

IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

C OF A (CIV) 7/2018

In the matter between:

TS'OSANE MPHUTLANE

APPELLANT

And

**TOWN CLERK – MASERU CITY
COUNCIL (MCC)**

1ST RESPONDENT

**PRINCIPAL SECRETARY MINISTRY
OF LOCAL GOVERNMENT**

2ND RESPONDENT

MATAELO MATSOSO

3RD RESPONDENT

MABOHLOKOA MAJARA

4TH RESPONDENT

HLATHE MAJARA

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

CORAM: MAHASE A.J.A
CHINHENGO A.J.A
MTSHIYA A.J.A

HEARD : 13 May 2019

DELIVERED : 31 May 2019

SUMMARY

The appellant is challenging the lawfulness of the municipal election of the 22 September 2017. The 1st respondent held two elections on the 11th September 2017 and the 22nd September 2017. Appellant having been successful in the first round of the elections of the 11 September but unsuccessful in the second round of the 22 September 2017.

Appellant seeking a declaratory order validating the elections of the 11 September, but asking Court to declare as a nullity the elections held on the 22nd September 2017 – This he sought only after he had lost the second elections of the 22 September.

JUDGMENT

MAHASE A.C.J

- [1] The subject matter herein is the elections held in terms of S. 4 (c) of the Local Government Law of 1997(4) (c).
- [2] The appellant is one of the gazetted chiefs whose area of jurisdiction is Ha Leqele in the district of Maseru.

- [3] The 3rd, 4th and 5th respondents are also all gazetted chiefs whose jurisdictional areas are Qoaling, Ha Mabote and Khubetsoana respectively. The appellant, 3rd, 4th and 5th respondents and all other gazetted chiefs who fall under the administrative area of the first respondent were served with letters inviting them to a meeting whose purpose was to elect three representatives of the chiefs in the Maseru City Council (MCC)
- [4] The 1st and 2nd respondents are the Town Clerk of the Maseru City Council (MCC) and the Principal Secretary of the Local Government. The 1st respondent's office is directly answerable to that of the 2nd respondent. In terms of the law, the MCC is an authority responsible for the administration of Maseru City.
- [5] In order to carry out its mandate, among others, there are elected into this council three gazetted chiefs to represent the chiefs in the municipal council of Maseru.
- [6] When the time was ripe for the elections of a council of chiefs, the first respondents issued letters inviting chiefs to attend a meeting in the MCC Boardroom on 11 September 2017 for that purpose. The letters are dated the 7 September 2017.

- [7] The names of the chiefs who had been invited to that meeting are annexed to the founding affidavit, as well as the names of those chiefs who actually attended that meeting. All in all, seventeen chiefs attended including the appellant.
- [8] Voting duly commenced at the stipulated place and time. The voting was presided over by Mr. Mokuoane who is described only as an officer from the Ministry of Local Government and Chieftainship.
- [9] Ultimately, the 4th respondent, the appellant and one chief Thoriso Matsoso were announced by Mr. Mokuoane as the winners. However, after that announcement an objection was raised, directed at the inclusion of chief Thoriso Matsoso in the election process. The objection being that this chief did not qualify to be voted into the Municipal Council because he is not a gazetted chief.
- [10] Mr. Mokuoane then deferred the ruling on the objection in respect of chief Thoriso Matsoso to an undisclosed date and did so unilaterally. He thus made no specific finding on this objection immediately after the meeting.

[11] I pause to note that, although there is no record of proceedings of that day annexed to the founding affidavit, this issue is not being denied by any of the parties herein.

[12] Later on the chiefs were once more invited to the next meeting wherein they learned that the purpose of the meeting on 22 September 2017 was to again elect three chiefs to represent the chiefs in the Maseru Municipal Council.

[13] The elections were now attended by fourteen chiefs including the appellant and not by seventeen chiefs as previously. (But only twelve chiefs were registered as having been in attendance).

