# IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU**

**C of A (CIV) NO.49/2015**

In the matter between

**BASOTHO DEMOCRATIC NATIONAL PARTY** **APPELLANT**

and

**THE INDEPENDENT ELECTORAL COMMISSION AND OTHERS** **RESPONDENTS**

**CORAM** : FARLAM, AP
LOUW, AJA
CLEAVER, AJA
DR MUSONDA, AJA
CHINHENGO, AJA

**HEARD** : 11 APRIL 2016

**DELIVERED** : 29 APRIL 2016

## ***SUMMARY***

*Elections – section 126 (6) of the National Assembly Act 14 of 2011 is not peremptory – oral evidence not required at the trial of an election petition where facts not in dispute – Quota of votes required under section 3(1) (a) of Schedule 3 of the Act.*

## JUDGMENT

**FARLAM, AP**

Introduction

[1] This is an appeal against the dismissal by the High Court (Majara CJ, Monapathi and Peete JJ), in terms of section 69 of the Constitution of an election petition.

[2] The petition which was dismissed was brought by the appellant, the Basotho Democratic National Party, against a number of respondents, including the Independent Electoral Commission (first respondent) and the Attorney General (90th respondent).

[3] The appellant sought orders, inter alia, (1) declaring irregular, null and void for its omission of the appellant the legal notice published in Government Gazette no 15 (vol 60) of 5 March 2015, (2) directing the first respondent to publish a fresh notice relating to the proportional registration seats which included the appellant (clearly as a party to which a proportional registration seat was allocated); and (3) directing the 90th respondent *'to draw up a bill to be debated and possibly passed by Parliament that clause 1 (a) of schedule 3 of [the National Assembly Electoral Act] 14 of 2011 be declared as being not in compliance with section 104 of the …Act'.* (In what follows I shall refer to Act 14 of 2011 as 'the Act').

[4] The petition also contained a prayer for costs to be paid by the first respondent and by such other respondents which or who opposed the application, together with a prayer for further and/or alternative relief.

[5] In addition to dismissing the petition on what may be called the merits the judges in the High Court upheld an objection raised on behalf of the 12th respondent, the Democratic Congress, that the application was time-

barred under section 126 of the Act because, though it had been brought on 1 April 2015, it had 'only properly [been] served on 18 May 2015 because the first service was improper.'

[6] The prayer that a bill be drafted by the 90th respondent for debate in Parliament was not persisted in on appeal and it is accordingly unnecessary for me to say anything more about it.

Relevant Statutory Provisions.

[7] Before the facts of the case and the grounds on which the appellant has sought to attack the judgment in the court a quo are summarised it will be convenient to set out the relevant provisions of the Constitution, the Act and the Court of Disputed Returns (National Assembly Election Petition) Rules, 1993.

[8] Section 57 of the Constitution, as amended by section 3 of the Fourth Amendment to the Constitution, Act 4 of 2001, reads as follows:

*'(1) The members of the National Assembly shall be elected in terms of a mixed member proportional electoral system that-*

*(a) is prescribed by legislation;*

*(b) is based on a national common voters roll; and*

*(c) provides for the constitution of the National Assembly as follows-*

*(i) eighty members to be elected in respect of each of the constituencies contemplated by section 67 (1); and*

*(ii) forty members to be elected to forty seats in accordance with the principle of proportional representation applied in respect of the National Assembly as a whole.'*

[9] The following sections of the Act and Schedule 3 thereof are also relevant, viz the definition of 'political party' in section 2, sections 47 (1), 55, 104 (1) and (3), 105 (1), section 126 (6), and section 127 (2) and sections 1, 2 and 3 of Schedule 3.

[10] Section 2, the interpretation section, contains the following:

*'(1) In this Act, unless the context otherwise requires –*

*…*

*"political party" means an association that is registered under the Societies Act 1966 whose primary purpose is to contest elections for election of members of the National Assembly but for purposes of proportional representation elections includes an independent candidate.'*

[11] Section 47 (1), which deals with the procedure for submitting party lists of candidate for elections under proportional representation, reads as follows:

*'(1) A political party intending to contest proportional representation elections shall nominate and submit a list of nominated candidates to the Director in the prescribed manner before the date stated in the elections time table for close of nominations.'*

[12] Section 55, which deals with conversion of votes, read as follows,

*'During general elections, constituency votes shall be counted both for the candidate and be converted into party votes.'*

[13] Section 104 as far as is material, contains the following:

*'(1) After all constituency votes have been declared in accordance with section 102, the Commission shall convert the constituency candidates votes into national political party votes in terms of section 55.*

