

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CIV) 45/2022
CIV/APN/0272/2022**

In the matter between

MABATSI RAPITA

AND

LEHLOKA JOHANNES HLALELE

1ST RESPONDENT

DEMOCRATIC CONGRESS

2ND RESPONDENT

THE NATIONAL EXECUTIVE COMMITTEE

3RD RESPONDENT

OF DC

CONSTITUENCY COMMITTEE OF

4TH RESPONDENT

DC-MOSIUNYANE NO.16

TSEPISO SELIKANE

5TH RESPONDENT

INDEPENDENT ELECTRAL COMMISSION

6TH RESPONDENT

CORAM : K. E. MOSITO P
P. MUSONDA AJA
N.T. MTSHIYA AJA

HEARD 8 SEPTEMBER 2022
DELIVERED 11 NOVEMBER 2022

SUMMARY

Voluntary associations such as a political party are bound to observe their constitutions - An efficacious electoral process anchors intra-party democracy- the Court can only interfere by

way of judicial review if the electoral malpractices undermine the will of the people to the extent that the electors are unable to elect a candidate of their own choice.

JUDGMENT

P. MUSONDA, AJA.

Introduction

[1] The appeal is against the order of Mokoko J declaring the 1st respondent as the duly elected candidate for Mosilinyane constituency to represent the Democratic Congress in the 7th October 2022 general election. Further, the party was ordered to forward his name to the independent Electoral Commission. The party's decision to have a third re-run was set aside. We heard this appeal on urgent basis on 8th September 2022. The appeal was dismissed with costs. We intimated that we will give our reasons later. We now give those reasons.

[2] The notice of motion broadly sought review, declaratory and interdictory reliefs. Firstly, the 1st respondent sought the interdicting of the 3rd respondent from proceeding with the elections and or any process prescribed for the nominations of the candidate for Mosilinyane constituency¹. An order interdicting 2nd and 3rd respondents from entering into an agreement or arrangement which could interfere with the 1st respondent's nomination as a candidate in the National elections slated for 7th

¹ Notice of Motion Prayer 2.1

October, 2022². An order suspending the implementation of the decision to have a re-run³: Order directing 3rd respondent or anybody responsible for keeping the minutes of proceedings of the 14th and 21st August 2022, constituency meetings, and any conceivable records incidental to exact names of branches which participated in the election to dispatch the same to the Court within seven days⁴. The 2nd respondent and its servants be directed to serve the 1st respondent and dispatch to the Registrar of the High Court record of reports of voting outcome submitted to the NEC in relation to the expression of the will of the people of Mosilinyane Constituency for the contested nominations conducted on the 14th and 21st August 2022 and information incidental and or connected to the oversight role of the 2nd respondent in those two elections within three days of receipt of the order⁵. An order declaring the letter dated 24th August 2022 to hold fresh elections as *pro non scripto*. The respondent further sought an order that the 2nd respondent submit his name to the IEC as a candidate to stand for elections in the Mosilinyane constituency.

The Factual Matrix:

[3] The Democratic Congress Party herein called the 2nd respondent, was aggrieved by the pending delimitation of

² Prayer 2.4

³ Prayer 2.5

⁴ Prayer 2.2

⁵ Prayer 2.3

constituency boundaries and sought to challenge the constitutionality of the delimitation exercise and they were unsuccessful in the constitutional Court.

Mosilinyane constituency was among the 20 constituencies, which the constitutional Court ordered that the boundaries be rectified by the Independent Electoral Commission herein called the IEC. The effect was that the delimitation exercise created new constituencies, abolished others. In some cases, the Constituencies remained the same. This obviously affected the nomination process at constituency level, which affected the Mosilinyane constituency as well.

[4] The 1st Respondent in elections held on 14th August 2022 polled 89 votes and Mr Tsepiso Selikane the 5th Respondent polled 5 votes; this election was held pursuant to the 2010 delimitation of constituencies.