[14] Ultimately, when the results of the elections of that day were announced. The appellant lost the elections. The winners were the 3rd up to the 5th respondents. The second letter of invitation dated the 19 September 2017 to chiefs to attend this meeting clearly shows that the purpose of the meeting is “continuation of election of representatives of the three chiefs in the Local Government (Municipal Council) on Monday the 22 September 2017 at the hours of 09:00 a.m.”.

[15] In brief, the invited chiefs all attended that meeting of the 22 September 2017 being well aware of the agenda. The appellant attended and participated in the meeting of 22 September 2017 without having objected to repeat or reconvening of the meeting of the 11 September 2017, called by the 1st and 2nd respondents.

[16] He only raised an objection when it became clear to him at the announcement of the results that he had actually lost the elections. It is not his case that his letter inviting him to attend the meeting of the 22 September 2017 was differently worded from those which had been addressed to the other chiefs.

[17] The appellant's pleas to the Minister of Local Government to intervene in this issue yielded no results; hence he approached the High Court for relief.

[18] The appellant's reliefs are contained in his notice of motion and could in brief be summarized as being the setting aside of the election results of the 22 September 2017:

- the stay of the swearing in of the 3rd up to the 5th respondents into the Municipal Council pending finalization of this application;

- an interdict against the above said respondents from exercising or assuming the functions of the offices of the said council pending finalization of this matter;
- declaration of the re-election of chiefs by the 1st and 2nd respondents as being null and void and of no legal force on effect;
- a declaration that the elections held on the 11 September 2017 are valid;
- that the 1st and 2nd respondents be directed to hold fresh elections in respect of only one seat which remained vacant by virtue of the disqualification of the candidates after the 11 September 2017 elections.

[19] Of course, he also sought costs against the respondents. In prayer 2 – he sought relief that prayers 1, 2(a) and (b) operate with immediate effect as interim orders.

[20] In the Court *a quo*, my Brother Monapathi J dismissed the appellant's application, hence this appeal to this Court.

[21] In a nutshell, the alleged disqualification from the elections of chief Thoriso Matsoso was a direct result of the cancellation or annulment of the election results of the 11 September 2017.

[22] The issue that the said chief Thoriso Matsoso could not participate in the election of Municipal Council was not contested by the other respondents, or by the appellant himself.

[23] It immediately became clear on the 11 September 2017 after the election results were announced that chief Thoriso Matsoso did not qualify to have participated in those elections.

[24] The basis for the disqualification of a candidate from being elected in the Municipal Council elections is found in the provisions of section 29 (1) (c) of the Local Government (Amendment) Act 2004 (No. 5 of 2004) which reads as follows:

29(1) *“Objections may be made to the nomination paper on all or any of the following grounds but on no other grounds.....*

(c) that it is apparent from the contents of the nomination paper that he candidate is not capable of being elected as a member of the council”.

[25] Now in terms of section 26 of the above Act: “*every* person who is a gazetted chief, and who is a registered voter is eligible for elections as a member of a Council and may be nominated and elected as a candidate to represent the Local Authority area in which such Council is constituted under section 3 of the Local Government Act 1996”. (This should read 1997 – it is found at page 64).

[26] In this application, the objection with regards to Thoriso Matsoso centred around the fact that he has actively participated and voted in the elections held on the 11th September 2017 whilst in law he did not qualify to do so because he is an ungazetted chief, thereby rendering the elections process flawed.

[27] This objection was raised by the 3rd respondent under whom the said Thoriso Matsoso is a headman. The fact that he is a headman under the 5th respondent, and that he is not a gazetted chief, has not been denied.

[28] In fact, nowhere in his papers does the applicant disclose this crucial fact to the Court. The fact that the said elections of the 11 September were deferred after an objection as outlined herein was raised, is also supported by the 5th respondent.

