IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.28/13

In the matter between

NDIWIHLELI NDLOMOSE	**1ST APPELLANT**
DEMOCRATIC CONGRESS	**2ND APPELLANT**

And

DOREEN CHAOANA-MAPETJA	**RESPONDENT**

CORAM: SCOTT AP
HOWIE JA
FARLAM JA
THRING JA
MAJARA JA

HEARD: 7 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

SUMMARY

General Election – National Assembly Electoral Act 14 of 2011 – “misconduct” not sufficient to justify order in terms of section 130 (2) – doubtful whether English doctrine of election agency applicable – non-compliance with section 86 as to who may be assisted – onus on petitioner to satisfy court such non-compliance would or could have affected result in terms of sections 130 (3) (a) and 130 (4) (a) – “could” interpreted to mean reasonably possibly could – remote or speculative possibility not sufficient.

JUDGMENT

SCOTT AP

[1] This is an appeal against the judgment of the High Court (Per Moiloa J with whom Peete J and Molete J concurred) upholding a petition brought by the respondent in terms of section 126 of the National Assembly Electoral Act 14 of 2011 (“the Act”) to declare invalid and set aside the election of the first appellant in the constituency of Tele No 64 in the General Election for Parliament held on 26 May 2012. The first appellant, standing for the Democratic Congress (“the DC”) defeated the respondent, standing for the Lesotho Congress for Democracy (“the LCD”), by the

slender margin of 14 votes. The DC is the second appellant.

[2] The grounds upon which the respondent relied in her petition for the relief sought were essentially the following:

(a) The station manager at the Maleka Tsekoa Primary School voting station, Mr Leopa Ntsibolane, permitted electors to be assisted to vote who did not qualify for assistance in terms of the provisions of section 86 of the Act in that they were neither blind nor physically handicapped;

(b) Ntsibolane permitted three persons each to assist more than one elector to vote;

(c) When the respondent's party agent and others complained to Ntsibolane about what was taking place, he ignored the complaints without explanation;

(d) A party agent for the DC, Mr Lebohang 'Molaoa was seen outside the voting station to be handing out voter registration cards to persons waiting in the queue to vote.

[3] The principal ground upon which the respondent ultimately relied in this Court for the relief sought was that set out in paragraph 2 (a) above. The relevant provisions of section 86 of the Act read as follows:

> *"86 (1) If an elector claims to be incapacitated from voting in the prescribed manner by blindness or any other physical cause, the elector may request the voting station manager to permit the elector to –*
>
> *(a) vote using the prescribed template for blind electors; or*
>
> *(b) vote with the assistance of a person accompanying the elector.*
>
> *(2) A voting station manager shall permit an elector to vote with the assistance of a person accompanying the elector if the voting station manager is satisfied –*
>
> *(a) that the person accompanying the elector is a relative or friend of the elector; and*

> *(b) that the elector is incapacitated in the manner referred to in subsection (1).*

[4] It was common cause that the number of electors who were permitted to vote with the assistance of another person who marked the ballot paper on behalf of the elector was in the region of 20. One elector who had broken or otherwise damaged her hand in a fall on the way to the voting station and possibly another who had a tremor were accepted by the parties as being physically handicapped within the meaning of the section. None of those who were assisted was totally blind. Several, however, complained that their eyesight was such that they required assistance. One was an albino, the others were elderly. If *"blindness"* in section 86 (1) is to be construed as total blindness, as I think it must, then *"any other physical cause"* must be given a meaning wide enough to include an elector whose vision is sufficiently impaired to justify concern on the part of the elector that he or she may be unable to correctly mark the ballot paper. In a remote and rural area such as that where the voting station in the present case is situated one would expect many people to fall within this category,

particularly if they were poor and did not have spectacles. To construe the section otherwise would be to deprive such persons of the vote which could not have been the intention of the legislature. However, the majority of those who sought assistance did so because they were illiterate. It is common cause that illiteracy is not a reason that entitled them to assistance in terms of the section.

[5] It appears that the *modus operandi* adopted by Ntsibolane was that, if an elector stood at the polling booth apparently at a loss as to what to do, he would approach the elector, enquire what the problem was and whether he or she required assistance, and if so, whether there was anyone outside whom the elector trusted. Ntsibolane would call in that person to assist the elector. At some stage Ntsibolane made an announcement outside that electors who were *"visually impaired"* should be accompanied by a person whom they trusted when entering the voting station. Although he initially denied having done so, he later admitted subsequently having made a similar announcement in respect of electors who were illiterate.

