IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.10 OF 2019**

In the matter between:

KORO KORO CONSTITUENCY COMMITTEE	**1ST APPELLANT**
PHOHLELI PHOHLELI	**2ND APPELLANT**
MORAKE KEKETSI	**3RD APPELLANT**

AND

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

CORAM : DR. K. E. MOSITO P.
DR. P. MOSUNDA AJA
M. CHINHENGO AJA

HEARD : 01 FEBRUARY 2019

DELIVERED : 26 FEBRUARY 2019

SUMMARY

Voluntary association – political party – conflict within the party – National Executive Committee of party suspending constituency committee without a

hearing – such decision invalid; - National Executive Committee denying nominee of constituency committee to contest for position of deputy leader - such decision invalid - Article 5(e) of Constitution of the party denying members access to courts in certain circumstances – such clause unconstitutional – Appeal upheld with order as to costs.

JUDGMENT

DR. K. E. MOSITO P

BACKGROUND

[1] This matter commenced in the High Court by way of a notice of motion launched by the appellants against the respondents. The notice of motion broadly sought *review*, *declaratory* and *interdictory* reliefs. First, it sought the setting aside of the suspension of the first appellant[1] and the taking over of the running of the Koro Koro Women and Youth Committees by the Secretary General (SG).[2] Second, it sought the setting aside of the rejection of the candidature of Professor Quosa Leuta Mahao (the professor) for the All Basotho Convention (ABC) deputy leader position[3] and ordering and directing the National Executive Committee (NEC) to accept the nomination.[4] Third, it sought an order declaring as null and void the rejection of the professor's candidature.[5] Fourth, it asked for an order declaring as null and void a clause in the ABC constitution which decrees that a member of the ABC who institutes legal proceedings against the party

[1] Notice of motion, prayer 2(a).
[2] ibid, prayer 2(b).
[3] Ibid, prayer 2(c).
[4] Ibid, prayer 2(e).
[5] Ibid, prayer 2(d).

without exhausting internal remedies forfeits membership[6]; on the ground that the provision violates the applicants' rights guaranteed under the Constitution of the Kingdom of Lesotho. Fifth: it sought an order that, should the matter not have been adjudicated before the taking place of the elective conference, the court halts the elective conference until the matter is finalised.[7]

[2] 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 also seeking specific relief aimed at redressing the rejection of his candidature for the position of deputy leader. The ABC respondents filed answering papers[8], followed by the appellants' reply on 11 January 2019.[9] It appears, therefore, that it was not until 11 January that the matter was ripe for hearing.

[3] The matter was subsequently heard by the High Court in January 2019. 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.*

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[6] Ibid, prayer 2 (f).
[7] Ibid, prayer 2(g).
[8] *There is no date stamp of the registrar to show when that occurred.*
[9] *There is an office stamp of Advocate Thoatlane with an indication that it was received at 4:44 p.m. on 11 January 2019.*

[4] On 14 January 2019 the appellants noted an appeal to this Court against the above order in **Koro Koro Constituency Committee and 2 Others v Executive Working Committee: ABC and 6 Others C OF A (CIV) NO.04 OF 2019**. After hearing the appeal, this Court [per Damaseb and Musonda AJJA] [with Chinhengo AJA dissenting to the extent indicated) gave 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 [respondents] are allowed: (a) The objection to the production by the applicant's counsel of a document purporting to be the constitution of the ABC; (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.

[5] The matter was subsequently remitted to the High Court for hearing. After hearing the parties again, the High Court (Mahase ACJ) on 31 January 2019 made an order, again without reasons, dismissing the application with costs.

[6] On the same evening of the 31 January 2019, the appellants noted an appeal in **C OF A (CIV) NO.10 of 2019** against the learned judge's refusal to grant an order halting the elective conference scheduled for 1 and 2 February 2019. On 1 February 2019, the learned judge's order dismissing the application with costs was signed and the appellants filed the present appeal. Since the ABC elective conference was scheduled for 1 and 2 February 2019, the appeal in **C OF A (CIV) NO.10 of 2019** had to be and was heard on the evening of the same day as an expedited appeal.

[7] This happened as a result of the appellants' request that the matter in **C OF A (CIV) NO.10 of 2019** be heard as an expedited appeal. The matter was then set down for hearing at 3.00pm on 1 February 2019. After hearing the appeal, this Court upheld the appeal and gave the order that appears at the end of these reasons for judgment.

[8] Our brief reasons for the above order were: firstly that, the Koro Koro Constituency Committee was suspended by a decision of the Executive Working Committee. That body is not vested with power

in terms of the ABC's constitution to suspend the Committee. That power lies with other structures of the party. In this connection, the power to suspend a constituency as a structure of the party is not one of the functions and powers conferred upon the NEC by the constitution, but one vested in the Annual Conference in line with the common sense approach enunciated by this Court in ***National Executive Committee, Basotho National Party and Others v Molapo***.[10] The exercise of power that it did not possess means that its decision could not stand. Second, the nomination of Professor Nqosa Leuta Mahao, a member of the Party, was rejected by the National Executive Committee, which was improperly constituted. Three of Professor Nqosa Leuta Mahao's competitors, who are high ranking officials of the Party, participated in the decision to disqualify him. They were clearly conflicted. That decision also must be set aside. Third, section 5 (e) of the ABC constitution is in our view unconstitutional to the extent that it prohibits a member of the Party from approaching the courts of law without exhausting local remedies regardless of the circumstances. We undertook to prepare a fully-reasoned judgment in due course. We now set out to motivate our aforesaid reasons for judgment in the paragraphs that follow.

THE PARTIES

[9] The 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

[10] National Executive Committee, Basotho National Party and Others v Molapo C of A (CIV) 34/2011 .

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. 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.

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

[11] The first respondent is the Executive Working Committee (EWC), while the second respondent is the NEC. Both are organs of the ABC which took decisions adverse to the Koro Koro Constituency Committee 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).