[29] The appellant alleges in his founding affidavit that he is a gazetted chief of Ha Leqele even though in the Government Gazette Notice No. 34 of 2017 he is mistakenly referred to as the chief of Majoe-a-Litsoene in the district of Maseru. He goes on to say that the mistake is being attended to and relies on annexure “TMA” as proof of his gazettelement as the chief of Majoe-a-Litsoene.

[30] This fact stated above by the appellant makes his case worse. To the extent that he is wrongfully gazetted as a chief of a different area, then that disqualifies him from participating and voting in the municipal council elections until that error in his gazettelement has been rectified.

[31] It must be indicated at this juncture that an application for condonation of the late noting of this appeal was filed but the application was not opposed. It was accordingly granted.

[32] Grounds of appeal:

These grounds of appeal contained in the record of appeal but are not paginated. They are said to appear at pages iii-iv of the record.

They are as follows:

- That the learned Judge erred and or misdirected himself by dismissing the entire application.
- The learned Judge erred and misdirected himself by concluding that the unilateral cancellation of the elections of the 11 September 2017 wherein the applicant was elected into the city council committee was fair and legal.
- The learned Judge erred and or misdirected himself by concluding that the second elections as ordered by the 1st respondent were lawful, when they were held without prior notice and due process of the law.

[33] There are no other grounds of appeal filed on behalf of the appellant in the alternative.

[34] In brief the appellant's case is that the elections of the 22 September 2017, in which he lost, should be declared as

being contrary to the rules and therefore the results thereof should be declared null and void. Further, that the 1st respondent cancelled the earlier elections of 11 September 2017 unilaterally and called for the second elections of the 22 September 2017 without proper notice.

[35] The first ground of appeal is not supported by evidence because in his founding affidavit, the appellant says and confirms that after the winners were announced there was an objection raised regarding the qualification of chief Thoriso Matsoso to be voted into the municipal council. He concedes that as a result of that objection, the electoral officer, one Mr. Mokuoane deferred the objection in respect of chief Matsoso.

[36] What this means is that at the time when all else was done on that day, the chiefs, including the appellant, left that place, the MCC Boardroom, with the knowledge that an objection against the elections had been raised and was to be dealt with later.

[37] Chieftainess 'Mataelo Matsoso's supporting affidavit filed of record indeed confirms that an objection was noted by her with regard to the participation and voting of chief Thoriso

Matsoso in the said election. She is supported by chief Hlathe Majara in this regard.

[38] There is no denying that once such an objection was raised, then there was a flaw in the whole process of the elections. Elections in respect of the municipal council could not and cannot be cancelled or annulled piecemeal where clearly there is a violation of the electoral laws.

[39] What stands out clearly from the provisions of the law herein is that chiefs who participate in municipal council elections are clearly identified in accordance with their status in the community.

[40] In the case under consideration, the law is clear and unambiguous to the effect that participation and voting in the municipal council election is only in respect of the gazetted chiefs. So the participation and voting of the ungazetted chiefs in such elections affected the outcome of the election. Mr. Mokuoane was therefore correct in having cancelled the whole elections and to have them started afresh.

[41] It is totally incorrect that the cancellation or annulment of the election was done unilaterally because the appellant and all other chiefs participating in the elections were informed as to the reasons why the elections of the 11 September 2017 were being nullified.

[42] Notably, and most interesting, when the applicant received the letter inviting him to participate in the second elections of the 22 September 2017, he willingly attended and participated in the voting without first raising an objection as to why the elections were being held again and/or without first challenging the decision of the electoral officer to have the elections of the 11 September 2017 repeated instead of just directing voting for the vacant position which was left as a result of the disqualification of chief Thoriso Matsoso.

[43] The appellant and this is common cause, participated in such elections but cries foul only after he realizes that he has lost in the second election. He does not say why he did not rush to court to interdict the first respondent from going ahead with the elections as communicated in the letter dated 19 September 2017 inviting him to the meeting for the specified purpose, particularly when he had received

such a letter and appears as one of the chiefs who had actively participated in the second election. Refer to page 50 of the record wherein the appellant is shown as having registered as one of such chiefs.