[6] Ntsibolane admittedly did not ascertain or record the name or the relationship to the elector of the person summoned to assist the elector to vote. This troubled Mr Ayanda Faniso, an official of the IEC whose task it was to mark the finger of each elector with ink, and he voiced his concern to Ntsibolane, who took no notice. The probabilities are overwhelming, however, that an elector, when asked the name of the person who should be called to assist, would give the name of a friend or relative within the meaning of section 86 (2).

[7] The second ground of complaint was that Ntsibolane permitted three persons each to assist more than one elector to vote. The number of times each rendered assistance is unclear on the evidence, but the fact that the same person assisted more than one elector to vote is not in dispute and appears not to have been of concern to Ntsibolane. What did concern him was a request by an elector that assistance be rendered by a party agent. It appears that on one or more occasions-the evidence is not clear – an elector asked to be assisted by Mr Molebatsi Somsoeu who was a DC party agent. The request was

refused by Ntsibolane and the elector was asked to choose someone else. Similarly, when an elector asked to be assisted by Ms Nomzimkhulu Tšeloa, an LCD party agent, Ntsibolane required the elector to choose someone else.

[8] The next ground upon which the respondent relied in her petition was that Ntsibolane ignored Nomzimkhulu Tšeloa's complaint and failed to give her the necessary form so that the complaint could be lodged in writing. Significantly, the complaint was confined to Ntsibolane's allowing a person to render assistance to more than one elector. This much is clear from the evidence of both the returning officer and the respondent herself. In the event, Tšeloa completed the necessary complaint form two days later and it was forwarded to the district electoral officer. The other complaint ignored by Ntsibolane was the complaint made by Ayanda Faniso to which I have already referred.

[9] The final ground upon which the respondent relied was that the DC agent, Mr Lebohang 'Molaoa, was seen

calling a young man out of the queue outside the voting station and handing him his voter registration card after which he, 'Molaoa, put a number of such cards back into his pocket. When asked for an explanation he was reported to have said that he was in possession of the cards for the purpose of registering their owners for a pension fund. It was common cause that the voter registration cards were used as a means of identification in the absence of a passport. 'Molaoa denied the incident. Instead, the other DC agent, Somsoeu, said that it was he who had the cards in his possession and that they were the voter registration cards of his four adult children which were in his possession for safe-keeping. He explained that he kept the cards locked away in his shop and he intended handing them to their owners when they arrived at the voting station to vote.

[10] The Court *a quo* rejected 'Molaoa's evidence denying the incident regarding his possession of voter registration cards and found that both 'Molaoa and Somsoeu had been in possession of voter registration cards belonging to other people. I do not think that finding can be faulted.

[11] It is convenient at this stage to dispose of a preliminary issue raised by Mr Letsika, who appeared for the appellant, namely the non-joinder of the Independent Electoral Commission ("IEC") in the proceedings. The contention was that the IEC has a direct interest in the outcome of the proceedings inasmuch as in the event of the election of the first appellant being set aside, the IEC would be obliged to hold a fresh election with concomitant financial implications for it. I do not think there is merit in the point. No rules of court were made subsequent to the enactment of the Act. In terms of section 28 of the Interpretation Act 1977 the rules made under the repealed National Assembly Election Act 1992 remain in force to the extent that they are not inconsistent with the 2011 Act. Rule 3(2) requires a copy of the petition, the verifying affidavits and notice of motion to be served *inter alia* on the Chief Electoral Officer. This requirement is in addition to the persons on whom service is to be effected in terms of section 126 (6) of the 2011 Act, but there is no inconsistency. In the event, the petition and accompanying documents were served on the Chief Electoral Officer. The short answer to the point is that the respondent has complied with the rules in so far as the IEC's participation

in the proceedings is concerned. The rule presupposes that the IEC need not be joined. If it were otherwise the rule would be superfluous.