[12] The first and second respondents are organs of the third respondent which, in the name of the latter, took the decisions which the Koro Koro Constituency Committee applicants took on

review and which are the subject of the present appeal. Professor Mahao was nominated by the Koro Koro Constituency Committee as a candidate for the position of deputy leader. 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.

[13] The founding affidavit on behalf of the Koro Koro Constituency Committee 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 SG.

THE FACTS

[14] 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 conference. On 26 November 2018 the Koro Koro Constituency Committee nominated the professor for the position of deputy leader of the ABC. According to the Koro Koro Constituency Committee 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 EWC suspended the Koro Koro Constituency Committee's membership of the ABC; in both respects without a hearing. The EWC also informed Koro Koro Constituency Committee that henceforth the latter's Women's Committee and the Youth Committee shall be run under the auspices of the SG.

Rejection of Prof. Mahao's candidature

[15] 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 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, the Koro Koro Constituency Committee 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'. He further avers 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 [ABC] Constitution'.[11]

[16] Some suggestion is made that the circumstances of the professor being co-opted 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. 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.

[11] *The actual terms of clause C (1) are not quoted in the affidavit.*

Likewise, the incumbent Treasurer was also appointed without an election. The allegation goes that co-option to party positions without election 'is common practice, which is deemed acceptable and lawful'.

[17] 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. 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 Koro Koro Constituency Committee 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.

[18] 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 Koro Koro Constituency Committee to be eligible for nomination to the position of deputy leader.

[19] Another alleged instance of selective and discriminatory application of the constitution relied on by Mr Phohleli relates to the nomination of the 7th 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 Ntlafatso 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.

[20] 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[12] 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?

[21] 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)[13] 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'.

[22] Mr Phohleli then goes on to allege that of the incumbent members of the NEC only 10 are eligible to stand for re-election, implying that the remainder do not qualify under clause C(1)(e) but

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[12] That provision is identified in the affidavit as being clause C(1)(b) of the constitution of ABC.
[13] The actual wording of the provision is not quoted in the affidavit.

will be allowed to contest while 'only [the professor] has been cherry picked for exclusion'[14] relying on clause C(1)(d).

[23] The deponent goes on to state that 'in order to avoid an unfair and unjust decision from being taken, the Constitution of ABC 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'.

[24] Mr Phohleli alleges that in an effort to exhaust local remedies, on 28 October 2018 Koro Koro Constituency Committee wrote a letter to the NEC in terms of clause J(d)[15] 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 Koro Koro Constituency Committee 'to avoid going to court' and to exhaust local remedies.

The suspension of Koro Koro Constituency Committee

[25] According to Mr Phohleli, on 31 December 2018 the Executive Working Committee wrote a letter to the Koro Koro Constituency Committee 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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[14] Again, the deponent does not quote the actual wording of the clause in question.
[15] The terms of the provision are not quoted.

[26] According to Mr Phohleli, the suspension decision 'was wrong' as the EWC 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.[16]

[27] 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 EWC 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'.

[28] 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.

[29] Finally, Mr Phohleli refers to clause 5(e) of the ABC constitution which he alleges decrees that a member of the party forfeits membership by suing the party. The actual terms of the constitution are not quoted. He alleges that the clause is

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[16] *Again, the actual terms of the provision are not quoted.*

unconstitutional because it 'stifle(s) 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.

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

The opposition

[31] The ABC respondents filed answering papers[17], followed by the appellants' reply on 11 January 2019.[18] The answering affidavit on behalf of the first, second and third respondents is sworn by the SG. While he raises several *in limine* objections, he also answers the application on the merits.

[32] 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*

[33] The ABC respondents raised the following preliminary objections to the application: (a), It was incompetent for the appellants to challenge the decisions taken by the EWC considering that the decisions of that body had since been ratified

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[17] There is no date stamp of the registrar to show when that occurred.

[18] There is an office stamp of Advocate Thoatlane with an indication that it was received at 4:44 p.m. on 11 January 2019.

by the NEC. The appellants' prayers directed at the EWC 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 Koro Koro Constituency Committee and was therefore not competent to institute the present legal proceedings on behalf of Koro Koro Constituency Committee. (g), The appellants were compelled to bring their review proceedings in terms of Rule 50 (b) of the High Court Rules.

ISSUES

[34] There are three issues which are dispositive of this appeal: First, whether the decision of the EWC, later ratified by the NEC of the ABC, as alleged, to suspend the Koro Koro Constituency

Committee without a hearing is valid. Second, whether the decision of the NEC of the ABC to reject the Koro Koro Constituency's nomination of the professor as a candidate to contest for the position of deputy leader of the ABC is valid. Third, whether clause 5(e) of the ABC constitution is constitutional.

THE APPLICABLE LEGAL PRINCIPLES

[35] Before delving into the merits of this appeal, I consider it suitable to begin by discussing the legal principles applicable to its resolution. The starting point should be the Constitution of Lesotho. Our Constitution, like many democratic constitutions, pays little attention to the role of political parties, despite the fact that it is now widely accepted that political parties play a crucial role in modern democracies. Although the Constitution does mention political parties in some of its sections, it does not attempt to regulate them.

[36] Section 1(1) of the Constitution of Lesotho provides that, Lesotho shall be a sovereign democratic kingdom. Thus, as a constitutional democratic kingdom, Lesotho has committed itself to providing: a system of periodic elections with a free choice of candidates; competing political parties; universal adult suffrage; political decisions by majority vote; protection of minority rights; an independent judiciary; constitutional safeguards for basic civil liberties, and the opportunity to change any aspect of the governmental system through agreed procedures.

