

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU  
2019**

**C OF A (CIV) NO.: 04 OF**

In the matter between:

<b>KOROKORO</b>	<b>CONSTITUENCY</b>	<b>COMMITTEE</b>
<b>1<sup>ST</sup> APPELLANT</b>		
<b>PHOHLELI PHOHLELI</b>		<b>2<sup>ND</sup></b>
<b>APPELLANT</b>		
<b>MORAKE KEKETSI</b>		<b>3<sup>RD</sup></b>
<b>APPELLANT</b>		

**AND**

<b>EXECUTIVE WORKING COMMITTEE:</b>		
<b>ALL BASOTHO CONVENTION</b>		<b>1<sup>ST</sup></b>
<b>RESPONDENT</b>		
<b>ALL BASOTHO CONVENTION -</b>		
<b>NATIONAL EXECUTIVE COMMITTEE</b>		<b>2<sup>ND</sup></b>
<b>RESPONDENT</b>		
<b>ALL BASOTHO CONVENTION</b>		<b>3<sup>RD</sup></b>
<b>RESPONDENT</b>		
<b>PROFESSOR NQOSA LEUTA MAHAO</b>		<b>4<sup>TH</sup></b>
<b>RESPONDENT</b>		
<b>HON. PRINCE MALIEHE</b>		<b>5<sup>TH</sup></b>
<b>RESPONDENT</b>		
<b>HON. MOTLOHI MALIEHE</b>		<b>6<sup>TH</sup></b>
<b>RESPONDENT</b>		
<b>DR. MOEKETSI MAJORO</b>		<b>7<sup>TH</sup></b>
<b>RESPONDENT</b>		

**CORAM:** MUSONDA AJA  
DAMASEB AJA  
CHINHENGO AJA

**HEARD:** 25 JANUARY 2019

**DELIVERED:** 28 JANUARY 2019

### **SUMMARY**

*Urgent review proceedings brought to have decisions of the ABC set aside as being irregular and unfair- Proceedings however being determined on points of law raised by both parties and not on the merits - Court on Appeal dismissing the objections raised as regards the set down of the appeal on the basis of its urgency and the fact that no attack has been made against the discretionary exercise by the President of the Court of Appeal to have the matter set down. Appeal court further holding that the lack of reasons from the court a quo does not render the record of appeal defective since no reasons /judgment was given by the court a quo.*

*On other preliminary issues, Court of Appeal holding that although nothing debars the High Court from hearing a matter involving the enforcement of a constitutional right, appellants ought to have proceeded under the constitutional litigation rules; that the court a quo rightly rejected the production and reliance on the purported ABC constitution and that its inclusion in the appeal record improper, which ultimately implicates other points in*

*limine such as (a) mootness, (b) failure to exhaust local remedies, (c) first applicant not being properly before court and (d) lack of locus standi whose determination is based on the interpretation of the constitution of ABC.*

*Appeal Court further holding that non reliance on rule 50 does not render the application defective but a selection by the appellants where the benefits may be waived.*

*Cross appeal dismissed on the basis that rules of natural justice are implied in contracts binding members of voluntary associations such as a political party and their decisions are therefore subject to judicial review.*

*Appeal succeeds in part, no order as to costs and matter remitted to the High Court for determination of the merits.*

*Chinhengo AJA in his dissenting judgment proposes not to remit the matter ad would dismiss all points in limine raised by the respondents a quo and on appeal.*

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## **ORDER**

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1. The appeal succeeds in part and the order of the High Court is set aside and substituted for the following:

“1. Only the following objections raised *in limine* by the first, second and third applicants are allowed: (a) The

objection to the production by the applicant's counsel of a document purporting to be the constitution of the All Basotho Convention; (b) the objection to prayer 2(f) of the notice of motion.

2. The remainder of the first, second and third respondents' objections *in limine* are dismissed.

3. There shall be no order as to costs."

2. The first, second and third respondents' objection to the appeal being heard and it being struck from the roll instead, is dismissed.

3. The first, second and third appellants' ground of appeal against the exclusion from the appeal record of a document purporting to be the constitution of the ABC is dismissed.

4. The first, second and third appellants' ground of appeal that the Court of Appeal determine the merits of the appeal is dismissed.

5. The matter is remitted to the High Court exercising its ordinary jurisdiction, to be heard and determined by Mahase ACJ (and in the event she is not available) by any other available judge of the High Court.

6. The matter shall be called before Mahase ACJ or a judge designated for that purpose by her, to preside in the matter no later than 14h00 p.m. on Tuesday, 29 January 2019 and for the matter to be dealt with according to law.
7. There shall be no order of costs in the appeal.

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## **JUDGEMENT**

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Damaseb AJA (Musonda AJA concurring):

[1] The All Basotho Convention (ABC) is a duly registered political party in terms of the laws of the Kingdom of Lesotho. It is public knowledge that the ABC is the ruling party in the Kingdom and it is common ground that its elective National Conference (elective conference) is scheduled for 1-2 February 2019.

[2] There is common ground that ABC is governed by a constitution and that the elective conference is a requirement under that constitution. At the elective conference, elections will take place to membership of ABC's National Executive Committee (NEC) and to various positions in the national leadership, in particular the Deputy Leader of the ABC.

[3] There is no dispute between the parties that in terms of the ABC constitution, there are structures making up the party known as a Constituency Committees which have the mandate to recruit new members for the party and having the right to participate in an elective conference and to nominate candidates to stand for election to vacant positions, including that of Deputy Leader of the ABC.

### **The parties**

[4] The first appellant is a duly established Constituency Committee of the ABC for the Korokoro Constituency No. 42 (Korokoro CC). The second appellant is the Chairman of Korokoro CC and also a member of the Korokoro CC. The third respondent is the secretary of Korokoro CC. I will henceforth refer to these appellants collectively as the 'Korokoro CC applicants' (when referring to both proceedings *a quo* and on appeal).

[5] The first respondent is the Executive Working Group (EWG), while the second respondent is the National Executive Committee (NEC). Both are organs of the ABC which took decisions adverse to the Korokoro CC applicants and which are the subject of the review proceedings which give rise to the appeal now before this court. The third respondent is a political party (ABC).

[6] The first and second respondents are organs of the third respondent which, in the name of the latter, took the decisions which the Korokoro CC applicants took on review and which are the subject of the present appeal. The fourth respondent was nominated by the Korokoro Constituency Committee as a candidate for the position of deputy leader. Henceforth I refer to him simply as 'the professor'. Fifth to seventh respondents are senior leaders of the ABC who have been duly nominated to contest for the position of deputy leader of ABC.

[7] The founding affidavit on behalf of the Korokoro CC applicants is deposed to by Mr Phohleli Phohleli as chairman of the first applicant. Hereafter I refer to him simply as Mr Phohleli. The answering affidavit on behalf of ABC respondents is deposed by the Secretary General (SG) of ABC.

### **The Secretary General's circular of 23 October 2018**

[8] It is not in dispute that on 23 October 2018 the SG issued a circular calling for the nomination of prospective candidates for leadership positions to be contested at the elective National Conference. On 26 November 2018 Korokoro CC nominated the professor for the position of deputy leader of the ABC.

