

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 70/2019

CIV/APN/125/2019

C OF A (CIV) 1/2020

RE: CONS. CASE8/2019

In the matter between:

INDEPENDENT ELECTORAL COMMISSION

APPELLANT

AND

**THE GOVERNMENT OF LESOTHO
RESPONDENT**

64TH

**MINISTER OF FINANCE
RESPONDENT**

65TH

In re: the main application between:

**TRANSFORMATION RESOURCE CENTRE
& OTHERS**

1ST to 3RD APPLICANTS

AND

THE COUNCIL OF STATE & OTHERS RESPONDENTS	1ST to 5TH
INDEPENDENT ELECTORAL COMMISSION	6TH RESPONDENT
THE ATTORNEY GENERAL	7TH RESPONDENT
REGISTERED POLITICAL PARTIES (FORUM) RESPONDENTS	8TH to 38th
VARIOUS OTHERS RESPONDENTS	39TH to 63RD

CORAM: **P.T. DAMASEB, AJA**
DR. J. VAN der WESTHUIZEN, AJA
N.T. MTSHIYA, AJA

DATE HEARD: **20 May 2020**

DATE DELIVERED: **29 May 2020**

Summary

a) Urgent counter-application to join main application- filed by former commissioners of the Independent Electoral Commission whose terms of office had expired-High Court dismissing application without order of costs- High Court decision, confirmed on appeal with order of costs against former commissioners.

b) Urgent application by former commissioners for stay of dismissal decision by High Court-dismissal order not executable and accordingly application dismissed.

c) Former Commissioners- seeking condonation for late filing of appeal against dismissal of stay- condonation application dismissed with no order as to costs.

JUDGMENT

MTSHIYA AJA

INTRODUCTION

[1] The parties in this appeal have agreed that the matter be determined on the basis of the record and submissions as permitted by Rule 30(5)(b) of the Court of Appeal (Amendment) Rule 2020.

The dispute in the appeal is between the appellant (the IEC) and the Government of Lesotho. The former commissioners of the appellant whose 5year terms of office expired on 7 January 2019 have refused to vacate office and claim that they are in law entitled to remain in office until a new chairperson and commissioners are appointed. As observed by this court in **C OF A (CIV) NO 57/2019** “**The IEC is a very important institution in the political life of the Kingdom**”. It is therefore necessary that its operations are run smoothly. There should be cooperation between the appellant and the Government.

[2] There are two appeals filed in this matter. The first appeal is against the High Court’s decision of 16 October 2019 wherein it dismissed the IEC’s counter urgent application. The second application is against the High Court’s decision of 28 November 2019 dismissing the IEC’s application for stay. However, with respect to the second appeal, there is a notice of condonation for late filing of the appeal. The affidavit in support of the condonation application is signed by **Justice Mahapela Lehohla**, the former chairman of the appellant.

BACKGROUND

[3] The IEC is established in terms of section 66 of the Constitution of Lesotho and consists of a chairman and two other members. The Commissioners are appointed by the King on the

advice of the Council of State for a period of not more than five years but maybe reappointed for only one further term not exceeding five years. In their work the commissioners are assisted by a Director of Elections.

[4] Prior to the dispute, the commissioners were **Justice Mahapela Lehohla (Chairman), Dr M. Nyaphisi and Adv M. Pholo**. As at 7 January 2019 the trio had served the commission for five years. They offered themselves for reappointment but the offer was declined by government. The dispute then began with the former commissioners arguing that until the appointment of new commissioners, they remained in office, because according to them, the constitution does not allow for there to be a vacuum in the membership of the commission.

[5] As government was putting in place a process to appoint new commissioners, the former commissioners including the Director of Elections, who is their appointee, approached the High Court under case **No CIV/APN/125/2019** seeking to interdict the Council of State from proceeding with the process until their application was determined. The court ruled that the application was not urgent. That application, is now pending for hearing before a panel of three Judges of the High Court as an ordinary application.

[6] While the commissioners' application (**CIV/APN/125/2019**) was before the High Court, **Transformation Resource Centre, Maieane Khaketla and African Ark (a) Areka Ea Basotho**

also instituted an application for the review of the process of appointing commissioners to the IEC (i.e the main case **08/19**).

[7] On 27 June 2019, under the review application, an interim order was issued by the High Court interdicting His Majesty The King and the Council of State (1st and 2nd respondents in the main review application) from proceeding with the appointment of new commissioners pending the finalization of that application.