*....*

*(3) The 40 seats contemplated in section 57 (1) (c) (ii) of the Constitution as amended shall be allocated between the political parties in accordance with the formula contained in Schedule 3.'*

[14] Section 105 (1) reads as follows:

*'(1) The seats allocated in terms of section 104 to each party shall be filled by the candidates on the party list, in order of preference.'*

[15] Section 126 (6) is in the following terms:

*'(6) Within 30 days of the contested result being announced in terms of sections 102 or 106 (1) or declared under section 105, the petitioner shall-*

*(a) lodge an election petition with the High Court; and*

*(b) serve it on -*

*(i) any political party and any of its candidates whose seat or membership of the National Assembly is being challenged; or*
*(ii) any independent candidate whose seat or membership is being challenged."*

[16] Section 127, which deals with the procedures for an election petition, contains the following:

> *'(2) In determining an election petition, the High Court shall be guided by the substantial merits of the case without regard to legal form or technicalities and shall not be bound by the rules of evidence.'*

[17] The relevant sections of Schedule 3 read as follows:

> *'(1) The Commission shall determine the total votes cast for-*
>
> *(a) each political party which participated in the proportional representation elections according to section 105 and add together all the total party votes which shall be referred to in this Schedule as the "total votes",*
> *(b) each political party by adding the total votes from the constituencies which shall be referred to in this Schedule as the "total party votes";*
>
> *…*
>
> *(2) (1) The Commission shall then determine the number of votes required for the allocation of seats by-*

*(a) dividing the total votes by 120 or any number of constituencies that successfully contested elections plus forty proportional representation seats; and*

*(b) rounding off to the next number, any decimal fraction, including a whole number.*

*(2) The resulting figure shall be figured to in this Schedule as the "quota of votes".*

*(3) (1) The Commission shall determine the provisional total number of seats in the National Assembly to which each political party is entitled on the basis of its share of the total vote and, this allocation shall be referred to in this Schedule as the "provisional allocation of the total number of seats" and, it shall do so in the following manner:*

*(a) it shall divide the "total party votes" by the "quota of votes", the resulting number shall be referred to as the "party's quota of votes",*

*(b) it shall allocate seats to each political party, equal to the party's quota of votes without taking any decimal fraction into account;*

*(c) it shall then add all the seats allocated under paragraph (b) and deduct that total from 120 seats in the National Assembly or any number of constituencies that successfully contested elections plus forty proportional representation seats;*

*(d) if there are fewer provisionally allocated seats than the total number of seats in the National Assembly, the remaining seats shall be allocated in the following manner:*

*(i) the first remaining seat shall be allocated to a political party with the highest decimal fraction arising from the calculation done in terms of paragraph (a);*

*(ii) the next remaining seat shall be allocated to the political party with the next highest decimal fraction; and*

*(iii) each further remaining seat shall be allocated to the political party with the next highest decimal fraction.*

*(2) The Commission shall then determine each party's provisional allocation of proportional representation seats and, shall do so by deducting the number of seats won by the party in the constituency elections from the total seats allocated in terms of section 3 (1) (d) and, the resulting number of seats shall be referred to as "party's provisional allocation of compensatory seats" under this Schedule.*

*(a) The Commission shall then add the total number of compensatory seats provisionally allocated in terms of subsection (2) and if the resulting total is equal to the number of seats set aside for proportional representation, the provisional allocation shall be the final allocation.*

*(b) If the total referred to in paragraph (a) add[Sc. amounts] to more than the total number of seats set aside for proportional representation, the Commission shall determine the final allocation of seats in the following manner:*

*(i) if a political party has won equal or more constituency seats than its provisional allocation, then the constituency seats shall be its final allocation;*

*(ii) the Commission shall exclude the political party from further calculation of compensatory seats, and*

*(iii) the Commission shall then allocate to the remaining political parties, number of seats which are available for allocation by following the same procedure contained in section 2 and 3(1).'*

[18] Rules 8 (c) of the Court of Disputed Returns Rules reads as follows:

*'8 (c )If he [a respondent] intends to raise any question of law only, without any answering affidavit, he shall within the time stated in the preceding paragraph, file with the Registrar and serve on the petitioner, or his attorney, a notice of his intention to do so, setting forth such question.'*

<u>Facts that were common cause or not properly disputed</u>

[19] 1. The appellant was one of the parties registered with the first respondent that contested the 2015 general election in respect of both constituency and proportional representation seats.

2. None of the candidates on its proportional representation list was allocated a seat.

3. In calculating the *'quota of votes'* under section 2 of schedule 3 first respondent did not take into account the 5651 votes won by independent candidates who did not participate in the proportional representation election.

