



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 25/2023

CIV/APN/0002/2022

In the matter between -

DEMOCRATIC CONGRESS

APPELLANT

and

INDEPENDENT ELECTORAL

COMMISSION

1ST RESPONDENT

DIRECTOR OF ELECTIONS

2ND RESPONDENT

BASOTHO NATIONAL PARTY

3RD RESPONDENT

BASOTHPATRIOTIC PARTY

4TH RESPONDENT

'MASETOTA LESHOTA

5TH RESPONDENT

TEFO MAPESELA

6TH RESPONDENT

CORAM:

KE MOSITO, P

PT DAMASEB, AJA

P MUSONDA, AJA

M CHINHENGO, AJA

J VAN DER WESTHUIZEN, AJA

HEARD: 16 OCTOBER 2023

DELIVERED: 17 NOVEMBER 2023

SUMMARY

The Lesotho electoral system is a first-past-the-post, winner-takes-all single member constituency-based one, mixed with a proportional representation one. Out of 120 seats in the National Assembly, 80 are filled by members who gained a majority in their constituencies, whereas 40 seats are proportionally allocated to political parties, based on the total number of votes they received. A formula, encompassing several steps, for the calculation and allocation of seats to parties is prescribed by Schedule 3 of the National Assembly Electoral Act of 2011. After the initial allocation of seats, following the 7 October 2022 general election, the Independent Electoral Commission petitioned the High Court to set aside the allocation of proportional representation seats and for leave to amend the allocation. The petition was granted. The decision was appealed against but upheld by this Court.

JUDGMENT

J VAN DER WESTHUIZEN, AJA:-

Introduction

[1] Laws, as well as the courts mandated to apply them, are there to solve human disputes and dispense what is regarded as justice, to the best of their ability. Some disputes are harder to fathom and further removed than others from the general skillset of lawyers. This matter entails a mixture of constitutional law; electoral systems; accounting and maths, to

the extent that evidence by a highly qualified mathematician was relied on; and the interpretation of complex detailed legislation - hopefully leaving some space for common logic as well; but hardly suitable for a basic introduction to democracy.

[2] The Kingdom of Lesotho has experienced its fair share of political change and turmoil. Emotions sometimes run high. On 7 October 2022, a general election took place. The country is not large, so 515,018 votes were cast. Revolution for Prosperity (RFP) obtained the highest number of votes, namely 199, 867; and Prayer Shawl and Light (PSL) the lowest, namely 113. The question is how to allocate 40 Parliamentary seats, proportionally, amongst the 49 parties of this vibrant democracy.

[3] This is an appeal brought by a party, the Democratic Congress, against the judgment of the High Court (the Court of Disputed Returns), by Mokhesi J, with the concurrence of Moahloli J and Khabo J.

The law and the electoral model

[4] Under the overall authority of the Constitution, elections take place under the National Assembly Electoral Act 14 of 2011 (the Electoral Act).

[5] Different electoral systems are used by democracies. The bestknown in majoritarian democracies is the single-member district, or “first-past-the-post-winner-takes-all” system, followed in, for example, the United Kingdom. The country is divided into electoral districts, or constituencies. Political

parties put forward their candidates in each constituency where they have support. The representative of the party that gets the majority of votes in that constituency is the winner, who goes forward singularly to represent that constituency in the legislature, or Parliament.

[6] The theoretical advantage of this system is often argued to be that representatives are accountable to their constituents, who can recall them, or instruct them to break with the party line, when the constituents feel that way. The main disadvantage - according to its opponents - is the pure majoritarianism it serves. In theory it is possible that one and the same party's candidates win by a majority of one vote in every single district out of, for example, 120, in which case that party would occupy all the seats in Parliament. No space is then left for consensus democracy, even though that party's national majority across constituencies is only 51%.

