

# IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU  
41/2022**

**C of A (CIV)**

**CIV/APN/0238/2022**

In the matter between:

**KOSE MAKOA**

**APPELLANT**

AND

**ALLIANCE OF DEMOCRATS  
NATIONAL EXECUTIVE COMMITTEE  
OF THE ALLIANCE OF DEMOCRATS  
CONSTITUENCY COMMITTEE  
OF THE MOUNT MOOROSI CONSTITUENCY  
NO 67  
VUYISILE NONONO**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**CORAM:**

**K. E. MOSITO P  
P MUSONDA AJA  
NT MTSHIYA AJA**

**HEARD:**

**2 SEPTEMBER 2022**

**DATE OF COURT ORDER:**

**2 SEPTEMBER 2022**

**DELIVERED:**

**11 NOVEMBER 2022**

## **SUMMARY**

*Voluntary association - Political party- political party's constitution constitutes a contract - Breach of party's constitution constitutes breach of contract - Appellant's complaint that he had not been given a hearing despite the existence of his of his acquired candidacy rights- Appeal upheld with costs.*

## **JUDGMENT**

**K. E. MOSITO P**

**Factual background**

[1] This is an appeal from a judgment of the High Court (Makhetha J) on an application by the appellant. The appellant sought an order in the High Court to declare as unlawful, null and void, and of no force and effect the second respondent's decision to direct the constituency committee for Mount Moorosi No. 67 to hold a constituency elective conference for a fresh election of a candidate to represent the Alliance of Democrats (AD) in the forthcoming national elections in October 2022.

[2] The appellant had won from the primaries right up to the constituency level of the party to represent the AD in the said national elections in October 2022.

[3] The constituency elective conference was scheduled for 6 August 2022. Based on urgency, the appellant brought the application on 3 August 2022 and was granted interim relief on 8 August 2022.

### **Facts**

[4] The appellant based his claim for an interim interdict on the foundation on or around 30 January 2022 and 6 March 2022; the second respondent held elective constituency conferences for Seapala No.66 Constituency and Mount Moorosi No.67 Constituency, respectively. The appellant was nominated by most of the voters in the Mount Moorosi No. 67 Constituency. <sup>In</sup> contrast, the <sup>fourth</sup> respondent was nominated by the majority of voters in the Seapala No.66 constituency. After such nominations, but before confirmation of the nominees by the <sup>second</sup> respondent in section 5.2.1 (a) of the <sup>first</sup> respondent's

Constitution, the Independent Electoral Commission (IEC) passed a Constituency Delimitation Order, Legal Notice No. 37 of April 2022. After that, the IEC undertook a review of constituency boundaries.

[5] This exercise affected Sehapala No.66 and Mount Moorosi No.67 constituencies. After the reviewing legal notice was issued, the second respondent held a meeting of its members on 27 April/May 2022, at which it was decided that owing to the said legal notice, new elective conferences be held in order to allow the voters to elect and nominate one nominee where the legal notice affected the old constituency boundaries. A Circular No. AD/CRI/06/22 dated 22 June 2022 was thereafter issued and it ordered that nominated candidates from the affected constituencies must meet and agree on which candidate would represent the constituency in the national elections.

[6] In the event of a dispute amongst the nominated candidates, the Constituency Committee was ordered to call for the convening of nominations of election candidates amongst the affected candidates. The appellant participated in the said NEC resolutions/meetings. However, the appellant avers that it was at the second respondent's meeting of 1 August 2022 that the issue of holding a fresh election for the Mt Moorosi No.67 constituency was deliberated upon and objected to the holding of such fresh elections for nominations.

[7] His reservations and objections to the decision to hold fresh elections were ignored, and the decision was proceeded with

and implemented. It then became the appellant's case that he had been duly elected and nominated throughout the AD structures, from the sub-branches and branches up to the constituency level within the Mt Moorosi constituency and finally nominated, uncontested, as a candidate to represent the AD for the forthcoming national elections in the Mt Moorosi constituency in compliance with the AD's constitution.