### **Genesis of the dispute**

[9] According to the Korokoro CC applicants, the dispute that has led to the present appeal has arisen because, in the wake of its nomination of the professor, the NEC on 19 December 2018 rejected that nomination and on 31 December 2018 the EWG suspended Korokoro CC's membership of the ABC; in both respects without a hearing. The EWG also informed Korokoro CC that henceforth the latter's Women's Committee and the Youth Committee shall be run under the auspices of the SG.

[10] Aggrieved by the above actions of the ABC national leadership, Korokoro CC applicants approached the High Court on an urgent basis seeking relief against the ABC respondents. The Notice of Motion broadly sought *review, declaratory and interdictory* relief. First, the setting aside of the suspension of the first appellant<sup>1</sup> and the taking over of the running of the Korokoro West Women and Youth Committee by the SG.<sup>2</sup> Second, the setting aside of the rejection of the candidature of the professor for the ABC deputy leader position<sup>3</sup> and ordering and directing the NEC to accept the nomination.<sup>4</sup> Third, declaring as null and void the rejection of the professor's candidature.<sup>5</sup> Fourth, declaring as null and void a clause in the ABC constitution which decrees that a member of ABC who institutes legal proceedings against the party without exhausting internal remedies forfeits membership<sup>6</sup>;

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<sup>1</sup> Notice of motion, prayer 2(a).

<sup>2</sup> *ibid*, prayer 2(b).

<sup>3</sup> *Ibid*, prayer 2(c).

<sup>4</sup> *Ibid*, prayer 2(e).

<sup>5</sup> *Ibid*, prayer 2(d).

<sup>6</sup> *Ibid*, prayer 2 (f).



on the ground that the provision violates the applicants' rights guaranteed under the Constitution of the Kingdom. Fifth: That should the matter not have been adjudicated before the taking place of the elective conference, the court halts the elective national conference until the matter is finalised.<sup>7</sup>

### **The grounds for the challenge**

[11] I will now proceed to set out the salient allegations in Mr Phohleli's affidavit in support of the relief sought in the accompanying notice of motion. In so doing I will, where he mentions specific clauses in the ABC constitution, state so. What will become apparent though is that in the situations where he actually references specific provisions, he does not quote the actual wording of the provision. That is rather important if regard is had to the fact that, as is common cause, he does not annex a copy of the constitution to his founding affidavit.

#### *Rejection of Prof. Mahao's candidature*

[12] Mr Phohleli states that the professor became a member of ABC on 16 August 2015 and was appointed a member of the Branch Committee of Mokema. The professor waited for two and half months for his membership card to be issued by the

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<sup>7</sup> Ibid, prayer 2(g).

Constituency Committee. The card was issued to the professor on 10 November 2015 having been signed by the Constituency secretary, Peter Machaba. The provisions applicable in this regard are not stated by the deponent. On 13 September 2015 Korokoro CC appointed the professor 'into their structures on the basis of his skills' for the 'growth and benefit of the entire constituency and he accepted that'. In terms of what provision is not stated, but the allegation continues that 'he served in that committee from that date until now under clause 6(n) of ABC Constitution, which is Education and Technology'. Mr Phohleli goes on to aver that the professor 'has more than 36 months serving in the Constituency Committee and . . . met the basic requirements of the ABC to participate in the elections of the NEC for the position of Deputy Leader as spelled out in clause C(1) of . . . the Constitution'.<sup>8</sup>

[13] Some suggestion is made that the circumstances of the professor being coopted to the Branch and the Constituency Committee is comparable to how Mr Phohleli himself rose to ascendancy to the NEC under clause A(1)(p) and clauses A(1)(a) to (i) of the constitution of ABC. The terms of those provisions are not quoted though. In similar vein, the deponent alleges that the incumbent deputy leader of the ABC, the fifth respondent, was 'appointed' into the position and no election was held. Likewise, the incumbent Treasurer was also appointed without an election. The allegation goes that cooption to party positions without

<sup>8</sup> The actual terms of clause C (1) are not quoted in the affidavit.

election 'is common practice, which is deemed acceptable and lawful'.

[14] According to Mr Phohleli, the NEC did not have the power to reject the candidature of the professor. He maintained that the elections should be run by an independent body and not the NEC. For that proposition, the deponent does not place reliance on a particular provision of the constitution. He added that 'sitting members of the NEC cannot logically vet prospective candidates as that is irregular and absurd'. He further stated that the fifth and sixth respondents hold positions as Deputy Leader and Chairman of ABC respectively and are also candidates for the position of deputy leader and that their participating as members of the NEC in 'vetting' the candidature of the professor was self-serving. The further assertion is that the professor and Korokoro CC ought to have been afforded the opportunity to make representations before the rejection of the nomination. The deponent further alleges that the sixth respondent who is also a nominee was under suspension at the time of his nomination and was in terms of clause C(1)(e) of the ABC constitution not qualified to stand for election as deputy leader but had, in breach of the constitution, been allowed to stand after the NEC conveniently lifted his suspension on 19 December 2018 to pave the way for him to stand for election. That would still violate the constitution, it is said, because the sixth respondent had been on suspension when the deadline for nominations closed on 30

November 2018. According to Mr Phohleli, the actions of the NEC are arbitrary and discriminatory in that the decision to unlawfully lift the suspension of the sixth respondent and that rejecting the nomination of the professor were taken at the same meeting: the one purportedly being granted as an indulgence to one candidate while excluding the other on the ostensible ground that he had not served the requisite period of 36 months on the Korokoro CC to be eligible for nomination to the position of deputy leader.

[15] Another alleged instance of selective and discriminatory application of the constitution relied on by Mr Phohleli relates to the nomination of the 7<sup>th</sup> respondent for the position of deputy leader. According to Mr Phohleli, while in 2015 the seventh respondent was not a member of a branch as required by the constitution, he was impermissibly made a member of a District Development Committee at Komiti ea Ntlatfatso ea Setereke to qualify him as a member of the NEC in March 2015. That candidate allegedly did not serve the requisite period of 24 months in a branch to be eligible to stand for election. No specific provision of the constitution is relied on in support of this allegation.

[16] A further allegedly discriminatory act relied on by Mr Phohleli is the alleged waiver by the Party Leader for the election of members of the Executive Committee of the ABC Women's Committee. In that regard, it is alleged that the waiver by the

Leader made it possible for candidates to stand for election without having served as Constituency Committee members for 36 months to qualify to stand for election – the very same clause<sup>9</sup> being relied on to disqualify the professor from contesting the position of Deputy leader. The argument is, if others could stand for positions in the Party when they did not qualify, why should the professor be prevented from doing so?

