LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) N0.32 & 33 /2019
(CIV/APN/47 &/142/2019

(1) In the/matter between:

ALL BASOTHO CONVENTION	1ST APPELLANT
NQOSAMAHAO	2ND APPELLANT
LEBOHANG HLAELE	3RD APPELLANT
SAMUEL RAPAPA	4TH APPELLANT.
MANTOELIMASOETSA	5TH APPELLANT
MATEBATSO DOTI	6TH APPELLANT

vs

HABAFANOE LEHANA	1 sT RESPONDENT
KEKETSO SELLO	2ND RESPONDENT
MOHAPI MOHAPINYANE	3RD RESPONDENT

(2) In the matter between:

ALL BASOTHO CONVENTION	**1ST APPELLANT**
NQOSAMAHAO	**2ND APPELLANT**
LEBOHANG HLAELE	**3RD APPELLANT**
SAMUEL RAPAPA	**4TH APPELLANT**
MANTOELIMASOETSA	**5TH APPELLANT**
MATEBATSO DOTI	**6TH APPELLANT**

VS

MOTSEKI LEFERA	**1ST RESPONDENT**
MATUMISANG NTIISA	**2ND RESPONDENT**
MARTHA MAHKOHLISA	**3RD RESPONDENT**

CORAM: K.E.MOSITO P
P.T.DAMASEB AJA
P.MUSONDA AJA
M.CHINHENGO AJA
N.TMTSHIYA AJA

HEARD: 24 MAY 2019
DELIVERED: 31 MAY 2019

SUMMARY

Major political party in governing coalition having held elective conference for its National Executive Committee members and new Committee having been elected - Election contested by some party members - Interim orders issued by High Court excluding

new Committee from running the Party and restoring old Committee until disputed election resolved in court - Members of new Committee appealing against High Court orders

Non-party to proceedings in the High Court appealing to Court of appeal - Need to apply for leave to appeal - Factors to be considered in permitting non-party to appeal stated.

Party seeking consolidation of matters one in which it is not party and another in which it is party - Matters based on different causes of action and having different respondents - Not permissible to consolidate such matters - Applicant ordered to pay costs.

Respondents applying for stay and/ or striking off appeal from roll as well as interdicting legal practitioner from representing it - Case for stay and/ or striking appeal not made - Interdict application made in wrong forum - Application refused - applicant to pay costs.

Party abandoning judgment in its favour on appeal after protracted contestation - Such party to bear costs on appeal.

Court of Appeal declining to consider issue on appeal that would impact on merits in matter pending in High Court and pre-empt decision therein.

JUDGMENT

CHINHENGO AJA (MOSITO P; DAMASEB AJA; MUSONDA AJA AND MTSHIYA AJA CONCURRING):

Introduction

[1] All Basotho Convention (ABC) is the biggest party in a coalition" of political parties currently in power in Lesotho. It held a conference (the elective conference) on 1 and 2 February 2019 to elect members of its National Executive Committee (NEC). All the positions in the NEC, except that of the Leader of the Party who is the current Prime Minister, were contested. All the elective conference arrangements were put in place by the outgoing NEC, including assigning to the Lesotho Council of Non-Governmental Organisations (LCNGO) the task of conducting the elections and announcing the results thereof. Unfortunately for the members of the outgoing NEC (the old NEC), most of them were routed out of office through the vote at the elective conference and a new NEC (the new NEC) was voted into office by wide margins for each of the new members.

[2] The new NEC consists of the Leader of the Party, the Rt Honourable Prime Minister, and the 2nd to 6th appellants. The 2nd appellant, Professor Nqosa Mohao, who happens to be a relatively new member of the ABC, was elected as the Deputy Leader of the Party. His participation in the elections was

opposed by some of the members of the old NEC but that matter was resolved through the courts. [1] The outcome of the elective conference has destabilised, or has the potential to destabilise, not only the ABC but also the coalition government and the general governance of the country. Following upon two applications made to the High Court by members of the ABC, the old NEC were sanctioned by two High Court orders to remain temporarily in office in the NEC and the new NEC members were disallowed from assuming the positions to which they were elected at the elective conference.

Lehana Application

[3] The first application was by Habafanoe Lehana and three other members of the Party (the Lehana application). The respondents therein were the ABC, the old NEC as a body, the Lesotho Council of Non-Governmental Organisations (LCNGO), members of the new NEC and the old NEC in their individual capacities, and several other persons who were nominated and competed for various positions in the (NEC), also sued in their individual capacities.

[4] The Lehana application was commenced as an urgent application in the High Court on 11 February 2019. It is opposed by the members of the new NEC through an affidavit

[1] *Karo Kora Constituency Committee* & *Others v Executive Working Committee of All Basotho Convention* & 6 *Others* C of A (CIV) No. 10/2018.

deposed to by the person elected at the elective conference to be the new Secretary General of the Party, Lebohang Hlaele. I will refer to this affidavit as the "Hlaele affidavit". The members of the old NEC and other respondents have not filed any opposing papers.

[5] In the Lehana application, the applicants sought interim orders to stop the ABC from confirming the election of new NEC members; to stop the old NEC from handing over to the new NEC and the new NEC from taking over the administration of the Party, all pending the finalisation of the application. The applicants also sought, as final relief, the nullification of the elections and that the ABC and the old NEC should prepare for and hold fresh elections within three months from the date of the order that the court would make. In the alternative to the final relief, they prayed for an order that the complaints raised in the application be referred to the Party's Dispute Resolution Committee in terms of the Party's constitution.

