THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU **C OF A (CIV) No.39/2018**

CIV/APN/487/2011

In the matter between:

INDEPENDENT ELECTORAL COMMISSION **APPELLANT**

AND

SEEISO SEHLOHO **1ST RESPONDENT**

ATTORNEY GENERAL **2ND RESPONDENT**

CORAM: K.E MOSITO P
DAMASEB AJA
MTSHIYA AJA

HEARD: **14 JANUARY 2019**
DELIVERED: **01 FEBRUARY 2019**

SUMMARY:

High Court ordering the Independent Electoral Commission to conciliate a dispute between a political party and an elector arising from a refusal as a member of such party on the basis of s 135 read with s 139 of the Act – In ordinate delay in bringing review proceedings against the refusal condoned - no reasons given for the exercise of such a discretion – on appeal, court not finding reasonable explanation offered for the delay – emphasis made on court's duty to record the

reasons for the exercise of that discretion so that the Court of Appeal can satisfy itself that it was exercised on correct principle – Appeal Court further holding that refusal of membership not within the ambit of s 134 as it does not constitute a breach of the code neither does it relate to a dispute regarding the interpretation or application of the Act by the IEC. Court a quo's order set aside on appeal.

JUDGEMENT

DAMASEB AJA:

Damaseb AJA (Mosito P and Mtshiya AJA concurring):

[1] The appellant, Independent Electoral Commission of the Kingdom of Lesotho (IEC)[1], was, without reasons, ordered by the High Court (Peete J) on 29 May 2018 to conciliate a dispute between the respondent (Mr Sehloho) and a political party, the Basotho Congress Party (BCP[2]). The dispute arises from a refusal by BCP to admit Mr Sehloho as a member.

[2] In ordering the IEC to conciliate the dispute between the BCP and Mr Sehloho, the High Court invoked s 135 of the National Assembly Electoral Act 2011 (the Act) which, in relevant part, states as follows:

---

[1] Created by s 66A of the Constitution.
[2] Duly registered political party by the IEC in terms of s 24 of the Act.

'*135. For the purpose of carrying out its functions under the Constitution and this Act, the Commission shall have the following powers-*

…

(m) to appoint persons to conciliate a complaint-

(i) concerning a contravention of the Code in terms of s 122(4); or

(ii) submitted in terms of section 123.'

[3] It is clear from the quoted provision that the jurisdictional basis for the invocation of the IEC's competence to 'conciliate' is either a contravention of the Code[3] or a complaint submitted in terms of s 123. It is common ground that the dispute between Mr Sehloho and the BCP does not relate to a contravention of the Code. Instead, Mr Sehloho relies on s 139(2) of the Act which states as follows:

'An elector or a political party registered with the Commission may submit a complaint to the Director in the prescribed form concerning any irregularity arising from the interpretation or application of this Act.'

[4] Mr Sehloho also alleged in his affidavit in support of his case that after the rejection of his membership application, he directed a

[3]Section 122(1) establishes the Electoral Code which is annexed to the Act as Sch 2. In terms of subsec (2) of s 122, a registered political party must subscribe to and is bound by the Code.

written complaint to the IEC requesting it to conciliate between him and BCP but that the IEC declined jurisdiction.

[5] According to Mr Sehloho, BCP's refusal of his membership application was unlawful, entitling him to seek conciliation by the IEC because, in terms of s 24(1)(b) of the Act, a political party such as the BCP may only be registered by the IEC if its membership is 'voluntary and open to all citizens of Lesotho without discrimination on the grounds of race, colour, gender, language, religion, nationality or social origin, property, birth or other status'.

[6] He alleged further that the IEC had the power to cancel the registration of a political party if it no longer complied with the requirements for registration under s 24.