[12] The issue in this appeal is whether on the basis of the evidence summarized above the respondent was entitled to the relief sought. The Court *a quo* held that she was, both in terms of section 130 (2) (a) and section 130 (4) (a) of the Act. It is necessary to quote the relevant provisions of section 130:

"Powers of the High Court

130. (1) The High Court may make any appropriate order including –

(a) an order declaring the elections (sic) of a candidate to be valid;

(b) an order declaring the elections (sic) of a candidate to be invalid;

(c) an order declaring another candidate to be validly elected; or

(d) an order setting aside the elections and directing

fresh elections to be held.

(2) The High Court shall make an order under subsection (1) (b) if –

(a) it finds that a candidate who was returned during the elections, or any other person, with the consent or connivance of that candidate, was guilty of an illegal practice during the elections period;

(b) it is satisfied that that candidate was not qualified to be, or is disqualified from being elected as a member of the National Assembly; or

(c) as a result of a scrutiny of the votes recorded during the elections, it is satisfied that that candidate was not properly returned.

(3) The High Court shall make an order under subsection (1) (b) or (d) if –

(a) the Court is satisfied that any illegal practice or misconduct committed during the elections period would or could have affected the results of the elections; and

(b) the person committing an illegal practice is a person other than –

(i) the candidate; or

(ii) a person acting with the consent or connivance of the candidate.

(4) The High Court shall not make an order under subsection (1) (b) –

(a) unless the Court is satisfied that any failure to comply or irregularity in compliance with a procedure or requirement prescribed under this Act would or could have affected the results of the elections;"

[13] With regard to the applicability of section 130 (2) (a), the Court *a quo*'s reasoning appears to have been as follows: (1) the possession of voter registration cards which belonged to other persons by the DC's party agents amounted to *"misconduct";* (2) applying the English doctrine of election agency, the misconduct of the agents was to be attributed to the candidate as if the candidate was guilty of the misconduct in question; (3) accordingly, the court was empowered to make an order declaring the election of the first appellant invalid regardless of whether or not the misconduct would or could have affected the result.

[14] In my view the reasoning of the Court *a quo* cannot be upheld. First, in terms of section 130 (2) (a) the candidate (or his or her agent) must be proved to have been guilty of an *"illegal practice."* There is no acceptable basis for reading into the section the word *"misconduct"* which, as I shall indicate below, contemplates conduct not amounting to *"illegal practice."* Second, *"illegal practice"* is defined in section 2 to be "*a practice that constitutes an offence under Part 3 of chapter 11*" of the Act. There is nothing in the Act that renders the possession by a party agent or by anyone else of another's voter registration card an offence, nor is there any indication in the Act that it would amount to *"misconduct."* In this regard, it is perhaps necessary to point out that the two incidents relating to the possession by the party agents of voter registration cards occurred outside, not inside, the voting station. The provisions of section 85 (7) are accordingly inapplicable.

The section reads:

> *"A person shall not, except as provided for under this Act, approach, interfere with, speak to or assist a person wishing to vote during elections from the time the person has entered the voting station to vote until the person leaves the voting station."*

A further reason why the party agents could not be held to have been guilty of an illegal practice is to be found in section 132 (2) of the Act which provides that the court may not make a finding that a person has committed an illegal practice or consented to the commission of an illegal practice *"unless it has given the person concerned an opportunity to be heard, to give and to call evidence on the matter."* In the present case the party agents were not given the opportunity to call evidence on the matter.

[15] In view of the above, there is no need to decide whether for the purpose of construing the Act the English doctrine of election agency is to be regarded as forming part of the law of Lesotho. It is significant, however, that section 130 (2) contains no reference to the candidate's agent. (Compare in this regard Regulation 74 (1) of the National Assembly (Conduct of Elections) Regulations, 1965 published in Government Notice 7 of 1965 in which

an illegal practice committed by a candidate's agent is expressly attributed to the candidate, subject to a savings provision in Regulation 75.) Furthermore, an illegal practice committed by the candidate's agent would fall within the ambit of section 130 (3). It would seem therefore that the legislature has elected to deal with illegal practices on the part of a candidate's agent differently and not on the basis of the doctrine of election agency. However, as the matter was not fully argued, I prefer not to express a final opinion on the subject.

