

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 8/2014

In the matter between:

**RAMAHOANA MATLOSA
MPABALLENG MOTJETJEPA**

**1ST APPELLANT
2ND APPELLANT**

and

**PRINCIPAL SECRETARY – MINISTRY OF
GENDER AND YOUTH, SPORTS AND
RECREATION**

1ST RESPONDENT

**MINISTRY OF GENDER AND YOUTH
SPORTS AND RECREATION**

2ND RESPONDENT

NATIONAL YOUTH COUNCIL

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

**CORAM: HOWIE, JA
 THRING, JA
 LOUW, AJA**

HEARD : 11 APRIL 2014
DELIVERED : 17 APRIL 2014

SUMMARY

National Youth Council Act, 2008 – appellants were council members nominated in terms of s 5 (1) (g) as representatives of the youth league of the political party then commanding the majority in the National Assembly- whether on their changing political affiliations their membership of the council ceased by operation of law.

JUDGMENT

HOWIE JA:

[1] In terms of s 5 (1) (g) of the National Youth Council Act, 2008 (“the Act”) the appellants were nominated in February 2012 as members of the Council. They were nominated by the Lesotho Congress for Democracy (“LCD”) of which they were members. Not much later a faction of that party broke away and became the Democratic Congress (“DC”). The appellants terminated their membership of the LCD and joined the DC. The question is whether that ended their membership of the Council.

[2] Section 5 lays down that the Council consists of the following members (apart from the **ex officio** members) –

- (a) two representatives of youth, one male and one female, who shall be elected from each District Youth Council by the youth;
- (b) a representative of the youth who shall be nominated by the Lesotho Sports and Recreation Commission;
- (c) a representative of the religious youth associations;
- (d) a representative of the youth association of people living with a disability who shall be nominated by the Lesotho National Federation of Organisations of the Disabled;
- (e) a representative of students in institutions of higher learning;
- (f) a representative of the association of youth in business;

- (g) three representatives of Political Party Youth Leagues, two of whom shall be nominated by the party commanding majority in the National Assembly and one of whom shall be nominated by the opposition parties;
- (h) two persons who have expertise, knowledge and interest in youth development who shall be appointed by the Minister; and
- (i) a representative of youth organisations who shall be nominated by the youth organisations registered with the Council.

[3] With s 5(1) must be read the provisions of s 6 (1) and (4)

(1) A member, except an ex-officio member, shall hold office for a period of three years from the date of appointment, election or nomination.

(4) A member shall

(a) resign from office upon giving one month's notice writing to the Council

(b) be disqualified from being a member if –

(i) it is in the public interest or for misconduct;

(ii) he or she has been convicted of a criminal offence and sentenced to imprisonment without the option of a fine;

(iii) he or she is unable to perform the function of his office due to infirmity of body or mind; or

(iv) he or she has been absent from three consecutive meetings of the Council without the permission of the Chairperson

(5) If a member dies, resigns or otherwise vacates his or her office before his or her term in office expires, another person shall be elected, appointed or nominated to fill the vacancy and shall hold office only for the remaining term of office of the person who vacated such office.

[4] In a letter dated 18 March 2013 to each of the appellants from the first respondent, the Principal Secretary of the Ministry of Gender and Youth, Sport and Recreation, attention was drawn to the fact that their post-nomination membership of the DC had resulted in opposition parties now having their original nominee plus the appellants i.e three representatives on the Council

instead of just one as provided for in s 5 (1) (g). This was said not to be in accordance with the Act. “It is against this background” wrote the Principal Secretary “that you are informed of the removal of your name or participation in the (Council) as a member.”

[5] Citing the Principal Secretary, the Minister of Gender and Youth, Sports and Recreation, the Council and the Attorney-General, the appellants launched an application in the High Court for various forms of relief including orders that the Principal Secretary’s “decision to terminate (appellants’) membership” of the Council be reviewed and set aside and declared null and void. The application was only partly successful, hence this appeal.

[6] All the respondents opposed the application, the opposing affidavit being deposed to by the Principal Secretary. He denied having terminated the appellants’ Council membership. The relevant passage in his affidavit reads:

“I did not terminate their membership in the National Youth Council. All I did was to inform them of the removal of their names or participation in the National Youth Council as members. What this actually meant was that because they had lost the status of being representatives of the Political Party Youth Leagues nominated by the party or parties commanding majority in the National Assembly, their names as representatives of such a party were being removed and as such could not continue to participate in the National Youth Council as members. My understanding was that they had by operation of the law lost their representativity of the Political Party Youth Leagues nominated by the party or parties commanding majority in the National Assembly the moment they switched over to the DC.

[7] However, the respondents did not, despite the stance taken in that passage, seek a declarator, by way of a counter-application, that the appellants' council membership had ceased by operation of law.

[8] In his judgment in the court below Makara AJ said this:

[14] The Court having considered the imperatives of s 5 (1) (g) of the Act particularly the representative nature contemplated therein, finds that the applicants lost their membership to the Council by operation of Law. This is attributable to the political development which this court could take judicial notice that at present, the LCD doesn't have a majority in the National Assembly. It cannot, therefore, exercise the nomination powers entrusted upon a majority party therein under the section.

[9] In a penultimate paragraph the learned Judge said:

[21] The judgment must be clearly comprehended that it details that the membership of the applicants to the council, has been terminated by operation of the law. This has nothing to do with the letter addressed to them by the 1st Respondent and his subsequent actions against them. It has already been stated that he hadn't in that correspondence made reference to any provision in the law which authorized him to have executed it. The Court finds that the applicants were, given the contents of the letter, justified in construing it to tantamount to the termination of their membership.

