotho*". In particular under section 69 of the Constitution which vests in the High Court jurisdiction to hear and determine any question whether

> *"any person has been validly elected as a member of the National Assembly"*

the Attorney General may make an application *suo motu* or may intervene if such an application has been instituted by any other person qualified to vote in the general election. It is my view that the main function of the Attorney General in this regard is to see to it that electoral law and the Constitution of Lesotho are complied with and that no persons unfit have been unlawfully elected to Parliament. This is a sacred duty indeed!

The applicants allege a general election fraud perpetrated "*by the illegal manipulation of election papers by the Independent Electoral Commission*" This, in my view, is a very serious charge that criminality has occurred; and it also casts doubt upon the very validity of the election of most, if not all, honourable members of the present National Assembly.

Section 97 of the 1992 orders reads:-

> "*(1) A person shall not open a sealed ballot box, packet of ballot papers (envelopes referred to in section 94 (1) (a) –(f) or a sealed packet of counterfoils of used ballot papers (b) inspect or allow another person to inspect ballot papers, ballot envelopes or counterfoils removed from such a packet.*
>
> *(2) A court of competent jurisdiction may grant an order under subsection (1) if it is satisfied on oath that the inspection of a particular ballot paper, ballot envelope is required for the purpose of*
>
> *(a)* ***prosecuting a person for an offence against this Order.***
>
> *(b)* ***determining an election petition***" (my emphasis)

Mr Pretorius has not informed this court that possible prosecution of the Director of Elections and The Commissioners is being contemplated. And he has statefastly contended that this is for the determination of whether the ballot papers be scrutinized.

I however also decided not to come to a final conclusion on this matter at this interlocutory stage. This will again be fully revisited at the end of the day.

The most fundamental issue of to-day is whether this court should exercise its discretion to grant or refuse postponement in these application proceedings. I have already stated that the interim order was obtained *ex parte* and the respondents had five court days to answer to the bulky papers of the application. In all fairness, they could not humanly have consulted fully and filed their papers on or before the 8th of July 2002. It was unfair, in my view, for the applicants to have placed conditions to the postponement. Under our system of justice, a "*fair hearing*" is guaranteed by section 12 (8) of Constitution which reads in part:-

> "..... *and where proceedings for such determination (of rights or obligation) are instituted before such a court or other adjudicating authority, the case shall be given a fair hearing."* (my emphasis).

As I have said already, it would be grotesque justice that can transmogrify this fundamental right if this court were to deprive the three respondents the opportunity to answer issuably to the serious allegations of (a) dereliction of

duty as far as the Attorney General is concerned; (b) alleged corruption and contravention of the Electoral law on the part of the second and third respondents.

In the exercise of my discretion and having due regard to all circumstances of this case, I make the following order-

1. The case is formally postponed to the 2nd September 2002.

2. The respondents are to file their answering affidavits on or before the 16th August 2002.

3. The applicants are to file their replying affidavits on or before 30th August 2002.

   Counsel to appeal before the Registrar of this Court on the 2nd September 2002 to be allocated a date of hearing.

The issue of costs in this application for postponement by agreement is deferred to a later date.

S.N. PEETE

JUDGE

For Applicant : **Advocate Pretorius**
(instructed by **Mr Phoofolo**)

For 1st Respondent : **Mr Makhethe**

For Second and Third Respondents: **Advocate Viljoen SC**
(Instructed by **Webber Newdigate**)

CIV/APN/277/02

IN THE HIGH COURT OF LESOTHO

In the matter between

LIPHAPANG MOTHEBE	PLAINTIFF
and	
LESOLE MOLELEKI	**1st DEFENDANT**
MATS'EKHA FUNERAL PARLOUR	**2ND DEFENDANT**
COMMISSIONER OF POLICE	**3RD DEFENDANT**
ATTORNEY GENERAL	**4TH DEFENDANT**

JUDGEMENT

Delivered by the Honourabe Mrs. Justice K.J.Guni
On the 9th July, 2002

The applicant in this matter is LIPHAPANG MOTHEBE, an adult male MOSOTHO of SEBETIA HA NKUTU. The first respondent is LESOLE MOLELEKI, an adult male Mosotho of MAPOTENG in the Berea district. LESOLE MOLELEKI is the father of the deceased – 'MAMAISA MOTHEBE.

The applicant alleges that in 1992 he entered into customary marriage with the 1st respondent's daughter. They lived together for many years as husband and wife. In the said customary marriage the parties were blessed with three children. On the 23rd May 2002, the applicant stabbed the deceased with a knife. He alleges that she there and then fell down and died. He must have been arrested and taken into custody because he now claims to be on bail awaiting the trial.

On the 20th June 2002, this applicant approached this court by way of an urgent ex-parte application. He sought and obtained a rule Nisi in the following terms:-

(a) That the modes and services as contemplated by the Rules of court be dispensed with due to urgency hereof;

(b) The First Respondent shall not be restrained and/or interdicted from burying the remains of Applicant's wife the late 'MAMAISA MOTHEBE pending the finalisation hereof;

(c) That the remains of the late 'MAMAISA MOTHEBE shall not be released to Applicant for funeral arrangements and burial;

(d) That the second Respondent **Matsekha Funeral Parlour** shall not be restrained and/or interdicted from releasing the body of the 'MAMAISA MOTHEBE pending the determination of this application;

(e) In the event of the second Respondent has already released the body of the late 'MAMAISA MOTHEBE to first Respondent and/or any of the first Respondent's family members before this order could be served upon it, that first Respondent shall not be ordered to return to Applicant the body of the late 'MAMAISA MOTHEBE to keep it in the mortuary of his choice;

2. That the first Respondent be ordered to pay costs hereof on Attorney and client scale and the other Respondents only in the even of opposition;

3. Granting Application such further and/or alternative relief this Honourable Court may deem fit.

4. That prayers 1(a), (b), (c), and (e) operate with immediate effect as Interim Court Orders.

5. That the third Respondent/and/or Subordinate Officers to him in Mapoteng Police Post shall not be ordered to oversee the implementation of this order.