[37] The role of political parties in the development of constitutional democracy is of vital importance. A political party is an organization through which the electorate is involved in both the exercise and transfer of power. It is the presence of two or more political parties within a democratic structure that separates constitutional democracy from the pseudo-democratic structures found in single-party totalitarian states. Political parties in a constitutional democracy are independent of the state. They are concerned with the integration and representation of many interests and beliefs, and, crucially, they are open to wide public participation. There is competition between political parties to achieve government. Even if a political party is too weak to form a government, it has the ability to influence government policies and legislation. Political parties act as a means of representing all interests in the membership of the constitutional democracy and at the same time, they provide an efficient and peaceful means for the transfer of power in the state. A '... modern democracy is unthinkable save in terms of the parties ... [Political] parties are not therefore merely appendages of modern government: they are in the centre of it and play a determinative and creative role in it.'[19]

[38] As Peete J. pointed out in ***Pela-Tsoeu N0.10 Constituency Committee of the Basutoland Congress Party v Basotho Congress Party and Executive Committee of the Basotho Congress Party***,[20] '[p]olitical parties (duly registered) are

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[19] *E E Schattschneider Party Government (1942) 1, cited in WP Cross & RS Katz 'The challenges of intra-party democracy" in WP Cross & RS Katz (eds) The Challenges of Intra-Party Democracy (2013) 2 .*

[20] *Pela-Tsoeu N0.10 Constituency Committee of the Basutoland Congress Party v Basotho Congress Party and Executive Committee of the Basotho Congress*

important elements in the democratic governance of Lesotho. For example, a leader of a political party that commands a majority in the National Assembly after general elections can be invited to form a government of His Majesty.[21] Under the new *Mixed Members Proportional Model* operating in Lesotho, political parties that have been registered under law and have contested general elections are entitled to be allocated some seats in the National Assembly.'[22]

[39] While section 1(1) of the Constitution supports the system of multi-party democracy, there are no explicit rules in the Constitution that regulate how political parties should function, whether their internal systems should be democratic, how they should appoint leaders and office bearers, how they should manage their relationship with their members, nor does the Constitution require auditing or disclosure of their finances. What

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Party (CIV/APN/360/08. I also find myself in respectful with the remarks of Peete in the Pela-Ts'soeu case (supra), that: [48] … I state categorically that without a basic democratic culture in their own constitutional infrastructures, the now many political parties in Lesotho shall totally fail to sustain democracy and good governance in Lesotho.

[49] The Court notes with grave concern, that some if not most or all of the constitutions of political parties in Lesotho have disturbing and alarming undemocratic features which tend to promote autocratic rule by the political elite and to sideline the basic principles of natural justice, rule of law and simple fairness. This has a rippling effect which prejudices the stability and good governance of the country at large.

[50] In our democratic era in Lesotho of the New Millenium, all these undemocratic tendencies must be uprooted and be replaced by virtues of true justice, of accountability, of transparency, of good governance, of fairness, of meritocracy and other good attributes. The Basotho are a peace loving and homogeneous people with common aspirations and it would be wise for the "now too many political parties" in Lesotho to engage with all good sense and maturity towards finding a common ground, common vision, common policies and manifestoes geared at achieving a national vision and goal. They should patriotically sideline petty rivalries both within and between each and one another. The voting patterns in Lesotho would then assume rational democratic trends for the good of Lesotho.

[21] *Section 87 of the Constitution of Lesotho.*

[22] *Section 92A of the National Assembly Election (N0.1) (Amendment) Act No.16 of 2001.*

explains this relative 'absence' of regulation of political parties in democratic constitutions is anyone's guess.

[40] Section 2 of the Constitution provides that, this Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void. This section states in peremptory terms that any law inconsistent with it is invalid and, importantly, that the obligations imposed on it must be fulfilled. Our courts are the foremost and watchful protectors of our Constitution, its values and mores. They have an obligation to respect, protect, promote and fulfil its obligations. As a result, no court may countenance or enforce a contractual clause that is incongruent with the Constitution as it will be acting in violation of the Constitution — the supreme law.

[41] Section 118 of the Constitution provides for the judicature. It vests the judicial power in the courts of Lesotho which shall consist of - (a) a Court of Appeal; (b) a High Court; (c) Subordinate Courts and Courts-martial; (d) such tribunals exercising a judicial function as may be established by Parliament. It further provides in subsection (2) that, the courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law. Thus, the core mandate of the Courts is to interpret, protect and enforce the Constitution and the rights and freedoms provided thereunder.

[42] Chapter II of the Constitution provides for the protection of fundamental human rights and freedoms. There are twenty such fundamental human rights and freedoms provided for under that chapter. Amongst the said rights are: the right to a fair trial; freedom of association; the right to equality before the law and the equal protection of the law; and the right to participate in government.

[43] In regard to freedom of association, every person is entitled to, and is not be hindered in his enjoyment of freedom to associate freely with other persons for political purposes. Thus, the freedom to belong to political parties has its constitutional basis in this provision.

[44] Furthermore, the Constitution provides that, in respect of the right to participate in government, every citizen of Lesotho shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot; to have access, on general terms of equality, to the public service subject to the other provisions of this Constitution. It is clear therefore that section 20 of the Constitution provides in essence, for a representative democracy, which is a type of democracy founded on the principle of elected officials representing a group of people. In a representative democracy, the power is in the hands of the representatives who are elected by the people. All political parties

participating in Parliament can be taken to subscribe to constitutional principles.

[45] I am of the view that it was in recognition of this legal imperative that Guni J held in ***Lelala v Basotho National Party and Others***[23] that, 'I have therefore found it expedient to allow the people of HA MAAMA Constituency who are the final and ultimate authority as regards the determination of who should represent them to exercise their right which enables them to participate in government. The Supreme Law of the land (1993 constitution of Lesotho) so demands by enshrining every citizen's right to vote his or her representative to parliament.'

[46] Thus, the ABC must as a ruling party and party in parliament, necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld. It represents constituents that collectively make up the electorate. It effectively represent the public in Parliament.

[47] As far as relates to the right to equality before the law and the equal protection of the law, the Constitution provides that, every person shall be entitled to equality before the law and to the equal protection of the law. In my opinion therefore, every person's freedom of association and the right to participate in government must be equally protected.

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[23] *Lelala v Basotho National Party and Others (CIV/APN/156/98 at p.4.*

[48] In the interpretation of the ABC constitution or that of any other political party, a court must always bear in mind the Constitution and other laws of this Kingdom, which create an open and democratic society as opposed to a tyrannical and dictatorial framework.