[6] This urgent application came before Mahase ACJ and on 13 February 2019 she issued a *rule nisi* granting the interim relief and fixing 15 February 2019 as the return day of the rule.

[7] In simple terms the interim order restored the members of the old NEC into their previous positions and excluded members of the new NEC from taking office until the application

was finalised. This obviously means that by virtue of Mahase ACJ's order, the old NEC is currently running the affairs of the Party and any dispute as to who administers the Party in the interim, has been settled for the time being. The return day of the *rule nisi* has been postponed several times and the rule itself accordingly extended, for one reason or another. The date of hearing of the application has been set by the court for 14 June 2019.

[8] It will be noted that the Lehana application, commenced as an urgent matter, has still not been heard almost 5 months down the line and was scheduled to be heard on 14 June 2019, a very regrettable state of affairs and one with several unintended consequences.

Lefera Application

[9] One of the unintended consequences of the several postponements of the hearing of the Lehana application, and the failure to finalise it, was that on 6 May 2019 three members of the ABC lodged an application (the Lefera application) which they styled "petition" citing the old NEC as the respondent and indicating that the matter would be heard on 8 May 2019, subject of course to the agreement of the presiding judge. The application was served on the Secretary General of the old NEC. In that application the relief sought was an order declaring the elective conference null and void; that the old NEC should

continue to execute the functions of the ABC's National Executive Committee as an interim NEC for a period of twelve months from 8 May 2019, during which period it should make necessary preparations to amend the ABC Constitution and provide for the election of members of Party's NEC. The contention was that currently the Party's Constitution does not at all provide for the election of a national executive committee.

[10] It is to be noted that whilst this application is referred to as a petition[2], it was commenced by notice of motion seeking final relief as set out above. Except for indicating that the matter will be heard on 8 May 2019, the notice of motion does not contain a prayer that the application be heard as an urgent matter. It was nonetheless heard on the day appointed by the applicants. The simple allegation in the papers, or the cause of action therein, is that the Constitution of ABC does not provide for the election of a NEC and as such the elective conference should not have been held at all. This explains the prayer for the continued functioning of the old NEC for twelve months and for the directive that the Party should amend its Constitution and make provision for the election of a NEC.

[11] It is interesting to note that in the founding affidavit the applicants state that the elective conference was held "at [the]

2 See heading of the founding affidavit, which incidentally is a sworn affidavit.

behest" of the old NEC. It 1s also interesting that the 1st applicant states as follows:

> *"12. It* is *also paramount to note that the holding of similar elective conferences of the ABC in 2008 and 2014 were to the extent of their inconsistency with the constitution of the ABC null and void.*
>
> *13. It* is *not my call, however, in this petition to have them similarly declared null and void because that would in large measure be an academic exercise."*

[12] The quoted paragraphs are interesting in that whilst the applicants state that there has never been a foundation in the ABC Constitution for the election of a NEC, the old NEC should however be ordained to run the affairs of the party until the constitution is amended and an election held pursuant to such amendment.

[13] The Lefera application came before Mahase ACJ on the day appointed in the notice of motion, i.e., 8 May 2019. The old NEC did not oppose the application even though the application was served upon the Secretary General of that NEC on 7 May 2019. Mahase ACJ granted the order sought. She did not give reasons for her drastic order and it remains unknown why she decided that the old NEC should, following the elective conference, run the affairs of the ABC until the application was finalised and preferred to ordain the out-voted NEC to do so. Ordinarily, an elected person continues in office until a challenge of his

election succeeds whereupon he ceases to hold office. The learned ACJ's order is a final order and it reads -[r]

> *"1. The proceedings and outcome of the elective conference of the All Basotho Convention Party (ABC) held on the 1st and 2nd days of February 2019 be declared null and void.*
>
> *2. The respondents fold NEC} should continue to execute the functions of the National Executive Committee (NEC) in line with the Constitution ofthe All Basotho Convention Party (ABC) for a period not exceeding twelve (12) months from the Sth day of May 2019 as an Interim National Executive Committee (INEC).*
>
> *3. That the Interim National Executive Committee (!NEC) should make the necessary preparations with the relevant structures of the All Basotho Convention Party (ABC) to effect the requisite amendments to the Constitution of the ABC to make provision for the election of all members of the National Executive Committee (NEC) which are not currently provided for in the Constitution of the ABC."*

[14] Mahase ACJ was and remains the judge seized with the Lehana application which has still to be finalised. It hardly could have escaped the ACJ's attention that after granting the Lefera application, any well-meaning applicant in the Lehana application would not pursue the Lehana application because effective and effectual relief sought in that application would have been obtained 1n the Lefera application. It 1s

understandable why the old NEC would not oppose the application, even had they been given a full opportunity to do so. The relief sought favoured their cause.

Orders of Court

[15] The new NEC appealed against the final order in the Lefera application and against a ruling in the Lehana application which they believed was a final order striking out their defence as contained in the Hlaele affidavit. At its sittings to hear preliminary applications connected with the two appeals and the appeals themselves, this Court made four orders altogether, some of which were preliminary in nature.

