IN THE COURT OF APPEAL OF LESOTHO

CONSTITUTIONAL CASE NO.26/2020

In the matter between:

TRANSFORMATION RESOURCE CENTRE & 2 OTHERS — **APPELLANTS**

AND

THE COUNCIL OF STATE AND 62 OTHERS — **RESPONDENTS**

CORAM: DR MOSITO, P
DAMASEB, AJA
DR MUSONDA, AJA
CHINHENGO, AJA
VAN DER WESTHUIZEN, AJA

HEARD: 12 OCTOBER 2020
DELIVERED: 31 OCTOBER 2020

SUMMARY

Intersection between s 20 and s66 (4) of the Lesotho Constitution, whether a civil society organisation entitled to participate in the selection of members of the Independent Electoral Commission. Held that it was not.

JUDGMENT 28 OCTOBER 2020

P T DAMASEB AJA

Introduction

[1] The present appeal raises an important issue in the political life of the Kingdom: Does the constitution of Lesotho (the Constitution) recognise the right of civil society or private citizens to participate in the selection process of members of the Independent Electoral Commission (IEC)?

[2] The case started life in the High Court in the form of an urgent *ex parte* application in which the appellants alleged denial of the right to participate in the 'public affairs' of Lesotho in the selection of candidates for possible appointment as members of the Independent Electoral Commission (the IEC). They based their relief on s 20 of the Constitution which states:

> *'1. Every citizen of Lesotho shall enjoy the right-*
> *(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
> *(b) To vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot;*
> *(c) to have access, on general terms of equality, to the public service.*
> *2. The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution.'*

[3] The first applicant (the TRC) is a voluntary association whose members include citizens of Lesotho. The second appellant is a registered voter who unsuccessfully applied to be shortlisted for consideration as a member of the IEC. The third appellant is a political party duly registered with the IEC.

[4] On 27 June 2019, the appellants succeeded in obtaining interim relief from Monapathi J, in effect halting the process of the selection of the chairperson and members of the IEC, pending finalisation of the application brought by the appellants.

[5] After the *rule nisi* was granted it was extended several times and starting 3 July 11 August 2019 the High Court, exercising its constitutional jurisdiction and comprising (Mahase ACJ; Molete J and Moahloli J) heard the matter. Molete J having passed away after the matter was heard, the two remaining judges on 11 August 2020 dismissed the application and discharged the *rule nisi*, with costs.

[6] After the judgment was handed down, the appellants approached this court for an interim stay of the High Court's judgment pending the hearing of the appeal. That application was heard by the President of the court who on 5 September 2020, by agreement of the parties gave an order directing that the respondents 'shall not execute the High Court judgment pending finalisation of the appeal' which the appellants had noted against the judgment and order of the High Court.

[7] Mosito, P had *mero motu* raised the question about the propriety of the remaining judges handing down judgment after the death of one of their number and invited the parties to address the Court of Appeal thereon when the appeal was to be heard in the October session.

[8] Although the parties submitted written arguments on the issue raised by the President, during oral argument it was agreed that it would not be necessary for the court to decide on that issue and that given the public importance of the case we proceed on the basis that the High Court's judgment is valid; and to determine the appeal. By way of background which informs this concession, since the High Court granted the interim order, the process of selecting members of the IEC has been halted pending the final judicial determination of the matter. The result is that the Kingdom has been plunged into a political stalemate and no election can take place without a functional IEC.

[9] The court is indebted to the parties for their pragmatic approach which will only advance the cause of democracy.

The constitutional backdrop

[10] Section 66 of the Constitution states:

> *'1. There shall continue to be an Independent Electoral Commission consisting of a chairman and two members who shall be appointed by the King acting in accordance with the advice of the Council of State.*
>
> *2. …*

3. In its advice to the King under subsection (1), the Council of State shall submit to him the names of three persons selected from a list of not less than five names.
4. For the purpose of enabling the Council of State to select the names of persons to be submitted to the King under subsection (3), the Council shall request all registered political parties in accordance with the procedure agreed by them to jointly propose to the Council, within a period of thirty days from the date specified by the Council, a list of not less than five names'

Brief factual matrix

[11] It is common cause that the registered political parties formed a forum (the Forum) of political parties to give effect to s 66 of the Constitution. The third applicant initially took part in the Forum proceedings but was later excluded because, according to the respondents, it became obstructive and hindered the proper performance of the Forum's mandate. At the Forum, the parties took certain important decisions. Firstly, to advertise the vacant positions of chairperson and members of the IEC and (b) to invite interested persons and organisations to apply to be considered for appointment to shortlist and interview the candidates that applied for the vacant positions.