[8] On 17 September 2019, the former commissioners filed, in the High Court, what they called an urgent counter application. I am not clear why it was called a counter-application. In that application, the commissioners, among other reliefs, prayed for the IEC to be joined to the main review application filed by **Transformation Resource Centre and Others** and also for the consolidation of the pending application, namely **(CIV/APN/125/2019)** with the said review application. It was later decided, with the agreement of the parties, that the court should commence by disposing of the urgent counter-application.

[9] In filing the counter application, the former commissioners purported to be acting on behalf of the IEC. In the founding affidavit, the former chairman, Justice Mahapela Lehohla, averred as follows:

“I am an adult male, the Chairman of the Independent Electoral Commission. I am duly authorized by the two incumbent commissioners to make this application on behalf of the Independent Electoral Commission as I hereby do.” (My own underlining).”

[10] In terms of the **Notice of Motion**, the main relief sought on behalf of the appellant in that urgent counter application was:

“2.1 Declaring that the Independent Electoral Commission (hereafter “IEC) continues to exist at all times, including any times after the expiry of the period of appointment of the commissions and before the procedurally correct appointment of new commissioners;

2.2 Declaring that the IEC commissioners whose period of appointment has expired (hereafter referred to as “the incumbent commissioners”) remain in office as the IEC commissioners, with full employment benefits and having full powers and duties as such, until such time as the procedurally correct appointment of new commissioners.

2.3 Declaring that the incumbent commissioners have the right of access to their offices and the duties as set out in the National Assembly Electoral Act, 2011 as read with Section 66 of the Constitution.

2.4 Ordering the 64th and 65th respondents (the Government of Lesotho and the Minister of Finance) to forthwith pay all arrear salary and other benefits to the incumbent commissioners, such payment to be made out of the Consolidated Fund in terms of Section 66(D)(2) of the Constitution, and to continue to make payment of salary and other benefits to the incumbent commissioners until such time as the procedurally correct appointment of new commissioners.

2.5 Declaring that Mr Lebohang Bulane was validly appointed as the Acting Director of Elections and is recognized as the “Director” as defined in the National Assembly Electoral Act, 2011 and is therefore the Chief Accounting Officer of the IEC in terms of Section 144(5) of the National Assembly Electoral Act 2011.”

[11] In their founding affidavit the former commissioners contended that:

- a. they had legitimate expectations to continue in office despite the expiry of the period of their initial appointments.
- b. they were suitable persons to hold and continue to hold office.
- c. their purported dismissal by the Government Secretary through a letter dated 22 May 2019 was illegal.
- d. that in terms of section 66(1) of the Constitution “ There shall continue to be an Independent Electoral Commission ...” which on a proper interpretation means that the Independent Electoral Commission shall at all times exist and continue to exist, and that there may never be a situation where there are no members of the Independent Electoral Commission; and
- e. that in terms of the constitution the three commissioners are the commission and without them there can be no commission and such a state of affairs is legally and constitutionally intolerable, thus creating a constitutional crisis in the Kingdom.

[12] For their apart 8th to 38th respondents, through an answering affidavit deposed to by Chief Pelele Letsoela, representing all political parties registered with the appellant, in part, aver, as follows:

“4. The applicant acts through the medium of commissioners and on the version of the deponent Lehohla the contracts expired but they continued to regard themselves as IEC commissioners until when they were terminated by the Government Secretary on 28 May 2019 as clearly appears from annexure “ML03” to his founding affidavit. The contracts of the three (3) commissioners having expired and/or their continued occupation of office with the IEC having been so terminated by the Council of State they would not be entitled to purport to resolve to bring this litigation in the names of the IEC because they are no longer commissioners.

5.The powers of the IEC to litigate in terms of section 140 of the national Assembly Act of 2011 relates to the IEC as an institution represented by validly appointed commissioners.

6. It follows as a matter of logic that the applicant is not properly before court and on this ground alone the application ought to be dismissed with costs to be paid by Justice Lehohla, Dr Nyaphisi and Advocate Pholo personally, jointly and severally, the one to pay to absolve others.

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18. Their contracts were not renewed and they were not re-appointed as contemplated in section 66 of the Fifth Amendment. I aver that the provisions of section 66 require what for a term of commissioners, which has expired by operation of law after they served five (5) years, to be renewed there has to be re-appointment by the appointing authority being the King acting in accordance with the advice of the Council of State. The former commissioners were not re-appointed in accordance with the provisions of this section, and therefore there is no way they could claim automatic entitlement by a court order, when the Constitution requires that the King must exercise his constitutional powers of re-appointment after being advised by the Council of State.