[16] The first order arose from an application, in reality a written request, which by practice is made to the Registrar, seeking the urgent enrolment of the appeals. Accompanying that request was an urgent application for the hearing of an application for consolidation of the two appeals, C of A (CIV) 32/ 19 being the appeal in the Lehana application and C of A (CIV) 33/19 being an appeal in the Lefera application, and for joinder of the appellants as co-appellants in C of A (CIV) 33 / 19. The Court's order reads:

> *"HAVING read the papers filed of record and having heard Counsel for the parties -*

IT IS HEREBY ORDERED AS FOLLOWS:

1. *The appeals shall be heard on an urgent basis on 24 May 2019.*
2. *The application by way of notice of motion.filed on 13 May 2019 be heard on an urgent basis.*
3. *The parties shall file written submissions in respect of consolidation and joinder on or before Monday 20 May 2019. In the case of appellants they may supplement the oral submissions made today."*

[17] The second order arose from an application by some of the respondents in the Lehana matter seeking a stay of the appeals or striking them off the roll and also interdicting Nthontho Attorneys from representing the ABC Party and the NEC. The Court had to decide this application because it was necessary to provide an answer to the applicants therein in respect of the issues that they raised before hearing the appeals on the merits. The applicants prayed for the striking off the roll of the two appeals on the ground that the appellant in both matters, being the ABC had not resolved to note such appeals against the relevant judgments/rulings of the court *a quo* and had not instructed the Ist respondent (Nthontho Attorneys) to note such appeals in the name of and/ or on behalf of the ABC. The Court also had to decide upfront the application for consolidation and joinder of the appeals. After hearing the applications for stay and striking off and for consolidation andjoinder, we issued the following order:

"l. The application dated 20 May 2019 seeking stay ofC of A (CIV) 33/ 2019 and C *of A (CIV) 32/ 2019 and/ or striking off of the appeals* is *dismissed. The relief seeking to interdict Nthontho Attorneys* is *refused for the reason that it was brought in the wrong court.*

2. The 2nd to 6th applicants are granted leave to appeal against the High Court judgment and order of 8 May 2019 in C *ofA (CIV) 33/ 2019.*

3. The application for the consolidation of C *ofA (CIV) 32/ 2019 and* C *of A (CIV) 33/ 2019 [and for joinderj* is *refused and the two appeals shall be heard separately.*

4. The costs shall be costs in the cause.

5. The reasons for the orders will be handed down in due course."

[18] Adv. *Setlojoane* conceded that the interdict sought against Khotso Nthontho t/a Nthontho Attorneys was not properly before this court. The concession was properly made and it was for that reason that we struck the interdict application from the roll. This court cannot sit as a court of first and final instance in respect of a matter which has the potential, as the interdict application did, to result in disputes of fact which might necessitate the hearing of oral evidence.

[19] Immediately after hearing the substantive appeals we issued orders in both appeals and stated that our reasons for all the orders would be given later. I will conveniently refer to

the appeals as the Lehana appeal and Lefera appeal, as the case may be. We heard these appeals one after the other as foreshadowed at paragraph 3 of the order referred to in the preceding paragraph. In the Lehana appeal which the ACJ had set down for hearing on 14 June 2019 we set aside that date of hearing and made the following order:

> *"1. By consent this matter* is *remitted to the High Court to be enrolled by the Registrar of the High Court before another judge, not later than 28 May 2019 and to be finalised by the High Court expeditiously in view of the public importance of the matter.*
>
> *2. The appellants shall pay the* costs *of the appeal, jointly and severally, the one paying the other to be absolved."*

[20] Following the abandonment of the court order in the Lefera matter (CIV/APN/142/19) we set aside the order therein and issued the following order:

> *"In light of the order of the court a quo in CW/APN/142/19 having been abandoned without a tender of* costs, *the respondents shall pay the appellants'* costs *ofthe appeal jointly and severally the one paying the other to be absolved."*

Lehana Appeal

[21] The Lehana appeal arises from Mahase ACJ's ruling in an interlocutory matter in which, according to her, the issue was

which of the two parties had the right to begin in respect of preliminary objections or points of law raised in that proceeding. The respondents (new NEC) had raised certain objections in that matter: first, that the applicants had no *locus standi* to approach the court in their individual capacities because, in terms of the ABC constitution, it is Party constituencies that are entitled to nominate candidates for election to the NEC and have the right to challenge the nomination and election of the candidates; second, that the applicants did not join the Credentials Committee as a party when it was the body involved in the management of the elections, vetted and accredited delegates and possessed the "relevant data with regard to registration and accreditation of delegates for the conference." In this regard it should be recalled that the main complaint in the Lehana application was that irregularities occurred at the elective conference and they included a complaint that persons not entitled to vote, voted.

[22] The third objection was that there were senous and material disputes of fact which cannot possibly be decided on the papers and the matter should be referred to oral evidence. Examples of such disputes of fact are set out in the Hlaele affidavit.

[23] The applicants in Lehana application had also raised an objection in the replying affidavit that the deponent of the Hlaele

affidavit had no authority to depose to the affidavit on behalf of the ABC and the NEC. The Hlaele affidavit was filed on 13 February 2019 at 9:24 am, very likely before Mahase ACJ issued, on that day, the interim order ordaining the old NEC as the body to run the affairs of the Party until that application was finalised. The deponent to the affidavit had been authorised by resolution of the new NEC to file an affidavit on behalf of the Party and the NEC on 11 February 2019, about two days before the ACJ's order was made. Similarly, Nthontho Attorneys had been mandated by the same resolution to represent the Party and the NEC. Strictly speaking therefore, it would appear that, as at that point in time, Hlaele was entitled to depose to an affidavit on behalf of the ABC and the new NEC. Similarly, it would appear that Nthontho Attorneys had been properly appointed to represent the Party and the NEC. The Hlaele affidavit makes it clear that the deponent was making it on behalf of the new NEC and the ABC for he says, right at the beginning:

> *"1.1 I am the incumbent Secretary General of the 2nd respondent (ABC NEC) herein. I was the deputy secretary general of the 2nd respondent in the committee that stepped down in the recent elective conference of All Basotho Convention held on the]st and 2nd February 2019 ...* ".
>
> *1. 2 I have been authorised to depose to this affidavit on behalf of the National Executive Committee as the Secretary General and the resolution to defend the matter is attached and marked "ABCl."*

[24] As I have stated above, the new NEC met on 11 Februa:ry 2019 and resolved to appoint KJ Nthontho Attorneys to represent the Party and the NEC in the Lehana application as well as to appoint Hlaele, as Secreta:ry General, to sign papers on behalf of the Party and the NEC. These assignments were in order because the old NEC had been voted out and no one else could represent the Party other than the new NEC, at that stage. After all, as earlier stated, it is only members of the new NEC that opposed the Lehana application. The old NEC did not oppose the application. It seems that one of the issues for decision in the proper forum will be whether an affidavit that was signed with proper authority when it was made may be expunged on the basis that subsequently the deponent was divested of authority to represent the Party and the NEC.

[25] When Mahase ACJ dealt with the preliminary issues she conceived that she was confronted with the question as to whose prelimina:ry objection(s) had to be dealt with first. She decided that the objection by the applicants before her would be dealt with first when the court resumes on 14 June 2019. If
the Hlaele affidavit were struck off, the effect thereof would be to render the new NEC without a defence. It seems to me that, inevitably, that is the conclusion that Mahase ACJ is bound to come to going by what she said at paragraph 14 [and I add paragraph 17] of her ruling. This is the reason that the appellants asked this Court to order that the matter be placed

before a different judge on remittal. At the said paragraphs 14 and 1 7, Mahase ACJ said:

> *"14. In casu the resolution that had been annexed to the answering affidavit by the 1 ?th respondent [Hlaele}* is *lacking in form and highly questionable for the following reasons. Firstly the court takes judicial notice that at the time of the execution of the affidavit the 1 ?th respondent as well as the newly elected National Executive Committee were interdicted from accessing the office of the Jst respondent {ABC} and they did not have access to the stamp and or any effects to enable them to execute any duty in their capacity as such. So the stamp affixed to the resolution calls for the respondents to explain how they procured it. Secondly the resolution itself has been signed by the 1 ?th respondent purporting to authorise him to sign documents on behalf of the National Executive Committee. Thirdly there* is *no indication whether at the alleged meeting passing the resolution a quorum was formed.*
>
> *15. ...*
>
> *16. ...*
>
> *17. On the foregoing principles, it* is *therefore prudent to follow this principle that, in the event that the authority of Mr. Hlaele to depose to the answering affidavit* is *fatally defective in that it has been signed by Mr. Hlaele himself authorising himself to depose to the affidavit on behalf of the 2nd respondent and there has been no ratification and or confirmation of such authorisation. This* is *more so where such authorisation* is *questioned."*

[26] The new NEC understood paragraph 14 to be a final ruling, in effect, striking off the Hlaele affidavit. They accordingly appealed against that perceived finding and prayed for an order that that affidavit be reinstated by order of this Court. In what appears to be inconsistent with her reasoning at paragraphs 14 and 17, the ACJ at paragraph 18 of the ruling said:

> *"It follows from the argument advanced above therefore that the applicant's (Lehana's) point in limine raised in reply will be heard.first before one can consider the answering affidavit of Mr. Hlaele and its contents."*

[27] The reasoning of the learned ACJ and the order she made clouded the issues somehow. Be that as it may, the matter before us is resolved by the consent order and nothing more needs to be said about it on the merits. Suffice it to reiterate that the views expressed by the learned ACJ at paragraph 14 convey the impression that the issue she said was still to be decided, was already prejudged.

[28] I must observe, and this is a matter of some concern, that the ACJ did not have her facts correct. She ignored the fact that Hlaele was authorised to depose to an affidavit by resolution of the new NEC dated 11 February 2019, two days before she made the order ordaining the old NEC to be the interim NEC. She also ignored the fact that the Hlaele affidavit was filed on 13 February 2019, a point made by the appellants at the

hearing and not contested by the respondents nor their counsel, Adv *Sepiriti.* Had she correctly appreciated these facts she may very well have taken a different view of the matter. It is therefore understandable that the appellants construed paragraphs 14 and 17 of her ruling as effectively granting the application to strike out the Hlaele affidavit as a final order, hence the appeal. Although at paragraph 18 of the ruling, the ACJ creates the impression that she was yet to decide the issue, any reasonable litigant was entitled to hold, at the very least, that the decision had been made and the result foregone. This court therefore considered that the order for remittal, which was not objected to by the respondents to the appeal, was justified in the interest of justice and a speedy resolution of what regrettably is becoming an intractable dispute. In this regard, I again observe that the directive that the Registrar should enrol the matter before another judge of the High Court was not only by consent of the parties, but was also informed by our understanding that whilst the ACJ is empowered bys 12 of the High Court Act 1978 to "regulate the distribution of the busines in the court", the fact of regulating does not entail that she has herself to allocate cases to judges. The allocation can be done by anyone else mandated to do so [3]. See *Abubaker v Ellerines Furnishers*