[5] However, the 21st August 2022 election, which were post constitutional Court order of 13th May 2022 which ordered delimitation, the appellant joined the race as her branch had been co-opted into Mosilinyane constituency.

[6] The elections were supervised by the DC NEC. The respondent had demanded for the NEC minutes of the meeting which contained a resolution to overturn his election and have a third rerun and the reasons, views and findings and conclusion of the NEC. The respondent wanted NEC to produce the record of the proceedings of the constituency electoral conferences dated 14th and 21st August respectively.

[7] The appellant did not formally file his complaints with NEC to enable 1st respondent to make a meaningful representation. There was failure to dispatch the record in accordance with R50 of the High Court Rules.

On the 21st the constituency election committee unanimously declared the 1st respondent as the duly elected candidate with 35 votes against appellant: 34 and Tsepiso Selikane 5 votes. The Respondent Advocates, Hudsons Chambers wrote to the Secretary General on 24th August 2022, which letter was styled as extremely urgent. There was no response. The letter sharply focused on the legitimacy of the electoral process, which produced the 1st respondent as a winner. The process was supervised by the party's National Executive Committee. The election was representative of the branches which had been co-opted into Mosilinyane constituency after the Constitutional Court ordered delimitation in that Constituency among others.

[8] There being no response to the Advocates letter, on 27th August, they approached the High Court for interim relief as set out in the notice of motion.

Applicant's case

[9] It was the applicant's case in the Court a quo that the 2nd respondent had directed constituencies to nominate candidates to represent the DC in the National Assembly elections. The applicant polled 89 votes and 5th respondent polled 5 votes. In nomination elections held on 14th August 2022.

[10] The Democratic congress had resolved that its National Assembly candidates were to be nominated in accordance with the old demarcation of constituencies. The Party had challenged the new delimitation Order before the Constitutional Court. At the behest of the Constitutional Court delimitation order dated 13th May 2022, Mosilinyane constituency had to align representatives of the branches and subbranches, which had participated in the 14th August 2022 election. This necessitated the repeat of the elections.

[11] At the time of the August 21st, 2022 elections, the candidates were the appellant, 1st respondent and the 5th

respondent. The 1st respondent again emerged the winner. According to the 1st respondent the party was obliged to inform the IEC of his candidature.

[12] The secretary to the 2nd respondent had called the IEC to ignore the 1st respondent's name as NEC had their own choice. It was that communication, which prompted him to instruct his lawyers to write to the 2nd respondent, as they were *Fuctus officio*. The letter was not responded to.

[13] The intra party electoral system is representative of the branches and sub-branches of the party. It has been put beyond NEC manipulation. The applicant averred that it was in that context why he wanted that NEC produce record of the electoral proceedings as he believed he won transparently as the 2nd responded not only supervised the election, but prescribed the procedure thereat and consequently a re-election was unnecessary.

[14] The learned Judge in the Court a quo in her interim Order granted prayers 2.1, 2.2, 2.4 in the notice of Motion and postponed the matter to 30th August 2022, for *inter parte* hearing.

The Respondent's case

[15] The then 5th Respondent in the Court a quo now appellant notified the Court of her intention to oppose through her Attorney.

[16] The answering affidavit was deposed to by the Secretary General of DC Tsitso Chebo. He deposed that the 1st Respondent (DC) had challenged the constituency demarcation exercise which was conducted by the Independent Electoral Commission. The party wanted the constituency demarcation that had been in place since 2010 to be retained. While the matter was *sub Judice*, the 6th respondent proceeded to implement the constituency demarcations that were the subject of litigation.

[17] When the constitutional matter was pending, there was pressure on the DC to give directions on the holding of Constituency elective conferences based on the 2010 constituency demarcations. A circular in that regard, was sent out. The nomination elections were to begin at Subbranch levels on the 6th August 2022 and then move to the branch levels.