[49] As Chikopa J, in ***Hassan Hilale Ajinga V United Democratic Front***,[24] set out the law on how disputes in the context of political parties should be handled. The members conduct, however, is regulated by the clubs' rules/constitution which acts like some contract between the members and the club and between the members themselves. The clubs (in this case the parties' activities are regulated by the clubs rules/constitution. In the case of party primaries they must be run in accordance with the party's rules/constitution. If there are disputes they should be resolved in accordance with the party's rules/constitution.

[50] As was said in ***Basutoland Congress Party v Molapo Qhobela***,[25] the courts try as much as possible to avoid being involved in the administration of political parties because, "…to be involved would tarnish the essential impartiality of the courts…." The courts should be slow, again very slow, to intervene in a party's internal dynamics.

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[24] *Hassan Hilale Ajinga V United Democratic Front Civil Cause Number 39 of 2007 (unreported).*
[25] *Basutoland Congress Party v Molapo Qhobela CIV/APN/410/99.*

[51] In ***Ajinga v. United Democratic Front***[26], the court stated as follows: '[i]n the case of ***Wallace Chiume & Others v Aford, Chakufwa Chihana & Another***[27] we, borrowing a leaf from the Constitutional Court in South Africa and the House of Lords in England, opined that judicial officers are not best placed to decide on matters inter alia of politics. The considerations operating in politics are different to those obtaining in the courts. The courts are preoccupied with the law, facts, evidence and ensuring that their decisions are in accordance with legal, factual and evidential merit. Politics on the other hand deals primarily in numbers with emotions and egos taking a not too distant second. In politics he who has the numbers carries the day. Merit in whatever respect is not a primary consideration. We talk of the foregoing not because we have some particular distaste for politics but to drive home our view that as much as possible the courts should be slow, very slow in our humble view, to adjudicate on matters that, though dressed up as legal, are really political disputes. In fact our position is that the more political a dispute is the more amenable it should be to a political solution. The less political it is or becomes, the more amenable it is or becomes to juridical intervention.'

[52] As was said in ***Ishmael Chafukira vs John Zenus Ungapake Tembo and Malawi Congress Party***[28], it is in the interest of political groupings to avoid judicialisation of political disputes and that democracy by its very nature means dialogue or discussion

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[26] Ajinga v. United Democratic Front Civil Cause Number 2466 of 2008 (unreported).
[27] Wallace Chiume & Others v Aford, Chakufwa Chihana & Another Civil Cause Number 108 of 2005 (Mzuzu Registry, unreported).
[28] Ishmael Chafukira vs John Zenus Ungapake Tembo and Malawi Congress Party Civil Cause No. 371 of 2009 (unreported).

among persons of different political persuasion, inclination or even thought. It is with the above principles in mind that I turn to consider this appeal.

THE APPEAL

[53] The first complaint by the appellants is that the Koro Koro Constituency was denied an opportunity to make representations prior to its suspension. In his written submissions, Counsel for the appellants argued that since it is common cause that the Koro Koro Constituency was denied an opportunity to make representations on any factor that might lead to the Koro Koro Constituency Committee's suspension, the decision was invalid.

[54] The anterior question to the determination of the issue raised is whether the High Court is in law entitled to review decisions of domestic bodies of a voluntary association such as a political party. It appears from the pleadings that the respondents' position is that it is not, while the appellants contend that it is. This Court has in the past held in ***Lesotho Evangelical Church v Pitso***[29] that, the approach of the Courts has for many years been that the Court will intervene where there is evidence of mala fides, irregularity or non-observance of the procedures laid down for the functioning of domestic tribunals. After referring to the cases of **du Plessis v Synod of D.R.C**[30].and Crisp **v S.A. Council of the Amalgamated Engineering Union**,[31] this Court referred to the latter case at p. 236 where Wessels J.A., in dealing with rules of a

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[29] *Lesotho Evangelical Church v Pitso C of A (CIV) 5/A/92 at p.7.*
[30] *du Plessis v Synod of D.R.C. 1930 CPD 403 at 422, 426.*
[31] *Crisp v S.A. Council of the Amalgamated Engineering Union 1930 AD 225.*

society or corporation which "constitute the contract between the parties" and which clearly exclude Courts of law, said:

> "The law courts, however, will not consider their jurisdiction as ousted, even if the rules of the society should say so, where the act complained of is *ultra vires* the society or against the principles of natural justice, for in the last resort the law courts can always be appealed to."

[55] Thus, this Court held in ***Lesotho Evangelical Church v Pitso***[32] that:

> "Although it has been suggested that the passage referred to was obiter, (See *Jockey Club of S.A. and Others v Feldman* 1942 AD 340 at 363) the matter was clarified in *Theron v Ring van Wellington van die N.G. Sendingkerk in SA* 1976 (2) SA 1. At p. 9 van Blerk A.C.J. stated that parties to the agreement creating the domestic tribunal of a voluntary association can "in certain respects" exclude the jurisdiction of the courts, but can in any event not do so in relation to "unlawful conduct" and where the exclusion of the court's jurisdiction will be contrary to public policy. In the same case Jansen J.A. drew a distinction between the autonomy which an ecclesiastical court may reasonably have in relation to doctrinal issues and the jurisdiction which a court of law would have to pronounce upon the interpretation of ordinances of the church- As the respondent's complaints relate both to the procedure before the Seboka and the interpretation of the constitution I think that the jurisdiction of the court a quo was not ousted by Order 214 of the Constitution. In this regard I should add that while Mr Penzhorn has submitted that disciplinary measures are matters not to be subjected to scrutiny by the courts, he correctly conceded that that does not apply if the parties do not adhere to the constitution."