[3] The procedure of remitting matters to the High Court with a directive that the Registrar places a matter before a different judge is well-established in this jurisdiction: See for example, Makhetha *v* Estate Late Elizabeth 'Mabolase Sekoyela (C of A (CIV) 44 of 2017) : Mda and Another v Director of Public Prosecutions (10/2004) [20041 LSCA 12 *(20* October 2004); Asset Recoveries (Pty) Ltd *v* Lesotho Dairy Products (Pty) Ltd and Another: MacCloyv Makakane (C OF A (ClV) No.30/05): Hui *v* Feng Fu (C of A (ClV) No.42/2010): Tlali *v* Mphonye and Others (C OF A (ClV) 33/2010):: Serage and Another v Taioe (C OF A (ClV) N0.34/2010): Khoeli *v* Khoeli (C OF A (ClV) 17 /10): Phooko vj & M Properties (C OF A (CIV) 36/2013): Shale v Limema and Others (C OF A CIV) N0.53/14);

(Lesotho) (Pty) Ltd and Another", with which I agree on this point, where Lehohla J (as he then was), commenting on the allocation of cases by the Chief Justice said, in relation to s 12 aforementioned:

> "The section does not say that the Chief Justice shall distribute the business in the court. The fact that it says he shall regulate the distribution presupposes that the distribution is to be effected by someone else: in this regard the Registrar. If the Legislature intended the Chief Justice to distribute the business then there would have been no need to have used the elaborate phrase "shall regulate the distribution of the business ... ". The purpose would have been adequately served by saying the Chief Justice "shall distribute the business of the court". The failure to follow the strict terms of the Act has the unfortunate effect of clothing with an aura of acceptability documents which have otherwise been irregularly received."

[29] In a case such as the one before us, where the ACJ appears to have made up her mind in relation to the Hlaele affidavit or is perceived to have done so, it served her well and also the ends of justice that the allocation be by the Registrar, thereby removing any perception of interference or undue influence by

Phafoli v Provisional Liquidators of MKM Star Lion Group re of A relV) 7 of 20171; Kaleme tech & Hire v Metsi A Pula Fleet Management Agency re of A re1V1 60 of 2015.

4 eIV/APN/288/89

her. See also *President of the Republic of South Africa v The office of the Public Protector & Otherss*

Question whether appeals were properly before court

[30] The substantive issues in Lehana and Lefera appeals were, as is apparent, disposed of on the basis of an order by consent and an abandonment of the judgment or order, respectively. Apart from the issue of costs, which I will address later, the only other issue that calls for consideration is whether both appeals were properly before us in the first place.

[31] In the Lehana matter the respondents submitted that Mahase ACJ's order was an interlocutory order from which no appeal could lie to the Court of Appeal without leave. In the Lefera matter the question was whether the appellants, who were not parties to the proceedings in the High Court, were at all entitled to appeal against the order made therein and further that order having been granted in default it is one that can only be set aside pursuant to rule 45 of the High Court Rules and is not appealable. I will begin with the granting of leave in the Lefera matter.

Lefera matter

5 President of the Republic of South Africa v The Office of the Public Protector and Others (91139/2016) at para. [59.1], [68]-[71] and [141] -[150] delivered on 13 December 2017

[32] The Lefera application was served on the old NEC, specifically on the Secretary General. It was not served on the appellants. The Secretary General did not cause the old NEC to file any opposition to the application and a default judgment was entered against the NEC. From the record of proceedings in the court *a quo,* it is clear that had the Secretary General wished to oppose the application, he could hardly have done so. That application was filed or issued on 6 May 2019, served on him on 7 May and heard and disposed of on 8 May 2019, hardly two days from the date of service. There is no evidence on record that Secretary General communicated to the registrar of the court or to the judge that the old NEC did not intend to oppose the application. There was, no doubt, a failure by the applicants therein to comply with Rule 8(8) and by the ACJ to ensure that the correct procedures were followed.

[33] Rule 8(8) provides that:

> *"In such notice [of motion] the applicant shall appoint an address within 5 kilometres ofthe office ofthe Registrar at which he will accept notice and service of all documents in such proceedings, and shall set a day not being less than five days after service thereof on the respondent on or before which such respondent is required to notify the applicant in writing whether he intends to oppose such application, and shall further state that ifno such notification is given the application will be set down for hearing on a stated day, not being*

less than seven days after service on the said respondent of the said notice."

[34] The granting of the order on 8 May 2019, after service of the application on 7 May 2019, was clearly not in compliance with rule 8(8). The application was disposed of at supersonic speed and counsel for the respondents was, I believe, so embarrassed by the procedure and the order granted that he was constrained to abandon the order at the hearing, as he did. The abandonment of a judgment or order is provided in rule 44 of the High Court Rules. As I previously stated, upon abandonment of the judgment, we issued an order to that effect and ordered the respondents to pay the appellants' costs.

[35] In view of the abandonment of the judgment, it is not necessary, in my view, to deal with all the arguments that had been raised in the appeal relating to the merits thereof. What, however, requires consideration by this Court is the propriety of permitting the appellants to appeal against an order in proceedings to which they were not parties.