[17] Mr Phohleli references other situations where, allegedly, clause C(1)(b) was waived by the ABC leadership to pave the way for persons not qualified to do so to stand for election as members of parliament. The argument goes that because the ABC leadership had in the past waived the requirements of clause C(1)(b) in respect of some individuals, the party was ‘estopped’ from rejecting the professor’s nomination on the strength of it. He also avers that in yet another instance of breach of the constitution and its inconsistent application, a member of the NEC who had been suspended in terms of clause C(1)(e)<sup>10</sup> of the constitution and was therefore ineligible had been allowed to stand for election. As he states in the affidavit ‘I understand the clause to mean that only former members of the [NEC] who have not left under dubious circumstances can contest’.

[18] Mr Phohleli then goes on to allege that of the incumbent members of the NEC only 10 are eligible to stand for re-election,

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<sup>9</sup> That provision is identified in the affidavit as being clause C(1)(b) of the constitution of ABC.

<sup>10</sup> The actual wording of the provision is not quoted in the affidavit.

implying that the remainder do not qualify under clause C(1)(e) but will be allowed to contest while ‘only [the professor] has been cherry picked for exclusion’<sup>11</sup> relying on clause C(1)(d).

[19] The deponent goes on to state that ‘in order to avoid an unfair and unjust decision from being taken, the Constitution of All Basotho Convention should be read and applied benevolently for the benefit of all parties involved and for the benefit of all members, all in the name of endorsing democratic values’.

[20] Mr Phohleli alleges that in an effort to exhaust local remedies, on 28 October 2018 Korokoro CC wrote a letter to the NEC in terms of clause J(d)<sup>12</sup> of the constitution, requesting the convening of a Special Conference ‘to resolve the issue of the nomination of the professor’. The NEC was given an ultimatum to comply within 7 days in an effort for Korokoro CC ‘to avoid going to court’ and to exhaust local remedies.

### *The suspension of Korokoro CC*

[21] According to Mr Phohleli, on 31 December 2018 the EWG wrote a letter to Korokoro CC informing it that it had been suspended for (a) confronting the NEC, (b) holding a press conference to announce the nomination of the professor, and (c) attacking the ABC ‘in radios and holding a press conference’.

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<sup>11</sup> Again, the deponent does not quote the actual wording of the clause in question.

<sup>12</sup> The terms of the provision are not quoted.

[22] According to Mr Phohleli, the suspension decision ‘was wrong’ as the EWG is not competent to suspend a Constituency Committee. He states that ‘there are structures established by the Constitution duly created by the NEC to deal predominantly with issues in the event that there is indiscipline’. He relies on clause 5 of the constitution in that regard and says that it creates a Disciplinary Committee which has the power to deal with matters of discipline and to make recommendations to the NEC.<sup>13</sup>

[23] Without stating what provision he relies on, Mr Phohleli avers that the ‘party can also use the Conflict and Dispute Resolution also found in the same Constitution’, concluding that any action by the EWG to impose discipline in the circumstances it did ‘is beyond its powers and therefore *ultra vires*. The fact that no hearing was held makes the entire process a nullity’.

[24] Mr Phohleli next addresses his attention to the placing of the Women’s Committee and the Youth Committee under the control of the SG. Without relying on a particular provision, he maintains that the ‘ABC Constitution does not bestow that kind of duty on the office of the SG under any circumstances’, rendering the decision liable to be declared irregular and unlawful.

[25] Finally, Mr Phohleli refers to clause 5(e) of the ABC constitution which he alleges decrees that a member of the party

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<sup>13</sup> Again, the actual terms of the provision are not quoted.

forfeits membership by suing the party. The actual terms of the constitution are not quoted. He alleges that the clause is unconstitutional because it 'stifle party members from approaching courts of law in the event that they are aggrieved' and that it 'goes against the hallowed principles of access to courts and clearly violates the Constitution of Lesotho as it is dictatorial' and should be declared unconstitutional and null and void.

[26] Mr Phohleli adds a cautionary rider that should serious disputes of fact arise, the matter be referred to oral evidence.

[27] On 10 January 2019, the professor filed of record a counter application, not only making common cause with the allegations made in support of the relief sought by the appellants, but seeking specific relief aimed at redressing the rejection of his candidature for the position of deputy leader.

## **The opposition**

[28] The ABC respondents filed answering papers<sup>14</sup>, followed by the appellants' reply on 11 January 2019.<sup>15</sup> It appears, therefore, that it was not until 11 January that the matter was ripe for hearing. The record does not tell us when it was called for the first time before Mahase ACJ. All we know, as far as the available

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<sup>14</sup> There is no date stamp of the registrar to show when that occurred.

<sup>15</sup> There is an office stamp of Advocate Thoatlane with an indication that it was received at 4:44 p.m. on 11 January 2019.



record is concerned, is that an order was made on 13 January 2019.

[29] The answering affidavit on behalf of the first, second and third respondents is sworn by the third respondent's Secretary General (SG), the Hon. Mr Samonyane Ntsekele. While he raises several *in limine* objections, he also answers the application on the merits.

[30] In order to better appreciate the evolution of the litigation, it is appropriate at this stage to set out briefly the *in limine* objections raised in the answering affidavit on behalf of first to third respondents. I turn to that task next.

### **The ABC respondents' objections *in limine***

[31] ABC respondents raised the following preliminary objections to the application:

- (a) It was incompetent for the appellants to challenge the decisions taken by the EWG considering that the decisions of that body had since been ratified by the NEC. The appellants' prayers directed at the EWG decisions had therefore become moot;

- (b) Because ABC was a voluntary association not exercising public power, its decisions were not subject to administrative law review;
- (c) The challenge to the constitutional validity of the ABC constitution's clause presuming forfeiture of membership of those taking the party to court, was not competent in the High Court exercising its ordinary jurisdiction and should have been brought in the Constitutional Court;
- (d) The appellants should not have approached court but should have taken their grievance to the Annual General Conference. In other words, that the application was launched prematurely without exhausting internal remedies;
- (e) The first appellant was a member of the NEC and therefore was bound by the decision of that body as its member and was not competent in law to challenge 'his own decision' because of 'collective responsibility'.
- (f) The first appellant as member of the NEC had by operation of law seized to be a member of the Korokoro CC and was therefore not competent to institute the present legal proceedings on behalf of Korokoro CC.

(g) The appellants were compelled to bring their review proceedings in terms of Rule 50 (b) of the High Court Rules.

[32] After hearing the parties, the High Court (Mahase ACJ) on 13 January 2019 made an order, without reasons, in the following terms:

- '1. The counter-application is struck off for failure to file the notice of intention to oppose in the main application.*
- 2. The points of law are upheld except point of law no. 10 (lack of jurisdiction to review private entities).*
- 3. The application is dismissed with costs.'*

## **The various grounds of appeal**

### *ABC respondents: cross appeal*

[33] It will be recalled that Mahase ACJ dismissed the *in limine* objection by ABC respondents that administrative law review relief was incompetent against a voluntary association such as ABC, a political party. It is suggested that the High Court's conclusion was wrong in law.