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20. The relief sought by the IEC seeks to sanitize re-appointment of the former commissioners of the IEC. Their re-appointment cannot be renewed by a court of law because it is a constitutionally sanctioned process. A court of law cannot grant

an order that is inconsistent with the provisions of the Constitution because courts of law should not assist litigants to break the law. Courts of law must grant orders that are compatible with and that operate within the legal framework. The appointment must follow the process set out in section 66 of the Fourth Amendment or section 66 of the Fifth Amendment. It is a constitution requirement that must be followed and which cannot be circumvented through a court order as the applicant seeks to do”.

GROUND OF APPEAL

[13] There are a total of 31 grounds of appeal which in the main are all centered on how the *court a quo* dealt with the legal issues placed before it. Given the fact that both facts and legal issues addressed by the High Court were common cause, I do not find the need to repeat all the grounds of appeal raised on behalf of the IEC. However, it will be necessary to briefly indicate what the common cause issues which called for legal interpretation were.

Common cause facts.

[14] The common facts are:

- a. the 5 year terms of office of the 3 constitutional appointees, the Commissioners, expired on 7 January 2019.
- b. the 5year terms of office of the former commissioners were never, in terms of the Constitution, extended.
- c. the commissioners continued to perform their functions until the appointments were purportedly terminated through a letter of 22 May 2019 authored by the Government Secretary.
- d. on 6 June 2019 the High Court issued an interim order interdicting His Majesty The King and the Council of State from proceeding with the appointment of new commissioners until finalisation of the review application filed by Transformation Resource Centre and Others. The interim order remains extant.

Issues

[15] In view of the above common cause facts, it becomes clear that what the parties are arguing about are legal issues anchored on the relevant provisions of the Constitution of Lesotho of 1993 (the Constitution) as amended and the National Assembly Electoral Act, 2011 dealing with the IEC. The issues for determination need to be spelt out.

These are:

- a. whether or not the Constitution allowed for automatic extension of the commissioners' terms of office after expiry on 7 January 2019 (i.e through effluxion of time).
- b. In the event that the terms of office of the commissioners were not constitutionally extended could they exercise authority on behalf of the IEC including instituting these court proceedings.
- c. Is it legally correct for the commissioners to argue that without them the institution cannot exist? .

[16] In my view, if the answers to the above issues are not in favour of the former commissioners, then this appeal, which the former commissioners claim to have filed on behalf of the IEC, is disposed of and there would also be no need to detain ourselves with the application for leave to appeal against the dismissal of the application for stay.

[17] In its heads of argument, the appellant insists that its request for an interim order to allow the former commissioners to remain in office was meant to avoid a lacuna in the institution. It poses the following questions:

“1.1 Is there to be a lacuna and a period where there is no independent Electoral Commission (as the Court a quo appears to have decided), or

1.2 Do the incumbent commissioners whose period has expired remain as commissioners in an acting capacity until the proper appointment of new commissioners? Appellant submits that this is the true position”.

The position the appellant takes does not enjoy the support of law as shall be demonstrated in this judgment.

[18] On their part the respondents generally maintain the stance that the commissioners terms of office expired through effluxion of time on 7 January 2019. On that approach, there were not dismissed. Furthermore, with their terms having expired, the commissioners had no authority to institute court proceedings against respondents. A resolution for legal proceedings to be instituted could only be passed by legally appointed commissioners. There was, *in casu*, no such resolution.

THE LAW

[19] A fixed term contract would normally end after the duration agreed to by the parties. *In casu*, the lifespan of the terms of office of the former commissioners is regulated by the Constitution.

[20] The establishment of the commission and the appointment of its commissioners is provided for under section 66 of the Constitution. For present purposes, the relevant provisions are:

“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.

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7. A member of the Electoral Commission shall hold office for such term, being not more than five years, as specified in his instrument of appointment, and may be reappointed for only one further term not exceeding five years.

8. If the office of Chairman of the Electoral Commission is vacant or if the person holding that office is for any reason unable to exercise the functions of his office, then, until a person has been appointed to and has assumed the functions of that office or until the person holding that office has resumed those functions, as the case may be, those functions shall be exercised by such one of the other members of the Commission as may for the time being be designated in that behalf by the King, acting in accordance with the advice of the Council of State.