### **The law**

[8] In order to be able to resolve the dispute before us, we must bear in mind that the salutary principle is that a political party is a voluntary association. The relationship between the party and its members is a contractual one. The terms of the contract are contained in the constitution of the party. In matters of contract, the parties are taken to have intended their legal rights and obligations to be governed by the terms of their contract. Before a functionary makes a decision which prejudicially affects an individual in his liberty or property or the existing rights, the latter has the right to be heard before the decision is taken if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity.<sup>1</sup>

[9] Where an issue arises that a litigant has waived his entitlement to assert his claim, the *onus* is on the party relying on a waiver to allege and prove the waiver on a balance of

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<sup>1</sup> Traube and Other v Administrator, Transvaal and other 1989(1) SA 397 (WLD) at 403D.

probabilities.<sup>2</sup> In assessing the probabilities, the factual presumption that a party is not lightly deemed to have waived his rights should be considered.<sup>3</sup>

A political party is a voluntary association. It, therefore, cannot act contrary to the express terms of its constitution. If it makes a resolution which violates its constitution or is *ultra vires* of the political party's body concerned, and if the constitution does not deprive the individual member of a say in the matter, then our law will assist him in seeing that no injustice is done to him. Whether an individual member has such a right depends on the nature of the voluntary association and the terms of its constitution.<sup>4</sup>

### **The approach by the High Court**

[10] After hearing the parties and their submissions, the High Court found as a fact that it is undisputed that the appellant was nominated as a candidate at Mt Moorosi No.67 constituency before the Delimitation Order of April 2022 was issued. The learned Judge also found that the appellant's nomination and election from the sub-branch branch up to the constituency elective conference was followed in compliance with the first respondent's constitution. The court went further to find that the April 2022 Delimitation Order varied the boundaries of the constituencies after the election of the appellant and the fourth respondent in their respective constituencies. Due to the new delimitation, the Mt. Moorosi No.

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<sup>2</sup> See *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A); *Feinstein v Niggli* 1981 (2) SA 684 (A).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Wilken v Brebner and Others* 1935 AD 175 at p181.

67 constituency was affected to the extent that it now includes new villages from the extinguished Sebapala No. 66 constituency that was not part of the former before.

[11] The learned Judge then said, "[a] proper interpretation of the effect of the April 2022 Delimitation Order with regard to the combination of the two constituencies by a legal instrument is that the old Mt Moorosi constituency is no longer existent.... What remains in my view now is the new Mt Moorosi No.67 constituency which is composed of parts of the old Mt Moorosi and parts of the Sebapala constituencies?" The learned Judge then concluded that any candidacy rights earned by the appellant from the constituency election of March 2022 under the old Mt Moorosi constituency are no longer in existence.<sup>5</sup> On this basis, the learned Judge further concluded that the appellant could not, therefore, seek to enforce his entitlement for candidacy under the current Mt Moorosi No.67 constituency which has terminated the rights he earned under the old and replaced constituency.

[12] In paragraph 28 of the judgment, the learned Judge holds that the appellant was therefore not entitled to a hearing (the benefit of *Audi alteram partem* rule) as claimed because there was no duty on the 2nd Respondents to do so when he had no more candidacy rights under the new Mt Moorosi constituency, which has been brought about by a legal instrument and not one of the party's creation. She then goes on to say that she established that the appellant was consulted on the matter as

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<sup>5</sup> Makoa V Alliance of Democrats (CIV/APN/0238/2022) at para 25.

he was a member of the second respondent. She then held that the appellant was amenable at all material times to the calling of new elections following the Delimitation Order but started to resist earlier decisions when the impact affected his constituency.

[13] On the appellant's prayer for the court to declare the decision of the second respondent to or the holding of fresh elections for purposes of the re-election of candidates in the Mt Moorosi Constituency as unconstitutional for violating the party's constitution, the learned Judge found that, in case, the political party has in contravention of its constitution, instructed the holding of elections at the highest level of the election and nomination processor structure, that is at the constituency level. The learned Judge found that the second respondent had also acted outside its mandate under the constitution in directing the appellant and fourth respondent to compete for constituency candidacy at the highest level. Despite the foregoing, the learned Judge dismissed the application.

### **In this Court**

[14] In essence, the appellant complained about the High Court judgment, saying that he had not been given a hearing (the benefit of the *audi* principle) and that the political party's constitution had been breached. On 2 September 2022, we gave the following order after hearing the parties; Counsel:

1. We are aware of the urgency of this matter and for us to account for our decision. We heard this

expedited appeal today and thereafter gave an order based on the following reasons, amongst others:

- (a) The fourth respondent was not nominated/elected by the sub-branches and branch levels of the <sup>first</sup> respondent in the Mount Moorosi Constituency NO 67 as per the party's constitution.
  - (b) The <sup>first</sup> respondent was bound by its constitution and had to comply with it. The <sup>first</sup> respondent did not comply with its constitution regarding the primaries as far as it relates to the <sup>fourth</sup> respondent's nomination.
  - (c) The appellant had acquired rights due to his nomination and election to represent the first respondent.
- 2.2 Our complete and further reasons will be filed on 11 November 2022.

[15] It is for those reasons that we now proceed to file.