[7] The gravamen of Mr Sehloho's case in the court *a quo* can be summed up as follows. Because of the duty imposed on BCP not to discriminate against eligible persons in admitting members, and the corresponding power of the IEC to deregister a party which fails to comply with its obligations under s 24 of the Act, the IEC is under an obligation to conciliate a dispute between a person whose membership is rejected by a political party - and that a failure by the IEC to conciliate when his right to association guaranteed under the Constitution is infringed by the BCP, entitles him to approach the High Court to seek a *mandamus* against the IEC.

IEC's case

In limine

[8] In the answering affidavit of the Director of Elections, the IEC had raised several *in limine* objections to Mr Sehloho's application. I propose not to deal with them all but will focus on one only. The IEC stated that Mr Sehloho took 'inordinately too long to come to Court and no reasons for the delay have been advanced in his affidavit'. I place emphasis on this ground because, as is trite, relief aimed at impugning a decision of an administrative body must be brought within a reasonable time.

[9] The absence of reasons by the judge *a quo* begs the question whether he had considered that objection because such an objection cannot be brushed aside. As first instance court, the High Court has a discretion to condone delay if it finds it to be unreasonable, and therefore has the duty to record the reasons for the exercise of that discretion so that the Court of Appeal can satisfy itself that it was exercised on correct principle.

Importance of reasons

[10] There is a sound public policy rationale behind the appellate process. Where the legislature has found it necessary to provide for appeals it creates the expectation in litigants that they are afforded careful consideration of both law and fact at two stages of the legal process: at first instance and on appeal. As an appellate judge in my

own jurisdiction, I have no hesitation stating that appellate judges benefit a great deal from the considered views of first instance judges. That is an even more compelling consideration in the case of the Kingdom of Lesotho where, historically, the Court of Appeal has relied on the services of foreign judges who necessarily are not steeped in the Kingdom's unique legal system and custom in especially the personal law of the people of Lesotho. Those unique features would clearly emerge from a considered first instance judgement which would assist appellate judges immensely.

[11] Where the first instance judge fails to provide reasons for a decision the appellate process becomes a chimera for in that case, the Court of Appeal effectively becomes the court of first instance and the litigants are denied the benefit of a two-layered interrogation of law and fact. In other words, there is a failure of justice and such conduct constitutes dereliction of duty on the part of a presiding judge.

Unreasonable delay is fatal unless condoned

[12] According to Mr Sehloho, his application for membership was refused by BCP on 4 December 2012. He then, on 22 October 2013, requested the IEC to conciliate the matter. He was advised on 6 November 2013 that the IEC would not assume jurisdiction. It was only in June 2016, some three years later that he brought the present

application to seek a *mandamus* against the IEC. He gives no explanation whatsoever in his founding affidavit or in reply for the delay in approaching court.

[13] The Supreme Court of Namibia has held that if an applicant fails to offer any explanation for an unreasonable delay in challenging an administrative decision, when the issue of delay has been squarely raised, that will be fatal to the application.[4] On that basis alone Mr Sehloho's application should have been refused by the High Court.

[14] I mentioned the issue of unreasonable delay to emphasise the importance of judges at first instance providing reasons for their decisions to assist the Court of Appeal in assessing the merits of the appeals that come before it.[5]The importance of the need to provide reasons cannot be over-emphasised.[6]

[15] Be that as it may, and although the application stood to be refused on the ground of unreasobale delay alone, I will proceed to consider the question whether the High Court's order directing the IEC to conciliate is sustainable in law. I do so because of the public importance of the issue so as to avoid similar problems arising in the future.

---

[4] *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC).
[5] *LTTU v Director, TSD & Others* LAC (2000-04) 803 at 806 paras 6-7.
[6] This is clear from the plethora of cases usefully collected in Ntholi v Ntholi and Others C of A(CIV) No.45/2018, handed down on the same date as the present appeal by this court.

The merits

[16] The IEC's stance is that it is not empowered by the Act to conciliate disputes arising from the refusal of membership by a political party to a person who seeks such membership. On appeal, Mr Letuka, counsel for the IEC, submitted that conciliation of such disputes falls outside the scope of the matters falling under that body's jurisdiction under s 66A of the Constitution[7], read with s 135 of the Act.