### *Korokoro Constituency applicants*

[34] On 14 January 2019 the appellants noted an appeal to this court against the order of Mahase ACJ. Their grounds of appeal

are directed at the ruling of Mahase ACJ in relation to the points of law raised by the ABC respondents. Given the lack of detail to the order handed down by the judge *a quo*, it might seem strange that the grounds of appeal are as detailed as they are. It must be assumed therefore that the inferences drawn as to what the learned judge held are reasonable given the manner in which the points *in limine* were framed. Since his counter-application was also dismissed the professor also noted an appeal against Mahase ACJ's order. Given that his cross-appeal was withdrawn when the appeal was called, nothing further need be said about it.

[35] The Korokoro CC applicants' grounds of appeal include the ground that the High Court erred in not hearing the merits of the case and only dealt with the points of law while it was seized with a 'single comprehensive application'.

[36] In what are called additional grounds of appeal these appellants raise more grounds. The backdrop is the High Court's ruling upholding the raft of ABC respondent's objections *in limine* to the urgent application.

[37] It is stated that the learned acting Chief Justice misdirected herself in finding that: (a) the relief sought against the EWG was moot because that decision had since been ratified by the NEC and that there is no challenge to the NEC's ratification; (b) the High Court exercising its ordinary jurisdiction

lacked the competence to adjudicate the relief aimed at declaring as unconstitutional the ABC constitution's provision which proscribes court challenges by members; (c) the Korokoro CC applicants did not exhaust local remedies before approaching court; (d) the second appellant was bound as a member of the NEC by its decision ratifying the EWG decision to suspend Korokoro CC and to place the Women's and Youth Committees under the SG; (e) that because the second applicant as member of the NEC could also not hold membership of the Constituency Committee his participation in the meeting authorising the present legal proceedings was not competent; (f) that the review application was incompetent because the applicants failed to obtain a decision of the NEC in relation to the ratification of the EWG decisions and then to supplement their papers in terms of rule 50(4) to direct the review at the NEC.

[38] The appeal was set down for hearing on 22 January 2019 on the direction of the President of the Court of Appeal but it was postponed to 25 January 2019 because the ABC respondents were not ready to proceed. In anticipation of the appeal the ABC respondents raised further points in *limine* impugning the propriety and viability of the appeal.

[39] In the light of those objections that have been squarely raised on behalf of the respondents, it is necessary to now set out

the litigation history in so far as it is apparent from the record filed on appeal.

### **The litigation history**

[40] Under a certificate of urgency of the appellants' counsel of record, and bearing the High Court Registrar's official stamp of 4 January 2019, the first to third appellants (*qua* first, second and third applicants *a quo*) launched an urgent application 'In the High Court of Lesotho' as opposed to the High Court exercising its jurisdiction as the Constitutional Court.

[41] It is not apparent from the record when the application was served on the respondents since the return of service, if it exists, is not part of the record. Curiously, the record of appeal filed by the appellants suggests that the return of service appears at page 79 of the record while it does not. Just when the notice of intention to oppose was entered is also not clear because although it is reflected in the 'Index' to the record as appearing at pages 80-82, the notice does not form part of the record.

[42] When the counter application of the professor was filed is also not apparent from the record.

[43] At all events, the respondents filed answering papers<sup>16</sup>, followed by the appellants' reply on 11 January 2019.<sup>17</sup> It appears, therefore, that it was not until 11 January that the matter was ripe for hearing. The record does not tell us when it was called for the first time before Mahase ACJ and all we know, as far as the available record is concerned, is that an order was made on 13 January 2019.

### ***Disposal of the objections relative to setting down of the appeal***

[44] Not only do the ABC respondents persist with and support all the *in limine* objections they raised *a quo* which were upheld by Mahase ACJ, they also point to four matters which they posit are dispositive of the appeal even without consideration of the already traversed points of law.

[45] The first relates to the manner in which the Korokoro CC applicants sought and obtained a hearing date for the appeal. They seek to make much of the prejudice they apparently suffered therefrom but in essence suggesting that the appellants should have followed the normal rules to obtain the date. That

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<sup>16</sup> There is no date stamp of the registrar to show when that occurred.

<sup>17</sup> There is an office stamp of Advocate Thoatlane with an indication that it was received at 4:44 p.m. on 11 January 2019.

seems to me to be unreasonable in the light of the obvious urgency that attached to the matter.

[46] The procedure proposed by counsel for the ABC respondents would in effect have meant that the appeal could only have been heard and determined way after the elective conference had taken place. For me, the complete answer to the protestation raised with great enthusiasm by counsel for the ABC respondents is that the learned President of the Court to whom the request was directed applied his mind to the matter, considered the merits of the urgency of the matter and set it down in his discretion. It therefore lies ill in the respondents' mouth to suggest that that discretion was improperly exercised when there is no challenge to it. Nothing further needs to be said on that issue.

[47] The second issue relates to the alleged defectiveness of the record filed by counsel for the Korokoro CC applicants. It is common cause that the judge *a quo* made an order without giving reasons; an order which benefits the ABC respondents who, rather counterintuitively, seek to brush aside the appeal on account of its absence. One wonders what would have been the case if the order went against them. If this argument holds, they would in those circumstances have been precluded from proceeding with the appeal. That is not a path that leads to justice.



[48] There no doubt will be circumstances where it will be undesirable for the appeal court to entertain an appeal in the absence of written reasons for a decision. The problem we are faced with here is that at the time of handing down her order on 13 January 2019, the judge *a quo* made it clear that she was not going to provide reasons until after the 24<sup>th</sup> of January 2019, being the last day of the special session of the Court of Appeal in which she was engaged. There was nothing that the appellants could have done to file reasons which did not exist or to obtain them when the judge had already said they would not be available; yet the matter was time-sensitive and awaiting those reasons would have defeated the purpose of the relief they came to court for in the first place. So, although I accept that in certain circumstances an appeal would be meaningless without reasons, this was, for the reasons I have stated, not such a case.

[49] The next matter relates to whether the record before this court is a complete record of the proceedings in the High Court which is the subject of the present appeal. It is submitted on behalf of the ABC respondents that it is not and that the certificate filed by the counsel of record of the Korokoro CC applicants in terms of rule 7(2)<sup>18</sup> is materially flawed as the record is not an 'entirely true and faithful record of the proceedings' in the High Court.

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<sup>18</sup> Which reads: "A certificate certifying the correctness of the record, duly signed by the person referred to in sub-rule (1), shall be filed with the record and served on all other parties to the appeal."

[50] The backdrop to this assertion is the manner in which the Korokoro CC applicants presented their case in the supporting affidavit. While the entire dispute relates to the interpretation of the ABC constitution, the second appellant who swore to the main supporting affidavit chose not to prove the constitution by attaching it as an annexure to his affidavit. Although reference was made to some provisions of the constitution in the affidavit, the second appellant did not provide the text. He should have.

[51] The appeal record filed by counsel for the Korokoro CC applicants includes what purports to be a copy of the ABC constitution at pages 188-236 (in Sesotho and English) of the appeal record.

[52] The point taken *in limine* by Mr Thoahlane on behalf of the ABC respondents is that the inclusion of what purports to be the constitution of the ABC is improper because it was not proved as a fact by the applicants on their papers. The reason that becomes important is that the learned judge *a quo* refused to allow reference to an unproven constitution in her assessment of the points *in limine* argued before her.

