

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.42/2011

In the matter between:

RETHABILE MARUMO

1ST APPELLANT

RAMAHOOANA MATLOSA

2ND APPELLANT

TŠOEU MOKERETLA

3RD APPELLANT

and

**NATIONAL EXECUTIVE COMMITTEE
OF LESOTHO CONGRESS FOR
DEMOCRACY**

1ST RESPONDENT

**LESOTHO CONGRESS FOR
DEMOCRACY**

2ND RESPONDENT

CORAM:

RAMODIBEDI P
MELUNSKY JA
SCOTT JA

HEARD:

8 DECEMBER 2011

DELIVERED:

13 DECEMBER 2011

SUMMARY

Voluntary association – Political party – Internecine conflict within the party over the holding of a special general conference – Article 5.2 of the Constitution of the party – The High Court dismissing the appellants’ application for lack of locus standi – Appeal upheld with costs including the costs consequent upon the employment of two counsel.

JUDGMENT

RAMODIBEDI P

[1] This is an appeal from a judgment of **Guni J** in the High Court dismissing the appellants’ application for an order directing the first respondent (“the NEC”) to convene a special general conference of the second respondent’s party pursuant to petitions filed by 17 constituencies. The purpose of the special general conference was two-fold, namely,:-

(1) deliberating and resolving a motion of lack of confidence in the NEC and

(2) filling the vacant position of the Treasurer of the party.

[2] The learned judge a quo dismissed the appellants' application solely on the ground that they had no locus standi. It is the correctness or otherwise of that decision which falls for scrutiny in this Court. It is thus necessary to commence the exercise by revisiting the facts upon which the appellants rely for locus standi.

[3] I observe at the outset that the material facts on which the appellants rely for their contention that they have locus standi in the matter are not in dispute. They are contained

in the founding affidavit of the first appellant and may be summarised as follows:-

[4] The first appellant is a Mosotho female adult of Mohobollo N0. 12 Constituency. She is an ex officio member of the Constituency Committee as well as a member of the Constituency. Above all, she is a Member of Parliament representing the Constituency in question having joined the Parliament through the second respondent party. Furthermore, she is a card carrying member of the second respondent. It is common cause that as such, she is “duty bound” to uphold the constitution of the second respondent party in terms of Article 12 (a) of the constitution in question which provides that “all members shall respect and uphold the LCD’s constitution, its decisions and orders”.

[5] The second appellant is a Mosotho male adult of Maseru Constituency No. 32. He is the Youth League Chairman for the Constituency and an ex officio member of the Constituency Committee. He is a card carrying member of the second respondent party. It is not disputed that as a card carrying member he is “duty bound” to uphold the constitution of the party in terms of Article 12 (a) of the party’s constitution.

[6] The third appellant is an adult Mosotho male of Mashai No. 76 Constituency. He, too, is an ex officio member of the Constituency Committee. He is a member of the Constituency. He, too, is a Member of Parliament representing his constituency through the second respondent party. He, too, is a card carrying member of the second respondent. As with other appellants, it is not disputed that he is “duty bound” to uphold the second

respondent's constitution in terms of Article 12 (a) of its constitution.

[7] It requires to be noted at the outset that although the respondents did not contest the factual position relating to the appellants' bases for locus standi they did, however, allege in the forefront of their case that Article 5.2 of the second respondent's constitution on which the appellants rely confers power on the constituency and not on an individual member. It was contended on that basis, therefore, that the appellants do not have locus standi.