[7] As opposed to the above, the system of proportional representation - currently followed in for example South Africa - allows for both majorities and minorities to be represented. The percentage of votes each party receives is proportionally translated into the party's number of seats. The advantage is argued to be that no party is overrepresented or underrepresented, which enhances consensus politics. One disadvantage often pointed out is the power of "party bosses". Candidates are nominated on a list by the party leadership. One's position on the list and security in Parliament depend less on the will of one's constituents, than on a good relationship

with the party's leaders. Voters largely vote for the party with the most charismatic leader.

[8] Lesotho's electoral model is a mixed-member-proportional one (MMP). This is provided for by section 57(1) of the Constitution (as amended by section 3 of the Fourth Amendment to the Constitution Act of 2001. The system is -

“(a) prescribed by legislation; and

(b) based on a national common voters' roll; and -

(c) provides for the Constitution of the National Assembly as follows -

- (i) eighty members to be elected in respect of each of the constituencies contemplated by section 67(1); and*
- (ii) forty members to be elected to forty seats in accordance with the principle of proportional representation applied in respect of the National Assembly as a whole.”*

[9] Section 104 of the Electoral Act states:

“(1) After all constituency votes have been declared in accordance with section 102, the (Independent Electoral) Commission (Commission) shall convert the constituency candidates' votes into national political party votes in terms of section 55.

(2) In converting the candidates' votes into political party votes, the Commission shall take into consideration the special ballot papers contemplated in sections 44 and 45.

(3) The 40 seats contemplated in section 57(1) of the Constitution ... shall be allocated between political

parties in accordance with the formula contained in Schedule 3.

(4)....”

[10]Schedule 3 states the following:

“1 The Commission shall determine the total votes cast for

-

- (a) each political party which participated in the proportional representation elections according to section 105 and add together all the total party votes ... referred to in this Schedule as the ‘total votes’;*
- (b) each political party by adding the total votes from the constituencies which shall be referred to in Schedule as the ‘total party votes’;*

2 (1) The Commission shall then determine the number of votes required for the allocation of seats by -

- (a) dividing the total votes by 120 or any number of Constituencies that successfully contested elections plus forty proportional representation seats; and*
- (b) rounding off to the next number, any decimal fraction, including a whole number.*

(2) The resulting figure shall be referred to in this Schedule as the ‘quota of votes’.

3 (1) The Commission shall determine the provisional total number of seats in the National Assembly to which each political party is entitled on the basis of its share of the total vote and, this allocation shall be referred to in this Schedule as the ‘provisional allocation of the total number of seats’ and, it shall do so in the following manner.

- (a) It shall divide the ‘total party votes’ by the ‘quota of votes’, the resulting number shall be referred to as the ‘party’s quota of votes’;*
- (b) If the total referred to in paragraph (a) add to more than the total number of seats set aside for proportional representation, the Commission shall*

determine the final allocation of seats in the following manner:

- (i) if a political party has won equal or more constituency seats than its provisional allocation, then the constituency seats shall be its final allocation;*
 - (ii) the Commission shall exclude the political party from further calculation of compensatory seats; and*
 - (iii) the Commission shall then allocate to the remaining political parties, number of seats which are available for allocation by following the same procedure contained in section 2 and 3(1).*
- (c) If in any calculation two or more political parties receive the same quota of votes or the same decimal fraction as a result of division and there are not sufficient seats to be allocated to both or all of the political parties, the Commission shall allocate the seats as follows:*
- (i) the political party with less constituency seats than the provisional allocation shall be given preference;*
 - (ii) in all other cases by lot administered by the Commission in the presence of the political parties affected.*

4 For the purpose of this Schedule all fractions shall be allocated to as many decimal places as may be necessary to distinguish, but to at least 5 decimal places.”

Facts

[8] After the general election of 7 October 2022 the Commission declared the results in terms of section 106 of the Electoral Act. It then published the names of those elected in each constituency, with their constituencies, and those members elected by proportional representation. Thereafter the Commission sought a review of its allocation of proportional

representation compensatory seats to the Democratic Congress and the Alliance for Democrats, who were the fourth and fifth respondents before the court *a quo*. (The fourth respondent is the appellant before this Court.)