[53] It is common cause that the second appellant, who is the main deponent to the appellants' supporting affidavit, did not allege and place reliance on a particular document as being the constitution of the ABC. As a result, he failed to prove the text of

the constitution of ABC although he refers to clauses from what he alleges to be the constitution. That was the state of affairs before the judge *a quo*.

[54] In adjudicating points of law the court does so solely on the papers of the applicant.

[55] The clear implication is that if the respondent, upon its production by the applicant, disputed the authenticity of the text produced, the court would have disregarded it and proceeded on the basis that the text produced was not the applicable constitution.

[56] The notion that the respondent was somehow bound to attach what he considered to be the constitution because, as suggested during oral argument, it is the custodian of the constitution is therefore misplaced and not supported by authority.

[57] In motion proceedings, a party must both allege and produce on affidavit documentary evidence such as a constitution it relies on in support of its case because in motion proceedings, the affidavits constitutes the evidence. It was pointed out during oral argument that counsel for the appellants sought to hand up to the court a document which purported to be the constitution and that it was objected to and the objection sustained. That is

subversive of the discipline of motion proceedings and as the apex court this court should not sanction it. How else should the respondents have reacted in those circumstances? What if they agreed to the document being admitted and when later they read through it realised that it was not entirely accurate and that there were, in their view, changes to the document in their possession which materially affected their case? After all, these were urgent proceedings initiated by the applicants and had to be decided as such. They could have asked for discovery of the constitution but did not.

[58] A document not produced as part of the applicant's case is inadmissible and counsel for a party is not a witness in such proceedings and could not have introduced evidence in the way he attempted to. Admissibility of evidence is a matter of law and not of discretion.<sup>19</sup> The document was inadmissible as a matter of law and the judge *a quo* had no discretion to admit it. The judge *a quo* therefore acted properly in not admitting the documents which counsel for the appellants wanted to hand up as evidence. The document was properly disallowed and the ABC respondent's objection to its inclusion in the appeal record is properly taken and the document must be expunged from the record.

## **Consideration of the appeal grounds**

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<sup>19</sup> Only relevant evidence is admissible in a court of law. Inadmissible evidence is, by its very nature, irrelevant: *Swissborough Diamonds Mines (Pty)Ltd and Others v Government of the Republic of South Africa*, 1999 (2) SA 279 (T) 336F-G; cited with approval in *DPP v ZUMA* 2009 (2) SA 277 at para 23.

[59] I will now discuss the grounds of appeal. The central question to be answered is whether the High Court's order in the form already referenced in relation to the points *in limine* is sustainable. Since what were at issue were *in limine* objections the ratio of this court in *Makoala v Makoala*<sup>20</sup> applies.

[60] As Melunsky JA put it at para 4:

*'When a point in limine is raised, the issue for determination is whether the applicant's affidavits make out a prima facie case. Consequently the applicant's affidavits alone have to be considered and the averments contained therein should be considered as true for the purpose of deciding upon the validity of the preliminary point (see Valentino Globe BV v Phillips and Another 1998 (3) SA 775 (SCA) at 779(F-G). Unfortunately the practice of converting defences on the merits into preliminary points has become so prevalent in motion proceedings. . . .'*

The learned judge went on to state at para 5 as follows:

*'Moreover a court, when faced with an application for only a preliminary point to be argued, should be astute not to grant that relief too readily, mindful of the need to avoid piecemeal hearings with concomitant delays and the incurring of additional costs'.*

[61] It is on the strength of that test that I proceed to consider the *in limine* objections raised by the ABC respondents and

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<sup>20</sup> [LAC] 2009-2010 p.40.

sustained by the learned judge *a quo*. For convenience, I will deal with them in a different order to that raised in the papers.

*Was the High Court the proper forum: prayer 2(f)*

[62] The relief sought is in the nature of a declarator and no consequential relief is sought. That is of course permitted by s 2(1) (c)<sup>21</sup> of the High Court Act 34 of 1978 (as amended). The remedy is a discretionary one. The non-granting of the order sought, it is apparent from the affidavit of the applicants, would not have immediate effect on them, otherwise they would have sought consequential relief, yet the issue that the relief raises involves an important question whether a provision in a constitution of a voluntary association such as the ABC should be visited with the same scrutiny as national legislation. That is an important matter in the constitutional development of the Kingdom and to be decided with great care and deliberation.

[63] There is authority from this court binding on the High Court that in the wake of the promulgation of the Constitutional Litigation Rules (CLR), issues implicating the enforcement of constitutional rights guaranteed in ss 4-21 of the Constitution of Lesotho must be ventilated under the CLR.<sup>22</sup> It will be recalled

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<sup>21</sup> Stating that the High Court shall have 'in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination . . .'

<sup>22</sup> *The Chief Justice and Others v The Law Society of Lesotho* CIV NO.: 59/2011 delivered on 27 April 2012.

that the appellants rely on the constitutional right of access to court<sup>23</sup> and allege that the provision in question infringes that right.

[64] If I understood the appellants correctly, the Lesotho Constitution does not create a separate Constitutional Court and the High Court exercising its original jurisdiction is not debarred from hearing a matter involving the enforcement of a constitutional right. That seems the correct position as far as it goes, but the question is whether it was open to the appellants, in respect of their prayer in question, to proceed under the High Court Rules as opposed to the Constitutional Litigation Rules. In other words, did they by so doing deny the respondents the benefits arising from the application of the Constitutional Court Rules as opposed to the Rules of the High Court. That is how the matter was approached by this court in the matter of the *Chief Justice and Others v The Law Society*.

[65] As Smallberger JA observed at paras 13-14:

*'13. By its own account the Law Society is seeking redress in the High Court in the exercise of its constitutional jurisdiction. That being the case the Law Society, in bringing its application, was obliged to comply with the Constitutional Litigation Rules (the validity of which has not been challenged). That it failed to do. Instead it followed the Rules of Court applicable to the High Court exercising its ordinary jurisdiction. [A] Constitutional challenge cannot properly be brought before a judge*

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<sup>23</sup> Thus implicating s 22 of the Constitution of Lesotho.

*exercising...ordinary jurisdiction, which is what happened in the present case. Monapathi J should therefore have upheld the appellants' objection to the matter proceeding before him under his ordinary jurisdiction.*

*14. The objection is not a purely technical one. Where different rules regulate different procedures it is incumbent upon a litigant to follow the correct procedure. Where that is not so the Constitutional Court Rules might become redundant. The invocation of these rules, and the allocation of a number by the registrar designating the matter as one raising a constitutional issue, will alert whoever is responsible for arranging the roll that the matter is one which may require a complement of three judges, and presumably the Chief Justice will be advised accordingly. [C]onsequently the appellants have been denied a hearing before three judges in the High Court exercising its constitutional jurisdiction to which they were entitled.'*

[66] The appeal was therefore allowed and the matter remitted to the High Court to commence *de novo* before the High Court exercising its constitutional jurisdiction in accordance with the CLR.