[12] The fifth respondent was then selected to conduct the shortlisting of the candidates to be interviewed. It is common cause that the manner in which the Forum carried out the constitutional mandate under s 66 was followed for more than twenty years. The process undertaken by the Forum was not funded through the Fiscus but by donor funding secured from the United Nations

Development Program (UNDP). Contrary to what the appellants alleged in the founding papers the issue of compliance with the statutory procurement process did therefore not apply.

[13] It was after the shortlisting and interviews were completed and before the Council of State could submit the names to the King that the interim relief was obtained.

The pleadings

[14] The appellants sought to invalidate the procedure adopted by the Forum on several grounds. It was maintained that the procedure adopted by the Forum was not transparent. According to the appellants the Forum had no legal basis and that it did not operate under a 'formulated institutional framework' to guide or inform the modalities of its operations in respect of the issue of recruitment and nomination of candidates. The appellants alleged, supported by a confirmatory affidavit on behalf of the third appellant, that the procedure adopted by the Forum was not compliant with the Constitution because it was not one agreed by all the political parties acting 'jointly'. It was also alleged that the 'outsourcing' by the Forum of the s 66 mandate to the fifth respondent, breached the public procurement regulations.

[15] It was alleged that the TRC, as a representative of the citizens of Lesotho, expressed the wish to the Forum to participate in the selection process but was denied the opportunity to do so. According to the TRC, if it was allowed it would have scrutinized

and facilitated 'public vetting of the candidates and get to appreciate their relevance, integrity and competencies to the duty'. The TRC maintained that its participation would have made the process transparent. Its exclusion, the allegation went, was 'undemocratic' and 'draconian' and therefore 'illegal and unconstitutional' and 'compromised the entire process'. That, it is said, violated s 20 of the Constitution.

[16] The approach to the court was also justified on the need to 'facilitate an amendment in the law with regard to promulgating rules of engagement in the whole exercise of appointing IEC commissioners' in order to comply with s 20 of the Constitution.

[17] The relief was opposed and the respondents each raised several points in limine and rebutted the factual allegations and legal contentions made by the appellants. I will summarise only those aspects of them that are relevant to the outcome of the appeal.

[18] According to the respondents, the first and third appellants' reliance on s 20 of the Constitution is misplaced because that section bestows rights only on natural persons who alone can be citizens of Lesotho. They also maintained that the relief sought by the appellants could have been adequately satisfied by other alternative remedies such as review and interdict and that, for that reason, the High Court should decline to entertain the matter in the exercise of its discretion under the proviso to s 22(2)(b) of the Constitution. According to the respondents, if there was any

illegality in the procedure followed by the Forum, the appropriate means of challenge was by way of review and or interdict.

[19] The respondents also maintained that the process followed has been the practice adopted by the political parties for more than twenty years. Significantly, they maintained that the process was funded with the financial assistance of the UNDP and that no Lesotho government funds were expended in the process.

[20] The respondents also maintained that the Constitution is silent on the procedure to be followed in the performance of the mandate under s 66(4) of the Constitution. Therefore, it was open to the Forum to adopt any reasonable procedure. They assert that the process they followed was transparent and was open to the media. Given that the Constitution is silent on how the process is to be conducted, it would be improper for the court to dictate to the political parties how to perform their mandate. The respondents assert that the right of Basotho to vote does not include the right to participate in the selection of the members of the IEC.

The High Court's approach

[21] Mahase ACJ wrote the main judgment with which Moahloli J was in 'complete agreement'. In the interest of brevity, it is proposed to only summarise those conclusions which are dispositive of the appeal.

[22] The High Court held that the nature of the relief sought by the appellants was such that it could have been sought by placing reliance on rule 50 of the High Court rules instead of proceeding under the Constitution Litigation Rules. According to Mahase ACJ the applicants in their founding affidavit did not make out the case for the invocation of the Constitution Litigation Rules. Rule 12(2) of CLR states in part:

> *'an application made under subrule (1) shall be on notice of motion accompanied by an affidavit stating explicitly the circumstances which justify a departure from the ordinary procedure'.*

[23] The High Court also held that s 66 of the Constitution has created a procedure for the selection of candidates and reposing it in the Council of State and the registered political parties to the exclusion of others such as the TRC. The desire of the TRC to participate in the s 66(4) process, the court held, 'cannot and should not override constitutional provisions since the Constitution is the supreme law'.