[17] Mr Selimo for Mr Sehloho submitted that the complaint to the IEC, and the invocation of its power to conciliate in the circumstances of this case, were competent because, in the language of s 139(2) of the Act:

---

[7] 66A: 'Powers, duties and functions of Electoral Commission
(1) The Electoral Commission shall have the following functions:
(a) To ensure that elections to the National Assembly and local authorities are held regularly and that every election or referendum held is free and fair;
(b) To organize, conduct and supervise, in an impartial and independent manner, elections to the National Assembly and referenda under the provisions of this Constitution and any other law;
(c) To delimit the boundaries of constituencies in accordance with the provisions of this Constitution and any other law;
(d) To supervise and control the registration of electors;
(e) To compile a general register of electors and constituency registers of electors for the several constituencies and to maintain such register or registers up to date;
(f) To promote knowledge of sound democratic electoral processes;
(g) To register political parties;
(h) To ascertain, publish and declare the results of elections and referenda;
(i) To adjudicate complaints of alleged irregularities in any aspect of the electoral or referendum process at any stage other than in an election petition; and
(j) To perform such other functions as may be prescribed by or under any law enacted by Parliament'.

> *'An elector or a political party registered with the Commission may submit a complaint to the Director in the prescribed form concerning any irregularity arising from the interpretation or application of this Act'.* (Underlined for emphasis)

[18] The first difficulty facing Mr Sehloho is that his grievance is that he has been denied membership of a political party which he feels he is entitled to. There is no suggestion that the refusal relates to a disagreement between him and BCP about the meaning of any provision in the Act. He also does not show, as between him and the BCP, the irregularity that has arisen from the manner in which BCP has interpreted or applied the Act. On the contrary, the interpretation conundrum has arisen as between him and the IEC to whom and not about whom he has lodged a complaint. Section 139(2) therefore has no application seen in that light. But that is not all.

[19] I will proceed to analyse the relevant provisions of the Act to see whether the complaint and conciliation procedure Mr Sehloho has invoked was intended by Parliament to apply to the facts before us.

[20] Once a complaint has been lodged, the Director of Elections is required to 'attempt to resolve the complaint[8] and if it remains unresolved 'shall' refer it to a conciliator who shall investigate the complaint[9] and if the conciliator is not able to resolve the complaint

---

[8] Section 139(3).
[9] Section 139 (4).

he or she shall complete a report and submit it to the Commission for a decision.[10] A person dissatisfied with a decision of the Commission may then appeal to the High Court.[11]

[21] The other provisions of the Act which are relevant to discerning the intent of the legislature are subsecs (8) and (9) of s 139. In terms of subsec (8), a complainant may seek urgent relief pending the processing of a complaint under s 139. And in terms of subsec (9), if a complaint arises within the elections period, an appeal to the High Court against the Commission's decision may only be heard and determined after the expiry of the elections period.

[22] I have cited the relevant provisions to show that the kind of complaint which the legislature's attention was directed at is that which relates to the conduct of elections. The main functions of the Commission are to be found in section 135.

[23] Being an acceptable guide to the intention of the legislature, the long title to the Act also gives an indication of what the proper role and function of the IEC is. The long title of the Act reads thus:

> *'An Act to repeal and replace the National Assembly Elections Act 1992; to give effect to the constitutional right of citizens to vote and stand for elections; to provide for periodic elections under a system of universal and equal suffrage; to provide for a secret ballot; to provide for some members of the National Assembly to be elected in respect of eighty constituencies and*

---

[10] Section 139 (6).
[11] Section 139(7).

others in accordance with the principle of proportional representation applied in respect of the National Assembly as a whole; to provide for additional powers, duties and functions of the Independent Electoral Commission; to provide for procedures for the registration of electors and political parties; to provide for the conduct of elections; to provide for procedures for the determination of objections; and to provide for incidental matters.'