[8] In order to fully understand the contest in this matter, an interneccine contest for that matter, it is accordingly necessary to reproduce Article 5 with particular reference to Article 5.2 of the second respondent's constitution. In relevant parts it reads as follows:-

“5.2. **Special General Conference (Emergency)**

*An emergency, Special General Conference may be called, through a resolution by the Leadership Conference that it be called, or if the National Executive Committee deems it necessary, or following a request from at least ten constituencies directed at the National Executive Committee of the Party through the office of the Secretary General. Such a request should give a reason or reasons for the calling of such a Conference. Beyond that such a request should be with constituency secretaries at least fourteen (14) days before that date. Special General Conference for the Women or youth Leagues can be called following the same procedures and reasons as the ones above. **Such a conference will need the approval of the National Executive Committee**, and it will take the format as indicated in 5.2.1, procedures as in 5.2.2 with authority as to 5.2.3.*

5.2.3. **POWER AND DUTIES [OF] THE SPECIAL GENERAL CONFERENCE**

Powers and duties of the Special General Conference of the Lesotho Congress for Democracy are:-

(a)

(b) **to deliberate on a special issue that has been brought before the Conference** by the National Executive Committee, which would be an issue from the General Conference of the Party, or the Leadership Conference, or the National Executive Committee or emanating from ten (10) constituencies, at least,

following section 5.2 of the Constitution with its sub-sections.

- (c) Special General conference will have the same powers, which will be equal to those of the usual General Conference with regard to the special issue that, the Special General Conference has been called to deliberate upon.*

5.3. LEADERSHIP CONFERENCE

Lesotho Congress for Democracy shall hold a Leadership Conference once a year, sometime during the months of September and/or October. The purpose of this Conference is to examine the Party in general, and to engage in debates of promoting the Aims and Objectives of the Party. Again this conference can be used in gainful deliberations in preparation for the General Conference.

5.3.3. POWERS AND DUTIES OF THE LEADERSHIP CONFERENCE

Powers and duties of the Leadership Conference shall be:

- (a) to listen and to discuss the speech of the Leader of the Party, and of those who have been invited to open the Conference or to deliver speeches at that Leadership Conference;*
- (b) to organize and prepare for the General Conference;*
- (c) to pass on suggestions onto the General Conference;*

(d) to examine the life of the Party and its workings;

(e) to call for a Special General Conference if necessary.”

[9] On 20 to 21 November 2010, and acting in terms of Article 5.3.3. (e) the Leadership Conference of the second respondent called for a special general conference of the party. This is common cause.

[10] It is further common cause that the Leadership Conference resolved that the special general conference in question should be held on 19 March 2011.

[11] On 28 February 2011 and by annexure “RM 2 A” the NEC undertook to “*consider*” a petition by 17 constituencies in which they expressed no confidence in it.

[12] Meanwhile, on 17 March 2011, and in prior proceedings in **Mafa Thibeli and Others v National Executive Committee of the LCD and Others, case number CIV/APN/54/2011**, the High Court (Majara J) declared as unconstitutional and null and void the resolution by the Leadership Conference to hold a special general conference referred to in paragraph [9] above. The sole ground for holding as it did was that the motion of no confidence in question was only directed at some and not all members of the NEC. The members excluded were the Leader and the Deputy Leader respectively.

[13] On 11 April 2011, and by letter annexure “RM4”, KEM Chambers for the 17 constituencies wrote to the NEC demanding the holding of a special general conference. Crucially, it was recorded in the letter that the NEC had

“decided to ignore the petitions without any justifiable cause.”

[14] On 19 April 2011, and by letter annexure “RM5”, the NEC rejected the petition by 17 constituencies to hold a special general conference, firstly, on the ground that no reasons were given for including the Leader and his Deputy and, secondly, that the filling of the vacancy relating to the Treasurer was in the process of preparation.

[15] The appellants’ allegation that the NEC has simply stonewalled and has no intention to call the special general conference in question was met with no more than a bare denial. In my view the appellants’ allegation should be accepted as correct. It is clear, as it seems to me, that in refusing to hold the special general conference the NEC is hiding behind **Majara J**’s order referred to in paragraph

[12] above. It is almost 9 months since that order was made and yet the NEC has still not called for a special general conference.

[16] Apart from hiding behind **Majara J**'s order it is noteworthy that the NEC has also raised all sorts of technicalities such as lack of urgency and locus standi.