[10] In that paragraph the word "details" may with every justification be read as "declares" for that is its import in the context of the judgment. The Judge went on nevertheless to grant the orders sought setting aside the Principal Secretary's decision to terminate the appellants' membership of the Council and declared it null and void. Orders aimed at certain interdictory relief were dismissed.

[11] Among certain (now immaterial) grounds of appeal filed by the appellant's legal representatives was one directed at the finding that, apart from the Principal Secretary's so-called decision, their council membership had nonetheless ceased. It was asserted that this finding was erroneous.

[12] Counsel for the appellants on appeal did not pursue that ground in his written argument but after its significance had been considered pursuant to questions by this Court he submitted that the court below ought to have granted a declaration that the appellant's membership of the Council had not been terminated by operation of law. Counsel for the respondents, on the other hand, argued that such relief was not asked for in the court **a quo** and could not be substituted on appeal.

[13] The application having been prompted by the Principal Secretary's letter, it is clear that the essence of the appellants' case was that their Council membership had not ceased. It is equally clear that the essence of the respondent's case was that such membership had indeed ceased but not as a result of the Principal Secretary's involvement; it had ceased, averred the respondents, because the appellants were no longer representatives of the party which had nominated them. In truth, the respondents advanced the case that the appellants' membership had ceased by operation of law and that was what the Judge held and, in effect, declared as a preface to the specific orders he made.

[14] As already pointed out, the relief sought **a quo** included a declaration that the decision purporting to end the appellants' Council membership was null and void. If their argument on appeal, to which I shall presently come, is correct, there is no reason why they should not have been granted, and should not now be granted, declaratory relief in respect of issues which were raised on the papers, which the respondents knew they had to meet and which they canvassed in the opposing affidavit and in argument before the court below. Accordingly there is no valid ground to withhold declaratory relief if the appellants, in substance, made out a case for it.

[15] In support of the contention that the appellants had ceased to be Council members by operation of law, respondents' counsel stressed the word "representatives", arguing that s 5 (1) (g) of the Act was intended to advance representative democracy; that the majority party in the National Assembly was entitled at all times to have two members on the Council; that the nominating party could always recall a nominee who was on the Council; and that if a new majority party came to power it could replace Council members nominated by the previous majority party with nominees of its own.

[16] The legislature's use of the words "representative" and "representatives" must be analysed in the relevant context.

[17] In terms of s 6 (1) membership of the Council commences on the date of election, nomination or appointment as the case may be. It then extends for three years. Nothing expressed or implied in the subsection conveys that it ceases upon withdrawal of the appointment or nomination or indeed as a result of any change of mind on the part of the entity which elects or nominates or the Minister.

[18] The only reasons for termination of membership are a member's death, resignation and vacation of office due to disqualification. The grounds for disqualification are four in number. None of them permits the elector, nominator or the appointing Minister to terminate membership by withdrawal of the nomination, election or appointment. Section 6 (5) provides for the filling of a vacancy where a member dies, resigns or "otherwise vacates" the office. Persons whose nominations are withdrawn do not vacate their office; on the respondents' argument they would be removed and replaced by new members. That is a process which is nowhere provided for in the Act.

[19] There is also no provision in the Act for membership to terminate if an entity which has elected or nominated a member ceases to exist.

[20] On a proper construction of s 5 (1), read with s 6, and leaving aside the case of a Ministerial appointment, it is election or nomination that establishes membership. Even in those paragraphs of the subsection which contain no reference to

election or nomination the person that becomes a member must be chosen in some manner by the group or association concerned, whether it be election, nomination or appointment. Council membership having been acquired, it endures until the expiry of three years or the happening of specific events which have nothing to do with the entity which nominates or elects. Remaining a member is in no way dependent on being anyone's representative. Representation effectively terminates on nomination or election. After that the person concerned, having become a member, does not represent, and is not answerable to, the entity as would be its agent or spokesperson. As a Council member, that person fulfils an independent function, not one bound by the dictates of the nominator or the elector. In effect, therefore, as a representative one is at most representative of, but not **the** representative of, the nominator or elector.

[21] The argument for the respondents would entail that nominated members of the Council could have their nominations withdrawn at any time in the course of a three year term even although that could disrupt the continuity of the Council's business and even though the persons concerned might be engaged upon fulfilling important roles in, say, Council projects or compiling Council reports. There is nothing in the Act to support the suggestion that the legislature intended that state of affairs to ensue.

[22] The submissions for the respondent can consequently not succeed. The appellants' membership could only be terminated

in one of the ways referred to in s 6. No such thing happened in this case. The Court below thus wrongly concluded that their membership had ended by operation of law. The appellants were entitled in the Court below to a declaratory order that their membership had not ceased by operation of law. That entitled them to be awarded costs in that Court. The appeal must therefore succeed.

[23] This Court's order is as follows-

1. The appeal succeeds, with costs.
2. The order of the Court below is set aside and substituted for it is the following:

“(1) It is declared that the applicants are members of the National Youth Council and that their membership has not been terminated by operation of law.

(2) The respondents are ordered to pay the costs of the application.”

C.T. HOWIE
JUSTICE OF APPEAL

I agree

W.G. THRING
JUSTICE OF APPEAL

I agree

W.J. LOUW
ACTING JUDGE OF APPEAL

For the Appellant : Adv. R. Setlojoane

For the Respondents : Adv. K.E. Mosito KC