

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

C OF A (CIV) NO. 68/2022

In the matter between:

MOVEMENT FOR ECONOMIC CHANGE

**1st
APPELLANT**

**MEC CONSTITUENCY
COMMITTEE-MATELILE NO. 54
APPELLANT**

2nd

AND

**INDEPENDENT ELECTORAL COMMISSION
RESPONDENT**

CORAM : MOSITO P
DAMASEB, AJA
CHINHENGO, AJA

DATE OF HEARING : 6 OCTOBER 2022

ORDER DELIVERED : 11 NOVEMBER 2022

Summary

Where a candidate is disqualified to stand as a candidate in a parliamentary election in terms of the National Assembly Electoral Act 2011, there is no duty on the Independent Electoral Commission to invite a political party to nominate another candidate. A party may, by nomination replace a

disqualified candidate at any time, provided it is before close of nomination and before printing of the ballot papers.

JUDGMENT

PT Damaseb AJA:

[1] The sole issue that arises in this appeal is whether a political party registered to participate in an election is entitled under the law¹ to be invited by the Independent Electoral Commission of Lesotho (IEC)² to nominate another candidate when the one previously nominated has been disqualified by the IEC from standing as a candidate.

[2] When all is said and done, the question is whether the IEC's and the court's duty is to enforce the letter and spirit of the law or to be guided by *mohau* (mercy) when political actors fall foul of the law.

[3] The High Court (Mokoko J) answered that question in the negative. Dissatisfied with the learned judge's order, the appellants approached this court seeking an order setting aside the High Court's order and replacing it with an order that:

¹ National Assembly Electoral Act 14 of 2011.

² Established in terms of s 66 of the Constitution of Lesotho.

- (a) *The decision of the IEC disqualifying Mr Sello Justice Tsukulu without giving Movement For Economic Change an opportunity to forward the name of an alternative candidate to replace him on the ballot paper is irregular;*
- (b) *Pursuant to the above order, the National Assembly Elections for Matelile No.: 54 Constituency due to be conducted on 7th October 2022 are interdicted and fresh elections are held within reasonable time which include the Movement For Economic Change; and*
- (c) *Costs.*

Common cause facts

[4] National elections in Lesotho were scheduled to take place on 7 October 2022. In terms of Legal Notice No.: 64 of 2022, the nomination period ran from 29 August 2022 to 5 September 2022.

[5] In respect of the Matelile No. 54 Constituency, the first appellant (MEC) nominated Mr Sello Justice Tsukulu as a candidate. His candidature was objected to because, in terms of s 40(2)(c) of the National Assembly Elections Act 14 of 2011 Mr Tsukulu, being a public officer, was disqualified from being elected as a member of Parliament.

[6] The IEC sustained the objection and on 8 September 2022 informed the objector and Mr Tsukulu of the decision disqualifying Mr Tsukulu.

[7] Mr Tsukulu approached to the High Court (Makhetha J) to review and set aside his disqualification and lost. He appealed Makhetha J's order to this Court on an urgent basis.

[8] In the meantime, the IEC proceeded to print the ballot papers for the Matelile No. 54 Constituency without any candidate under the banner of the MEC on it.

[9] The two appellants then approached the High Court on 28 September 2022 on an urgent basis seeking the relief that I set out earlier – that is, as the IEC correctly points out, some three weeks after the disqualification decision was made known.

[10] According to the IEC, the MEC and other political parties were informed on 21 September 2022 of the contents of the ballot paper which excluded Mr Tsukulu.

[11] As the IEC correctly points out in its opposing affidavit, the nomination of candidates for elections has nothing to do with political parties as under Lesotho's electoral legislative scheme electors elect individuals at constituency level. It is a candidate's choice to contest elections under the banner of a political party.

[12] The undisputed evidence of the IEC is that it at no point prevented the appellants from nominating an alternative candidate to the disqualified Mr Tsukulu.

[13] During oral argument, Advocate Lephuthing for the appellants conceded that the IEC had not acted unlawfully by excluding a candidate sponsored by the MEC from the Matelile No. 54 constituency ballot paper. It became common ground during oral argument that the party could after the rejection of Mr Tsukulu's candidature have nominated any other qualified person to stand in that constituency under its banner.

[14] In other words, the exclusion of a MEC-sponsored candidate from the ballot paper was not on account of any unlawful conduct on the part of the IEC, but the remissness of the appellants.

[15] Once an election date is set and the nomination schedule is announced by the IEC, a political party may nominate anyone to stand as a candidate and replace him or her if disqualified by the IEC as long as such replacement is done before expiry of the nomination deadline and before the printing of the ballot paper.

[16] There is no legal obligation on the IEC, once it disqualifies a nominated candidate, to invite a political party to nominate a replacement candidate.

[17] As Advocate Lephuthing ultimately conceded, the appellants' case is not premised on a legal entitlement to have

been afforded the opportunity to nominate but expected mercy (*mohau* in Sesotho) from the IEC.

[18] *Mohau* has no place in the sphere of competitive politics where the courts must insist on strict compliance with the law in the interest of certainty and predictability.

[19] The appeal has no prospect of success and is accordingly dismissed, with costs.



P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



KE MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



M.H. CHINHENGO
ACTING JUSTICE OF APPEAL

FOR APPELLANTS: ADV C J LEPHUTHING (duly instructed
by Mr Rasekoai)

FOR RESPONDENT:

ADV K W LETUKA