[17] Amazingly, it is apparent that in refusing to accede to the holding of a special general conference the NEC has taken the view that the call for such a conference is an insult to it. Obviously, the NEC does not consider such a call a fundamental principle of democracy which must be protected. Shockingly, still, it is now more than a whole year since the Leadership Conference of the party resolved to hold the conference in question.

LOCUS STANDI

[18] It is well-established that a party who has a direct and substantial interest in a matter is an interested party. Such a party has locus standi. It is upon this principle that I approach the present matter. I shall also bear in mind the salutary principle that a political party is a voluntary association. The relationship between the party and its members is a contractual one. The terms of the contract are contained in the constitution of the party. See, for example, **Matlholwa v Mahuma and Others** [2009] 3 All SA 238 (SCA) at para 8.

[19] In casu, it is regrettable that two Honourable Judges of the High Court came to different conclusions on locus standi, based on identical situations in **Thibeli's** case on the one hand and the instant matter on the other hand.

In the former case **Majara J** held that the applicants who were in a substantially similar position as the present appellants had locus standi to stop the very same special general conference forming the subject matter of the instant case. **Majara J** correctly recognised that in terms of the second respondent's constitution, the applicants before her had a duty to uphold the constitution of the second respondent's party. I conclude, therefore, that **Guni J** was in error in failing to adopt the same approach. Indeed, I should stress that **Majara J** is not alone in the approach she adopted. Thus, for example, in **Wilken v Brebner & Others 1935 AD 175** at p180 Wessels CJ made the following apposite statements with which I am in full agreement:-

"It may be at once conceded that whether the Nationalist Party is a universitas or a voluntary association the majority cannot act contrary to the express terms of the constitution of the party. If the resolution is in violation of the constitution of the party or ultra vires of the Congress, and if the constitution does not

deprive the individual member of a say in the matter, then our law will assist him to see that no injustice is done to the minority. It is, however, essential to consider whether an individual member of the party or even several members of the party have the right to ask this Court to interfere with the resolutions of the Congress of the party. The question whether an individual member has such a right depends on the nature of the voluntary association and the terms of the constitution.”

It should be emphasised that in this matter the appellants in their personal capacities had a special interest in seeking the holding of a Special General Conference.

THE REQUEST

[20] It seems to me that in order to succeed in calling for a special general conference under Article 5.2 the constituencies concerned have to establish three (3) jurisdictional facts, namely:-

- (1) There must be a request from at least 10 constituencies directed at the NEC through the Secretary General.
- (2) There must be reasons for the calling of such a conference.
- (3) Once the request has reached the NEC the latter shall inform the Constituencies' Secretaries of the proposed Conference at least 14 days before that date.

[21] Crucially, in its letter annexure "RM3" dated 28 February 2011 the NEC acknowledged receipt of petitions from 17 constituencies stating that they had no confidence in it. It is common cause that these petitions contained reasons for the holding of a special general conference.

The appellants contend that the NEC simply blocked the proposed conference. It did so because it wrongly considered that it had a discretion in the matter. There is much force in the appellants' submission in my view. Indeed, in stating what he alleged to be necessary in order to give effect to Article 5.2 of the second respondent's constitution, **Mr Metsing** said the following in his answering affidavit:-

"This honourable Court is asked to recall that in terms of clause 5.2 of the constitution of the second respondent, the petitions are required inter alia, to reach the constituency secretaries at least 14 days before the date of the proposed special conference. This in turn means that what is required are hard copies of petitions from all the LCD members who form a constituency as defined in the party constitution that are sent to the secretary of the constituency committee demanding the calling of the special general conference."