[18] During the currency of the nominations the Constitutional Court handed down its judgment. Firstly, the Court rejected the bid of the 1st respondent to nullify the new constituency demarcations. The Court further found that in at least 20 constituencies, of which Mosilinyane was one, their demarcations

had not complied with the law. The 6th respondent was ordered to comply with the law.

[19] The decision led to the creation of new constituencies, abolishing others and some constituencies were maintained. The DC NEC issued a circular to comply with the Court judgment. The constituencies that had lost some branches were to hand over membership of all those members, who subscribe their membership in the said branches. The constituency committees were to hand and receive members transferring and belonging to the Constituencies respectively.

[20] This process was to be conducted between the constituencies by the 10th to the 11th August 2022. The circular also directed that these branches that have been moved to new constituencies should be afforded the right vote and be nominated in their new constituencies and should enjoy all the rights that they had previously enjoyed in their erstwhile constituencies. The directive was not complied with in Mosilinyane constituency.

[21] It was the deponent's assertion that the 1st respondent hailed from Mashapha branch, which belonged to the Peka constituency. He therefore, belonged to that constituency,

therefore he was not entitled to participate as candidate or elector, in Mosilinyane Constituency which facts 1st respondent did not want to disclose to the Court. The approach of the Court by the 1st respondent was inappropriate, as he is a senior member of the party.

[22] The deponent denied that the NEC was *fuctus officio* in calling for fresh election. According to him all what NEC did was to ensure that the constituency delimitations are complied with.

Relying Affidavit:

[23] In the replying affidavit, the 1st respondent answered that according to annexure “SGI” he would have stood for elections in Likhetlane constituency where he stood for general elections in 2017.

[24] It was his case in the Court a quo that in terms of annexure “E” to his founding affidavit, it was a necessary precondition for holding of elections at sub-branch and branch level of Mosilinyane constituency that the handover of certain branches as directed in the circular be finalized between 10th and 11th August 2022.

[25] There was an audit of members who would be voted for the position of nominee to represent DC in the general elections. The domestic constitution was complied with. A report to that effect was submitted to the party and certified to be correct, thereby legitimizing the process, which process the deponent of the answering affidavit now seeks delegitimize.

[26] According to the dispatched record of proceedings, the branches met for the elective conference of 14th August 2022. Preparations had been completed to vet the delegates and to process the requisite handovers in consonance with the directives contained in the circular.

[27] A report by the constituency secretary approved the process, the 1st respondent stated that the elections went well except that three branches boycotted the vote though they did not leave the conference.

[28] The constitution of the DC prescribes a procedure for vetting of delegates. The secretary of every branch vouches for the legitimacy of participants in election. The eligibility criteria provided in the constitution of DC is adhered to. The applicant won the election supervised by the party. In a nutshell that was the 1st respondents reply to the answering affidavit in the Court a

quo, which was in sharp contradiction of the Secretary General answering affidavit.

Final Order:

[29] The Court a quo made the following final order;

1. The applicant succeeds and the applicant is declared the duly elected candidate to represent Democratic Congress for Mosilinyane No.16 constituency in the general elections scheduled for the 7th October 2022.
2. The decision of the 2nd respondent to direct the nominating elections contemplated in Con.16/2408/2022 is reviewed, corrected and set aside as irregular, null and void.
3. The 2nd respondent is ordered to fulfill its obligation of submitting the names of applicant to independent electoral commission as the candidate to stand for several elections in Mosilinyane No.16 constituency under the banner of Democratic Congress in October 2022.
4. The 1st to 3rd respondents are jointly ordered to pay 50 percent of the costs of this litigation.

[30] Aggrieved by the above order the respondent noted an appeal to this Court. There were four grounds of appeal.

