

CIV/APN/213/02  
IN THE HIGH COURT OF LESOTHO

In the matter between:-

LEKAKO NTHAKO	1st APPLICANT
BASOTHO NATIONAL PARTY -NATIONAL EXECUTIVE COMMITTEE	2nd APPLICANT
and	
INDEPENDENT ELECTORAL COMMISSION	1ST RESPONDENT
PIUS MOLAPO	2nd RESPONDENT
ATTORNEY GENERAL	3rd RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete on the 14th May. 2002

On the 30th April, 2002, an application was filed with the office of the Registrar "in terms of Rule 8 (22) of the High Court Rules 1980" on notice to the three respondents. It sought an urgent order couched in the following terms:-

2

- 1) Dispensing with the ordinary rules and modes of service pertaining to this Honourable Court.
- 2) Restraining 2nd respondent from holding himself out as the Basotho National Party candidate for Tsikoane No. 14 Constituency in the forthcoming general election pending the outcome of this application.
- 3) Declaring 1st respondent's act of superimposing 2nd respondent as the BNP candidate for Tsikoane No. 14 Constituency in the forthcoming general elections null and void and of no force and effect.
- 4) Declaring that applicant herein is the BNP's candidate for Tsikoane No. 14 Constituency in the forthcoming general elections.
- 5) Directing that respondent file their opposing papers hereto, if any or before the 30th April 2002 and that applicants file their reply if any on or before the 2nd May 2002, the matter to be heard as of urgency on the 2nd May 2002.
- 6) Directing respondents to pay the costs of this application, the paying the others to be absolved.
- 7) Granting applicants any further and/or alternative relief as this Honourable Court may deem meet.
- 8) That Prayers 1,2 and 5 operate with immediate effect as interim relief."

No interim order had been made when the matter was argued before me on the 7th May 2002.

In his founding affidavit the first Applicant states that on the 1st April 2002 he was duly elected unopposed as a parliamentary candidate for the Tsikoane Constituency No.14 having "garnered 131 votes."

3

He states that prior to these primary elections of the Basotho National Party Constituency, the National Executive Committee of the Party had appointed the 27th December 2001 as the date on which the Tsikoane Constituency No. 14 would hold a special meeting for the selecting names of three prospective candidates in terms of Article 23 of the Constitution of the Basotho National Party. Article 23 reads in full:-

"23.. APPOINTMENT OF PARLIAMENTARY CANDIDATES

- a) At every national election, each Constituency shall submit for the Party leader's consideration three names from which he may select a candidate.
- b) Any member of the Party wishing to be considered by a constituency as a prospective candidate should have acquired not less than one thousand support signatures of subscribed Party members, at least one week before a constituency's meeting convened specially for selecting the three names referred to above.
- c) Any such prospective candidates must be literate.
- d) The selection of these prospective candidates shall be supervised by duly authorized representatives of the N.E.C.
- e) The three names to be submitted to the Party leader should have been selected by a simple majority vote of the members of a constituency in a meeting convened for the purpose. The Party leader reserves the right to make his own selections or from outside, and his selection shall be final. "

The letter from the party NEC reads:-

4

TRANSLATION

"Basotho National Party  
P.O. Box Ms 124 - MASERU  
LESOTHO  
14.12.2001

Constituency Secretary  
Tsikoane No.14  
Leribe

Sir/Madam,

I greet you ka Tlholo ea mathata.

I have been instructed by the Head Office to notify you that on the 27-12-01 (10.00 am) there will be elections for a candidate for your Constituency.

Good luck  
Tlholo ea mathata

Signed: -

For L.P. Malefane  
Secretary - General"

It is not in dispute that the 1st applicant and 2nd respondent were the only two prospective candidates. He goes on to state that the elections did not take place because the 2nd respondent did not turn up. In contrast to this the 2nd respondent states that on that day both himself and the applicant were present and elections could not proceed because applicant's supporters were

5

unruly and rowdy such that the electoral officer Mr Mabaso declared the 2nd respondent as duly elected because he had over one thousand signatures whilst the applicant had only 402. It seems that there was no voting at all conducted on that day because the electoral officer Mabaso relied, so the 2nd respondent says, on Article 23 (b) of the Party Constitution, effectively disqualifying the applicant. It must here be noted that Article 23 (e) of the said constitution requires that the names "should have been selected by a simple majority vote of the members of the constituency in a meeting convened for the purpose." It seems *ex facie* that the 2nd respondent was irregularly selected.

The applicant goes on to state that the 2nd applicant - BNP-NEC-later arranged that a re-election be conducted on the 1st April 2002 at Tsikoane Constituency No. 14 and that on the appointed day and the 2nd respondent being absent Deputy Secretary General forged ahead with the elections and the 1st applicant garnered 131 votes and was returned unopposed.