[67] Regrettably, the same fate must be visited on prayer 2(f) of the applicants' notice of motion. This court's decision cited above was binding on the judge *a quo* and there is no reason to suppose that she was not acting on it. In sustaining the objection to the implicated prayer, the learned judge did not err, and the ground attacking her ruling in that respect must be dismissed.



*Objections intertwined with the merits*

[68] *Makoala* cautions against so-called points *in limine* which, in reality, are defences to the claims made by an applicant. Much to one's chagrin, several of the points *in limine* assume that character. One should remember that at the core of the appellant's grievance is that the Korokoro CC membership was unlawfully suspended without as much as an indication of how long and pending what.

[69] The impression one gains from the factual averments is that the action is aimed at frustrating their participation at the elective conference and to scupper the nomination of the professor. Whether that is indeed the case is what the court seized with the merits must determine. The applicants have stated that the constitution does not support the actions of the ABC leadership taken as a collective. Those issues cannot be determined by reference to anything stated by the respondents in their answering affidavits. Therefore, the assertion that the NEC had endorsed decisions taken by the EWG and that the National Conference has power to determine the grievances of the applicants, appearing as they do in the answering affidavits, are of no moment at the stage of the *in limine* objections.

[70] The consequence of that is that objections whose viability is dependent entirely on the respondents' averments stood to be

rejected by the judge *a quo*, more so because the ABC constitution from which the court could assess the claims of the applicants was not proved and the production of what purported to be the constitution was quite properly disallowed by the judge *a quo*. In that category fall the following objections: (a) mootness, (b) failure to exhaust local remedies, (c) first applicant not being properly before court and (d) lack of *locus standi*.

*Remaining objection: Failure to comply with rule 50(b)*

[71] The principle is now well established that rule 50 of the Rules of the High Court is for the benefit of the applicant who has the choice whether to proceed under it or to seek review under the common law.<sup>24</sup> In the present matter the appellants chose not to rely on Rule 50. It was their right to do so and the objection should have been dismissed.

### **Cross appeal: *Decisions of private entity not reviewable***

[72] This objection too need not detain us long because it clearly runs contrary to the drift of authority which we find persuasive. The appellants came to court alleging a breach of natural justice in that they were denied *audi* and that the respondent's officials acted with bias in own cause. The courts in

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<sup>24</sup> *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 at 662F-663D and *Motaung v Makubela and Another, NNO, Motaung v Mothiba* 1975 (1) SA 618 (O) at 625C-626A; *The Director on Corruption and 3 others v Tseliso Dlamini* (C of A (CIV) 21/2009), para 16-17 (Delivered on 23 October 2009).

Southern Africa have long acted on the authority established in *Turner v Jockey Club of South Arica*<sup>25</sup> that rules of natural justice are implied in contracts binding members of voluntary associations such as a political party.

[73] The objection was therefore properly disallowed and the cross-appeal must fail.

### **Should this court determine the merits of the case?**

[74] I reserved this ground of the appellants to the end because it has a bearing on the future conduct of the case after the appeal grounds have been disposed of.

[75] The first preliminary issue that we were called upon to resolve was whether to allow the appellants to argue the merits of the case in view of the urgency of the matter. The urgency arising from the fact of the impending elective National Conference scheduled for 1-2 February 2019. The appellants took the view that their arguing the merits occasioned no prejudice to the respondents and that this court had in the past considered the merits of the matter in the interest of justice although the court below had not and confined itself to preliminary legal objections. They relied on *Makoala supra*.<sup>26</sup>

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<sup>25</sup> 1974 (3) SA 633 (AD) at 645. Also compare: *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Africa en Andere* 1976 (2) SA 1 (AD); *Taylor v Kurssag NO and Others* 2005 (1) SA 362 (W) at 382B; *Pennington v Friedgood and Others* 2002 (1) SA 251 (CPD) at 263.

<sup>26</sup> At paras 14-15.

[76] Mr Thoahlane for ABC respondents' objected in the strongest terms to such a course on two grounds. The first being the common cause fact that the High Court did not deal with the merits at all and the second being the fact that the grounds of appeal do not address the merits at all. Mr Thoahlane argued that the course proposed by the appellants would prejudice them because, based on the case the grounds of appeal asked them to meet on appeal, he did not address the merits in their heads and did not come prepared to argue the merits. That is, of course, not supported by the record. As I already pointed out, the appellants stated as a ground of appeal that the court misdirected itself in not hearing the merits of a 'single comprehensive application'. The clear implication is that if this court agreed, it had to determine the merits; it could not be otherwise.

[77] The posture adopted by the respondents' counsel, with great drama I must add, even threatening to withdraw from the appeal if the court entertained the appeal on the merits, and summoning the judges to chambers to be castigated by his instructing counsel Mr Mosotho for taking so-called unprecedented steps in hearing an appeal on the merits, was potentially prejudicial to the respondents.

[78] After oral argument, we considered the matter and decided not to entertain the merits for the reasons that I set out below.

But had we chosen to entertain the merits it would per force have been without the benefit of legal argument on behalf of the respondents – much to the prejudice of the respondents. We view that conduct as most reprehensible and unbecoming of officers of this court whose duty it is to be helpful to the court and not to be obstructionist, however attractive a client might find that. Lawyers have the duty to act dispassionately and not to become a mouthpiece for clients.

[79] It would be most undesirable for the Court of Appeal to determine the merits of a matter if, for example, there was the potential for monumental disputes of fact arising.<sup>27</sup> The possibility of disputes of fact arising was foreseen by the appellants as I already demonstrated. A cursory glance at the replying affidavit shows that almost every factual averment made by the applicants is placed in dispute and such matters as the membership of the professor in the party is denied and alleged to have been obtained fraudulently.

[80] Absent proof of the actual text of the constitution of ABC from which the court could itself draw its own inferences through interpreting it, it would be most undesirable for this court to determine the merits of the matter. After all, interpretation of legal documents and instruments is a matter of law and not of fact and therefore evidence seeking to assign meaning to clauses

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<sup>27</sup> *Makoela supra* at para 14.

in a document is not permissible.<sup>28</sup> Since the court is to interpret the document in its entirety, its absence in the record renders any interpretation of the various provisions only referred to on affidavit very undesirable and unsafe. The constitution could be produced through discovery at the request of the parties<sup>29</sup> or at the instance of the court.<sup>30</sup> That can only be done in the High Court.

[81] The conclusion we come to therefore is that the proper course is to remit the matter to the High Court to determine the merits.

[82] Thus, although we had allowed the appellants to place on record that they wished the court to consider the merits if, after due consideration, it considered that course warranted, we have come to the conclusion that the present is not an appropriate case to do so.

[83] It bears mention that part of the relief sought is the halting of the elective conference pending the finalisation of the case. If the High Court, which has a discretion in the matter, feels that such an order is appropriate in the light of the progress or lack of

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<sup>28</sup> *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] 2 All SA 523, 2009 (4) SA 399 (SCA) at para [39]. This position is the same as in Namibia as stated in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC), para 24.