[16] In this Court Mr Teele, who appeared for the respondent, correctly in my view, did not attempt to support the finding of the Court *a quo* based on the provisions of section 130 (2) (a). He was also unable to refer to any provision in the Act which precluded a person from assisting more than one elector entitled to assistance in terms of section 86. The failure of Ntsibolane to entertain Tšeloa's complaint and to supply her with the necessary form is similarly of little consequence. The complaint, which related to three persons each having

assisted more than one elector, was in any event lodged with the returning officer on 28 May 2012.

[17] The Court *a quo* held that Ntsibolane's conduct in allowing electors to be assisted who did not qualify for such assistance in terms of section 86 amounted to a *"failure to comply or [an] irregularity in compliance with a procedure or requirement prescribed under this Act"* within the meaning of section 130 (4) (a). I did not understand Mr Letsika, who appeared for the appellants, to contest this finding, nor would there appear to be any basis for doing so. The Court *a quo* held, however, that once the failure to comply or the irregularity had been established, the burden of proof shifted to the appellants to prove that such failure or irregularity could not have affected the result of the election.

[18] In support of this conclusion Mr Teele relied, as did the Court *a quo,* on **Putter v Tighy 1949 (2) SA 400 (A)** and **Snyman v Schoeman and Another 1949 (2) SA 1 (A)**. In both cases the Court *a quo* was concerned with the

provisions of section 91 of the South African Electoral Consolidation Act 46 of 1946. The section reads:

> *"No elections shall be set aside by the court by reason of any mistake or non-compliance with the provisions of this Chapter, if it appears to the court that the election was conducted in accordance with the principles laid down therein, and that such a mistake or non-compliance did not affect the result of the election."*

As in the case of section 130 (4) (a), the section was expressed in a negative form. In **Putter,** Tindall JA observed at 406:

> *"It seems to me that section 91, though it is in negative form, assumes as an affirmative proposition that a non-compliance with the provisions of Chapter 111 will render an election invalid unless it appears to the Court that the election was conducted in accordance with the principles laid down in Chapter 111 and that such non-compliance did not affect the result of the election."*

Reference was also made in argument to **Morgan v Simpson [1974] ALL ER 722** in which it was held that a similar (but not identical) provision expressed in the

negative could for the purpose of its interpretation be transformed so as to be expressed in the positive. If section 130 (4) (a) is so transformed it would read:

> *"The High Court shall make an order under subsection (1) (b) if –*
>
> > *(a) the Court is satisfied that any failure to comply or irregularity in compliance with a procedure or requirement prescribed under this act would or could have affected the results of the elections."*

In this form the wording of the section would follow that of section 130 (3) (a), save that the latter refers to *"any illegal practice or misconduct."*

[19] With regard to the question of *onus*, Tindall JA in **Putter** said at 410:

> *"Passing to the onus of proof under section 91, it seems to me clear that, once it has been shown by the petitioner that a non-compliance with the provision of Chapter 111 has occurred, the onus lies on the respondent to prove both conditions mentioned in the curative section have been satisfied."*

In **Snyman v Schoeman and Another,** Van den Heever JA at 9 simply agreed, without comment –

> *"that once the irregularities are established the onus to prove the two conditions which support the saving clause lies upon the respondent."*

It was on the strength of these passages that the Court *a quo* and counsel for the respondent relied for the proposition that once the respondent had proved that there had been a *"a failure to comply or irregularity in compliance with a procedure or requirement prescribed under this Act"* the onus shifted to the appellants to satisfy the court that the failure or irregularity would not or could not have affected the result of the election. But whether couched as an affirmative or negative proposition, it is clear from the wording of section 91 of the South African Act, with which the court in **Putter** and **Snyman** was concerned, that once it was established that there was a mistake or non-compliance with the provisions of the chapter, the election was to be set aside unless the two specified conditions were fulfilled, namely (1) it appeared to the court that the election was conducted in accordance with the principles

laid down therein, and (2) the mistake or non-compliance did not affect the result of the election.