[31] The first ground was that the Court a quo erred and misdirected itself in declaring the 1st respondent as the duly elected candidate for the Mosilinyane No.16 constituency in the upcoming elections. The second ground was that, the Court a quo erred and misdirected itself in reviewing the decision of the 3rd respondent of directing the re-election for the Mosilinyane candidacy, as the elections were not conducted in compliance with the 2nd respondents' constitution.

The third ground was that the Court a quo misdirected itself in directing the 3rd respondent to submit 1st respondents' name to 6th respondent as a candidate to stand for elections at Mosilinyane constituency under the Democratic Congress flag. Fourthly and lastly, the Court a quo erred and misdirected itself in allowing the purported transfers of the 1st respondent from one sub-branch to the other as such only appeared in reply and as such was totally a new matter.

Appellants case;

[32] The sharp focus of this appeal was that the constituency conference was improperly constituted as the composition stipulated in Section 9.3.1 of the Democratic Party constitution was not complied with. Section 9-3.1 decrees the following as the constituents of the constituency conference;

- a) All members of the executive committee within such a constituency;
- b) All members of the women's league executive committee within such a constituency;
- c) All members of the youth league committee present within that constituency;
- d) All members of the women's league committee and that of the youth league in that constituency;
- e) All parliamentarian members and the district councils of the local government of the DC who are members of such a constituency;
- f) All committee members of such a constituency;
- g) The chair person, secretary and treasurer of every branch from each constituency; and
- h) Delegation from the branches who are elected, one member out of 30 (1:30) or past 30 members of the said branches who are registered from that constituency whose standings are in order in their rights to membership in that year⁶.

[33] The applicant did not fall under the categories stipulated in section 9.3.1, and his election was therefore unconstitutional. The dispatched record did also demonstrate that some members were allowed to elect those candidates who had been delaminated under the Peka and Tsikoane constituencies respectively.

⁶ DC Constitution.

[34] The introduction of the purported letter of transfer annexed to his replying affidavit was a new matter. The decision in **Shakot Investment (Pty) Ltd v Town council of the Borough of Stanger**⁷ was cited in support of that proposition where it was held;

'The procedure of the Courts as Ms. Feetham correctly pointed out is that an applicant must generally speaking stand or fall by his petition (founding affidavit) and the facts alleged therein. The tenor of the submission was that this Court should not allow the tendering of the document in evidence.'

[35] It was valiantly canvassed that the 1st respondent belonged to Peka constituency and not Mosilinyane. After delimitation was done, he was no longer part of the branch that was aligned to Peka constituency. He could therefore not participate in the affairs of Mosilinyane. The transfer after delimitation would only be between constituencies and not through sub-branches. The High Court did not give the respondent an opportunity to respond.

[36] Advocate Thoahlane, augmented his heads with oral arguments. He argued that his client was not happy with the

⁷ 1976 (2) SA 701 D

elections as outsiders voted. He graciously conceded that the 1st respondent protested about holding a third election, but he was ignored. He reiterated that some electors were not part of the constituency. He did attack the 1st respondent for voting for himself, but could not point to any constitution provision which proscribe a participant in an election not to vote for himself. In any event the vote is by secret ballot, how can one know that he voted for himself.

The 1st Respondents case on appeal

[37] It was argued with relentless vigour that the national executive committee which purportedly made a decision to direct fresh nominating elections for the third time was improperly constituted; consequently, its decision was invalid, as it had no legal authority.

[38] It was submitted on behalf of the 1st respondent that after winning the 21st August 2022 elections, he had complained to the NEC through his lawyers, but there was no response. The letter had sufficiently set out the grounds for rejecting a re-run. The administrative channel had been exhausted before approaching the High Court. The letter pointed out that it was inherently and procedurally inappropriate as the NEC was *Functus officio*. The

learned Judge found the non-response to the letter by NEC an arrogant act.

[39] There was concession in the High Court that the 1st respondent was not given a hearing despite the fact that the decision affected his rights. The case of **Rakhoboso V Rakhoboso**⁸, settles the law that 1st respondent was entitled to a hearing.