4. If the 5651 votes had been taken into account the appellant would, so it averred, have been allocated one seat. The first respondent merely denied this averment without elaboration.

Procedure followed at the trial of petition.

[20] No evidence was led at the trial of the petition, as the case was argued and disposed of on the basis of the facts contained in the appellant's petition. The first respondent filed an affidavit in which it was submitted that it had applied the correct formula and it further denied, without elaboration, the allegation that the application of what the appellant contended was the correct formula would have led to the allocation of a seat to it. The other respondents who participated in the trial, viz the second respondent, the Speaker of Parliament, the 89th respondent, the Minister of Law, Constitutional and Parliamentary Affairs, and 90th respondent, the Attorney-General, and the 12th respondent, the Democratic Congress did not file affidavits. The second, 89th and 90th respondents filed a Notice to Raise Points of Law in which, apart from dealing with the third order prayed for (which has now fallen away), they contended that 'only those votes obtained by the constituency candidates standing under the umbrella of a political party' and those cast for 'independent candidates that nominated and submitted lists of nominated candidates for election under proportional representation (party lists)' could be

converted into party votes for the purpose of the allocation of proportional representation seats. They also contended in their notice that no cause of action had been disclosed by the appellant because it was not alleged in the founding affidavit that the votes excluded were cast in favour of independent candidates who had submitted party lists in order that votes cast for them could be converted to 'party votes'.

[21] The 12th respondent relied for its opposition to the application on the time bar point to which I have referred above.

Appellant's submissions

[22] Counsel who appeared on behalf of the appellant contended that the court a quo had erred in not receiving viva voce evidence in support of the petition. He referred to the decision given by the Court of Disputed Returns in **Mathaba and Others v Lehema and Others 1993-1994 LLR-LB** 402 at 406-408; in particular he quoted what **Cullinan CJ,** with whom Molai and Kheola JJ agreed, said at 406:

> *'…(A)n election petition is not a proceeding on motion, which is invariably determined on the basis of the affidavits before court. An election petition is tried on viva voce evidence.'*

Counsel for the appellant also submitted that the court a quo was incorrect in upholding the time bar point. He submitted that the petition had been timeously served on all the respondents. In the alternative he contended that the provisions of section 126 (6) were not peremptory, despite the use of the word 'shall', and that if he had been permitted to lead oral evidence on the point in the court a quo he would have been able to establish that none of the respondents had been prejudiced, with the result that, if the petition had been served out of time, condonation of such late service would have been granted

Issues for Decision.

[24] Three issues arise for decision in this appeal, viz;

(1) Whether the court a quo was correct in holding that the provisions of section 126 (6) are peremptory;

(2) Whether the court a quo erred in not requiring oral evidence to be led on the merits at the trial of the election petition and, if section 126 (6) was not peremptory, whether it should have allowed the appellant to lead evidence to show that none of the respondents suffered any prejudice and that condonation of late service of the petition could and on the facts should have been granted; and

(3) Whether the first respondent correctly calculated the 'quota of votes' required under section 3 (1) (a) of Schedule 3 for the ascertainment of each party's quota of votes so that the proportional representation seats could be correctly allocated.

Discussion of Issue (1)

[25] Issue (1):Are the provisions of section 126 (6) peremptory?

In its discussion of this point the court a quo emphasised the use of the word 'shall' in section 126 (6). It found (in para [45] of its judgment) that the petition was 'only properly served on the respondents on the 18th May 2015 because the first service was improper.'

[26] It continued:

> *'[46] In this connection it is worthy to mention that demonstrably and it was conceded that service was completed 59 days after publication of the list of elected candidates when the first party was served which effectively made it to fall beyond the mandatory 30 days period. This was fatal to the petition because the relevant provision is couched in peremptory terms and thus must be strictly complied with.*
>
> *[47] Other reasons for this are aptly stated in amongst others, the case of* ***Basotho National Party (BNP) and Another v Director of Elections and 2 Others.*** *Indeed the rationale is simple. One only has to imagine a scenario where for instance after Parliament was opened, Senators appointed, seats allocated in the National Assembly, the Prime Minister elected, committees selected, programmes set and budgets estimated, a petition such as the present one was to be lodged after all that and were to succeed; that would in our view be a recipe for disaster. It would undoubtedly dislocate all Parliamentary operations. Hence the need*

*and wisdom not to condone non-compliance with section 126 (6) (a) of the Act.'*

[26] I do not agree that the use of the word 'shall' and the possible prejudice that may result if an election petition such as the present is served late are sufficient to justify the conclusion that the section is peremptory. In **Volschenk v Volschenk 1946 TPD 486 (at 470)** Malan J said