[56] As Kenyatta Nyirenda J of the High Court of Malawi persuasively put the issue in ***Patrick Bandawe v Malawi Congress Party***:

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[32] *Lesotho Evangelical Church v Pitso C of A (CIV) 5/A/92 at p.78-9.*

> "… a political party or its members will be allowed to have recourse to a court of law regarding disputes relating to activities of the political party where (a) the political party is in breach of its constitutive document or rules made thereunder, (b) the political party acts in breach of the rules of natural justice , (c) the *political* party or its members act in breach of the laws of Malawi, (d) the political party or its members conduct themselves in a capricious or arbitrary way."[33]

[57] There are also several cases in the courts of Botswana usefully dealt with by Chinhengo J in the High Court of Botswana's case of ***Mogorosi and Others v Botswana National Front and Others***.[34] Amongst them is a very persuasive, well-researched and reasoned judgment of Kirby J. in ***Stephen Ntutunyane Sorinyane v Kanye Brigades Development Trust and Leach Tlhomelang***,[35] where he summarised the law so far as it is relevant to this point, in paragraph 22 to be that:

> "(a) Where their officers, structures, boards or committees are required to perform quasi-judicial functions, voluntary associations, including sporting and recreational clubs, charitable associations, educational institutions, professional bodies, political parties, trade unions and others are subject to common law review of the exercise of such functions.
> (a) In exercising its powers of common law review, the Court will give effect to the constitutions, rules, regulations and laid down procedures of such voluntary associations, even where these conflict with the rules of natural justice provided that these are implemented in good faith.
> (b) The rules of natural justice and particularly those relating to *audi alteram partem* and impartial adjudication will be implied where they are not specifically excluded by such constitutions, rules, regulations or procedures."

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[33] *Patrick Bandawe v Malawi Congress Party CIVIL CAUSE NO. 1010 OF 2018 [2019] MWHC 3 (08 January 2019).*
[34] *Mogorosi and Others v Botswana National Front and Others (MAHFT-000134-10) [2010]*
[35] *Stephen Ntutunyane Sorinyane v Kanye Brigades Development Trust and Leach Tlhomelang MISCA 469 of2004.*

[58] I am of the view that, there is no reason for not adopting the principles discussed in the Botswana and Malawian High Courts to the Kingdom of Lesotho. They are consistent with the remarks of this Court in ***Lesotho Evangelical Church v Pitso (supra).*** I add that, the basis for intervention by way of judicial review is whether an impugned decision in respect of which natural justice was denied, affects the rights, interests, property, privileges or liberty of a person, not whether it is judicial or administrative in nature. It is rather the seriousness of the decision and the implications that flow from it which dictate what and how much fairness or natural justice is required. As Jane Burke-Robertson[36] said, the rules which most significantly affect members are those relating to continued compliance with membership qualifications, discipline, expulsion and suspension. The application of any of these rules can result in a spectrum of impact ranging from mere embarrassment in the context of a social club, to more significant implications such as the deprivation of economic or property rights in other organizations. It is trite that at common law and in terms of the tenets of natural justice, hearing the other party – *audi alteram partem* – is an indispensable condition of fair proceedings. As Donaldson LJ put it in *Cheall*:

> "[N]atural justice is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'." [37]

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[36] *Canadian Bar Association/ Ontario Bar Association National Symposium on Charity Law, 'Natural Justice, Members and the Not-For-Profit Organization: 'Fair Play in Action' 2007 Carters Professional Corporation at p.2.*

[37] *Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 1 QB 126 at 144B.*

[59] The principle is underpinned by two important considerations of legal policy. The first is recognising the subject's dignity and sense of worth. Second, there is a more pragmatic consideration. This is that *audi alteram partem* inherently conduces to better justice. Milne JA summarised both considerations in ***South African Roads Board***.[38] He said the application of the *audi alteram partem* principle—

> "has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."[39]

[60] The legal principles dictating the approach in matters requiring observance of natural justice appear from the following statement in this court by Gauntlett JA in ***Matebesi v Director of Immigration & others***:[40]

> The right to be heard (henceforth 'the *audi* principle') is a very important one rooted in the common law not only of Lesotho but of many other jurisdictions. . . . It has traditionally been described as constituting (together with the rule against bias, or the *nemo iudex in re sua* principle) the principles of natural justice, that "stereo-type expression which is used to describe [the] fundamental principles of fairness" (see *Minister of Interior v Bechler; Beier v Minister of the Interior* 1948 (3) SA 409 (A) at 451). More recently this has mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in *Ridge v Baldwin* [1964] AC 40, particularly in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) and more recently, *Du Preez v Truth and*

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[38] South African Roads Board v Johannesburg City Council [1991] ZASCA 63; 1991 (4) SA 1 (A).
[39] Id at 13B-C.
[40] Matebesi v Director of Immigration & others [1998] JOL 4099 (Les A) [1998] LSCA 83 at 7-8.

Reconciliation Commission supra and *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 (HL) at 106d-h.'

[61] In ***President of the Court of Appeal v The Prime Minister and Others***,[41] this Court pointed out that:

> As explained by Gauntlett JA in his earlier quoted dictum from *Matebesi,* the requirements of fair procedure, which includes the *Audi principle,* have 'more recently mutated to an acceptance of a more supple and encompassing duty to act fairly'. The same sentiments appear from the statement by Hoexter under the rubric '*audi alterem partem'* (at 363):
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> > 'From the late 1980s . . . our courts have steadily retreated from the old formalistic and narrow approach to "natural justice" and towards a broad and flexible duty to act fairly in all cases.'
> >
> > And in the same vein (at 362):
>
> '. . . [P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'

[62] However, this Court in ***President of the Court of Appeal v The Prime Minister and Others***,[42] proceeded that, '[t]he principle that procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and that the one-size-fits-all approach is inappropriate, has been explicitly recognised by the highest courts in England.[43] This

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[41] *President of the Court of Appeal v The Prime Minister and Others (C of A (CIV) No 62/2013) [2014] LSCA 1 (04 April 2014).*

[42] *President of the Court of Appeal v The Prime Minister and Othersat para 20.*

[43] *see eg Doody v Secretary of State for the House Department and Other Appeals [1993] 3 All ER 92 (HL) 106d-h) and in South Africa (see eg Du Preez & another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) 231-3; Minister of Health & Another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae) 2006 (2) SA 311 (CC) para 152.*

means, as I see it, that the strict rules of the *audi* principle are not immutable. Where they are not strictly complied with, as in this case, the question as to whether in all the circumstances of the case the procedure that preceded the impugned decision was unfair, remains.'

