

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) 42/2022**

**CIV/APN/20/2022**

In the matter between:

**TLHORISO LEKATSA AND 14 OTHERS**

**APPELLANTS**

AND

**MAREMATLOU FREEDOM PARTY**

**AND ANOTHER**

**RESPONDENTS**

**CORAM:**

K. E. MOSITO P

P MUSONDA AJA

N M MTSHIYA AJA

**HEARD:**

8 SEPTEMBER 2022

**DATE OF COURT ORDER:**

8 SEPTEMBER 2022

**DELIVERED:**

11 NOVEMBER 2022

***SUMMARY***

*Voluntary association- Political Party-Practice - Applications and motions - Authority to institute proceedings - The institution and prosecution of proceedings must be authorised - Appeal upheld.*

**JUDGMENT**

**K. E. MOSITO P**

**Factual background**

[1] This appeal has its origin in an application by the respondents in the High Court over which of the two contending groups was lawful National Executive Committee of the Marematlou Freedom Party (“MFP”) and its National Executive Committee (“NEC of MFP”). The MFP is a political party and a voluntary association with full legal capacity in terms of its constitution.

[2] The applicants were seeking an order that: First, the decision of the respondents to hold an annual conference and/or any conference in the names of the MFP be reviewed and set aside as unlawful. Second, it be declared that the first to eighteenth respondents were unlawfully registered as members of the National Executive Committee of the MFP. Third, that the conduct of the first to eighteenth respondents of convening a party conference in the names of the MFP is unlawful. Fourth that the Registrar of Societies be ordered to expunge the names of the first to eighteen respondents as members of the national executive committee of MFP from the public registers.

[3] Therefore, from the record, we know that the application had been preceded by the trauma of internecine strife in which the party's leadership was the central issue.

[4] The notice of motion was supported by the founding affidavit of one Nthabiseng Babeli ("Babeli"), who described herself as the Leader of the MFP, and the affidavit of one David Ntšihlele (Ntšihlele), who described herself as the First Assistant Secretary of the party's NEC.

[5] The respondents in the court *a quo* opposed the application through an answering affidavit of one Tlhoriso Lekatsa (“the appellant”), who described himself as the Leader of the MFP.

[6] In the court, *a quo*, the appellant's point in *limine* was that Babeli and Ntšihlele did not have *locus standi* to sue in the name of the MFP since their membership of the party had been revoked at a conference that was held on 20-21 March 2020. However, in her founding affidavit, Babeli contended that the two of them were still legitimate members of the party and its duly elected office bearers since that conference and its resolutions were a nullity because it was held in violation of clauses 11,12,13 and 17(5) of the party's constitution.

[7] The Court *a quo* dismissed *the* appellants' preliminary point of “*locus standi* (standing)” to institute the proceedings in the names of the present respondents. The Court *a quo* thereafter proceeded to grant prayers 2.4, 3, 4, 5 and 7 in the notice of motion. In the court, *a quo* the matter came before Moahloli J, who granted the order sought by the respondents. Dissatisfied with the court's decision, the appellant approached this Court on appeal.

### **The appellants’ case before the Court**

[8] As in the court *a quo*, the appellants’ point before this Court was that Babeli and Ntšihlele did not have *locus standi* to sue in the names of the MFP and its national executive committee. Regarding the substance of this objection, using the term “*locus standi* to sue” was not only inelegant but also unfortunate. Properly construed, the issue was not the *locus*

*standi to sue* but the authority to institute the proceedings in the names of the respondent political party and its national executive committee - a very different matter. It is the institution of the proceedings and the prosecution thereof which was at the heart of the appellants' objection. The appellants denied such authority. These allegations were left unanswered.

### **Issues for determination**

[9] The only issue for determination in this appeal, therefore, is whether, on the facts, the present respondents (as deponents to the founding affidavits) have established the authority to institute the proceedings in the names of the respondent political party and its national executive committee, not whether they or the party and its executive committee had *locus standi* to sue.

### **The law**

[10] In order to answer the above issue, it is now first, apposite to consider the two concepts, *viz: locus standi in judicio* (or shortly, *locus standi*) and the authority to institute a proceeding.

