

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 46/2016

In the matter between

TLALI KHASU

APPELLANT

And

**MOTSOAHAE THOMAS THABANE,
LEADER OF ALL BASOTHO CONVENTION
(ABC)**

1ST RESPONDENT

EXECUTIVE COMMITTEE OF ALL

BASOTHO CONVENTION

2ND RESPONDENT

ALL BASOTHO CONVENTION (ABC)

3RD RESPONDENT

CORAM:

LOUW, AJA

CLEAVER, AJA

MAJARA, CJ (*ex officio*)

HEARD:

20 OCTOBER, 2016

DELIVERED:

28 OCTOBER, 2016

SUMMARY

Disciplinary proceedings – Political Party -- Principle of procedural fairness is a variable concept which must be

applied in the context and circumstances of each case and encompasses a broad and flexible duty to act fairly – Dispute of fact in motion proceedings – Plascon-Evans rule.

JUDGMENT

LOUW AJA:

[1] On 18 September 2016, the appellant, who is the deputy leader of a political party, the All Basuto Convention (the ABC), was suspended for 90 days from taking part in the activities of the executive committee of the ABC.

[2] The appellant brought an urgent application in the High Court to set aside his suspension. The application came before **Monapathi, J** on 5 October 2016 who dismissed the application and made no order as to costs.

[3] The appellant lodged an appeal to this court against the dismissal of his application. His principal ground of appeal is that he was subjected to a procedurally unfair process which thwarted the principles of natural justice and culminated in his suspension.

[4] The appellant seeks leave from this court for the appeal to be set down during the current session (October 2016) of the Court of Appeal, mainly on the basis that by the next session (April 2017), his 90 day suspension would have run its course. The application for an early set down is opposed by the respondents. The parties were instructed to be ready to deal with the application and the merits of the appeal. At the hearing of the appeal both these issues were canvassed in argument.

[5] I give a brief summary of the background to the appellant's suspension. A dispute arose within the ABC on the issue as to who should take the position of the leader of the opposition in Parliament after the 2015 elections. The first respondent who is the leader of the ABC and the former prime minister, took the position that he should hold the office of leader of the opposition and in addition take the ex-prime minister's package. The appellant contended that he should be the leader of the opposition in parliament if the first respondent was to take the ex-prime minister's package. During the week of 12 September 2016, the appellant did an interview on a radio station in which he 'clarified' the position and 'straitened

the record' regarding the dispute concerning the leadership of the opposition. There is an irrelevant dispute on the papers as to how many interviews the appellant did.

[6] On 16 September 2016, the appellant received an SMS message from the secretary general of the ABC calling upon him to attend a meeting of the executive committee at an hotel in Ficksburg in South Africa on 18 September 2018 at 10 am. The appellant was not told what the purpose of the meeting was.

[7] The appellant attended the meeting where he was told by the first respondent not to participate in the meeting because the matter to be discussed concerned him. The appellant was asked to wait outside while the meeting took place.

[8] A member of the executive committee, Mathato Phafoli was present and she deposed to an affidavit on behalf of the respondents. She says that the first respondent addressed the executive committee and stated that the conduct of the appellant in discussing executive committee matters on the radio had forced him to suspend

the appellant for three months pending further investigation and the outcome of a disciplinary hearing. The first respondent had prepared a letter suspending the appellant and requested that his decision to suspend the appellant be confirmed by the executive committee. The members of the committee debated the question of the appellant's suspension and then decided to call the appellant into the meeting, to hand the letter to him and to enquire what his response to contents of the letter was.

[9] The letter is under the name of the first respondent and is addressed to the appellant. It is dated the day before the meeting took place. It reads:

'RE: YOUR SUSPENSION IN THE NATIONAL EXECUTIVE COMMITTEE AND ITS FUNCTIONS

As the leader of Kobo- Tata ea Basotho (ABC), I have taken a decision to suspend you for ninety days (90) in the National Executive Committee and its functions on the immediate receipt of this letter. The decision I have taken following latest developments where you seem to discuss party issues on the radio but most importantly those of the National Executive Committee which matters have caused confusion and hatred among the members of Kobo – Tata.

This I am doing in accordance with the ABC/KOBO-TATA constitution, section B.5(F).