[63] Having considered the foregoing principles I now set to apply them to the facts of the present case. I am satisfied that the application was rightly before the Court in that it falls within the categories of cases that are an exception to the general rule that "political disputes" are not amenable to juridical intervention.

[64] I hold that since it is common cause that the Koro Koro Constituency was denied an opportunity to make representations on any factor that could impact on it's suspension, then to suspend it was invalid. Furthermore, since the decision to suspend the Koro Koro Constituency was made without it being heard, it was in breach of the *audi alteram partem* rule – a fundamental principle of our law which both courts and administrative tribunals and functionaries are generally required to observe before they may make a decision adverse to anybody. Hence I agree that the strict requirements of the *audi* principle were not complied with.[44]I also hold that on the facts of this case, the NEC did not observe its duty to act fairly, which is a facet of the *audi alteram partem* rule.

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[44] For these principles, see eg Cora Hoexter Administrative Law in South Africa (2nd ed, 2012) (Hoexter) at 369 et seq.

[65] The normal consequence for a decision taken by a body, tribunal or functionary or a court adversely affecting the rights or interests of a person without compliance with the *audi alteram partem* rule, is that such a decision is invalid and should be set aside. The purpose of setting the decision aside is to rectify what was done wrong or to rectify an irregularity that occurred in the proceedings where the NEC and/or the EWC made a decision in a matter without all interested parties being before it.

[66] The purpose of the hearing was also to afford all interested parties an opportunity to be heard on whether the decision to suspend would be just and equitable in all circumstances – an opportunity all interested parties should have been granted before the decision to suspend could be granted against them. I can see no reason why there should be a departure from this general rule in the case of the NEC by its decision ratifying and confirming the EWC's decision to suspend the Koro Koro Constituency Committee. Therefore, both decisions are set aside.

[67] We have to interpret a constitution of a political party adopting a common sense approach. As this Court pointed out in ***National Executive Committee, Basotho National Party and Others v Molapo***:[45]

> [9] Dr Mosito KC, who appeared with Advocate Thejane for the appellants, contended that the manner in which the court a quo interpreted the constitution was incorrect, involving as it did the laying down a standard of observance that would always make it unnecessarily difficult and

[45] National Executive Committee, Basotho National Party and Others v Molapo C of A (CIV) 34/2011 .

> sometimes impossible to carry out the Constitution and he referred in this regard to what was said by M.T. Steyn J in Motaung v Makubela and Another NNO 1975 (1) SA 618 (O) at 626 J – 627D, where various cases were cited in support of the proposition that a benevolent approach should be adopted by the courts in construing the constitutional provisions of a voluntary association.
> [10]I agree with this submission. I think that the approach adopted in the court a quo deviated from what was described in the Motaung case, supra, at 627 A, as the 'practical commonsense approach to the matter' and was clearly wrong.
>
> [11]The court a quo should have found that the interpretation of the relevant provisions of the party's Constitution for which the respondent had contended should be rejected because it would make it unnecessarily difficult and sometimes impossible to carry out the Constitution.

[68] While we accept that, a practical common sense approach should be adopted in construing constitutional provisions of a voluntary a association where a strict approach would make it unnecessarily difficult and sometimes impossible to carry out the constitution, in this case, it was not suggested that it would be difficult or impossible to require of the association for the NEC to violate the constitution of the party and do things not contemplated in the party's constitution. This is not a mere requirement of form. (See ***Mahlaha and Others v Lesotho Public Motor Transport (Pty) Ltd***.[46]

[69] Bearing the aforegoing principles in mind, I observe that, the powers of the NEC are provided for under clause 8 of the party constitution. The EWC has no power under the Constitution to recommend neither either the suspension of a member nor a structure of the party. While I am of the view that, subsequent

[46] Mahlaha and Others v Lesotho Public Motor Transport (Pty) Ltd C of A (CIV) 10/2014 para 17.

ratification is the equivalent of prior consent, the *onus* of proving ratification is on the person alleging it and on an examination of the evidence, a judge has to determine it. If an organ of a political party such as the EWC or the Conflict and Dispute Resolution Committee (CDRC) recommends to the NEC in respect of a matter not falling within its constitutional province, then the purported recommendation is a nullity. It cannot be ratified by the NEC. The powers and functions of the NEC run from clause 8(1)(a) to (s). Under the clause, the NEC has no power to suspend a structure of the ABC. It has no power to suspend a constituency committee or any other structure for that matter. It has no power to purport to vest the administration of the structures of the ABC in the office of SG. It therefore acted *ultra vires* in purporting to suspend the Koro Koro constituency committee and vesting the running of the Koro Koro constituency women and youth in the office of the Secretary General. These actions were therefore null and void and of no legal force or effect. Furthermore, the functions of the office of the SG are provided for in clause 81.1 of the ABC constitution. Nowhere under that clause is it empowered to run a run a structure of the party.

[70] The second order that we gave was that, the decision of the NEC of the ABC to reject the Koro Koro nomination of the professor as a candidate to contest the position of Deputy Leader of the ABC is set aside. We further held that, the Koro Koro Constituency Committee was accordingly entitled to participate at the elective Conference and nominate its candidate for the position of Deputy Leader of the ABC. There are a number of grounds on which the

decision to disqualify the professor as a candidate was based. One of the reasons advanced is that, in the incumbent NEC that disqualified him, the second and third respondents hold the positions of Deputy Leader and Chairperson respectively. It is also contended that both are contesting for the position of Deputy Leader of the ABC as against the professor.