[24] Mahase ACJ also held that the third respondent was part of the process initiated by the Forum but that it was common cause that it had been 'expelled' but 'elected not to challenge that expulsion in the appropriate court under review.'

[25] As regards the manner in which the fifth respondent was appointed, the court a quo held that the appointment, if irregular, could have been challenged by way of rule 50 review by invoking the Public Procurement Regulations 2007.

The High Court made clear, having dealt with each of the points of law raised by the respondents, that the 'points of law raised herein are upheld'.

[26] The appellants appeal against the judgement and order of the High Court and persist that they had made out the case for the relief they sought in the High Court.

Analysis

[27] The manner in which the appellants framed their case presents conceptual difficulties. A raft of the prayers in the notice of motion do not lend themselves to constitutional relief and fly in the face of the well settled principle that the Constitution should not be resorted to if relief can be obtained through ordinary law remedies – a principle that has been entrenched in the Constitution in the case of Lesotho.[1]

[28] The Constitution must be the last and not the first resort in the resolution of disputes before court. Litigants must first try to seek remedies under ordinary law before resorting to the Constitution. This principle has been reiterated by this Court in *Sole v Cullinan NO and Others*[2]. The South African Constitutional Court has recognised the same principle in *South African National*

[1] The Lesotho Constitution, proviso to s 22(2)(b).
[2] LAC (2000-2004) 57 and *Ntsihlele & Others v IEC and Others* C of A (Civ.) no. 57/2019 para [44].

Coalition for Gay and Lesbian Equality v Minister of Home Affairs[3] when the court said:

> *'(W)here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the cause which should be followed.'*

[29] For example: Prayer 3.3 in the notice of motion required the production of the 'records of proceedings' of the Forum. Rule 50 of the rules of the High Court makes sufficient provision for a litigant who wishes to challenge administrative decision-making to approach the High Court to seek review relief and to demand production of the record.

[30] Prayer 4 sought an order declaring the appointment of the fifth respondent a 'nullity and of no force and legal effect'. That relief was anchored on the allegation that the fifth respondent was appointed without compliance with the Public Procurement Regulations. It beggars belief why that statutory framework was not prayed in aid. That relief alone, if granted, would have halted the entire process. But as has since become common cause, the process undertaken by the Forum was not funded with public funds and the relief was in any event incompetent.

[31] The same fate befalls prayers 6 and 7: Prayer 6 sought a declarator that the 'views, findings and recommendations of the 5th

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[3] 2000 (2) SA 1 (CC) (2000) (1) BCLR 39; [1999] ZACC 17 para 21; from the U.S.A, see, eg: *Zobrest v Catalina Foothills School Dist* 509 U.S 1 (1993) at 8 and Namibia, see *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) (1995) (1) SA 51; *Road Fund Administration v Skorpion Mining Co. (Pty) Ltd* 2018 (3) NR (SC) 829 para [45].

respondent in respect of the shortlisted candidates to be a nullity'. On the premise that the manner in which the fifth respondent was appointed was irregular and amounted to corruption, prayer 7 sought a mandamus against the third respondent 'to investigate the circumstances surrounding the award of the tender in favour of the 5th respondent'.

[32] The third respondent's grievance appears to be that it was unlawfully excluded from participation in the s 66(4) process. Its exclusion, if proven would amount to a clear illegality which would be subject to review under rule 50 and would even entitle it to seek temporary relief whilst the review was pending.

[33] The High Court therefore correctly concluded that, at least in so far as the above relief is concerned and on the assumption that a right guaranteed under sections 4 to 21 were violated, there were sufficient alternative remedies (as contemplated by the proviso to ss 22(2)(b)) for it to decline exercise of its powers to 'determine any question arising in the case' and to make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement' of a guaranteed right.

[34] On a most charitable view of the case as regards the TRC and the second respondent who made common cause with the TRC in the relief it sought, the only prayers which could conceivably be considered constitutional in nature are prayers 5 and 8 because they appear directly to implicate section 20 of the Constitution and not amenable to ordinary relief under any other law.

[35] Prayer 5 sought a declarator that the Forum's denial of participation by the TRC is unconstitutional. That depended on showing that s 20 guaranteed a right to civic participation in the s 66(4) process. It would have been necessary therefore for the court to make a declarator to that effect.

[36] Similarly, prayer 8 seems to seek vindication of a s 20 right. Under it the appellants sought an order directing the registered political parties 'to formulate the rules of engagement in the operationalization of section 66(4) in their nomination of a candidate for a commissioner within 14 days after the grant' of the order.