[24] It becomes immediately apparent that the main function of the IEC under the Act is to conduct elections and the 'incidental' powers and functions it is given are to support that main function.

[25] On the contrary, it is not immediately apparent to me, and Mr Selimo for Mr Sehloho has not been able to demonstrate, how issues of membership of political parties is critical to the conduct of an election by the IEC as to bring it within its purview.

[26] That the legislature found it necessary to make provision (a) for a complainant seeking urgent relief and (b) circumstances in which the High Court should not be required to render a decision while the elections are underway – presumably in order to remove the incentive for a complainant to make the argument that the election should be halted pending the decision of the court – is a clear indication that the legislature had in its contemplation for investigation and conciliation by the Director and the IEC respectively complaints which have the potential to affect the integrity of elections.

[27] During oral argument the Court pointed out to Mr Selimo two considerations which militate against an interpretation that a complaint such as that of Mr Sehloho is within the purview of the IEC. The first is a rule of law question: One should not be judge in own cause.

[28] It is common ground that the IEC has the power to deregister a political party if it is in breach of the law in the respects set out in the Act.[12] Now, if the Director and the Commission have the power to conciliate membership disputes and in the process become privy to potentially prejudicial information about a political party which could result in it being deregistered, it would be against the settled principle of natural justice (which can only be ousted by the clearest of language in the written law) for the IEC to be the same body that can take steps to have a political party deregistered.

[29] Although Parliament is entitled to do so if it chooses[13], I see nothing in the Act that the legislature intended to make the IEC both investigator and judge in own cause when it comes to the process of deregistration of political parties for breach of the Act.

[30] The second consideration is the supererogatory burden that such a power can potentially impose on the IEC in ways that can

---

[12] Section 27(1).
[13] *Sheely v Registrar and Taxing Master of the Supreme Court* (TPD) & another 1911 TPD 295 at 299.

render it ineffective in the performance of its main duty and function to conduct credible elections.

[31] Assume that just before an election, 20 000 individuals lodge complaints with the IEC to investigate and conciliate disputes resulting from denial of membership by one or more political parties. That would involve the IEC deploying resources and personnel to deal with such complaints and if it takes adverse decisions possibly become embroiled in myriad of urgent court cases[14] to resolve such disputes.

[32] It is beyond dispute that such a situation could hamstring the IEC in the effective conduct of an election. I am not persuaded that the legislature could have intended such an absurd result.

[33] Mr Sehloho located his right in support of the relief he sought from the High Court under the Constitution; in particular the right to association guaranteed by the Constitution.[15] Nothing prevents him from ventilating that right in the High Court. A person aggrieved by the refusal of membership by a political party is therefore not without a remedy if the conciliation avenue under the Act is not available to him or her.

---

[14] As contemplated in s 139 (8).
[15] The Constitution, s 4(1) (l).

[34] The High Court therefore erred in granting the relief sought by Mr Sehloho relying on ss 135 and 139 of the Act. Therefore, the order of the High Court cannot be sustained and the appeal must succeed.

COSTS

[35] Mr Selimo appeared *pro bono* for Mr Sehloho both *a quo* and in the appeal. Mr Letuka for the IEC accepted that, in the premises, it would be undesirable for the court to order costs against Mr. Sehloho. I propose to make an order in those terms both *a quo* and in the appeal.

ORDER

[36] Accordingly, I order as follows:

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

> "1. The application is dismissed.

2. There shall be no order as to costs”

2. There shall be no order as to costs in the appeal.

_____

P.T DAMASEB

ACTING JUSTICE OF APPEAL

I agree: _____

K. E. MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree: _____

MT MTSHIYA

ACTING JUSTICE OF APPEAL

For the Appellant: Adv. K.W Letuka

For the Respondents: Adv. Selimo