IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CIV) No. 17^{A}/2012**

In the matter between:

KALINYANE SEITLHEKO	**1ST APPELLANT**
SERAME KHAMPEPE	**2ND APPELLANT**
NTJA THOOLA	**3RD APPELLANT**
NATIONAL EXECUTIVE COMMITTEE of the NATIONAL INDEPENDENT PARTY	**4TH APPELLANT**

and

LETUKA NKOLE	**1ST RESPONDENT**
INDEPENDENT ELECTORAL COMMISSION	**2ND RESPONDENT**
REGISTRAR GENERAL	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

CORAM RAMODIBEDI P
MELUNSKY JA
HURT JA

APPEAL HEARD **:** 3RD OCTOBER, 2012
JUDGMENT DELIVERED **:** 19TH OCTOBER, 2012

SUMMARY:

Application - dispute of fact on affidavit - respondent's affidavit evidence not satisfactorily challenged by applicants in replying affidavits - factual disputes generated by bare denials on the part of applicants - dispute not a bona fide *dispute such as would warrant reference to oral evidence - judge's discretion under rule 8(14) - application dismissed.*

JUDGMENT

HURT JA

[1] In the build-up to the Lesotho General Elections in 2012, it appears that a dispute developed amongst certain members of the National Independent Party ("NIP") as to the constitution of the National Executive Committee ("NEC"). According to some of the members, the party's constitution provided for the annual re-election of the NEC but this provision had been breached by the current members of the NEC who had allegedly been elected in 2008 and had clung to office for a period of nearly 4 years. The NEC is elected by the National Conference and there

was consequently a call by the dissatisfied members for the National Conference to be convened for the purpose of electing and appointing a new NEC. This dispute went to the High Court and, eventually, to the Court of Appeal where the disputing parties managed to bury their differences and took an order by consent to hold the National Conference on 31 March 2012.

[2] It is common cause that the meeting which was accordingly arranged for 31st of March did not proceed smoothly. By the time it terminated the delegates were split into two main factions, one contending that the meeting had resulted in the election of a new NEC, the other that chaos had reigned at the meeting and that the convenors had been forced to abandon it. On 2 April 2012 the latter group addressed a letter to the office of the Registrar General, stating that the meeting had degenerated into chaos and that no election had taken place. On 3 April 2012, the group who adhered to the view

that there had been a valid election, addressed a letter to the Operations Office of the Independent Electoral Commission listing the names of nine members of the NIP who, they said, had been elected to office on the NEC. Faced with this conflict, the office of the Registrar General refused to accept the list of names as representing a validly elected NEC.

[3] The result was yet another application to the High Court, brought on a certificate of urgency, for a declarator to the effect that the election of the NEC members had been valid and a directive that the Independent Electoral Commission recognise and acknowledge this body as the NEC of the NIP. The applicants in that application are the appellants before us (I will continue to refer to them in what follows as "the applicants"), the application having been dismissed with costs by Moilwa A J. The first respondent, who was cited as "the former secretary of the NIP", opposed the application, describing himself in his

answering affidavit as "the National Secretary General of the NIP" and being supported in his contentions by two deponents to affidavits who described themselves respectively as "the National Chairman of the NIP" and "a member of the NEC".

[4] The learned judge held that, although there were factual disputes on the affidavit evidence, they were resoluble by an examination of the "inherent credibility"[1] of the evidence of certain independent witnesses who had made affidavits in support of the respondents and, accordingly, that the applicants had not discharged the onus of establishing that there had been a valid election at the meeting. It is this finding that the applicants challenge in this appeal. They contend that the learned judge erred in his approach to the evidence and that he should either have held that the contentions in the opposing affidavits did not generate a bona fide and material dispute of fact

[1] See ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A) at 635B**

or, at very least, have referred the matter for the hearing of oral evidence and cross-examination.