[71] In his founding affidavit, Mr Phohleli deposes that in the incumbent NEC which disqualified the professor as a candidate to contest the position of Deputy Leader of the ABC, the second and third respondents occupied the positions of Deputy Leader and Chairperson of the ABC. He further avers that this duo are also each contesting for the position of Deputy Leader against the professor. He therefore contends that the second and third respondents have a conflict of interest and could not themselves sit to vet other candidates such as the professor, who are contesting against them. In the answering affidavits, the respondents decided not to controvert Mr Phohleli's averments. In ***Chobokoane v Solicitor General***,[47]this Court held that:

> "Respondent does not deny these facts.... The affidavit made by the appellant contains not only his allegations but also his evidence, and if this evidence is not controverted or explained, it will usually be accepted by the Court. In other words the affidavit itself constitutes proof, and no further proof is necessary..."

[47] Chobokoane v Solicitor General C. of A. (CIV) .No 15 of 1984 at p.3.

[72] In ***Theko v Commissioner of Police and Another***[48] **the court said** '[t]he issues in our view must therefore be resolved on the basis of the acceptance of the unchallenged evidence of an officer of this Court. It follows that we must proceed on the assumption that Mr. Maqutu was repeatedly informed by high ranking officers in charge of the interrogation that it had been completed, that the detainee had answered all questions satisfactorily and that he was about to be released.' I am of the opinion that the same principle is applicable here. I therefore approach the issue on the uncontroverted basis that, the incumbent NEC which disqualified the professor as a candidate to contest the position of Deputy Leader of the ABC, included the second and third respondents who are also contesting for the positions of Deputy Leader.

[73] The next question is whether such second and third respondents were not conflicted. In ***Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs***:[49]

> [176]Lord Herschell in *Bray v Ford* [1896] AC 44 at 51 issued this warning: 'Human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty and thus prejudicing those who he is bound to protect.' In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 178-

[48] Theko v Commissioner of Police and Another C of A (CIV) 14/90 at p.

[49] *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs (1260/2017; 188/2018; 1279/2017; 187/2018) [2019] ZASCA 1 (24 January 2019)*

> 179, Innes CJ reasoned that the test pertaining to conflict of interest 'rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interest (e.g. by making a profit) at that other's expense.'

[74] In my opinion, a conflict of interest refers to a situation where a conflict arises for an individual between two competing interests. These are often, but not exclusively, interests of public duty versus private interests. This refers to a reasonably perceived, potential or actual conflict of interest. Conflicts of interest can involve financial or non-financial interests of the staff member and the interests of a business partner or associate, family member, friend or person in a close personal relationship with the staff member. I am of the view therefore that, as Lord Herschell in ***Bray v Ford (supra),*** warned, '[h]uman nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty and thus prejudicing those who he is bound to protect.' I am of the view that the vetting of the disqualification of the professor as a candidate (which included the second and third respondents) to contest the position of Deputy Leader of the ABC, was vitiated by the existence of the actual or perceived conflict of interest. This is moreso because this issue was not factually challenged by the respondents.

[75] There is a further reason why the disqualification of the professor as a candidate should be set aside. It is common cause that, after he had been nominated, his disqualification was made without affording him the benefit of the *audi* principle. It was

common cause on the papers and in argument before us that he was not afforded the benefit thereof.

[76] The last reason advanced by the NEC for disqualifying Professor Mahao's nomination is that, although it is common cause that he is a member of the Koro Koro Constituency Committee, the NEC disqualified him as a candidate to stand for the position of deputy leader of the ABC. In its letter of 20 December 2018, the NEC informed the Koro Koro Constituency that the NEC had decided not to accept nomination of Professor Mahao as a nominee for the position of Deputy Leader of the ABC. This was said to have been done in accordance with clauses, C.4.b;6.(m) and C.1.b of the constitution of the party.

[77] Clause C.4. provides for eligibility for membership in a constituency committee. Thus, clause C.4.b requires that, for one to qualify for membership in a constituency committee, such a person must have been a member of a Branch committee for at least 24 months and be a person with a good disciplinary record. It is common cause that, Professor Mahao took membership of the ABC on 16 August 2015. He was then appointed as a member of the Branch Committee for Mokema. In our view, clause C.4.b has no relevance to the question of the eligibility for membership in the NEC. It relates eligibility for membership in a constituency committee. It is not a prerequisite for eligibility for membership in the NEC. If this were so, the constitution would have said so in so many words.

[78] Another reason given as a basis for Professor Mahao's disqualification is clause C.1.b. This clause provides that, for a person to qualify to be a member of the NEC of the ABC, such a person must have been serving as a member of the Constituency Committee for at least 36 months. On the facts before us, it appears that, on 13 September 2015, Professor Mahao was co-opted into the Koro Koro Constituency Committee by the committee. Thus, arithmetically, from 13 September 2015 to 13 September 2018 he had completed 36 months as a co-opted member of the Koro Koro Constituency Committee. On 26 November 2018, he was nominated to contest for the position of Deputy Leader of the party, he had already completed the period of 36 months as a member of the Koro Koro Constituency Committee. Consequently, a disqualification based on his having not 36 months as a member of the Koro Koro Constituency Committee cannot stand. Furthermore, clause 6.(m) of the ABC constitution provides for representation at the conferences of the ABC. This has nothing to do with the qualification to contest for the membership of the NEC of the party.

[79] Finally, Mr Phohleli refers to clause 5(e) of the ABC constitution which he alleges decrees that a member of the party forfeits membership by suing the party. He alleges that the clause is unconstitutional because it 'stifle(s) 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. In our

order of 1 February 2019, we held that, section 5 (e) of the ABC constitution is in our view unconstitutional to the extent that it prohibits a member of the Party from approaching the courts of law without exhausting local remedies regardless of the circumstances.