[9] Thus the Commission approached the High Court with a petition in terms of section 69 of the Constitution, read together with sections 125 and 126 of the Electoral Act. Other parties joined the proceedings.

[10] After dealing quite extensively with the history of two attempts to bring the petition to court, jurisdiction and standing, the High Court proceeded. Seeing that procedural issues are not raised in the appellant's Grounds of Appeal, the High Court's rulings in this regard are not discussed in this judgment.

The issue

[11] In its Petition (Legal Notice 100 (Election Petition Notice) of 2022, the Commission sought an order reviewing and setting aside its own allocation of 11 seats, instead of eight, to the Democratic Congress, the fourth respondent. The Commission sought to adjust the allocation from 11 to eight seats.

[12] The Commission also sought to set aside the allocation of three compensatory seats to the fifth respondent, the Alliance for Democrats and to allocate two compensatory seats.

[13] The publication of names of some persons returned as members of the National Assembly had to be set aside as well.

[14] Finally, in the Petition the Commission requested leave to recalculate and reallocate the compensatory seats.

{15] The High Court stated (in [7] of its judgment):

“In the present proceedings, the only issue to be determined is the propriety of allocation of proportional representation seats by the IEC and not any other matter.”

Did the Commission err the first time around? And was it correct the second time?

The Commission’s view

[16] According to the Commission, as the petitioner before the High Court, in going about its constitutional mandate of ascertaining and allocating seats it erred in its application of the law governing the allocation of proportional representation seats. It did not follow section 3(2)(b) of Schedule 3. The error was committed in the application of the law and not in the calculation of numbers. On behalf of the Commission, the judgment of the High Court captures this well. No dispute of fact arose. No evidence was thus necessary.

[17] According to the Commission, it indeed determined the provisional allocation of the total number of seats to which each party is entitled on the basis of its share of the total vote and after allocating seats to each party, equal to the party’s quota of votes without taking into account any decimal fraction. (In this regard the Commission refers to sections 1,2 and 3(1) (a), (b) and (c) of Schedule 3.)

[18] It determined that it had allocated fewer provisional seats than the total number of seats in the National Assembly and it then allocated the remaining provisional seats to the parties in the order of their decimal fractions starting with the party with the highest decimal fraction. (See section 3(1)(d)(i)(ii)(iii).)

[19] Then, the Commission determined each party's provisional allocation of proportional representation seats by deducting the number of seats won by the party in the constituency elections from the party's provisional representation seats allocated to it (section 3(1) (d) and 3(2).

[20] The Commission furthermore added the total number of compensatory seats provisionally allocated to all the parties and it determined that the resulting total is 50 seats, which is more than the 40 seats set aside for proportional representation.

[21] Section 3(2)(b) provides that once the provisionally allocated seats add more than the total number of seats set aside for proportional representation, the Commission must determine the final allocation of seats as directed under section 3(2)(b)(i)(ii) and (iii). The Commission argues that this is the step that it erroneously failed to take. Hence its allocation was not correct. [22] This being the case, section 3(2)(b) directs that the provisional allocation shall not be the final allocation. The Commission must determine the final allocation of seats by excluding the party that has won equal or more constituency

seats than its provisional allocation and the constituency seats of such a party shall be its final allocation.

[23] In this case Revolution for Prosperity (RFP) won 56 constituency seats and was allocated 46 provisional representation seats. The National Independent Party (NIP) won one constituency seat and was allocated one provisional representation seat. The two parties have 56 and one as their final allocation and are in terms of section 3(2)(b)(ii) excluded from further calculations of compensatory seats envisaged under section 3(2)(b)(iii). The remaining seats available for allocation were thus 62, because the 56 RFP seats and the NIP's one seat are subtracted from 119 seats that were available for allocation. The seats available for allocation were thus 62.