<sup>29</sup> Rule 34(14)

<sup>30</sup> The court has the inherent jurisdiction to order the production of relevant documentation, even though there had been no application for discovery: *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W).

it in the finalisation of the hearing, it could grant such relief if the circumstances justify it. This court cannot assume the role of the High Court.

[84] Upon remittal of the matter, the danger inherent in possible frustration of the court proceedings to gain advantage in view of the impending elective national conference is not lost on this court. That danger cuts both ways. Those who want it to be halted might think it is an opportune moment to drag their feet to strengthen the case for the halting of the conference; while those who want the conference to proceed without the case being finalised might similarly drag their feet. The High Court should be alive to that danger both in its conduct of the hearing and in the exercise of its discretion relative to prayer 2(g) of the notice of motion.

## **Costs**

[85] While the appellants have achieved substantial success in reversing substantial parts of the High Court's order upholding the points *in limine*, the respondents have succeeded in expunging parts of the record improperly included. The latter is no less significant because had that part of the record remained, this court might well have determined the merits.

[86] The professor withdrew his cross appeal against the dismissal of his counter-application. That certainly saved the court time and I am not altogether certain that the cross appeal was without merit. In those circumstances, I would not be inclined to order costs against the professor in favour of the respondents for their wasted costs. This is an appropriate case where each party must bear its own costs, both in the court below and on appeal.

[87] I have had the benefit of the views of my Brother, Chinhengo AJA. Having considered his views on the matters he disagrees with in my judgment, I remain unpersuaded and am not able to agree with him.

### **Order**

[88] I would therefore propose the following order:

1. The appeal succeeds in part and the order of the High Court is set aside and substituted for the following:

“1. Only the following objections raised *in limine* by the first, second and third applicants are allowed: (a) The objection to the production by the applicant’s counsel of a document purporting to be the constitution of the All Basotho Convention; (b) the objection to prayer 2(f) of the notice of motion.



2. The remainder of the first, second and third respondents' objections *in limine* are dismissed.
  3. There shall be no order as to costs."
2. The first, second and third respondents' objection to the appeal being heard and it being struck from the roll instead, is dismissed.
  3. The first, second and third appellants' ground of appeal against the exclusion from the appeal record of a document purporting to be the constitution of the ABC is dismissed.
  4. The first, second and third appellants' ground of appeal that the Court of appeal determine the merits of the appeal is dismissed.
  5. The matter is remitted to the High Court exercising its ordinary jurisdiction, to be heard and determined by Mahase ACJ (and in the event she is not available) by any other available judge of the High Court.
  6. The matter shall be called before Mahase ACJ or a judge designated for that purpose by her, to preside in the

matter no later than 14h00 p.m. on Tuesday, 29 January 2019 and for the matter to be dealt with according to law.

7. There shall be no order of costs in the appeal.

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**P.T DAMASEB**

**ACTING JUSTICE OF  
APPEAL**

I agree:

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**P MUSONDA**

**ACTING JUSTICE OF APPEAL**

**CHINHENGO AJA:** (Dissenting)

[89] I have read the judgment very ably prepared in record time by his Lordship, Damaseb AJA, with which Musonda AJA agrees. I am in agreement with the orders proposing dismissal of most of the objections, except those the main judgment does not dismiss. I therefore wish to express my respectful disagreement with those aspects of the judgment and the concomitant orders.

[90] The factual background of the case has been admirably set out by his Lordship. I will advert to it if necessary for purposes of illuminating the issues I wish to raise. Before doing so, however, I will set out those orders with which I am in disagreement and which, in essence, address the three issues I have referred to.

[91] The relevant orders are (a) the order allowing the objection to the production by the Korokoro CC applicants' counsel of the constitution of the All Basotho Convention; (b) the order allowing the objection to prayer 2(f) being that clause 5(e) of the All Basotho Convention be declared null and void for the reason that it infringes s 26 of the Lesotho Constitution; (c) the order dismissing the first, second and third appellants' appeal against the exclusion from the record of the constitution of the ABC; (d) the order dismissing the first, second and third appellants' contention that the Court of Appeal should determine the merits of the case at first and last instance and, consequently, (e) the order remitting the matter to the High Court and its determination on the merits. I propose to begin with the remittal order.

[92] Counsel for the appellants relied for their submission on the remittal issue on *Makoala*, referred to in the main judgment. In that case, this Court was faced with the question whether the matter before it should be remitted to the court *a quo* for oral

evidence or not. On the facts of that case the Court decided not to remit the matter based not only on the principle that an appellate court has a general discretion whether to remit or not, but also on the ground that both parties consented to the Court determining that matter on the merits. The court pronounced itself as follows-

*“[14] The referral of a matter for oral evidence is a matter for the discretion of the court of first instance. The matter was apparently not raised in the Court a quo, and the learned judge did not consider it. The question is whether we should now do so. Although this question falls outside the scope of the points in limine, it was argued on appeal and, in fact, was essentially the main issue for this Court’s decision. Clearly, therefore, counsel were satisfied that we should go beyond the matters dealt with in the High Court and that it was proper for this Court to decide the appeal on the real issue raised before us. I proceed to do so.”*

[93] The court proceeded to determine the matter before it based on the averments in the appellant’s affidavit and, after finding that the information therein was insufficient, dismissed the appeal. What, in my view, that case establishes is that in a proper case the appellate Court may determine a matter on its merits without remitting it for oral hearing by the court of first instance if there is sufficient information in the affidavits to enable the court to make a determination of the merits.

[94] The reasons for remitting the matter to the High Court are set out in the main judgment at paragraphs [79] and [80]. I need not repeat them. I am not convinced that there are any “monumental disputes of fact” which cannot possibly be resolved on the affidavits. The question whether there are material or substantial disputes of fact is a question of fact. Counsel for the respondent did not make submissions in this regard, which had they been made may have persuaded the Court of the existence of real and substantial or material disputes of fact. The respondents’ opposing affidavit does not convince of this. The example cited in the main judgment of the membership of the professor, for instance, could very well be resolved on the papers. So are other seemingly disputed facts. The respondents attached to their answering affidavit a document showing who the members of the Constituency Committees are. See document at pp. 126- 153 of the record. At p.142 thereof the 2<sup>nd</sup> appellant is listed as the Chairperson of Korokoro Constituency Committee, at p.126 the 6<sup>th</sup> respondent is listed as a member of Botha- Bothe No. 5 and at p 139 the 7<sup>th</sup> respondent is also listed as a member of Thetsane No. 33. There are attached to the founding affidavit certain documents evidencing the professor’s membership of the party. The letter communicating the rejection of the professor’s nomination does not at all dispute his membership. His rejection, as communicated by that letter, is squarely based on the allegation that he was not a member of the Constituency Committee for the requisite period. It is quite possible that on

closer examination and analysis of the affidavits, the conclusion could well be reached that the purported disputes of fact are either not substantial or are merely illusory. It behoved this court, especially in view of the urgency of the matter, to have satisfied itself as to the existence of real and substantial disputes of fact before deciding to remit the matter.