[5] In order to deal with applicants' contentions, it is necessary for me to set out, as briefly as I can, the essential and material area of conflict between the versions of the applicants and the deponent's to the answering affidavits. In the founding affidavit, the first applicant informed the court that there had been some dissatisfaction with the procedure for accreditation and registration of the delegates to the meeting. His affidavit reads:

> *"Most of the delegates were disgruntled with regard to the manner in which he (first respondent) handled the proceedings and openly showed that discomfort. Instead of addressing the issues raised as a matter of concern, he then decided to abandon the conference. Other members of the executive committee, especially those who were singled out in the court order decided to proceed with the national conference. Those were Serame Khampepe who was at the time the vice president, Ntja Thoola (and) Maqetelo Khetla.*

"The business of that day and night was transacted accordingly in the premises organised for that (Sekekete Hotel). A new executive committee was voted into power as per the dictates of the order of court which was very specific regarding the date on which the conference was to be held, this being 31 March 2012."

[6] The answering affidavits paint an entirely different picture. The deponents to the answering affidavits state that unruly behaviour started shortly after 7:30 pm when the registration system was challenged and it persisted during the night until, at 3 am the next morning, the police and the security personnel in attendance at the venue ordered the delegates to disperse and locked the hall. The owner of the venue and the officer in charge of the security staff hired by the NIP to attend the conference described the situation as one in which it was necessary to disperse the people "so as to avoid bloodshed which was imminent". The applicants' response to this latter evidence was that it could not be regarded as "independent evidence" because both deponents (i.e. the

owner of the venue and the security officer) had some sort of business or political association with the first respondent and would be inclined to colour their evidence at his behest or in his favour. Apart from this bald assertion, the applicants did nothing to counter the evidence of the circumstances in which the conference terminated.

[7] The learned judge *a quo* took the view that the applicants' failure to refute or challenge the evidence of the owner and the security officer on a more substantial basis entitled him to treat that evidence as acceptable for the purpose of coming to a conclusion on the probabilities of the matter. He concluded:

> *"In casu there is no serious dispute of fact that the conference aborted . . . . as a result of disorderly conduct of conference delegates which necessitated abandonment of the conference and closure of the conference by the hotel proprietor with the assistance of the hotel security personnel. I am satisfied that*

there is no bona fide dispute of fact rendering determination of this matter incapable of resolution by the court on the papers before (it)."

[8] Now, in his judgment, the learned Judge appears to have stated the crucial issue as one of whether "the conference aborted . . . as a result of disorderly conduct". If this was his approach, he may have regarded the matter on rather too narrow a basis. It seems to me that the material question for resolution was whether, despite disruptions, there had been a procedurally valid election of a new NEC. In this regard, I think that the following features bear mention in an analysis of the evidence. They relate to the rather bland contentions of the applicants which I have quoted in para 5, considered in the context that the applicants do not seriously challenge the evidence that the hall was closed by the owner at about 3:00 a.m.

[9] What the applicants' deponent says in regard to the first respondent's description of what occurred is:

> *"There is no way rowdiness, commotion and drunken behaviour which was so intolerable as alleged could have lasted for hours (7:30 p.m. to 3:00 a.m.) in the presence of police and security personnel. There was no evidence that there could be bloodshed and Inspector Sello Kemiso (sc the police officer in charge at the venue) has not deposed to any affidavit in substantiation of those averments. By the time the hall was closed a lot of work had been done and delegates left around 7 a.m. . . .".*

As I understand this statement, it is either an acknowledgement that the venue was closed at about 3:00 a.m. or an assertion that it was closed even later, at 7 a.m., but in any event, after the meeting had been brought to a successful conclusion. I have three comments about this piece of evidence.

[10] First, it hardly lies in the applicants' mouth to suggest that any inference should be drawn in their favour simply

because there was no evidence from Inspector Kemiso. The first respondent had made positive statements, supported by two apparently independent witnesses, as to the unsatisfactory atmosphere at the meeting. It was for the applicants to make out their case on affidavit and to do this the applicants should, in my view, have taken proper steps to refute the respondent's version. Indeed, Moilwa A J specifically said: –

> *"If I had had a police version directly contradicting (the owner and the security officer) on this issue, I would have seriously considered referring this particular issue to oral evidence for I would have had two differing independent versions on the issue . . . "*

The absence of an affidavit by Inspector Kemiso or, at least, an explanation why no affidavit could be obtained from any members of the police or security staff, certainly did not assist the applicants' case. Perhaps I should add, in this regard, that the replying affidavit stood alone with

its bald denials. It was not supported, even, by any of the people whose names appear in the list sent to the Independent electoral commission on 3 April 2012 or, indeed, in the list of names of 47 people alleged by the applicants to have attended as delegates. If the applicants' assertions are correct, there would presumably have been no difficulty in obtaining a supporting affidavit from one or more of these people.

