

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

**C OF A (CIV) NO. 60/2022
CIV/APN/0288/2022**

In the matter between:

**CHEPANE MOTHAE
APPELLANT
DEMOCRATIC CONGRESS
2nd APPELLANT**

1st

AND

**THE INDEPENDENT ELECTORAL
COMMISSION
RESPONDENT**

CORAM : MOSITO, P
DAMASEB, AJA
CHINHENGO, AJA

HEARD : 4 OCTOBER 2022

DELIVERED : 11 NOVEMBER 2022

Summary

Regulation 143(3) of the Public Service Regulations 2008 require that a public servant resign at least one month before being nominated to stand for elections as a member of Parliament; that requirement is not met by a purported resignation with immediate effect. A public officer who challenges a disqualification by the IEC on the ground of non-compliance with Regulation 143(3) bears the onus that he or she has complied with the Regulation.

JUDGMENT

PT Damaseb AJA:

[1] The present appeal which, with leave of the President of the Court of Appeal, was enrolled on urgent basis in the October-November session of this Court, is concerned with the disqualification of the appellant (Mr Mothae) from standing for election to parliament under the banner of the 2nd respondent (a political Party) for the Mosalemane No. 66 Constituency in the recently concluded national elections.

[2] Mr Mothae was disqualified following an objection to his candidature on the ground that he is a public officer, contrary to s 40(1)(c) of the National Assembly Elections Act 14 of 2011(NAEA), read with Regulation 143(3) of the Public Service Regulations 2008.

Legislative framework

[3] Section 40 of the NAEA states:

*‘(1) A person is not eligible to be elected as a member of the National Assembly, if at the date of the nomination, the person –
...
(c) is not qualified-
(i) under section 59 of the Constitution’.*

[4] Section 59 of the Constitution provides:

“(1...no person shall be qualified to be elected as a member of the National Assembly if, at the date of his nomination or designation or, as the case may be, at the date of his nomination for election, he –

...

(4) Parliament may provide that, subject to such exceptions and limitations as may be prescribed by parliament, a person shall not ...be elected as a member of the National assembly if-

(a) he holds or acts in any office or appointment that is so prescribed...’

[5] Section 40(2) (c) of the NAEA gives effect to subsection (4)(a) of s 59 of the Constitution in the following terms:

‘40(2) A person is not eligible to be elected as a member of the National Assembly if, at the date of nomination, the person-

...

(b)holds, or is acting in, a public office.”

[6] Now, according to Regulation 143(3) of the Public Service Regulations (Reg. 143(3)):

‘A public officer who wishes to stand for general elections to the National Assembly ...shall resign or retire from the public service by giving a written notice of at least one month prior to the nomination day for the general elections ..as appointed by the National Assembly General Elections Act, 1992.’

[7] The issue that arose in the court *a quo* is whether, on the date that he was nominated to stand for parliament, Mr Mothae had complied with Reg. 143(3).

Factual background

[8] Mr Mothae was nominated on 2 September 2022 as a candidate under the banner of the second appellant. On 6 September 2022, he was informed by the IEC that his candidature was rejected following an objection that he is a serving public officer.

[9] The rejection letter dated 6 September 2022 informed him that -

“An investigation was conducted and we discovered that you issued a letter [of] resignation on 1st September 2022” and that his nomination was not “compliant with regulation 144(3) (sic) of the Public Service Regulations 2008” and “in violation of section 40(2) (c) and (3) of the [NAEA]”.

[10] Mr Mothae then approached the High Court on an urgent basis in effect seeking to interdict the IEC from removing his name from *“the registry of nominees”* for the 7 October elections”; to be allowed to stand as a candidate in the said elections, and to have the decision to disqualify him reviewed and set aside.

[11] In the founding affidavit, Mr Mothae made the following salient allegations. That on or about 1 January 2021, he was employed as a Marking Assistant in the Ministry of Home Affairs. That since he intended to stand for elections, he

submitted a letter of resignation to the principal secretary of Home Affairs on 2 August 2022. That the letter of resignation stated that it was with immediate effect – in other words from 2 August 2022. He stated that the letter of resignation was received by the principal secretary of Home Affairs on 3 August 2022. The letter stated that since the resignation was with immediate effect he would *“forfeit part of my severance benefits in lieu of Notice”*.

[12] Mr Mothae complained that the IEC had not given him any notice of the objection to his candidature. In effect, he alleges that he was entitled to but denied *audi* before his candidature was rejected.

[13] Mr Mothae also alleged that on the date of his nomination he had already resigned and that it was wrong for the IEC to disqualify him.

[14] The application was opposed by the IEC’s Director who also deposed to an answering affidavit. He stated that on 30 August 2022 the IEC received an objection to Mr Mothae’s candidature. The objection was considered and the IEC *“made investigations on the matter”* and the *“investigations revealed”* that Mr Mothae tendered his resignation letter’ on *“19 August, 2022, and is serving a one-month notice effectively from 19 August, 2022”*.

[15] The IEC Director’s affidavit is riddled with inconsistency and unsatisfactory pleading. The letter rejecting Mr Mothae’s candidature states that the IEC’s investigation showed that Mr

Mothae resigned on 1 September 2022 and that it was the basis on which he was disqualified. The same Director states on affidavit that the investigations they conducted showed that Mr Mothae resigned on 19 August 2022. This discrepancy is not explained.