[24] The Commission earlier missed this step of excluding RFP and NIP in calculating the number of seats available for allocation as compensatory seats despite the fact that it was already clear that the provisionally allocated seats exceeded the 40 available proportional representation seats, hence the number of seats available for allocation is 119 and the total number of votes used were 515018. Had the Commission followed section 3(2)(b)(ii) and (iii) and excluded the RFP and NIP from further calculations, as directed by law, the number of compensatory seats available for allocation would have been 62, not 119. The total of votes used to determine the second quota would be 311 448, because the total votes of the RFP and NIP would have been excluded from the calculation. The applicable law directed this.

The High Court's View

[25] In his judgment, Mokhesi J regards it as apposite that the rationale behind the formula for seat allocation provided for in Schedule 3 is fully appreciated in order to comprehend the basis of the Commission's alleged error. After relying on academic authorities like A Lijphart *Patterns of Democracy* Yale University Press 1999, J Elklit "Lesotho 2002: Africa's First MMP Elections"

Journal of African Elections September 2002 Vol 1 No 2 and M Gallager "Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities" *British Journal of Political Science* Vol 22, Issue 4, October 1992 469, he considers whether the Commission did commit an error as alleged. The judgment follows a comprehensive, thorough, and detailed multi-step procedure, as outlined in Schedule 3 (above), using several tables displaying the parties' names and numerous numbers of votes.

[26] The judgment concludes that the "quota of votes" is 4328. It continues to proceed through the steps, considering, along the way, the appellant's contentions. (These are dealt with below.) Then it concludes (in [31]) that "it is evident that the RFP and NIP should be excluded from the allocation of seats in the second round. Clearly, the exclusion of the RPF and NIP is bound to affect the outcome of the seat allocation."

The appellants' view

[27] The Democratic Congress appealed to this Court against the decision of the High Court. In its Grounds of Appeal,

it is stated that the court a quo “erred and misdirected itself in granting the petition ... in as much as the welter of evidence as presented by the appellant did not warrant” the granting of the petition. Section 3(2) does not authorise the exclusion of a party that gained more seats than the seats allocated to it in terms of section 3(1)(d) from the requirement that a deduction should be made.

[28] Counsel for the appellant emphasised (in accordance with para 3.5 of the appellant’s grounds of appeal) that the legislature nowhere in Schedule 3 provided that “zero or lower numbers, which could include negative numbers, do not constitute what is referred to as a party’s provisional allocation of compensatory seats”. Such numbers, starting from zero to negative numbers, should be included in the addition of the numbers obtained as a result of the deduction made under section 3(2). According to paragraph 8 of the appellant’s grounds of appeal, “the practical effect of a minus 10 being included in the Computation under section 3(2)(a) means that the RFP obtained no further compensatory seats, but the parties which have made it into that category are enabled to earn further seats on the basis of the original quota of votes hence the reallocation set out in step 7 table 4 of the appellant’s affidavit deposed to by Dr Khaketla, and this is not inconsistent with the formula set out in the schedule. It was, therefore, a misdirection for the court a quo to ignore the evidence of a number merely because it was a negative number.” (This sentence is one of several that rendered the appellant’s argument less than easy to follow.)

[28] Dr Mamphono Khaketla deposed to an answering affidavit in the court *a quo*. She holds a Doctorate and master's degree in mathematics and education, with a minor in statistics, from the University of Wisconsin-Madison in the USA. She also holds a Bachelor's Degree and Diploma from the National University of Lesotho, majoring in Mathematics and Education. She is a member of the DC, the appellant, as well as a former Minister and Member of Parliament.

[29] In her affidavit, Dr Khaketla seeks to demonstrate that the Commission did not make any mistake that requires correction. She recalls that on 21 October, the DC leadership was informed by the Commission that the Commission had made a mistake in the allocation of proportional representation seats. In the reallocation, the DC would lose three proportional representation seats and remain with eight seats.

[30] Her affidavit also takes the reader through several steps, through the use of five detailed tables. The negative number, relied on by the appellant, is clear in Table 3, where Revolution for Prosperity is indicated to have minus 10 provisional compensatory seats. She states:

"17.8 It is important to note at this (sic) that because Revolution for Prosperity has - 10 which means it takes away 10 PR seats, therefore we have to go back to the 16 decimal fraction list and remove 10 lowest decimal fractions."