This is intended to assist you in your work as the Deputy Leader to restore lasting confidence in the members and all committees of the party.

I beg for your cooperation.'

[10] The appellant says that he was called into the meeting and was handed the letter whereupon he was asked to comment. He then commented as follows:

'The members of the Democratic Congress are at loggerheads. The majority of Basotho know that we have this meeting we are more solid than ever and we can manage our affairs and we are ready to take government from those people who are fighting each other'.

He then continued to read the letter and asked whether he *'could go now that I was not given a hearing prior to the letter being written on 17 September 2016. The leader said I could go and I left.'*

[11] Mathato Phafoli says that the appellant was handed the letter and was requested to read it. After he had read the letter, the first respondent asked the appellant to comment on the letter. Mathato Phafoli agrees that the appellant responded with the statement set out above. She says, however, that he then went further and said that he accepted the decision to suspend him. The executive committee then confirmed the suspension in a decision reached by consensus. It was then explained to the

appellant that he was not being expelled from the party but was suspended for proper administration and further investigation into the matter and that the suspension required him not to take part in executive committee meetings and activities of the executive committee. After being given the explanation, the appellant left.

[12] There is a dispute of fact in regard to what occurred at the meeting of the executive committee and in particular as to what was said by the appellant when he was handed the letter of suspension. The rule in *Plascon-Evans Paints v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 643 – 645, which has consistently been applied in motion proceedings, applies and Mathato Phapholi's version which is not palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting her version merely on the papers, must prevail. It is appropriate in this regard to repeat the dictum of Harms DP in the judgement in the South African Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA) 277 at 290 D-G:

[26] *Motion proceedings, unless concerned with interim proceedings, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are*

not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's . . . affidavits, which have been admitted by the respondent . . ., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or creditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[13] The appellant was suspended in terms of paragraph B. 5 (F) of the Constitution of the ABC, which reads:

'The Leader of the ABC/KOBO-TATA will be vested with power to suspend any member of the executive committee whose function or behavior is unsatisfactory.

Such suspension should wait for either approval or disapproval by the executive committee.'

[14] It is well recognised by this court that the principle of procedural fairness is a variable concept which must be applied in the context and circumstances of each case and encompasses a broad and flexible duty to act fairly. (*Matebesi v Director of Immigration and Others* LAC (1995-1999) 619 at 623 C-G; *The President of the Court of Appeal v The Prime Minister and four Others*, Unreported judgment of this court delivered on 24 March 2014, at para [20])

[15] The evidence of the respondent shows that before the confirmation of the suspension by the executive committee acting in terms of Rule B.5(F), the appellant was asked to comment on the decision by the first respondent to suspend him. The appellant was then before the committee and if he had wished to say to the committee why he should not be suspended, he could have done so. Instead he made a political statement and then said that he accepted his suspension. It is true that the procedure adopted before the meeting was rather robust in the sense that he was not formally told what the meeting was about and that immediately before the meeting started, he was excluded from the meeting and only informed that the meeting concerned him and that he should be available to be called into the meeting later. He was therefore not present when the case against him was debated by the committee and he was not present to present his side of the facts. It is important to note that the committee had not taken any decision to confirm the suspension before the appellant was called in and upon been given the letter to read, being asked to respond thereto. It was only after he had responded and declared that he accepted his suspension, that the committee confirmed the suspension.

[16] The appellant has not said that he required more time to respond or that he was so taken aback when given the letter to read that he was not in a position to give a rational response. The context of this suspension is that it took place within a political party and amongst politicians who are used to stand up for their rights. As deputy leader of the party, the appellant no doubt knew that the final decision lay with the executive committee. His decision not to take the opportunity to present his case to the committee and his statement to the committee that he accepted his suspension, is in my view dispositive of the matter.

[17] In the circumstances the matter should be enrolled for hearing and the appeal should be dismissed with costs.

[18] The following order is made:

1. The appellant is given leave to enroll this appeal for hearing in the October 2016 session of the Lesotho Appeal Court;
2. The appeal is dismissed with costs.

W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree:

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree:

N. MAJARA
CHIEF JUSTICE

Counsel for the Appellant:

Adv L A Molati

Counsel for the Respondents:

Adv R Thoahlane

Adv M J Motsoari