[16] The Director also relies on inadmissible hearsay on very material aspects. References are made to sources of information without it being stated who conducted the investigations and who specifically was spoken to. In one respect, he also refers to a conversation and interaction that took place between Mr Mothae's counsel of record (without naming him or her) and the IEC's Director of legal Services (without naming him or her) and not even furnishing a confirmatory affidavit from the alleged Director of Legal Services.

[17] This manner of pleading calls for special censure. It makes the court's function of adjudication infinitely difficult and frustrating.

[18] Mr Mothae approached the High Court and made four salient propositions. First, that the IEC had no jurisdiction to entertain the objection when it did because it was made at a time when he had not yet been nominated. Second, that he had been denied *audi*. Third, that he was not a public officer because he was appointed on contract. Fourth, that he had resigned with immediate effect on 2 September 2020 and unilaterally forfeited his terminal benefits. Fifth, that the IEC

acted as a judge in own cause in that it conducted the investigations and then determined his fate based on its own investigation.

[19] The most crucial factual averment made by Mr Mothae is that his letter of resignation was received by the principal secretary of Home Affairs on 3 September 2022.

The High Court

[20] The High Court (Khabo J) records in his judgment that at the hearing counsel were in agreement that Mr Mothae is a public officer but the learned judge nonetheless proceeded to sketch the relevant statutory scheme and concluded that because Mr Mothae was on the payroll in the service of the Government of Lesotho, he was a public officer.

[21] That finding is unimpeachable and is not the subject of an appeal.

[22] Khabo J rejected the complaint that the statutory scheme allowed a public officer to resign with immediate effect. The learned judge also held that there was nothing untoward in the manner the IEC obtained information about Mr Mothae's disqualification.

The Appeal

[23] In his grounds of appeal Mr Mothae complains that the High Court misdirected itself in holding that the objection to his

candidature complied with s 42(1) read with s 41(4) of the NAEA.

[24] He also states that the High Court should have found that he was denied *audi*. He persists that the resignation took immediate effect and that the High Court misdirected itself in not so finding.

Discussion

[25] Against the backdrop of the unsatisfactory evidence adduced by the IEC, this being motion proceedings, the issue in dispute – that is whether Mr Mothae was a public officer on the date of his nomination – falls to be determined on common cause facts and his own version which is not denied by the IEC.

[26] Mr Mothae approached court seeking relief. He bore the onus to prove his case. He had to satisfy the High Court that he was not disqualified, and that the IEC acted unlawfully. In the light of Reg. 143(3), that onus included establishing that on the date of his nomination he had resigned from the public service at least one month before the date of his nomination.

[27] It established on the record that Mr Mothae had not complied with Reg. 143(3), he was by operation of law barred from being elected as a member of parliament. In that case whether he was denied *audi* and the manner in which the IEC came by the information is in my view irrelevant.

[28] Against that backdrop, the real dispute between the parties is whether (a) he could resign with immediate effect and if not (b) whether the resignation authored by him on 2 August complied with Regulation 143(3) of the Public Service Regulations. I proceed to consider those two issues next.

Was immediate resignation possible

[29] It would defeat the mischief behind the statutory scheme if public officers are allowed to submit resignations with immediate effect so as to bring themselves within the ambit of Reg. 143(3). If Mr Mothae's reasoning is correct he could as well have resigned with immediate effect on say the 27th of August 2022 and still have complied with Reg. 134(3).

[30] The language deployed by the legislature is deliberate and specific. It used the words 'at least one month' before the date for nominations. If it intended to permit a resignation simpliciter before nomination it would have said so. At least means not less than.

[31] The High Court was therefore correct in concluding that Mr Mothae's so-called immediate resignation had the effect that he was not a public officer on the date of his nomination.

The effect of the resignation letter of 2 August 2022

[32] Mr Mothae's own version is that his resignation letter dated 2 September 2022 was received by the principal secretary on 3 September 2022. That means it was to take

effect on the 4th of September 2022 which is a date after the date of his nomination which, again on his own version, was 2 September 2022.

[33] That is the effect of the Interpretation Act 19 of 1977 which, in s 50, states:

'Where a number of days not expressed to be "clear days" is prescribed the same shall be reckoned exclusively of the first day and inclusively of the last; where the days are expressed to be "clear days" or where the term "at least" is used both the first day and the last shall be excluded.'

[34] A month is defined in the Interpretation Act to mean 'a calendar month'. And the dictionary definition of calendar month is "a period of time between the same dates in successive calendar months". Therefore, a calendar month is the period from a particular date in one month to the same date in the next month, for example from 4th August to 4th September.

[35] On the facts before us, the same dates between August and September are 4th of either month, both which are excluded in terms of s 50 of the Interpretation Act.

[36] The combined effect of the definition of calendar month and s 50 is that (a) the one month's notice given by Mr Mothae on 2 August 2022 started to run on 4 August 2022 (the date after which it was received by the principal secretary) and

terminated on 5 September 2022 – that is three days after the date he was nominated.

[37] Mr Mothae therefore, on his own version, failed to establish that he complied with Regulation 134(3) of the Public Service Regulations and all the other issues that he raised to impugn the IEC’s decision are irrelevant. The High Court’s order dismissing his application cannot be faulted.

Order

[38] In the result, I make the following order:

The appeal is dismissed, with costs.



P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



K. E . MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



M.H. CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellants: Adv. T. Lesupi
T Maieane & CO, Instructed Thoahlane
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For the Respondent: Adv. K.W. Letuka
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