[11] Second, if, indeed, *"a lot of work had been done"* by the time the meeting ended, it is very difficult to understand why no records of the business thus conducted have been produced. All that has been put up by the applicants is the list of 47 delegates to which I have referred and a list of nine office bearers of the NEC alleged to have been elected at the conference. The list of delegates was expressly challenged as being spurious and it was asserted, in the answering affidavit, that 96 delegates had been registered by the time the conference

terminated. What is again of significance, in my view, is that not one of the relatively large number of people attending the venue has furnished an affidavit in support of the applicants' contentions in the replying affidavit. Nor is there any evidence about the *"work"* which the deponent alleges was done. It is difficult to believe that a meeting could be in progress for nearly 8 hours without a single documentary record coming into being. Moreover it appears that the sole purpose of the conference was to elect the executive body (at least there is no suggestion of any other business being on the agenda) and if, after some initial dissatisfaction, the proceedings were as fluent as the applicants suggest, it is equally difficult to accept that the conference would have continued into the early hours of the next morning.

[12] Third, the applicants do not seem to contest the evidence that when the owner came to the hall, at the request of the first respondent at about 3:00 a.m. for the

specific purpose of closing it, he found the place in a state of commotion. It seems improbable that this state would prevail at the end of a meeting at which business had effectively been conducted for some hours. Again, the applicants' failure to clarify this area of doubt in their replying affidavit must count against them.

[13] In these circumstances I consider that the applicants' version has the taint of improbability about it. I may say I have little doubt that although the learned Judge did not, in his written judgment, advert directly to these additional factors, he was fully alive to them.[2] It follows that I consider that he was correct in dismissing the application.

[14] Counsel for appellants has submitted that if the Judge was not prepared to find for the applicants on the papers, he should have found that the dispute was incapable of resolution without evidence and, in the

[2] ***R v Dhlumayo and Another.*** **1948 (2) SA 677(A)** at p 706, item 12.

exercise of his discretion, he should have referred the matter to the hearing of oral evidence. However, it seems clear that there was no request by the applicants for such a reference. But even if there had been, I consider that the judge would have been fully justified in refusing it. It is trite that a party who proceeds by way of motion and who asks for final relief, does so in peril of having the application refused if the papers reveal an irresoluble conflict of fact. In such a situation the judge has a discretion, under rule 8(14) of the High Court Rules, to refer the matter to oral evidence if he considers that such referral will lead to a "just and expeditious" result. There were numerous reasons why a discretion of this sort should not have been exercised in favour of the applicants by the time the matter was argued. I need mention only two. First, as counsel for the first respondent submitted, the applicants were aware, before moving the application, that their claim that a new NEC had been validly elected was challenged. Second, with the national election process due to commence in a

matter of days (party lists were to be verified and published for inspection by 28th of April 2012), and the matter only having been argued before the Judge on 18th of April 2012, a reference to oral evidence would almost certainly have resulted in the NIP being unable to compete in the election, to the prejudice not only of its officials but also to the voters who might have been disposed to support it. I consider that there is no substance, either in law or in practicality, in counsel's submission on this aspect.

[15] There is clearly a dispute as to the true composition of the NEC of the NIP. The applicants cited the NEC as the fourth applicant, but in the light of their failure to discharge the onus of establishing their contentions, there must be doubt as to their capacity to represent the NEC. Since, in my view, costs must follow the result in this appeal, it seems that the proper costs order should be

restricted to the first, second and third applicants/appellants.

[16] The appeal is dismissed. The first second and third appellants are ordered, jointly and severally, the one paying the others to be absolved, to pay the costs of the appeal.

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N.V. HURT
JUSTICE OF APPEAL

I agree: _____

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____

L.S. MELUNSKY
JUSTICE OF APPEAL

For the Appellants : Mr K.J. Nthontho
For the Respondent : Adv S. Shale