[40] Adv. Lephuthing, argued forcefully, that when dealing with autocratic and undemocratic leaders of a political party, this Court said in **Lehohla and others V LCD Executive Committee and Lesotho Congress for democracy**:

“In interpreting the Constitution of a voluntary association as the present one, it must be interpreted meaningfully purposefully in order to give effect to the accused aspirations, aims and objectives of the association namely democracy, it must therefore not be interpreted to condone oppression and or dictatorship⁹.”

⁸ LAC (1995) 331 at 3394-J

⁹ (1999-2000) LCR & CB41 at 49

[41] It was submitted that the High Court rightly confirmed the *rule nisi*. The NEC had implemented the Court Order and sponsored the candidature of 1st respondent. The decision which initially had been challenged was a NEC decision, which decision NEC implemented, which makes the appeal academic. The letter written by the lawyers on behalf of the respondent did indicate that, if the appellant was dissatisfied with the outcome of the election, she was supposed to petition the High Court. She did not do so. She effectively waived her right to contest the outcome of the election and the horse has bolted.

[42] Adv Lephuthing, cited a plethora of authorities dealing with the rules of natural Justice, of which **Koro Koro constituency Committee V Executive Working Committee All Basotho Convention**¹⁰, is one, where this Court said:

*The appellants came to Court alleging a breach of natural justice that they were denied audi and that the respondent's officials acted with bias in own cause. The Courts in southern Africa have long acted on the authority established in **Tiones V Jockey Club of South Africa** that rules of natural justice are implied in contracts binding members of voluntary associations such as a political party.*

¹⁰ Cof a (CIV) 10/2019 (2019) CSCA3 (01 February) 2019

[43] In augmenting the filed heads, it was argued that the elections were supervised by the DC NEC. The 1st respondent produced a letter of transfer. In a nutshell that was the 1st respondent's case.

The issues;

[44] The issues that arise in this appeal are:

- (a) Were the elections for the nomination of the 1st respondent in accordance with the party Constitution?
- (b) Was the election free and fair?
- (c) Were there electoral imperfections or malpractices and if so did they undermine the will of the electors or electorate to vote for a candidate of their own choice?

[45] Put it in another way, for the appellant to prevail in this appeal, she must demonstrate that there was violation of the Constitution of the DC. There were electoral imperfections or malpractices, which produced a different result than that desired by the majority of the electors.

The Law

[46] The qualifications and procedure governing elective office in the party is governed by the DC Constitution. The constitution mirrors a neo-liberal disposition. One of the objectives is, to get

rid of all the remnants of poor governance with all its cruelty and oppression, in Africa and the entire world, so that the nation's will prevails.

[47] The constituency committees, branch committees will be the ones to implement the constitution and resolutions, and the instructions of the committees of the party above it¹¹ the party constitution states that, all votes will be done in secret at all times¹². These are the relevant prescripts of the DC Constitution.

[48] Aside from compliance with the constitution, the electoral outcome is legitimized in the manner the elections are conducted. There is consensus on what an efficacious electoral process is, at whatever level the elections are conducted. Equally there is unanimity in the English-speaking commonwealth Africa, that there can never be a perfect election. The fundamental question is did the "will" of the people prevail. In **Lewanika and others V Fredrick Jacob Titus Chiluba**¹³, Ngulube said:

"even if there were imperfections they did not go to the general integrity of the system. There must be a perception that the electrical system had been comprehensively massaged or predisposed in advance

¹¹ Section 9 (c) of the DC Constitution

¹² Section 13 9 (a)

¹³ 1998 ZMSC 11

to front an unfair or any advantage or disadvantage to any candidate. It follows that although the elections were not perfect, and some aspects were quite flawed they had been conducted substantially in conformity with the law and practice governing elections.”