### **Issues for determination**

[16] The issues to be determined by the court in this matter are accordingly the following:-

- (a) The first respondent's non-compliance with its constitution had consequences.
- (b) The publication of the Delimitation Order No.37 of 2022 had the effect of erasing the candidacy rights acquired by the appellant from the constituency election of March 2022 under the old Mt Moorosi constituency is no longer in existence.
- (c) The appellant was or was no longer entitled to be heard regarding the candidacy rights acquired before the Delimitation Order No.37 of 2022.



## **Consideration of the appeal**

[17] The first ground is that the learned *a quo* erred in dismissing the applicant's application when she had made a finding that the respondents' decision had been made in violation of the AD's constitution. As indicated above, the learned Judge found that the second respondent has also acted outside its mandate under the constitution and directed that the appellant and fourth respondent compete for constituency candidacy at the highest level. A political party's constitution constitutes a contract between a political party and its members.

[18] In my view, if the resolution of a political party or its organ, such as the second respondent, violates the constitution of the party, and if the constitution does not deprive an individual member of a say in the matter, then our law will assist him in seeing to it that no injustice is done to him. In the present case, the learned Judge having correctly found that the party's constitution had been violated, erred in dismissing the appellant's complaint that the decision to call for a re-run was invalid. This is because the second respondent had no authority under the AD constitution to decree as it did.

[19] The second ground of appeal is that the learned Judge erred in holding that the respondent's violation of the party's

constitution was not material enough for the court to declare that the decision was unlawful. In my opinion, there is merit in this complaint. An examination of the AD's constitution reveals that it is based on representative democracy. Representative democracy is a type of democracy where elected persons represent a group of people, in contrast to direct democracy.<sup>6</sup> In my opinion, it was a material breach of the political party's constitution for the respondents to attempt to permit a person who had not been nominated from the sub-branches, and the branches, up to the constituency level, to contest at the apex level.<sup>7</sup>

[20] The third ground is that the learned Judge erred in holding that there is a new constituency called Mt. Moorosi No. 67. In her judgment, the learned Judge concluded that the appellant could not seek to enforce his entitlement for candidacy under the current Mt Moorosi No.67 constituency which has terminated the rights that he earned under the old and replaced constituency. There is merit in this complaint. The above conclusion, with respect, appears to me to be the inarticulate major premise of the judgment. To start with, its major premises are fallacious. Now, without discussing the admirable principle involved in that argument, it is a sufficient answer to it to say that the respondents have not made out their major premise.

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<sup>6</sup> Victorian Electronic Democracy, Final Report – Glossary". 28 July 2005. Archived from the original on 13 December 2007. Retrieved on 5 November 2022.

<sup>7</sup> Some political theorists have described representative democracy as polyarchy. This is clear from Dahl, R A (2005) "Is international democracy possible? A critical view", in Sergio Fabbrini (editor): Democracy and Federalism in the European Union and the United States: Exploring post-national governance: 195 to 204 (Chapter 13), Abingdon on the Thames: Routledge.

[21] The Delimitation Order No.37 of 2022 does not provide for the erasure of the Mt Moorosi No.67 constituency. It only readjusted the constituency's boundaries and added some villages to the already existing constituency. Hence the major premise articulated by the learned Judge is that the appellant cannot seek to enforce his entitlement for candidacy under the current Mt Moorosi No.67 constituency, which has terminated the rights he earned under the old and replaced constituency.

[22] The fourth ground is that the learned Judge erred in holding that the appellant was not entitled to a hearing because his rights had been terminated by creating the "new" Mt Moorosi. In her own words, the learned Judge points out that it is her view that the appellant was not entitled to hearing as claimed because there was no duty on the second respondent to do so when he had no more candidacy rights under the new Mt Moorosi constituency, which has been brought about by a legal instrument and not one of the party's creation. As indicated above, the theory of a new Mt Moorosi is misconceived.

[23] In paragraph 29 of her judgment, the learned Judge holds that she has already established that the appellant was consulted on the matter as he is/was a member of the second respondent. The learned Judge is also of the view that the appellant was amenable at all material times to the calling of new elections following the Delimitation Order but started to resist earlier decisions when the impact affected his

constituency. This view cannot stand regard being had to the fact that the appellant's uncontroverted version is that his objection was ignored.

### **Disposition**

[24] To wind up, the appellant complains that the AD's constitution was breached. The court a quo found as much. Therefore, we cannot agree with the court a quo that this should not have a consequence.

### **Order**

[25] For purposes of record, we 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 T MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

**For Appellant:** Mr. E. T. Fiee

**For Respondents:** Adv. M. V. Khesuoe with Adv T. L.  
Lekhotsa and adv M.B.  
Rasebonang.