[22] In effect what **Mr Metsing** is saying is that every single member of a constituency must join in such constituency's petition. In other words all the members of

the constituency must come together to sign a petition. As was contended on the appellants' behalf, and properly so in my view, this is a remarkable statement for which no authority was provided. Article 5.2 contains no such requirement. Similarly, Article 6.5 does not have such requirement. It simply provides no more than the following:-

“All members of the Lesotho Congress for Democracy living within the constituencies boundaries as defined for Parliamentary Constituency delimitations, within Lesotho, according to [the] constitution of Lesotho, or outside Lesotho, “according to how a Province is delimited”, shall come together to form a Constituency of the Lesotho Congress for Democracy.”

[23] As can plainly be seen, this Article merely provides a delimitation mechanism for a constituency of the second respondent party. It does not provide that all the members of a constituency must come together to sign a petition envisaged under Article 5.2. Had the framers of

the constitution intended the Article to have that effect they would no doubt have expressed themselves accordingly in clear and unambiguous terms.

[24] It seems to me that the interpretation of Article 5.2 contended for by the respondents would lead to absurdity. This would offend against the cardinal rule of construction that words be given their ordinary, literal and grammatical meaning unless to do so would lead to “a result which is manifestly absurd, unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute.” See **Volschenk v Volschenk 1946 TPD 486** at 407 – 408.

[25] Furthermore, I consider that the interpretation of Article 5.2 which the respondents contend for would, as was correctly submitted on the appellants’ behalf, “involve

the laying down of a standard of observance that would always make it unnecessarily difficult and sometimes impossible to carry out the party constitution.” I accept, therefore, that a benevolent approach should be adopted by the courts in construing the constitutional provisions of a voluntary association such as the second appellant. In this connection, I draw attention to the remarks of this Court in the case of **National Executive Committee of the Basotho National Party and 9 Others v Majara Jonathan Molapo C of A (CIV) No. 34/2011** at para [11], namely:-

“[11] The Court a quo should have found that the interpretation of the relevant provisions of the party’s Constitution for which the respondent had contended should be rejected because it would make it unnecessarily difficult and sometimes impossible to carry out the Constitution.”

This is undoubtedly such a case.

The same, I think, must be said of the alternative argument advanced on behalf of the respondents, namely, that the signatures of at least more than half of the members living in the constituency boundary had to be obtained. Not only would this be cumbersome and difficult to obtain, but there is nothing in the Constitution of the second Respondent to suggest such a procedure.

[26] The position, in my view, is correctly spelt out in paragraphs 4.9 to 4.10 of the appellants' additional heads of argument in these terms:-

4.9 This argument loses sight of the fact that this party operates a representative democracy founded on the principle of elected individuals representing the people. In terms of this system, committee members and/or an elected candidate represent(s) the members of a particular constituency. The representatives form an independent ruling body (for an election period) charged with the responsibility of acting in the people's interest, but with enough authority to exercise swift and resolute initiative in the face of changing circumstances, such as to require that a Special General Conference be called. It is submitted that it is in line with the proposition of adopting the

*‘practical common sense approach to the matter’ that members of a constituency of a party should be represented by the elected members of that constituency as contemplated by the various clauses of the Constitution of the Party. (See for example, **Articles: 5.8.1; 5.10.1 (i); 5.12. (ii); 7.5(a) of the Constitution of the LCD**).*

4.10 *It is respectfully submitted therefore that it makes no sense for the Respondents to argue that if the Party Constitution was intended to confer power on the constituency committees to demand a Special General Conference, clause 5.2 would have specifically referred to committees. It is submitted that a reference to constituencies in Article 5.2 should be construed as a reference to such constituencies as represented by their respective constituency committees. This is the only practical common sense approach to the matter.”*

In my view the constituency committee, established under Article 7.6 of the Constitution, has the power to represent the constituencies for all purposes in terms of Article 5.2.