He goes on to state that through "sheer inadvertence" the office of the BNP Secretary General issued to the 1st applicant and to the 2nd respondent two "Independent Electoral Commission Form 3" for submissions to the Independence Electoral Commission.

It seems clear that as early as 5th March 2002 (some twenty six days before the 1st Applicant was elected on the 1st April 2002) the Secretary General of the BNP-NEC had written to the secretary of the Tsikoane Constituency No.14 that "Pius Tanki Molapo" had been selected by the Leader of the Basotho National Party in terms of article 23 of the Party Constitution. It

6

seems clear therefore that when the second bout of elections was held on the 1st April 2002, the 2nd respondent had already been officially - if one may put it that way - selected by the leader of the BNP to be the BNP parliamentary candidate for Tsikoane Constituency.

The applicant goes on to state that on the 5th April 2002 the Deputy Secretary General Jeremiah Letsie wrote a letter to the 2nd respondent which reads:-

TRANSLATION  
"Basotho National Party  
P.O. BOX MS 124 –MASERU  
LESOTHO  
5.4.2002

Mr Pius Molapo Tsikoane

No. 14

Sir,

I am hereby instructed to inform you that the Leader of the Party, Major-General Justin Metsing Lekhanya, has made a decision that the candidate for Tsikoane No. 14 constituency shall be Mr L Nthako. The Leader has made the decision in exercise of his constitutional powers - section 23.

I am also instructed to inform you that it was a mistake that you were required to fill the Independent Electoral Commission Form 3 and submit the same to the IEC. You are accordingly requested to retrieve the Independent Electoral Commission Form 3 from the IEC and return it to the office.

7

The Head Office regrets the mistake and confusion caused to you and asks for an apology from you and all affected persons.

By copy of this letter the IEC is made aware of this change.

Pele-ea-pele le tlasa mathata

Deputy Secretary General

CC: Independent Electoral Commission Tsikoane No.14"

The applicant contends that effect of this letter LN2 dated 5.3.2002 was to revoke and undo the letter appointing 2nd respondent as BNP parliamentary candidate for Tsikoane Constituency No. 14. It reads:-

"Basotho National Party  
P.O. BOX MS 124 – MASERU  
LESOTHO  
05/03/2002

Ho.....  
Mongoli oa Komiti ea Lebatooa  
Tsikoane No. 14

Mofumahali/Mohlomphehi

Khetho ea Mokhethoa

Ke u lumelisa ka tsholo ea 'nete ea mathata uena le komiti eohle ea Lebatooa.

Ke laeloa ke Mohlomphehi Moetapele oa Mokha oa Sechaba sa Basotho Major General Metsing Lekhanya ho tsebisa komiti ea lebatooa la heno

8

hore, a ipapisitse le temana ea 23 ea molao oa motheo, hape a ipapisitse le keletso ea komiti ea phethahatso o fihletse qeto e latelang.

Hore Mokhethoa oa lebatooa la Tsikoane No. 14 Likhethong tse na tse tla tšoaroa ka la 25 Motšeanong, 2002, ke Pius Tanki Molapo Mohlomphehi Moetapele o le kopa bohle ho amohela Mokhethoa enoa oa lona le ho mo tšehetsa ka matla mosebetsing oa ho hlolela Mokha likhetho lebatooeng leo. Ea behiloeng ke eena 'me Maneshenale 'ohle a tla khetha eena. Ba reng ba ea ikemela ha ba sa tšepahetse Mokheng oa BNP re tla ba nka e le mahlaba-phieo.

Pele-ea-pele ke tlasa mathata.

Sgn: Mongoli-Kakaretso "

He says that the said Letsie on the 22.4.2002 also communicated this change to the 1st respondent stating that:-

"In respect of Tsikoane Constituency No. 14, the Party has withdrawn the candidature of Pius Molapo and replaced him with Lekako Nthako."

Ordinarily you can only withdraw something which has been submitted.

He further states that by the letter dated 25th April 2002 the said Letsie informed the Returning Officer of Tsikoane Constituency No. 14 "that the duly authenticate person as a candidate is LEKAKO NTHAKO."

He finally submits that despite these communications, the 1st respondent has registered the 2nd respondent as the BNP candidate for Tsikoane

9

Constituency No.14 thus overriding and jettisoning the wishes of the 2nd applicant.

He lastly submits that he will suffer irreparable harm if his name is not included in the ballot paper as a BNP candidate for Tsikoane Constituency No. 14, as he will not be able to run for the forthcoming general elections.