[80] One must remember that in the previous judgment handed down by this Court in ***Koro Koro Constituency Committee and Others v Executive Working Committee: All Basotho Convention and Others***[50] this Court held that, the following objections raised *in limine* by the first, second and third respondents are allowed: (a) The objection to the production by the applicant's counsel of a document purporting to be the constitution of the ABC; (b) the objection to prayer 2(f) of the notice of motion. It further stated that-

> [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

[81] The essence of this order is that prayer 2(f) of the notice of motion which challenged the constitutionality or otherwise of clause 5 (e) of the ABC constitution ought to have been presented before the High Court exercising its constitutional jurisdiction for determination. There was no indication on record before us whether or not this was done. We were only presented with an

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[50] Koro Koro Constituency Committee and Others v Executive Working Committee: All Basotho Convention and Others C OF A (CIV) NO.: 04 OF 2019.

order without reasons, that "the application is dismissed with costs." We are therefore not entitled to assume that the constitutionality or otherwise of clause 5 (e) of the ABC constitution was or was not presented before the High Court exercising its constitutional jurisdiction for determination as directed by this Court. All we are aware of is that, the application was dismissed with costs. We are therefore entitled to assume that that order related to all issues which were presented before the Court a quo. Even if it had been presented before the High Court exercising its constitutional jurisdiction for determination, we would still have jurisdiction to determine the correctness of that decision because, appeals from the High Court exercising its constitutional jurisdiction lie to this Court.

[82] I now turn to consider the constitutionality or otherwise of the said clause. In my opinion, contractual terms are subject to constitutional rights. In ***Brisley v Drotsky***,[51] the essential principles of which were endorsed in ***Afrox Healthcare Bpk v Strydom***,[52] it was affirmed that the common law of contract is subject to the Constitution. It is constitutionally unacceptable for contracting parties to contract so as to exclude constitutional values such as the right of access to the courts embodied in the right to a fair trial contemplated by section 12(8) of the Constitution. I also find myself in respectful agreement with Cameron JA in ***Napier v Barkhuizen***[53] that, the Constitution requires us to employ its values to achieve a balance that strikes

[51] Brisley v Drotsky 2002 (4) SA 1 (SCA) at paras [88] - [95].
[52] Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).
[53] Napier v Barkhuizen 2006 (4) SA 1 (SCA) at para 13.

down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is to respect the complexity of the value system the Constitution creates.[54] It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.[55]

[83] This case touches on the intersection between constitutional law and contract law. The doctrine of unconstitutionality is about how the court will decide a contract term being enforceable or not in case one party of the contract has more power than the other. This doctrine is well acknowledged in Common Law. A strong case can be made out for the proposition that clauses in a contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom.

[84] In my view, clause 5(e) of the ABC constitution is constitutionally unconscionable when measured against the constitutional standards of access to justice and right to a fair trial contemplated by section 12(8) of the Constitution of Lesotho. The first is that an expressly guaranteed constitutional right is engaged, namely the right to have a dispute between the parties resolved by a court. Section 12(8) of the Constitution of Lesotho,

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[54] Ibid.
[55] Ibid.

provides that, any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time.

[85] I hold that the two-part test in ***Mohlomi,***[56] on whether a provision affords a claimant an inadequate and fair opportunity to seek legal redress, applies in this case. The first part relates to whether the impugned term stands on the members' right to sue. The second part probes whether the stipulation is inflexible and requires strict compliance, whatever the circumstances. In my opinion, it does. Any member of the ABC who takes the party to court risks forfeiting his membership. For my part, the impugned clause, fails the test laid down in *Mohlomi* on both counts. The clause is manifestly inflexible. It is couched in certain and explicit terms. It irreversibly takes away, the right of action of a member of the ABC and, in that way, denies the member a reasonable opportunity to have the dispute decided by an independent court or adjudicating authority. The likely impact or tendency of this bar is to release the party from liability to its considerable gain and to the irreparable prejudice of the member.

[86] Second, it is not clear what legitimate purpose is served by this kind of clause in a democratic society. Furthermore, one must

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[56] *Mohlomi v Minister of Defence 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).*

wonder why this one-sided provision is necessary to protect the interests of the party. The likely harm to the member that the provision wreaks seems disproportionate to the interest the ABC seeks to protect. In other words, the prejudice that the clause visits on aggrieved litigating members is disproportionate to the conceivable benefits that it confers on the party. Third, the attenuated bar is not reciprocal. The ABC constitution does not contain any bar to the ABC's right of action against the members. It may maltreat the members when it chooses. Fourth, in the present matter, the impugned clause, on its terms, is enforceable whatever the reason is for failure to comply. In other words, the clause may be enforced however unfair or unjust its consequences may be. In my view, there are no common law defences which could render the clause flexible. In my view, the clause means what it says.

SUMMATION

[87] It was with the aforegoing reasons in mind that we made the order that we handed down on 1February 2019. We did not at that stage deal with the issue of costs. In exercise of our discretion, we consider that we should not order any costs against either party. In the result, each party is to bear its own costs. For the avoidance of doubt, I repeat the full order that we gave reads as thus: The decision of the High Court is set aside and substituted with the following:

1. The decision of the Executive Working Committee of the All Basotho Convention Party to suspend the Kokokoro

Constituency Committee (irrespective of ratification by National Executive Committee), is set aside. Consequently -

(a) The Committee is entitled to participate in the ABC Elective Conference scheduled for 1st and 2nd February 2019.

(b)The vesting of the responsibility for the Koro Koro Women's Committee and Youth League Committee in the office of the Secretary General is set aside.

2. The decision of National Executive Committee of the All Basotho Convention to reject the Koro Koro nomination of Nqosa Leuta Mahao as a candidate to contest the position of Deputy Leader of the All Basotho Convention is set aside. Accordingly the Koro Koro Constituency Committee is entitled to participate at the Elective Conference and nominate its candidate for the position of Deputy Leader of the ABC.

3. The decision of the National Executive Committee to rejecting the nomination of Nqosa Leuta Mahao to stand for the position of Deputy Leader of the All Basotho Convention is hereby set aside. Accordingly Professor Nqosa Leuta Mahao is entitled to contest the election.

4. Clause 5 (e) of the ABC Constitution is unconstitutional and is hereby struck down.

DR K.E.MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:

DR P MUSONDA

ACTING JUSTICE OF APPEAL

I agree:

M CHINHENGO

ACTING JUSTICE OF APPEAL

For the Appellants: Mr K Nthontho

For 1st to 3rd Respondents: Adv C.L. Letompa