9. If at any time there are less than two members of the Electoral Commission besides the Chairman or if any such member is appointed to act as Chairman or is for any reason unable to exercise the functions of his office, the King, acting in accordance with advice pf the Council of

State, may appoint a person who is qualified to be appointed as a member of the Electoral Commission to act as a member, and any person so appointed shall, subject to the provisions of subsection(5), continue to act until the office in which he is acting has been filled or, as the case may be, until the holder thereof has resumed his functions or until his appointment to act has been revoked by the King, acting in accordance with the advice of the Council of State.”

Analysis

- a. Whether or not the constitution allowed for automatic extension of the commissioners terms of office after expiry on 7 January 2019 i.e after effluxion of time.

[21] I propose to commence by considering the appeal challenging the dismissal of the urgent counter-application. In so doing, it is important to look at how the *court a quo* disposed of the legal issues that were argued before it.

In dealing with the entire application the High Court was alive to the fact that the IEC sought an interim declaratory order to the effect that:

“a. The I.E.C continues to exist at all times including any time after the expiry of their period of appointment until the next commissioners are appointed procedurally.

b. That they must remain commissioners with full benefits retaining their powers and duties until the new appointments are made.”

[22] The court further noted that the respondents has raised a number of points of law, namely that:

- a. the four individuals lacked locus standi to represent the I.E.C.
- b. they have other available remedies
- c. the matter was *lis pendens* as they were raising the same issues they had already raised under case number CIV/APN/125/2019 which is currently pending under a panel of three judges in the High Court; and
- d. this constitutes an *actio popularis* for the former commissioners.

[23] In addressing this issue, the High Court, guided by subparagraphs (1) and (7) of section (66) of the Constitution reasoned as follows;

“[14] In the present case the 5year period expired in January 2019. That means when the King appointed the applicants he had pre-determined their termination as well, therefore what was expected and should have been done by the applicants was to vacate office at the end of their term, more so when they had been informed that their offer to continue had not been

accepted. The effect would be that from that day there would be no IEC Chairman and Commissioners, but that would not be their fault and certainly not their business to launch this counter-application as the IEC."

[24] I agree with the above reasoning of the *court a quo* because, in my view, in terms of the law a commissioner, whether in a designated or acting capacity, can only hold office legally if the following requirements are fulfilled:

- a. advice or recommendation to the King with respect to the person to be appointed (Section 66 (3) of the Constitution)
- b. approval of the King (Section 66 (1) of the Constitution);
- c. contract or instrument of appointment (Section 66 (7) of the Constitution)- although there are no copies in the record, the former commissioners in their letter of 8 January 2019 to the authorities refer to their contracts of engagement.
- d. oath of office in terms of Section 134 of the National Assembly Electoral Act, 2011 (the Act) which provides as follows:

"A member of the Commission shall, before assuming the duties of the office take and subscribe to the oath specified in Schedule 4 to this Act." (My own underlining)."

[25] The constitutional provisions quoted above have the effect that in the absence of the above requirements, no person can

claim appointment to the office of Chairman or Commissioner of the IEC.

In the event that the terms of office of the commissioners were not constitutionally extended could they exercise authority on behalf of the appellant including instituting these court proceedings.

[26] In constitutional appointments of this nature, it is not possible for someone to assume duties of office without having subjected themselves to the oath of office as required by section 134 of the Act. It cannot be denied that upon appointment in 2014 the former Chairman and the other two former commissioners satisfied the requisite requirements enumerated above. With the expiry of their terms of office on 7 January, 2019, their oaths of office to duty also expired. They were therefore disabled from performing any duties attaching to the office of Chairman or Commissioner of the IEC. To that end, it is my finding that they could not legally purport to file court proceedings on behalf of the IEC as provided for under section 140 of the Act. They had no legal authority to do so. That being the case, the IEC's appeal has no prospect.

[27] Furthermore, as they were no longer commissioners, they could not competently pass a resolution to appoint a Director of Elections as they purported to do. Any actions undertaken by the former commissioners on behalf of the IEC after 7 January 2019 were invalid.

[28] Correspondence between the former commissioners and relevant authorities up to the time they started filing court papers, clearly prove and point to the fact that the former commissioners were fully aware that their terms of office had expired. That is why they were requesting the authorities to reappoint them. On that basis they were estopped from relying on the argument that there was no interruption in the appointments until new commissioners are appointed.