*'I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity.*

*An important consideration should be whether by failure to adhere to a strict compliance with the time provision substantial prejudice would result to persons or classes of persons intended to be protected and if prejudice may result whether it is irremediable or whether it may be cured, by allowing an extension of time.'*

[27] An instructive case in this regard is **Phillips v Direkteur vir Sensus 1959 (3) SA 370 (AD)**, in which it was decided that the time limit of thirty days in which an objection to a classification under the

South African Population Registration Act 30 of 1950 could be made was not peremptory and could be extended. At 375 D-F Van Blerk JA, with whom Steyn CJ, De Beer and A B Beyers JJA and Holmes AJA concurred, said that the thirty day provision was clearly inserted to prevent a delay in the compilation of a correct register, but that it was obvious that a time provision which could be extended will not be automatically extended, but only where adequate reason for condonation is advanced. Accordingly extension will not be in conflict with an intention that the speeding up of the administrative working of the act must not be hampered.

[28] See also **Suidwes-Afrikaanse Munisipale Personeel-Vereniging v Minister of Labour and Another 1978 (1) SA 1027 (SWA)** at 1038B, where Hart AJP said:

> *'the principle... has now been firmly established that, in all cases of time limitations, whether statutory or in terms of Rules of Court, the Supreme Court has an inherent right to grant condonation where the principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such*

*time limits have been explained to the satisfaction of the court.'*

[29] In my view the possible prejudice referred to by the court a quo in the passage quoted above from its judgment would not arise because in such a case the court would not condone the failure by the petitioner to serve the petition in the prescribed time.

[30] I do not think that the Legislature intended that in cases where no substantial prejudice is suffered (something which the petitioner concerned would have to establish) the time provision should be strictly enforced with the result that the petitioner wold be deprived of his right to approach the court: cf the Phillips case at 374 H to 375 B.

Discussion of Issue 2

[31] Issue (2): Did the court a quo err in not requiring oral evidence to be led on the merits or in support of an application for condonation of the failure to comply with the time provision?

It is true that **Cullinan CJ** said in **Mathaba and Others v Lehema and Others 1993-1994 LLR-B 402** (C of DR) at 406 that 'an election petition is tried on viva voce evidence' but that was said in a case where serious allegations of electoral irregularities were made in electoral petitions, which were verified on affidavit by the petitioners, but not admitted by the respondents. The petitioners having declined to give oral evidence, the court refused to accept the verifying affidavits as evidence and heard oral evidence from the respondents and their witnesses. The present case is distinguishable. Here the allegations made by the petitioner are not challenged and, as I have said, the opposition to the petition is based in the main on legal contentions advanced in the affidavit filed on behalf of the first respondent and the Notice to Raise Points of Law filed on behalf of the second, 89th and 90th respondents in terms of rule 8(10)(c). It is also to be remembered that oral evidence is not always led in a trial in the High Court, as the rules relating to trials provide for cases to be dealt with by way of the special case procedure (see rule 32).

[32] In my view the appellant's contention that oral evidence had to be led on the merits is answered by section 127 (2) of the Act, which, it will be remembered, provides

that the Court of Disputed Returns must be 'guided by the substantial merits of the case without regard to legal form or technicalities.'

[33] No point would be served (but a lot of money and time would be wasted) by requiring oral evidence to establish facts which were not in dispute.

[34] I am accordingly of the view that the court a quo did not err in not requiring or permitting oral evidence to be led on the merits.

[35] The position is different, however, as far as the circumstances in which the petition was served out of time are concerned. There the facts were not common cause and the appellant should have been allowed to lead evidence to lay a basis for an argument that the late service of the petition should be condoned.

Discussion of Issue 3

[36] Issue (3): Did the first respondent correctly calculate the 'quota of votes' required under section 3 (1)

(a) of Schedule 3 for the ascertainment of each party's quota of votes so that the proportional representation seats could be correctly allocated?

Counsel for the appellant contended on this part of the case that the formula used by the first respondent in making the seat allocation was not correct because the first respondent, as counsel put it, 'without authorisation by law decided to exclude independent candidates' votes'. This he submitted, was 'unlawful and went against the spirit and letter of the enabling act'.

[37] He also criticised what he called the 'further misconception' that for the purposes of the computation of the national political vote 'independent candidates ought to have submitted a proportional representative candidate in their respective constituencies and if they [did] not do so then the votes cast in their constituencies would be excluded.' He said that an independent candidate 'goes it alone' in one constituency. 'How then,' he asked, 'in one constituency can he appoint forty members in that constituency?'