In **Abubaka V Yar Adua**¹⁴, the Supreme Court of Nigeria said:

“The burden is on the petitioner to prove non-compliance with the electoral law and to show that non-compliance affected the results”.

The decision of the Chief Justice Odoki in **Besigye V Museveni**¹⁵, **Amawa Mbabazi V Museveni**¹⁶ and in the Zambabwean Supreme Court **Chamisa V Munangagwa**¹⁷, all mirror the primacy of the “Will of the people” doctrine.

Sabato and others say¹⁸:

“Since the age of enlightenment positioned the individual to be a sovereign as any King, who is there to rule other than the people? If the people are not competent to govern themselves, then we must suffer

¹⁴ (2007) ALL FWCR

¹⁵ (2007) UCSC 24. (30th January 2007)

¹⁶ (2006) UGSC 3

¹⁷ 192 CCZ 21/19

¹⁸ Sabato J Larry, Ernest R Howard Larson, A Bruce, Dangerous Democracy? The Battle Over Ballot Initiatives in America (Oxford Romance and Little filed Publishers Inc), P.63.

whatever kind of government the people's competence chooses."

[49] The primacy of the people's "will" anchors constitutional democracy, anything to the contrary is a threat not only to intra-party democracy, but democracy at national level as well.

[50] The Secretary General of the party decided to have a re-run without considering the objection of the 1st respondent. Both complaints should have been put on the scale. The individual must be treated fairly by the authority he/she is subjected to. This was the tenor of Mosito P's momentous judgment in ***Koro Koro constituency committee (Supra)***.

Consideration of the Appeal.

[51] The 1st respondent first stood for elections in Mosilinyane Constituency on 14th August 2022, under the watchful eye of both NEC and the constituency Executive Committee. The 1st respondent polled 89 votes and the 5th respondent polled 5 votes in a two-man race. On the 21st August 2022 1st respondent polled 35, appellant 34 and the 5th respondent had 5. The NEC and the constituency had an eye on the 21st August election, the DC

Constituency Electoral Commission declared the 1st respondent winner.

[52] I have considered the conduct of elections as to whether there may have been actual or creeping disenfranchisement of the electors in the Constituency. The election was absent of intimidation or violence. In any event the 1st respondent fared poorly in the impugned elections than the 14th August 2022 election, which he won by a land slide victory 89 to 5. The elections were peaceful, credible, transparent and inclusive.

[53] There was no demonstrable imperfections or malpractices that the elections were conducted not in accordance with procedural fairness to the extent that appellant was substantially disadvantaged. Such conduct could potentially undermine the will of the people.

[54] The Secretary General of the party decided to have a re-run without considering the objection of the 1st respondent. Both complaints would have been put on the scale.

[55] The Constituency Committee, which is ordained under the DC Constitution to be the guardian of the DC Constitution at the

Constituency level supervised the election and vouched for their fairness and integrity. The National Executive Committee had an eye on the elections. Later spurious allegations are made, never to be put to the respondent and a rerun is ordered until interdicted by the Court. There was a violation of the Rules of National Justice, as canvassed by Adv Lephuthing.

[56] There was no violation of the Constitution of the DC and Rules made thereunder. There were no electoral imperfections or malpractices which negated the “will” of DC members to elect a candidate of their own choice to represent the party in the upcoming General elections.

Disposition:

[57] There was no factual or legal basis to order a third nomination election in the constituency. The re-run was motivated by the secretary General of the DC, who preferred the appellant to be the candidate of DC in Mosiliyane Constituency. The conduct of the Secretary General was a reflection of intra-party undemocratic tendencies.

Order:

The appeal is dismissed with costs.



**P. MUSONDA
ACTING JUSTICE OF APPEAL**

I agree



**K. E. MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree



**NT. MTSHIYA
ACTING JUSTICE OF APPEAL**

FOR APPELLANT: ADV. M. RAKOLOBE
FOR RESPONDENTS: ADV. C. J. LEPHUTHING