[20] While it may at first appear that section 130 (4) (a) of the Act and section 91 of the South African Act are similarly worded, this is not so. Couched as an affirmative proposition, section 130 (4) (a) directs the court to make an order in terms of section 130 (1) (b) if it is satisfied that the requirements specified in the former section are met. In other words, the court is empowered to make such an order only if it is satisfied *"that any failure to comply or irregularity in compliance with a procedure or requirement prescribed would or could have affected the results of the elections."* It is the satisfaction of the Court in the respects stated that is necessary for the exercise of the power. The party who seeks an order relying on section 130 (4) (a) by reason of such a failure or irregularity accordingly bears the *onus* of satisfying the court that the requirements of the section are met, namely that there was a failure or irregularity <u>and</u> that it would or could have affected the result of the election. If the court is not so satisfied, it cannot make an order. It follows that the Court *a quo*

misdirected itself in holding that the *onus* shifted to the respondent to establish that the failure or irregularity would not or could not have affected the result.

[21] In this Court Mr Teele submitted that Ntsibolane's failure to comply with the requirements of section 86 amounted not only to a failure to comply or an irregularity within the meaning of section 130 (4) (a) but also to *"misconduct"* within the meaning of section 130 (3) (a) of the Act. The term *"misconduct"* is not defined and appears only in section 130 (3). Mr Teele submitted that the term was to be construed as referring not only to prohibited conduct generally but also to contraventions under Chapter 11, Part 3, dealing with illegal practices, where the conduct in question did not amount to an illegal practice as defined, either because the necessary *mens rea* had not been established or because of non-compliance with the provision of section 132 (2) referred to in paragraph 14 above. Section 171 (in Chapter 11, Part 3) makes contravention of section 86 an offence.

[22] Counsel's reasoning strikes me as correct. However, what was said regarding the question of *onus* in relation to section 130 (4) (a) holds true for section 130 (3). As in the case of section 130 (4) (a), the *onus* is on the party seeking to rely on the section to have the election declared invalid to prove that the conduct in question would or could have affected the result. The same would be true if the conduct in question amounted to an illegal practice.

[23] At first blush the word *"would"* in the phrase *"would or could"* would seem superfluous. If all that was required to be established was that the result *"could"* have been affected there would seem to be no reason for the alternative requirement that it *"would"* have been affected. But the superfluity is avoided, I think, if *"would….have affected"* is construed as meaning *"did affect."* The inquiry would then be: did the conduct in question or the failure or irregularity affect the result, or if not, could it have affected the result? The inquiry whether the result *"could"* have been affected must in turn be understood as meaning *"a reasonable possibility that the result could have been affected."* The Legislature could never have intended that

any possibility would suffice, however remote or fanciful, nor did I understand counsel to contend the contrary.

[24] To return to the facts of the present case, it is clear that in each case in which an elector was assisted, the person assisting was someone chosen by the elector and in whom the elector placed his or her trust. There is nothing in the evidence to suggest that the person assisting the elector voted for a party other than the party for which the elector intended to vote. In the absence of such an indication – and the *onus* of proof was upon the respondent – the possibility that the person assisting voted for some other party, to say the least, is remote, speculative and not a reasonable possibility as contemplated in section 130 (3) (a) and 130 (4) (a). The possibility of this occurring in sufficient numbers to affect the result is even more remote.

[25] It follows that in my view the respondent failed to discharge the burden of satisfying the court that the misconduct or the failure to comply or irregularity in compliance with a procedure or prescribed requirement

could reasonably have affected the result. I should add that even if the *onus* had been upon the appellants I would have been inclined to hold that on the evidence the *onus* had been discharged. If follows that in my view the respondent was not entitled to an order in terms of section 130 (1) (b), whether on the basis of section 130 (3) or section 130 (4) (a), and the appeal on this account, too, must be upheld.

[26] The following order is made:

(1) The appeal is upheld with costs.

(2) The order of the Court *a quo* is set aside and the following order is substituted in its place:

“(a) The petition is dismissed with costs;

(b) In terms of section 131 (1) of the National Assembly Electoral Act 14 of 2011 the Registrar of the High Court is to cause a copy

of this order to be delivered to the Independent Electoral Commission and to the Speaker of the National Assembly."

D.G. SCOTT

ACTING PRESIDENT

I agree

C.T. HOWIE

JUSTICE OF APPEAL

I agree

I.G. FARLAM

JUSTICE OF APPEAL

I agree

W.G. THRING

JUSTICE OF APPEAL

I agree

N. MAJARA

JUSTICE OF APPEAL

For the Appellant: Q. Letsika

For the Respondent: M.E. Teele KC