[29] Given the fact that the Constitution in, section 66 (2) perceives the former commissioners to be people of “a high moral character and proven integrity, it is a matter of concern that after 7 January 2019, they remained on the State’s pay roll without raising questions. That raises the obvious question whether they are in law entitled to remuneration. In the absence of any legal approval for them to remain in office as they did, they should not have remained on the state’s pay roll.

[30] Notwithstanding the language therein, I also do not find any legal significance in the purported letter of dismissal authored by the Government Secretary. Arguing about that development, which, in my view, was purely for administrative purposes, does not take the former commissioners’ case far. That letter served no purpose with respect to their status. I say so because there is no argument that the former commissioners’ terms of office had already expired through effluxion of time. The expiry of their terms of office was in line with their contracts of engagement. Indeed in their letter of 8 January 2019 addressed to the Senior

Private Secretary to His Majesty and Secretary to the Council of State they make reference to their expired contracts.

c. Is it legally correct for the commissioners to argue that without them the institution cannot exist.

[31]With respect to the argument that there can be no IEC without the physical presence of the commissioners, namely the Chairman and the other two Commissioners, the learned Judge in the *court a quo* correctly reasoned as follows:

“I deem it important to make a distinction between the IEC as an institution established by law, in this case the constitution and its functionaries who are appointed from time to time. The constitution creates an institution of the IEC and the words “there shall continue to be an Independent Electoral Commission...”, simply serve to clothe it with perpetual existence as an institution and nothing more. On the other hand, the functionaries or people who constitute Chairman and Commissioners are appointed for a specified period and at the end of that term their appointment expires without further ado. Nobody has to tell them or terminate anything. It is by operation of the law that they have a fixed term.”

[32] Section 66 of the Constitution establishes the IEC as an institution of perpetual existence. To that institution, selected individuals are then appointed for fixed periods, *in casu* five years. Once that period is over and there is no reappointment, one cannot claim reappointment as a matter of right. What

remains on a permanent basis is the institution. Appointees to man the institution come and go. In short, the institution continues to exist without the former commissioners' who, are fully aware that until the interdict of 27 June 2019 is discharged, His Majesty The King and the Council of State are disabled from continuing with the process of appointing new commissioners pending the finalisation of the review application.

[33] All in all, I am unable to fault the reasoning of the court a quo on its interpretation of the law as it applies to the appointment of the former commissioners. Accordingly, this appeal has no merit.

In my view, these findings herald the end of this matter. That includes the condonation application relating to the intended appeal against the High Courts' decision in rejecting an application for stay.

Application for condonation for late noting of appeal against dismissal of stay

[34] In terms of the rules of this court an appeal should be filed within 6 weeks upon receipt of the judgment appealed against. The applicant herein has correctly noted that it is time barred and hence the application for condonation. Under normal circumstances, an application of this nature would be granted at the discretion of the court. This would be done a court would have examined after the merits thereof, with particular reference to the reasons given for the delay and prospects of success. However, *in casu*, having ruled that the IEC has no prospects due to the fact

that the former commissioners lacked legal authority to institute court proceedings on behalf of the IEC, I find it totally unnecessary to proceed to deal with the condonation application. Suffice to say prospects of success in the intended appeal, which is based on an order that is clearly not executable, are nil. The application cannot therefore be granted.

Costs

[35] It is the finding of this court that the former commissioners had no authority to involve the IEC in this matter. Under the circumstances, the IEC cannot be made to suffer the costs of this appeal. The costs of this appeal should therefore be borne by the three former commissioners, who instituted the court proceedings.

[36] I therefore make the following order:

1. The appeal is dismissed.
2. The costs of this appeal shall be paid by the former commissioners; namely Justice Mahapela Lehohla, Advocate Mamosebi Pholo and Dr Makase Nyaphisi.



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N.T. MTSHIYA

ACTING JUDGE OF APPEAL

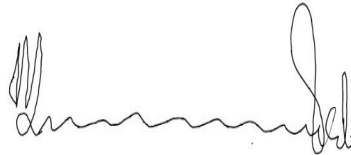
I agree



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P.T. DAMASEB
ACTING JUDGE OF APPEAL

I agree



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DR P. MUSONDA
ACTING JUDGE OF APPEAL

FOR APPELLANTS:
THABANE & CO,

MOFOLO, TAU-

**FOR 1ST, 2ND, 4TH, 7TH,
64TH & 65TH**

RESPONDENTS:

THE ATTORNEY GENERAL

FOR 8TH TO 38TH RESPONDENTS: MEI & MEI ATTORNEYS