[38] He stated that Schedule 3 was a replica of schedule 5 of the act which the present act repealed, viz. The National Assembly Elections Act 16 of 1992. There was a difference between the two acts because, unlike the 2011 act, in terms of which each voter was issued with one ballot paper, the 1992 act provided for two ballot papers to be issued to each voter, one for the constituency vote and the other for the proportional representation vote. The repetition of the schedule from the 1992 act had, he submitted, led to a distortion of what he called the substantive provisions of the present act. The grammatical meaning of the schedule resulted, he contended, is an absurd interpretation with the consequence that the court should adopt another interpretation, which would as he put it 'make sense'.

[39] I do not agree that the first respondent used an incorrect formula in allocating the proportional representation seats. It is important to bear in mind that, as appears from the definition of 'political party' in section 2, that expression 'for the purpose of proportional representation elections includes an independent candidate.' This means that section 47 (1) has in the light

of the definition section, to be expanded to provide as follows:

> *'A political party [and an independent candidate] intending to contest proportional representation elections shall nominate and submit a list of nominated candidates ….'*

This does not, of course, mean that an independent candidate is obliged to contest proportional representation elections. As was correctly pointed out in **Tsepe v Director of Elections**, **CIV/APN/228/12**, High Court 9 May 2012, para [29], 'the word "intending" [in section 47 (1)] ordinarily implies option, choice or discretion.'

[40] It is clear, in my view, that the conversion of constituency votes into party votes under section 55 can only occur in respect of constituency votes which have been cast for parties or independent candidates (who are equated for this purpose with parties) which or who have chosen in terms of section 47 (1) to participate in the proportional representation elections. When the 40 proportional representation seats are to be allocated under section 104 (3) it is already clear from the provisions of the Act that votes cast for parties or independent

candidates which or who have not so chosen cannot be taken into account.

[41] Section 1 of Schedule 3, on its ordinary or grammatical wording, is not in conflict with this. Read in the light of the definition of 'political party' in section 2, this section, like section 47 (1), has to be expanded to provide as follows:

> *'The Commission shall determine the total votes cast for –*
>
> *(a) each political part [and independent candidate] which [or who] participated in the proportional representation elections according to section 105 and add together all the total party votes which shall be referred to in this schedule as the "total votes",*
>
> *(b) each political party [and independent candidate] by adding the total votes from the constituencies which shall be referred to in this schedule as the "total party votes".'*

[42] It is clear from the wording of the subsection and in particular the use of quotation marks before and after the expression 'total votes' that that expression is used not in its normal meaning, but as defined in the subsection.

[43] The number of votes required for the allocation of seats (the 'quota of votes') is determined by dividing the 'total votes' as defined (i.e., the votes cast for parties and independent candidates participating in the proportional representation election) by 120 (or the number of constituencies successfully contested plus forty). It follows that the 'exclusion' (of which the appellant's counsel complains) of votes cast for parties or independents not participating in the proportional representation elections is authorised in the sections of the act quoted. There is thus no conflict between them and the schedule. It follows that the key argument advanced on behalf of the appellant must be rejected.

[44] The further argument that this interpretation leads to absurd results so that the court must depart from the ordinary meaning of the words used can also not be accepted. The leading case on absurdity following on giving the words of a statute their ordinary meaning, so that a departure from the ordinary effect of the words is permissible, is **Venter v R 1907 TS 910**, where Innes CJ (at 914-5) spoke of *'absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the*

*legislature, as shown by the context or by such other considerations as the court is justified in taking into account'*.

I do not think that that test can be met in this case. I am accordingly of the view that the third issue set out above must be decided in favour of the first respondent.

[45] In the circumstances the appeal must fail. This being a constitutional matter, I am satisfied that no order for costs should be made:

The following order is made:

The appeal is dismissed.

_____

**I G FARLAM**
**ACTING PRESIDENT**

I agree:

_____
**W J LOUW**
**ACTING JUSTICE OF APPEAL**

I agree:

_____
**R B CLEAVER**
**ACTING JUSTICE OF APPEAL**

_____
**DR P MUSONDA**
**ACTING JUSTICE OF APPEAL**

I agree:

_____
**M H CHINHENGO**
**ACTING JUSTICE OF APPEAL**

| | | |
|---|---|---|
| **For Appellant** | : | Adv M Ntlhoki KC |
| **For Respondents** | : | Adv K.K. Mohau KC |
| **For Twelfth Respondent** | : | Adv S. Phafane KC |