[44] There is nothing filed of record which indicates that the appellant refused to participate in the second election but instead raised an objection.

[45] The letter, dated 22 September 2017, which he purportedly wrote to the Minister of Local Government does not show when exactly in relation to the actual time of the holding of the second elections it was written, but it is clear that it was written on the day that the said elections were held and concluded and after he had signed the nomination form at page 50 of the record.

[46] The appellant is accordingly estopped from denying his participation in the second election as is shown at page 50 of the paginated record. He authenticated the said election process in which he actively, and I may add, voluntarily participated but cries foul only because he has lost in the said elections.

[47] Whilst the issue regarding the manner in which the appellant alleges the second elections were held was not an issue in the court *a quo*, it cannot seriously be argued that the elections which were held on the 22 September 2017 were held without proper notice because the appellant and others were served with such notice on the 19 September 2017, a period of almost three days before the said elections were held, but in between that period, he did nothing by way of challenging the 1st respondent for calling for the second elections.

[48] The above reasons, coupled with the incorrect gazettment of the appellant as chief of Majoe-a-Lits'oene instead of chief of Ha Leqele do not help to advance his case.

[49] It is noted however, that the issue of his incorrect gazettment was also not debated in the Court *a quo*. This Court will therefore not deal with it.

[50] A lot was said about the interpretation of the heading of the letter dated the 19 September 2017. This is a letter through which the first respondent invited the gazetted chiefs to attend meeting of 22 September to elect the three chiefs into the municipal council.

[51] Both counsel could not say what exactly the grammatical interpretation of the heading was in terms of the Interpretation Act of 1977.

[52] Whilst this issue was not raised in the Court *a quo*, it was raised on appeal by this Court because there were differing views on what exactly the heading of the letter of the 19 September 2017 conveyed.

[53] This confusion is cured by section 15 of the Interpretation Act No. 19 of 1977, Part III thereof; under the heading “General Provisions of Acts”.

It provides as follows:-

“Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

[54] The above read together with section 32(1) Part VI may shed some light as to the interpretation of a letter by its heading. It provides as follows:-

32 (1) “Where an Act confers upon a person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing”.

[55] Effectively, in the instant appeal, since Mr. Mokuoane was the officer who presided over the elections, he had power to make any decision for the furtherance of the elections. For purposes of the elections of 11 September 2017, he acted within his powers to have cancelled or annulled them after an objection referred to was raised. There is no other officer other than himself who could exercise such powers.

[56] In brief it is not for the appellant nor for any other chief to have said what steps Mr. Mokuoane was to take in order to remedy the situation that had been created or brought about by the participation and voting of chief Thoriso Matsoso in the elections contrary to the law. This is particularly so because it was only Mr. Mokuoane in whom the law conferred power to preside over the municipal councils elections.

[57] Indeed in terms of section 31(1) Part VI (Powers) of the Interpretation Act:-

“Where an Act confers a power or imposes a duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires”.

[58] In the instant application, the letter of 19 September 2017 is very clear as to the purpose of the meeting to which all

chiefs were invited to attend. It is that the meeting was for continuation of election of representatives of THREE CHIEFS in the Local Government (Municipal Council) etc.

[59] This letter is couched in very clear terms, leaving no room for ambiguity. The appellant has no reason to doubt what it meant.

[60] For reasons stated herein, and regard being had to the facts and the surrounding circumstances of this matter, the appeal has to be dismissed.

[61] In the circumstances, this court makes the following order

1. The appeal is dismissed
2. The appellant shall pay the costs of appeal

MASEFORO MAHASE
ACTING JUSTICE OF APPEAL

I agree:

M. H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

N. MTSHIYA

ACTING JUSTICE OF APPEAL

Counsel for the Appellant: Adv. L. Kometsi

Counsel for the Respondent: Adv. L.D. Molapo