[27] It requires no magic in the circumstances of this case to conclude that by persistently refusing to call the special general conference as it did for more than a year

now the NEC has breached the constitution of the second respondent party, thus entitling the Court to intervene. It is indeed, a serious breach of the constitution by the NEC that the second respondent has been without a Treasurer for more than one year now which issue ought to have been resolved by calling a special general conference a long time ago. In relevant parts Article 7.1.3 of the constitution provides as follows:-

“CAUTION

When the Vacancy occurs in the position of Leader of the Party, the Secretary general or the treasurer, the National Executive Committee shall not fill in such vacancy, but it shall call a special conference to fill such Vacancy by direct elections, therefore, the same shall apply at all levels of the party.” (Emphasis added.)

[28] As can be seen from this Article the NEC has no discretion in the matter. It is duty bound to call a special general conference. Indeed, its intransigence in the matter is incomprehensible to me, having regard to the fact that

after receiving the petitions from the 17 constituencies it made preparations for the holding of the special general conference in question. This much is conceded in paragraph 8 of the respondents' heads of argument filed on 11 October 2011 in these terms:-

“8.1 Concerning the prayer about the election of the treasurer a few prefatory matters have to be stated. First annexure RM5 itself clearly reveals that the (NEC) was preparing for the holding of the election of the treasurer.”

The conclusion is inescapable in my view that the NEC's complete volte face in the matter can be traced from the two decisions of the High Court on locus standi previously referred to.

[29] It has been submitted on the appellant's behalf in the heads of argument that the Court should take judicial notice of the fact that there is “serious [infighting],

bickering and divisions within the ruling Party [the second respondent] which can only be resolved by the membership of the Party itself at the General Conference”. I agree. The real remedy lies in the special general conference of the party itself. It certainly does not lie with the courts.

[30] More than ten years ago in the case of **Mabusetsa Makharilele and Others v National Executive Committee of the Lesotho Congress for Democracy (LCD) and Others CIV (APN) 82/2001** I had occasion to state the following remarks which apply with equal force to the present matter:-

“The political intolerance that has dogged political parties for so long in this country has once again reared its ugly head. What is essentially a domestic affair that should be resolved internally has again been brought before the Court for determination simply due to mistrust and lack of political tolerance. Often when the courts do reluctantly intervene they are immediately and contemptuously turned into scapegoats and so the war of attrition continues unabated. At the root of this unholy war lies

endless power struggles in which people jostle for positions in the management of political parties which in turn obviously provides access to funds and even fat allowances.

Indeed as it is generally accepted that Lesotho is one of the poorest countries in the world the scenario described in the preceding paragraph is, I regret to observe, unlikely to disappear in the near future. Because of lack of jobs and the high rate of unemployment in the country it obviously pays to be in the management of political parties and hopefully to become a member of Parliament or, with more [luck] a Minister as a means of earning a living.”

Regrettably, one has a similar situation here involving the same party.

[31] The order that is proposed refers to a Special General Conference that is to be convened by the first respondent (NEC). It is my view that the Special General Conference referred to in paragraph 2 (a) of the order should be held before the annual general meeting of the second respondent.

[32] It follows from the foregoing considerations that the appeal must succeed. Accordingly, the following order is made:-

- (1) The appeal is upheld with costs including the costs consequent upon the employment of two counsel.
- (2) The court a quo's order dismissing the appellants' application with costs is set aside and is replaced with the following order:-

“(a) The first respondent [NEC] is hereby directed to convene a special general conference of the second respondent for the purpose of:-

- (i) deliberating on and resolving the issue of lack of confidence in the first respondent as requested by the 17 constituencies of the second respondent and
 - (ii) filling in the position of Treasurer of the second respondent.
- (b) The respondents are directed to inform the Constituencies' Secretaries of the special general conference referred to in 2 (a) (i) and (ii) above at least 14 days before the conference.
- (c) The respondents shall pay the costs of

the application including the costs consequent upon the employment of two counsel.”

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
JUSTICE OF APPEAL

For the Appellants: Adv K.E Mosito KC
(with him Adv. M. Rafoneke)

For the Respondents: Adv M.E. Teele KC
(with him Adv. S. Ratau)