[37] I will presently demonstrate that, in event, such relief was incompetent because s 20 finds no application to the s 66(4) process.

Disposal

[38] Section 20 guarantees the right, amongst other things, for citizens of Lesotho to participate (directly or indirectly) in the conduct of public affairs.

[39] Since it is not necessary to the outcome of the appeal, I prefer on this occasion not to enter the debate whether that right inheres only in natural persons. I will assume for present purposes, without deciding, that the right also extends to juristic persons such as the first and third appellant.

[40] In the first place, whether the right exists will depend on the nature of 'public affairs' that is desired to be participated in and whether the form in which participation is sought is congruent with the activity concerned. It could well be more than adequately satisfied if the 'public affairs' allows adequate participation 'through freely chosen representatives.' The onus rests on the party claiming the right to make out the case.

[41] Making laws and debates in the houses of parliament are certainly 'public affairs'. But can one plausibly argue that citizens have the right to 'directly' participate therein? The process of choosing judges is equally public affairs. Can the TRC claim the same in relation thereto?

[42] Secondly, the right, such as it is, is subject to 'other provisions' of the Constitution. The examples I gave above are good examples of such 'other provisions'.

[43] A s 20 right to participation in public affairs is no warrant for imposing strictures on the performance of public affairs which will render it impractical and onerous.

[44] The appellants recognise the inherent weakness of their claim to participation in s 66(4) 'public affairs' when they ask for an order against the registered political parties for the 'operationalisation' of s 66(4)' within 14 days 'in their nomination' of candidates. They are in effect asking the court to fill gaps in the Constitution.

[45] Under s 66(4) the Constitution empowers the registered political parties to select the names of candidates to be submitted

by the Council of State to the King 'in accordance with a procedure agreed by them to jointly propose to the Council'.

[46] I see no defect in such broad power. Even assuming there is a gap, it is one which is not curable by the court and certainly is no basis for imputing illegality of the actions of the political parties in giving effect to it.

[47] After all, the legislative intent must be viewed against the backdrop of the common law which teaches us that where discretionary power is given but no procedure is prescribed, those in whom the power vests may adopt any procedure that is reasonable in the circumstances.[4]

[48] The political parties carefully detailed the manner in which they went about the selection process and even asserted that it is the very same procedure that they followed for the past twenty years – an allegation which remains uncontested. Advertisements were placed in the media to invite all interested persons to apply.

[49] A serious attempt was made to give all qualified persons and organisations to apply to be considered to conduct the shortlisting and interviewing process. The proceedings were open to the media to cover and were not shrouded in secrecy. In my view, the approach adopted by the Forum fell well within a range of reasonable options open to it to carry out their mandate.

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[4] Compare: Baxter, L. 1984. *Administrative Law*. Juta: Cape Town at p. 444

[50] Section 66(4) vests the power in the political parties to select the candidates for possible appointment as IEC commissioners. It certainly is 'public affairs' being conducted by political parties duly registered with the IEC and representing different shades of public opinion and interest in Lesotho. Section 66(4) leaves no scope for direct participation by persons or bodies other than registered political parties.

[51] I conclude, therefore, that s 20 of the Constitution finds no application to the s 66(4) process. The appellants therefore did not discharge the onus that they are entitled to participate directly in the process initiated by the Forum.

[52] It is unnecessary for us to consider the other grounds on which the application was dismissed as neither appellant established a breach of s 20 in relation to the process for the selection of IEC chairperson and commissioners.

[53] If the third respondent was unlawfully excluded from participation in the s 66(4) process, it could have sought to review it under rule 50. In any event, we must accept on the Plascon-Evans test that it was part if the process but was excluded therefrom because of its own misconduct.

[54] The appeal must therefore fail. As for costs, our view is that although not successful the respondents should not be mulcted in costs as doing so might have a chilling effect on those who may wish to in future bring important constitutional issues to court in

order to promote constitutionalism and transparency in Lesotho's body politic.

The Order

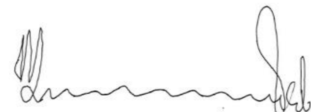
[55] The appeal is dismissed and there is no order as to costs.

P T DAMASEB
ACTING JUSTICE OF APPEAL

I agree

DR KE KANANELO
PRESIDENT OF THE COURT OF APPEAL

I agree



DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree

M CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

DR J VAN DER WESTHUIZEN
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