In his opposing affidavit the 2nd respondent states on the 27th December 2001 he was returned as unopposed candidate because the 1st applicant had garnered only 402 signatures instead of one thousand or more as required by section 23 (b) of the Party constitution. His nomination was put through to the Party headquarters; and at a later public rally in Maseru the Party leader Mr Justin Lekhanya had even announced that he had accepted and endorsed his nomination. This he says was followed by an official nomination signed by the Party Secretary General Mr Malefane dated 05/03/2002. It reads:-

"Basotho National Party  
P.O. BOX MS 124-MASERU  
LESOTHO  
05/03/2002

Ho.....  
Mongoli oa Komiti ea Lebatooa  
Tsikoane No. 14

Mofumahali/Mohlomphehi,

Khetho ea Mokhethoa

Ke u lumelisa ka tlholo ea 'nete ea mathata uena le komiti eohle ea Lebatooa.

10

Ke laeloa ke Mohlomphehi Moetapele oa Mokha oa Sechaba sa Basotho Major General Metsing Lekhanya ho tsebisa komiti la lebatooala heno hore, a ipapisitse le temana ea 23 ea molao oa motheo, haape a ipapisitse le keletso ea komiti ea phethahatso o fihletse qeto e latelang.

Hore Mokhethoa oa lebatooa la Tsikoane . Nol4. likhethong tse tla tšaroa ka la 25 Motšeanong, 2002, ke Tanki Pius Molapo Mohlomphehi Moetapele o le kopa bohle ho amohela Mokhethoa enoa oa lona le ho mo tšehetsa ka matla mosebetsing oa ho hloleha Mokha likhetho lebatooeng leo. Ea behiloeng ke eena 'me Maneshenale 'ohle a tla khetha eena. Ba reng ba ea ikemela ha ba sa tšepahetse Mokheng oa BNP re tla ba nka e le mahlaba-phieo.

Pele-ea-pele le tlasa mathata.

Mongoli-Kakaretso

Kopi....."

It is disconcerting that the applicant has not annexed any such official letter in support of his nomination save to present hand-written letter from the Deputy Secretary General Letsie. Moreover the leader of the party, though available, has not seen it fit to attest to an affidavit.

The two supporting affidavits of Tseliso Tsepe - Chairman of the Tsikoane Constituency and Maphamotse Tlélase Vice Secretary, state that the date of the 1st April 2002 was never communicated to them by the Party NEC. The applicant has indeed failed to attach any such letter. If the 1st April 2002 was ever selected as a date for selection of prospective candidates, Letsie should have written an official letter to the Tsikoane Constituency Committee to that effect like he did on the 14.12.2001.

11

All that the applicant states is as follows:

"I have been advised by the Deputy Secretary General, JEREMIAH LETSIE, that the Secretary General did inform 2nd respondent of this new date, I verily believe him in his respect. "

That is all hearsay and is refuted by the 2nd respondent and members of the Tsikoane Constituency Committee.

If at all he was elected unopposed as he says he was on the 1st April 2002, why was this nomination not endorsed in the official letter of the Party similar to the one headed "KHETHO EA MOKHETHOA"?

In this application it is important that the 1st applicant in order to succeed to establish that he has a "clear right" or legal interest which the court ought to protect. It is my considered view that the applicant has not succeeded upon the papers as they stand to show on a balance of probabilities that on the 27.12.2001 he had "garnered" more than a thousand signatures candidates in terms of Art. 23 (b) of the Party constitution, or that on the 1st April, 2002 he had garnered the requisite one thousand signatures - he merely says "I garnered 131 votes".

This is not apparent from his papers and in my view, he has not established a "clear right". The affidavit of Jeremiah Letsie is very brief and is not helpful at all.

12

The 2nd respondent has on the other hand shown that on the 27th December 2001 he was declared a winner candidate and this seems quite probable because on the 5th March 2002 the Basotho National Party leader formally nominated him as the Parliamentary Candidate for Tsikoane Constituency No.14.

Article 23 (e) of the Party constitution reads thus:-

"(e) The three names to be submitted to the Party leader should have been selected by a simple majority vote of the members of a constituency in a meeting convened for the purpose. The Party leader reserves the right to make his own nomination, either from the constituency submissions or from outside, and his selection shall be final "

This Article of the Party constitution vests vast power in the leader of the Party to make his own selection of a Constituency candidate, which selection may even override even the nominees of the Constituency meeting. I am going to say no more about this article except to say that if tested against provisions of section 20 of our Lesotho Constitution it may be struck down as flying in the face of the democratic spirit of the Constitution, (see comments of my Brother Ramodibedi J in Lehohla vs NEC -LCD -1997-98 LLR 104 at 115)

According to applicant, Letsie took steps to rectify the situation by writing the letter LN2 on 5.4.2002. It reads

13

Translation  
"Basotho National Party  
P.O. BOX MS 124 - MASERU  
LESOTHO  
5-04-2002

Mr Pius Molapo Tsikoane No. 14

Sir,

I am hereby instructed to inform you that the Leader of the Party, Major-General Justin Metsing Lekhanya, has made decision that the candidate for Tsikoane No. 14 constituency shall be Mr L. Nthako. The leader had made the decision in exercise of his constitutional powers - section 23.