[36] Ordinarily a judgment or order given in default is subject only to an application to the court of first instance for the rescission of such order. An appeal against a default judgment without seeking rescission is thus ordinarily impermissible because a judgment in default is not a final judgment. It is not

on the merits and therefore not appealable.6 An appeal is only permissible when there has been a refusal by the court of first instance to rescind the judgment or order. It seems to me that in terms of rule 45(1)(a) of the High Court Rules, only a party to the proceedings may make an application for rescission under that rule. The Rule provides that:

> *"(1) The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary -*
>
> *a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;".*

[37] In this case the old NEC, which was cited as a party, would have applied for rescission, if it was so minded. We know it did not do so, for its own reasons. The appellants however were not cited as parties and could not have taken advantage of rule 45(1)(a). Counsel for the respondents therein submitted that the rule applies only to a person who was a party in the proceedings. I agree with that. However, a defendant or respondent also has a right to apply for rescission of a default judgment or order at common law quite apart from the Rules.7 The appellants could therefore have also applied for rescission at common law.

6 Zimbabwean case of *Ramvali Trust's Trustees v UDC & Ors* 1998 (1) ZLR 110 (S).
7 *Sterkl v Kustner* 1959 (2) SA 495 (SWA).

(38] On 24 May 2019, we granted leave to the appellants to appeal the order even though they were not parties, and had not been cited as such, in the application. In reaching that decision we considered the following. The 2nd to 6th appellants were elected at the elective conference to be the new NEC of the ABC. They had a right to be joined as parties to any suit that sought or had the effect of removing them from the positions to which they were elected. The Lefera application and the consequent order, as we have seen, had the effect of removing the 2nd to 6th appellants from their newly acquired positions in the Party. That in our view could not be done without hearing them or without making them parties to a suit that resulted in them losing the positions to which they had been elected. They were necessary parties to the suit, especially in light of the fact that the cited party, the old NEC, did not oppose the application and that it was reasonably foreseeable that they would not oppose the application.

(39] A court may raise no-joinder if a third party not before it will be affected by an order of court and may set aside the order or remit the matter back for joinder of a party if that party is a necessary party. And where such interest becomes apparent even on appeal, a court must join such party and has no discretion in the matter. This is trite. This applies to both action and application proceedings. It must be emphasised that joinder of necessity is not governed by rules of court but by the

common law. Joinder of necessity arises where a party has or may have a direct and substantial interest in any order a court might make in the proceedings or if an order made cannot be sustained or carried into effect without prejudicing that party. A necessary party must therefore be joined unless it waives its right. Such party can also demand to be joined as of right and if it does so, the court will not deal with the matter without joining it. No question of discretion or convenience arises. Joinder of necessity when exercised by a court is part of the court's inherent jurisdiction. [8]

[40] As for the requirement that a party must have a direct and substantial interest to be joined of necessity, see *Amalgamated Engineering Union v Minister of Labour*[9] which lays down two tests for determining if a third party has a direct or substantial interest. The test is whether the party concerned would have

locus standi to claim relief concerning the same subject matter and whether, if a situation could arise which, if the party were not joined, any order the court may make would not be against it, entitling it to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.

BSA Steel Equipment and Co. *(Pty) Ltd* & *Ors v Lureck (Pty) Ltd* 1951 (4) SA 167 (T).
9 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[41] In the appeal before us, the 2nd to 6th appellants were not joined in the application in the court *a quo* even though they clearly had a substantial and direct interest in that matter and were going to be prejudiced by an order made therein. They were however left out and thus became non-parties to that suit. Could they appeal against Mahase ACJ's order? That is the question we had to consider. We determined that they could, hence we granted them leave to do so.

[42] A non-party may appeal against a judgment or order in very circumscribed situations. There are a number of considerations in this regard. The first is that the non-party should have a substantial and direct interest and should not have been excluded, a consideration I have discussed in the preceding paragraphs. The second is that the exclusion must be such that the non-party is prejudiced in its rights. That clearly was the position in relation to the 2nd to 6th respondents. The third is that this Court has, in any event, the inherent jurisdiction to permit a non-party to commence an appeal against the recognition that generally a person not party to the original application requires leave to appeal. We were in this connection referred to very useful authority from Canada by counsel for the appellants, with which I agree, - *Societe des Acadiens du NouveauBrunswick Inc. v Association of Parents for Fairness in Education, Grand Falls District 50 Branch,* [10] and *S.*

[10] [1986] 1 S.C.R. 549.

St. C. *v S. c.11.* In the latter case the position as set out in the form.er is well articulated. The court said:

> *"24. . . . the opportunity for a non-party to appeal is a matter of discretion for the Court ofAppeal and* is *not necessarily an incident of standing or a logical corollary of standing granted by statute. Unless the statute confers an express right of appeal, it depends on the justice of the case, and where children are involved, their best interest, as discussed below.*
>
> *25. This case illustrates the need for the Court to require leave when a non-party asserts the right to appeal. Were the appeal to be automatic, these adoptive parents would be dragged through a lengthy appeal and frustrated in their goal ofproviding a stable life for the child. The child would face yet one more period ofuncertainty while the case was pending. All this suffering would have to be endured even though the moving party in the appeal created the problem in the first place. "*

[43] The Court continued at paragraph 26 to deal with the factors that govern the granting of leave:

> *"The Societe des Acadiens case sets out the factors governing leave applications where a non-party seeks leave to bring an appeal at 594-595:*

'A review of cases listed in the English Manual indicates that in a proper case the practice of the Court of Chancery was to permit a grant of leave to appeal to a person not a party to an action. The test applied in order to determine when a case was a proper case for leave was whether a party would have been a proper, if not a necessary, party to the action. A number of factors which affect the exercise of the court's discretion on such an application are reflected in the cases. An appellant should be able to show, for example, (a) that its interest was not represented at the proceeding: (b) that it has an interest which will be adversely affected by the decision; (cl that it is. or can be, bound by the order: (di that it has a reasonably arguable case: and (el that the interests ofiustice in avoiding a multiplicity of proceedings would be served by the grant of/eave. Many of these elements are present in any judicial determination as to the appropriate parties to a law suit. As pointed out by Danie/l's Chancery Practice, [8th ed.,1914}, vol.I, c. *III, atp. 147:'*