[31] Counsel for the appellant argued that it was illegal for the Commission to invoke section 3(2)(b). When the RFP's - 10

is used to deduct seats from the 16 lowest decimal fraction, and when all the parties' provisional compensatory seats are added, the result will be equal to 40 proportional representation seats set aside for this purpose, making this the final step in the allocation.

[32]The High Court judgment deals with this argument. It refers to counsel for the Commission's contention that the approach proposed by the DC is not sanctioned by law. What should happen is that, because the RFP won more constituencies than its provisional application, it should be skipped. Thereby the second round of seats allocation, governed by section 3(2)(b) and onwards, should indeed have been triggered.

[33]The High Court referred to a submission by counsel for the appellant that section 3(2) is silent on what should happen when a party has won more constituency seats than its provisional allocation. Because a large number can be deducted from a small one, it should be done in this case. Mokhesi J (at [28]) found that approach to be "untenable as it is antithetical to the spirit of our electoral model ... instead of ensuring that no votes are wasted, it actively discards legitimate votes, thereby creating a possibility of a lot of voices being unrepresented".

[34]The High Court furthermore stated that the procedure proposed by the appellant was not sanctioned by law. Section 3 (2) is indeed silent on what should happen in a situation like the one at hand. It is inherent in the electoral

system that where a party has won more constituencies than its provisional allocation of proportional representation seats, provisional allocation of compensatory seats is not applicable to it, because it has – logically – more than it is “entitled to”.

[35]The High Court rejected the main submissions of the applicant. It agreed with the Commission that it had erred and granted the relief sought.

Conclusion

[36]The appellant’s first ground of appeal is that “the welter of evidence ... presented by the appellant did not warrant” the outcome reached by the High Court. The High Court is also criticised for not allowing oral evidence. To the extent that the evidence referred to is the answering affidavit by Dr Khaketla, it should be pointed out that pleadings in motion proceedings are partly evidence and partly legal arguments. In spite of her mathematics qualifications, Dr Khaketla is a politician, former minister, former member of Parliament and – especially – a member of the DC, the appellant, and thus a litigant.

[37]In so far as expert evidence about the significance of minus zero numbers in mathematics might have been useful, she cannot be regarded as an independent expert witness. The relevance of sub-zero numbers may depend on context and, in this case, has to be determined within the context of applying the law to the facts at hand, within the context and purpose of the legislation setting out the electoral

system. Whereas mathematics and accounting are, in this case, as often as in life, essential, the purpose of Schedule 3 is not to meet the highest standards at a mathematics competition. Different calculations and methods may be mathematically possible on a theoretical level. The aim here is to allocate proportional representation seats fairly in a small democracy with many political parties.

[38] In spite of the sometimes-cumbersome language of the relevant statutory provisions, such as Schedule 3, the approach followed by the Commission and put forward in its petition and legal argument in the High Court and this Court seems to be the reasonable and rational approach in this case. The High Court's thorough and meticulous step-by-step analysis contains nothing that can be regarded as a substantial error or misdirection on its part. The appeal has to be dismissed.

Costs

[39] The appellant brought to this Court a complex matter capable of being approached differently from a number of theoretical viewpoints. It dealt with a very important facet at the heart of democracy in Lesotho, namely the outcome of a general election.

No costs should be ordered.

Order

[40] In view of the above-mentioned, the following is ordered:

(a) The appeal is dismissed.

(b) There is no order as to costs.



J VAN DER WESTHUIZEN ACTING JUSTICE OF APPEAL

I agree



**KE MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree



**PT DAMASEB
ACTING JUSTICE OF APPEAL**

I agree



**P MUSONDA
ACTING JUSTICE OF APPEAL**

I agree



**M CHINHENGO
ACTING JUSTICE OF APPEAL**

FOR THE APPELLANT:

Adv M Teele, KC

FOR THE 1ST AND 2ND RESPONDENTS: Adv KW Letuka

FOR THE 3RD TO 6TH RESPONDENTS: Adv CJ Lephuthing