[95] The second reason at paragraph [80] for referral of the matter to the High Court is that, in the absence of the text of the constitution of ABC from which the Court could itself draw its own inferences through interpreting it, it is undesirable for the Court of Appeal to determine the merits. This reason is linked to the determination of the propriety of the exclusion of the ABC constitution from the papers before the court. I deal with that now.

[96] I must, however, make the observation that this Court is always reluctant to decide matters at first and last instance. It may do so in exceptional circumstances but it is preferable to have the benefit of the reasoning of the lower court because, that way, an appellant is not deprived of his right of appeal, and also deprived of the opportunity, in the exercise of this right, to place before this Court for consideration, a different view from that of the court *a quo*. I think that, in the circumstances presented by this case, this Court can make the final decision at first and last instance. The exigencies of urgency and the potential for an

appeal to this Court after remittal suggest that remittal is not the way to go.

[97] In my understanding, the only reason that the court *a quo* declined production of the ABC constitution was that it was not attached to the founding affidavit. Now, in motion proceedings, as indeed in all proceedings, documentary evidence, or any other evidence at that, is adduced to prove disputed facts. *In casu* the appellants referred to clauses of the ABC constitution in terms of which the professor's nomination was rejected as per the letter from the SG and other clauses on the basis of which the appellants contended that the relevant Party structures violated provisions of its constitution or otherwise failed to comply with it. The respondents on their part did not contest the content of the clauses concerned. They lurched onto the contention that the constitution should have been attached to the founding affidavit. When the appellants produced the constitution in the court *a quo*, the learned judge disallowed it, apparently for the reason given by the respondents. I say apparently because we have no written reasons for the order made by the court *a quo*. As pointed out in the main judgment, if the purpose of producing the constitution is merely to enable the court to peruse it and draw its own conclusions and not to enable it to determine the content of its provisions as alleged by one party, or to determine constitution's authenticity, then, in my respectful view, there was no warrant to reject its production. More so in urgent applications where parties

are hard put to gather all the necessary information in support of their positions.

[98] The question that a judge faces when presented with an urgent application is to decide whether or not to give priority to the application by dealing with it on an urgent basis. In arriving at that decision, the judge is called upon to exercise discretion and he or she must exercise such discretion judicially. If the judge comes to the conclusion that the matter is urgent enough to merit an urgent hearing then he or she, in conducting the hearing must give such orders as he or she thinks fit, including orders on admissibility of documents. The judge *a quo* determined that the matter was urgent. She should have exercised the necessary flexibility in dealing with the matter before her. Rejecting the ABC constitution on the sole ground that it was not attached to the founding affidavit, and in the absence of any real and substantial dispute of the correctness of the appellants' averments in relation to its contents, did not, in my opinion, measure up to a judicial exercise of discretion in the circumstances.

[99] In the main judgment at the said paragraph [80] it is stated that the constitution "could be produced through discovery at the request of the parties or at the instance of the Court." If the constitution can be produced at the instance of the court upon remittal of the case, the same surely could have been done at the hearing of the matter in the court *a quo*, or, if this Court had



decided to hear the merits, it could at its own instance have the constitution produced. At paragraph [55] of the main judgment the learned Judge of Appeal states that the “clear implication is that if the respondent, upon its [constitution] production by the applicant, disputed the authenticity of the text produced, the court would have disregarded it and proceeded on the basis that the text produced was not the applicable text.” That may be so, but the papers do not show that the respondents challenged the authenticity of the constitution produced by the appellants in the court below. I am constrained to the conclusion that the court *a quo* erred in refusing the production of the ABC constitution when the appellants attempted to do so in the course of urgent proceedings. It was within the court’s remit to approach this issue with the necessary flexibility required in such a case.

[100] The last point on which I wish to express my respectful disagreement is, as already alluded to, the finding in the main judgment that the issue concerning the constitutionality of clause 5(e) of the ABC constitution is exclusively a matter for the High Court sitting as a Constitutional Court. I respectfully disagree with the reasoning for the following reasons.

[101] Section 2(1)(c) of the High Court Act referred to at paragraph [62] of the main judgment indeed provides that the High Court has “in its discretion and at the instance of any interested person, power to inquire into and determine any

existing, future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination...”.

[102] I do not have a problem with a judge in the court *a quo* exercising her discretion one way or the other upon dealing with the matter. What I have a problem with is the conclusion that the High Court, in exercise of its ordinary jurisdiction, may not entertain this question because it is reserved for the Constitutional Court. In approving the conclusion of the judge *a quo*, the main judgment at paragraph [64] states that

*“... the question is whether it was open to the appellants, in respect of their prayer in question, to proceed under the High Court Rules as opposed to the Constitutional Litigation Rules. In other words, did they, by so doing, deny the respondents the benefits arising from the application of the Constitutional Court Rules as opposed to the Rules of the High Court.”*

[103] Reliance is placed on *Chief Justice and Others v The Law Society* and the conclusion is reached that the question must be referred to and determined by the High Court exercising its constitutional jurisdiction. The question, as it must be apparent, was incidentally raised in review proceedings that are essentially concerned with the suspension of the Korokoro Constituency Committee and the rejection of the professor’s nomination. It was raised, no doubt, in order to forestall or pre-empt the eventuality

that those individuals in the Committee who have taken the ABC to court may forfeit their membership should they be found to have done so without exhausting internal Party remedies. That, in my view, is the importance for asking the court to declare the impugned provision to be unconstitutional. It is undoubtedly clear that the appellants did not ask for any specific relief arising from the challenge to the provision, but the ramifications of that provision are significant not only for those who may immediately be affected by its application to them, but also for the general enhancement of democratic ethos of and within a ruling political party and the upholding of certain fundamental principles as enshrined in the Bill of Rights. I must mention that counsel, as I think they should have, did not draw our attention to any principal legislation that divests the High Court of jurisdiction in respect of constitutional issues. In my view, subsidiary legislation, standing alone, cannot divest the High Court of its jurisdiction to hear and determine constitutional issues. That can only be the case if permitted by an Act of Parliament. For these reasons, I would have left the matter to the court dealing with the merits to determine if, and how, it would exercise its discretion as provided in the High Court Act.

[104] I appreciate that being satisfied that the matter should not be remitted, I should have proceeded to determine the merits. But in view of the fact that I am in the minority and the matter will in any event be remitted, that will be prejudging the matter and for that reason I decline to determine the merits.

[105] In the result, I would have had this Court determine the merits and –

1. Substituted paragraph 2 of the High Court order with an order that-

“2. The objections raised *in limine* by the first, second and third respondents are dismissed.”

2. Formulated paragraph 3 of the order proposed in the main judgment to read-

“3. The first, second and third appellants’ ground of appeal against the exclusion of the constitution of the ABC from the record, is allowed.”

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**M CHINHONGO**  
**ACTING JUSTICE OF APPEAL**

**For the Appellants:**

Adv. K J Nthontho  
(Assisted by Adv. Mohapi)

**For the 1<sup>st</sup> to 3<sup>rd</sup> Respondents:** Adv. R. Thoahlane

(Assisted by Adv R Sepiriti)