> *'It was the aim of the Court of Chancery to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who were compelled to obey it, and to prevent fu,ture litigation. For this purpose, it was necessary that all persons materially interested in the subject should generally be made parties to the suit, either as plaintiffs or defendants.'* "

[44] In granting leave we had no doubt whatsoever that in the case before us the 2nd to 6th appellants' interest was not represented in the application; that they have an interest that was adversely affected by Mahase ACJ's order; that they were bound by the order; that they had a reasonably arguable case; and that the interests of justice in avoiding a multiplicity of proceedings would be served by the grant of leave. In respect of the last factor, if leave were not granted, the appellants would have had to go back to the High Court and apply for rescission of the order before the same judge or another judge and, if rescission were refused, they would have had to return to this Court in an appeal against the refusal and, if this Court were to grant that appeal they would then have had to defend the matter in the High Court with the potential that they would have to appeal again if they were aggrieved by the decision of the High Court on the merits. Meanwhile the destabilisation and uncertainty I have alluded to earlier would have continued much to the detriment of all concerned. So also would the public importance of the matter, referred to in our Order, and the public interest in general, not been advanced.

[45] We considered the provisions ofs 16 of the Court of Appeal Act 1978. We also considered that this Court has inherent jurisdiction to grant leave in terms s 123(4) of the Constitution which provides that:

"The Court of Appeal shall be a superior court of record and, save as othenuise provided by Parliament, shall have all the powers of such a court."

[46] This Court routinely exercises original jurisdiction as may be necessary or incidental to the hearing and determination of any appeal. In terms of its Rules this Court entertains varied applications made to it as if it were a court of first instance, such as applications for leave to appeal in terms of Rule 3, and various other applications for condonation. This is the basis upon which we granted leave to appeal to the 2nd to 6th

appellants in the Lefera appeal.

Lehana matter

[47] I have earlier indicated that we were prepared to hear the appeal in the expectation that submissions would be made before us if indeed the appeal was properly before us. During the hearing the respondents' counsel submitted that the ACJ's

ruling, even if it was what the appellants believed it to be, i.e., a final decision excluding the Hlaele affidavit, was nonetheless an interlocutory decision from which no appeal would lie without leave of the High Court. This was a persuasive submission. However, the focus or thrust of the submissions shifted to the question whether in fact Mahase ACJ had made any order at all. Counsel for the appellant reluctantly conceded that she did not make a decision excluding or disallowing the

affidavit. That concession was well advised. Mahase ACJ's order appearing at paragraph 18 of her ruling on the matter reads:

> *"It follows from the argument advanced above therefore that the applicants' [Lehana et al] point in limine raised in reply will be heard first before one can consider the answering affidavit of Mr Hlaele and its contents."*

[48] With the concession made by appellants' counsel it was no longer necessary for this Court to decide whether or not the appeal was properly before us.

Issue not decided on appeal

[49] It will readily be apparent from our orders and this judgment that we did not consider or determine the issues whether the ABC and/ or the NEC were appellants or respondents in the appeals before us and whether Adv. *Nthontho* or Adv. *Ndebele* represented the ABC and the NEC (whether new or old) in the appeals. We were of the view that any attempt to determine these issues would improperly impact upon or pre-empt the decision of the High Court in the Lehana case. The essential issue in dispute between the parties in the Lehana application is which NEC, the old NEC or the new NEC, is the rightful NEC and therefore the rightful body to act for the ABC. To answer the question whether or not Nthontho Attorneys represented the ABC or the question whether the ABC

is an appellant or a respondent or for that matter a party in the appeals necessarily meant that this Court would have to make a pronouncement on these questions when they are the real subject matter of the proceedings in the Lehana application. We thus deliberately shied away from dealing with these issues for this reason.

Costs

[50] Having now disposed of the issues that were necessary to be dealt with in the two appeals, all that remains are the reasons for the costs orders that we made. It is trite that costs ordinarily follow the result.

[51] In the Lehana appeal we ordered the appellants to pay the costs. They mounted an appeal in which they later conceded, in substance, that Mahase ACJ had in fact not yet made an order excluding the Hlaele affidavit and that the matter of its exclusion still has to be determined by the High Court upon remittal of the matter thereto. They had asked this Court, as their main relief on appeal, for an order that the Hlaele affidavit be reinstated. They had thus raised a point that they could not sustain on appeal. Had they properly applied their minds to paragraph 18 of the learned ACJ's order they would not have attempted to advance, as they did, that she had made a final order expunging the affidavit and prayed for its reinstatement.

We appreciate the predicament in which paragraph 14 of the ruling placed them, but the point remains that what the ACJ said did not amount to a definitive order in the face of the order she finally issued. Their complaint, as it turned out, was curable by a remittal of the matter to be heard by a different judge of the High Court. Their measure of success cannot, on balance, be equated to that of the respondent who successfully argued against the substantive relief sought by the appellants. In our opinion, it was only proper that the appellants must bear the costs associated with this issue.