I am also instructed to inform you that it was a mistake that you were required to fill the Independent Electoral Commission Form 3 and submit the same to the IEC. You are accordingly requested to retrieve the Independent Electoral Commission Form 3 from the IEC and return it to the office.

The Head Office regrets that mistake and confusion caused to you and asks for an apology from you and all affected persons.

By copy of this letter the IEC is made aware of this change. Pele-ea-pele le tlasa mathata.

Signed:

Deputy Secretary General

CC: Independent Electoral Commission  
Tsikoane No. 14"

14

Despite this apparent confusion, it seems the leader of the BNP did not see it fit to intervene. He never called 2nd respondent to give him audience before revoking what is ostensibly an official appointment. The leader has not submitted any affidavit in this application.

The decision by the leader of the Party to select a candidate of his own choice under article 23 (e) is his sole prerogative under the party constitution and it seems to me that in this case the leader appointed the 2nd respondent on the 5/3/2002 exercising his powers under this article. If a month later he wished to revoke or withdraw his selection of the 2nd respondent, could he still select another candidate without explaining his reasons for so doing to the 2nd respondent? Can the leader of the BNP change his decision when his initial selection created certain legitimate expectations the part of the 2nd respondent? In the case of Attorney General vs M.S. Makesi & others -1999-2000 LLR 306 it was held by the Court of Appeal of Lesotho that even a speech by a responsible Minister can create a legitimate expectation and the promise or decision cannot be altered without affording the affected parties a hearing. Matters of political or government policies are usually matters in respect of which the jurisdiction of the courts is excluded but where a decision is taken by the leader of a political party or Minister of Government promising or vesting certain legal rights or interests, "there are limitations on the power of a policy maker to change policies" - Per Friedman J.A. in A.G. vs Makesi (supra) at p.313.

This court has not been led to understand that the official letter dated 5.3.2002 appointing the 2nd respondent was induced by misrepresentation or fraud. It therefore stands as an official communication of the leader's



selection under article 23 (e). If for reasons based on a political strategy or expediency, the leader of the BNP saw it fit to withdraw the 2nd respondent as BNP parliamentary candidate for Tsikoane, he ought to have given such reasons to 2nd respondent before appointing the 1st applicant. Unless the letter of the 5.3.2002 appointing 2nd respondent can be shown to have been written without his knowledge or authority, that appointment stands. As I have stated, the exigencies of this application demanded that the leader of the Party himself to have attested to an affidavit so that the court should not be made to speculate about his true intentions. If a political debacle or misfortune had occurred through inadvertence or chicanery, this must be solved in the political forum and not in the courts of law.

In another case *Khauhelo Ralitapole vs Ntsukunyane Mphanya &*

*Others CIV/APN/394/99* (unreported) where the applicant's name was being sought to be withdrawn from the Interim Political Authority (IPA) by the BCP but before and without first affording the applicant a hearing, the Honourable Chief Justice held that the unilateral withdrawal of her name without a hearing was null and void because the applicant had a legitimate expectation to be consulted before she was withdrawn as the BCP representative in the IPA.

It is submitted by Mr Kulundu that under the article 23 (e) of the Party Constitution the leader of the Party has absolute power to appoint or revoke as he pleases. It is however even clear under article 23 (e) that the selection by the leader "shall be final" Final in the sense that the decision or selection of the leader cannot be questioned even by the Party Annual General Conference. I do not read the article 23 (e) as entitling the leader to revoke

the selection he has officially made under the article, [see also *NEC of LCD vs Lesao Lehohla - 1999-2000 - LLR 41*].

In this application, it should be observed, the 2nd respondent has not made a counter-application asking the court to declare that his nomination of 5.3.02 was constitutional and valid but has contended himself by stating in his opposing affidavit that his was an official nomination having been made by the leader of the party under article 23 (e) of the Party Constitution.

I am of the view that the proper approach to be adopted in this case is that this being an application for a final (mandatory) interdict the applicant has to show on a balance of probabilities that he has a clear right which he seeks to protect - *Prest - The Law and Practice of Interdicts - p.43; LUTARO vs NUL, 1999-2000 LLR 52 at 62.*

The applicant bases his claim on the letter written by Jeremiah Letsie on 5.4.2002. The effect of this letter while not revoking or withdrawing the appointment of 2nd respondent seeks to superimpose the appointment of the 1st applicant. The appointment of 1st applicant is not supported, as already shown, by the official letter entitled "*Khetho ea Mokhethoa*".

Under these circumstances, it is not possible to come to the conclusion that the applicant has established a clear right on a balance of probability.

17

This application is therefore dismissed with costs.

S.N.Peete  
JUDGE

For Applicants : Mr Kulundu  
For 2nd Respondent : MrMatoane