[11] There are two senses in which the term *locus standi in judicio* (or shortly, *locus standi*) is used in private law. The first sense is the capacity of a party to litigate. The second sense is that a litigant has a legally enforceable right or interest, enforceable by him or her. *Locus standi* depends on the

relationship between the litigant seeking redress and the right that has been violated.<sup>1</sup>

[12] Under the common law of Lesotho, a litigant must show a “direct and substantial interest” in the subject matter and the suit's outcome. The idea of “direct and substantial interest” requires the litigant to show a “legal interest” in the case and not merely an indirect financial or commercial interest.<sup>2</sup>

[13] This brings me to the issue of authority to institute proceedings. When one is concerned with the knowledge of a society or juristic person to institute proceedings in the names of that society or juristic person, it is essential to identify the natural persons whose knowledge is to be taken to be the knowledge of the entity. This is a search for what Lord Hoffmann once termed ‘the rules of attribution’ by which courts determine ‘[w]hose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company.’<sup>3</sup>

### **Consideration of the appeal**

[14] In the founding affidavit filed on behalf of the respondents, Babeli said that she was duly authorised to depose the affidavit by the party and its NEC. She further avers that the said respondents had resolved to institute the proceedings. In reaction to this averment, the first appellant avers in his answering affidavit that the party had not authorised the

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<sup>1</sup> Cheryl Loots, “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation”, 104 SALJ 131 (1987) at p.132.

<sup>2</sup> Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others 2011 (2) NR 726 (SC) at para 16; United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) at 415F-H, quoted in Kerry McNamara Architects Inc and Others v Minister Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 170H.

<sup>3</sup>Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 (PC) at 507F.

institution of the proceedings. He went on to say that the deponents to the founding affidavit had no right to sue using the name of the party and its NEC. He further averred that the party and its NEC had never met to resolve on the institution of the proceedings.

[15] The issue is whether the respondents' deponents had proved that the deponent, to its founding affidavit, had the requisite authority to institute the application on behalf of the party and its NEC. No replying affidavit was filed to controvert this fundamental denial. No replying affidavit was filed - nor did the respondents ever seek to have the appellants cross-examined. The respondents, having elected to institute proceedings by way of notice of motion, the issue must be decided on the appellants' version. There is no reason to depart from this well-established rule since the appellant's version is not so far-fetched as to be rejected merely on the papers. It must be accepted, therefore, that the deponents to the founding affidavits never obtained permission from the party and its NEC to litigate in its name and no such resolution was ever taken by the party.

[16] It is well-established in our law that if the dispute of fact is genuine and is of such a nature that it cannot be satisfactorily determined without the advantages of a trial, which affords the opportunity of estimating the credibility of witnesses and observing their demeanour, it is undesirable to attempt to settle such disputes of fact, solely on probabilities disclosed by the affidavit.<sup>4</sup> Therefore, the court *a quo* was obliged to

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<sup>4</sup> DA MATA v OTTO, NO 1972 (3) SA 858 (A) at 865.

examine this dispute and ascertain whether it is of the aforementioned kind and not fictitious.<sup>5</sup>

[17] In my view, this dispute was material. The deponents to the applicants' founding and supporting affidavits should have anticipated, among other things, that a material dispute of fact would arise concerning whether the applicants had authorised the institution of the proceedings in their names. If, as here, the dispute of fact is material and is of such a nature that it cannot be satisfactorily determined without the advantages of a *viva voce* evidence, which affords the opportunity of estimating the credibility of witnesses, and observing their demeanour, it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed by the affidavit evidence.

[18] In the present case, it was perilous for the present respondents to have not applied for *viva voce* evidence on this issue of authority to institute in these proceedings. Alternatively, the court *a quo* ought to have assumed the correctness of the version of the present appellant, that the applicants had not authorised the institution of the proceedings in the names of the MFP and its NEC.

## **Disposal**

[19] It was evident in this case that, given the materiality of the disputed issue, the application ought to have been dismissed. When a court cannot resolve a dispute without further evidence, a dispute of fact exists, and it is entitled either to take a robust, common sense approach to the dispute of fact,

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<sup>5</sup> Peterson v Cuthbert & Co. Ltd., 1945 AD 420 at p. 428, and Room Hire Co. (Pty.), Ltd. v Jeppe Street Mansions (Pty.) Ltd., 1949 (3) SA 1155 (T) at p. 1162.

assume the correctness of the version of the respondent or dismiss the application. It was on this basis that we upheld this appeal with a promise that our full reasons would be filed on 11 November 2022. We now hand down our reasons.

### **Order**

[20] For purposes of record, I reiterate our order that the appeal succeeds, and the judgement and order of the High Court is set aside and replaced by the following: 'The application is dismissed with costs.'



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

I agree:



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**P MUSONDA**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**N M MTSHIYA**  
**ACTING JUSTICE OF APPEAL**



**FOR APPELLANT:** ADV. E T TLAPANA  
**FOR RESPONDENTS:** MR. E. T. FIEE