The said interim court order was served upon all the respondents. Only the first respondent filled opposing papers.

From the evidence led what seems to be at issue is the right to bury the deceased. The deceased's father who is the 1st respondent herein claims that his daughter was never married. He denies that there was ever a customary marriage contracted as alleged by this applicant between himself and the 1st respondent's daughter.

The facts which were not in dispute are that the applicant abducted the 1st respondent's daughter. The message was sent to the 1st respondent to notify him of that abduction. The 1st respondent told the court that when he received the news about that abduction of his daughter, he demanded the immediate return of his daughter together with the payment of six (6) herd of cattle. The demand was ignored. The 1st respondent went to the applicant's place and fetched his daughter. No damages were paid for her abduction. She came and stayed for a little while with her father but without giving her father any notice, she returned to the applicant's place. In other words, the 1st respondent's daughter and applicant eloped according to the deceased's father.

The applicant claims that his elder brother was sent to the 1st respondent to let him know that his daughter has elopped with the applicant. The applicant's uncle – one LAGDEN MATSELA MOTHEBE was also sent to the deceased's father to go and pay lobola. Lagden Mothebe claims that he had in his possession two donkeys and a sum of five hundred (500.00) maloti. According to him these items constituted three heard of cattle.

There are two main types of marriages in this KINGDOM. Firstly there is SESOTHO CUSTOMARY Marriage. Secondly there is marriage by civil rites under the marriages Act.

The parties intending to enter into a marriage contract have the right of freedom to choose which of the two types of marriages they wish to contract. According to the applicant who now speaks for himself and his alleged late wife, they elected to enter into SESOTHO CUSTOMARY MARRIAGE.

In order to contract a valid SESOTHO CUSTOMARY Marriage, there are certain requirements which must be complied with. Those requirements are set out in THE LAWS OF LEROTHOLI PART 1.

In the first place, the parties who intend to be married, must have an agreement regarding their intended marriage. In the second place, their families, or at least their parents or those standing in the place of their parents must agree to the proposed marriage. Once the two families have agreed that their children should go ahead to enter into the Sesotho Customary Marriage, they negotiate and have to reach an agreement on the amount of lobola before a union can be called a customary marriage.

The applicant told the court they, he and the deceased agreed to enter into the alleged customary marriage. The deceased is not available to testify if at all there was such an agreement. The circumstances of the case are that after she was abducted, she was taken back to her parental home by her father. Abduction indicates that she was not a willing party. Once she was back with her own

parents she elopped with the applicant. Had she changed her mind? Elopment indicates that the two parties agreed to run away together to be secretly married.

The fact that the parties to the proposed marriage had agreed to be married is established. That agreement between the bride and the bridegroom is not enough by itself. There must be an agreement between the parents of the bride and those of the bridegroom. There are allegations that the uncle of the applicant went to pay part of the lobola. That can only happen where the parties had reached an agreement on the amount of lobola payable.

There is no evidence that the parties ever entered into negotiations regarding the amount of lobola to be paid. The deceased's father denies having received any part payment of lobala. This denial of receipt of part payment is most probable. The applicant has not shown in evidence that the deceased's parents and his parents ever discussed and agreed that their children should be married. Without the parental agreement that the parties should be married,

they couldn't be any payment of "lobola". Without knowing how much is "bohali" there was no way the two donkeys or five (5) hundred maloti could be paid as part payment of the unknown amount.

The applicant goes on to claim that there was in fact a written proof of receipt of those items by the 1st respondent. That written proof could not be produced before court for the various reasons indicated by the applicant's uncle. He claimed first of all that the letters were left with the 1st respondent because of the absence of the chief's stamp. Those letters were subsequently handed to his late brother-the applicant's father during his life time. The search to find the letters has not been successful.

He subsequently changed his evidence and claimed that such letters were never handed to his late brother. Those letters according to him remained and are still in the possession of the 1st respondent. There is noone who supports any of those allegations. The 1st respondent denies that anyone or this witness-Lagden Mothebe ever

came to his place to pay lobola. The 1st respondent left his daughter to live with the applicant for those years because he had failed to stop his daughter from elopping with the applicant. He had not given his consent to their marriage.

In conclusion, the surrounding circumstances of this case may show that there was a marriage of some kind between the deceased and this applicant. A great deal was made of the conduc of the parties. They lived together as husband and wife. Their neighours and relatives regarded them as husband and wife. The deceased used the applicant's name. They have three children together. All these point at one thing only, that the parties were reputed as husband and wife. There are instances where the parties may be regarded as husband and wife by repute. The applicant's case was that there was a customary marriage between the deceased and himself. The evidence before this court failed to establish the SESOTHO CUSTOMARY Marriage.

It was on that ground that the application failed and was dismissed with costs as prayed.

K.J. GUNI
JUDGE

For applicant - R. Lits'oane
For respondent - Ms. Machai