[52] In the Lefera appeal the respondents abandoned the judgment in their favour. They had constrained the appellants to take the matter on appeal only for them to abandon the judgment after a protracted contestation. In light of their capitulation there can be no good reason why they should not pay the costs. We therefore made an order accordingly.

[53] The costs in the application for a stay and/or striking off from the roll of the appeals and for interdicting Nthontho Attorneys from representing the ABC should, as we determined, be paid by the applicants in that matter. They were unsuccessful in their endeavour and the costs must follow the result and be paid by them. Similarly the costs associated with the applications for joinder and consolidation, which were both unsuccessful should be paid by the losing party, the appellants.

[54] The appellants only partially succeeded in relation to the application for leave to appeal. They succeeded in the Lefera matter but as it turned out they were not successful in the Lehana matter. The matter was remitted to the High Court as already stated.

[55] We consider that the respondents also partially succeeded in that the matter was not finally dealt with as an appeal but was sent back to the High Court for continuation, albeit before a different judge. This is the extent of the respondents' partial success. In our view no order of costs should be made. Each party should bear its own costs associated with the application for leave to appeal.

[56] It should also be recognised that the appellants did not directly apply for leave to appeal as a precursor to the noting of the appeal. They simply noted their appeals and it was during the course of the proceedings that it became clear to them that they, as non-parties, required leave to appeal in the Lefera appeal. We therefore make no order of costs in relation to the application for leave referred to in paragraph 2 of our first order dated 24 May 2019.

[57] These are the reasons for the orders we made in the two matters serving before this Court on appeal.

M CHINHENGO
ACTING JUSTICE OF APPEAL

MOSITO P:

[58] I agree with the views expressed by my brother Chinhengo AJA above. I however wish to add my own reasons to those advanced by my learned brother. As indicated above, at the hearing hereof, advocate Hoeane for the respondents in C of A (CIV) No.33 of 2019 informed this Court that he was abandoning the judgment 1n CIV/APN/142/2019. As Smalberger JA pointed out in *Commissioner of Police and Another v Makhetha and Another*, [12] such abandonment was legally competent. It should have been done formally in terms of High Court rule 44(1) by delivering a notice of abandonment of the judgment to the Registrar and all affected parties. Had this been done it may well have prevented later confusion. Presumably the requisite notice was not given because abandonment was agreed upon between the legal representatives of the parties before this Court. It was therefore competent for counsel to abandon the judgment before us as he did.

[12] *Commissioner ofPolice and Another v Makhetha and Another* (C of A(CIV)N0.14/06.

[59] As Froneman J pointed out in *Airports Company South Africa u Big Five Duty Free (Pty) Limited*, [13] by abandoning a judgment, a party gives up any rights it had by virtue of that judgment. Thus, if one asks what advocate Hoeane intended to achieve in context - the facts known to him, the reasons for the judgment - the only answer could be that he did not intend the Mahase ACJ's order to stand. As a result, the order did therefore collapse upon abandonment.

[60] The second aspect on which I wish to briefly comment is the non-party's right to appeal. As indicated above, the other issue was whether the non-party appellants had the right of appeal. As Fagan AJA pointed out in *Amalgamated Engineering Union v Minister of Labour:*[14]

> *'The other references to Voet (5.1.35 and 49.1.3) require some attention. The first of these two paragraphs (5.1. 35) enunciates the principle that a third party may intervene in an action between two litigants if a judgment in the matter at issue may prejudice him. The second paragraph (49.1.3) contains the proposition that, just as a party to a suit cannot appeal if the judgment does not harm him, so conversely it may happen that someone who was not a party may be allowed to appeal because he can be injured by the res inter alias judicata . ... These passages in Voet cannot, to my mind, be read as implying that the privilege which third parties have of intervening*

13 2019(2) BCLR 165 (CC) at para 38.

1[4] Amalgamated Engineering Union *v* Minister of Labour 1949 (3) SA 637 (A) at 652.

either in the Court offirst instance or in the Court of Appeal when there is reason to fear that the judgment may prejudice them, entitles the Court to give ajudgment which, in the words occurring in the judgment in the Bekker case (at p. 442), 'cannot be sustained and carried into execution without necessarily prejudicing the interest of parties who have not had an opportunity of protecting their interest by reason of their not having been made parties to the cause'.

[61] It follows in my view that, at Roman-Dutch Law, a third party as in C of A (CIV) No.33 of 2019 may intervene in an application between two litigants if a judgment in the matter at issue may prejudice him. Thus, it may happen that someone, as is the case with the case in C of A (CIV) No.33 of 2019 ,who was not a party may be allowed to appeal because he can be injured by the *res inter alias judicata*.

[62] It was therefore necessary to allow the appellants in C of A (CIV) No.33 of 2019 to appeal in this matter. It therefore became necessary that the non-party /third party appellants were entitled to be allowed to appeal as was done in this matter.

K.E. MOSITO P
PRESIDENT OF COURT OF APPEAL

I agree

P.T DAMASEB AJA

ACTING JUSTICE OF APPEAL

I agree

P. MUSONDA AJA

ACTING JUSTICE OF APPEAL

I agree

N.T. MTSHIYA AJA

ACTING JUSTICE OF APPEAL

For Applicants in C OF A (CIV) 32/2019: Adv R. Setlojoane

For Respondents in C OF A (CIV) 32/2019: Adv L. Matee &
Adv L. Molapo

For Applicants in C OF A (CIV) 33/2019: Adv M. Hlaele
& Mr K Ndebele

For Respondents in C OF A (CIV) 33/2019: Adv L Molapo,
Adv Hoeane