

IN THE HIGH COURT OF LESOTHO

In the application of:

MOKHOTLONG CONSTITUENCY COMMITTEE OF BASUTOLAND CONGRESS PARTY	1ST APPLICANT
THABANA-MORENA COMMITTEE OF BASUTOLAND CONGRESS PARTY	2ND APPLICANT
KHUBELU CONSTITUENCY COMMITTEE OF BASUTOLAND CONGRESS PARTY	3RD APPLICANT
MOHALE'S HOEK CONSTITUENCY COMMITTEE OF BASUTOLAND CONGRESS PARTY	4TH APPLICANT
JEREMANE RAMATHEBANE	5TH APPLICANT
MOTLATSI SEHOBAI	6TH APPLICANT
KHOTSANG MOSHOESHOE	7TH APPLICANT

and

PAKALITHA MOSISILI	1ST RESPONDENT
THEBE MOTEBANG	2ND RESPONDENT
TS'ELISO MOHLOKI	3RD RESPONDENT
SHAKHANE MOKHEHLE	4TH RESPONDENT
MONYANE MOLELEKI	5TH RESPONDENT
MOTLOHI MALIEHE	6TH RESPONDENT
MOPSHATLA MABILTE	7TH RESPONDENT
LIRA MOTETE	8TH RESPONDENT
PAKANE KHALA	9TH RESPONDENT
MAKATLA MAKATLA	10TH RESPONDENT
NOTS'I MOLOPO	11TH RESPONDENT
MOLAHLEHI LETLOTLO	12TH RESPONDENT
KELEBONE MAOPE	13TH RESPONDENT
NTSU MOKHEHLE	14TH RESPONDENT
MOLAPO QHOBELA	15TH RESPONDENT
TS'ELISO MAKHAKHE	16TH RESPONDENT
NTSUKUNYANE MPHANYA	17TH RESPONDENT
'MOLOTSI KOLISANG	18TH RESPONDENT
RATHALA RAMOLAHLOANE	19TH RESPONDENT
SEKOALA TOLOANE	20TH RESPONDENT
NTJA NCHOCHOBA	21ST RESPONDENT
MALAIISA MAHOSI	22ND RESPONDENT
MOHAILA MOHALE	23RD RESPONDENT
LEBENYA CHAKELA	24TH RESPONDENT
QOOANE PITSO	25TH RESPONDENT
MARTIN MOHOSHO	26TH RESPONDENT
KHATLAKE MOLOI	27TH RESPONDENT
'MAPONTS'O SEKHESA	28TH RESPONDENT
THULO MAHLAKENG	29TH RESPONDENT
B.C.P. NATIONAL EXECUTIVE COMMITTEE	30TH RESPONDENT
BASUTOLAND CONGRESS PARTY	31ST RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice G.N. Mofolo  
on the 18th day of October, 1996.

This is a matter in which Mokhotlong Constituency Committee of Basutoland Congress Party, Thabana-Morena Constituency Committee of Basutoland Congress Party and Khubelu Constituency Committee of Basutoland Congress Party referred to herein as the 1st, 2nd, and 3rd applicants respectively made an application against Pakalitha Mosisili (1st Respondent) and 30 other respondents, for an order couched in the following terms:-

1. Permitting short service and/or dispensing with the rules of this honourable court relating to service and periods of notice and hearing the matter on an urgent basis.
2. That a Rule Nisi be issued returnable on the date and time to be determined by this honourable court, calling upon the respondents to show cause, if any, why:-
  - (a) Fourteenth to thirteenth respondents shall not be ordered jointly and severally, not to hand over the property and administration of the thirty-first respondent to the first to thirteenth respondents pending the determination of this application.
  - (b) The proceedings of the Annual Conference of the thirty-first respondent held on the 8th to 11th March, 1996 shall not be nullified.
  - (c) The purported election of the first to thirteenth respondent to the National Executive Committee of the 31st respondent shall not be declared unconstitutional and null and void.

- (d) First and thirteenth respondents shall not be interdicted forthwith from unlawfully interfering with the property, administration and affairs of the thirty-first respondent pending the finalisation of the application.
- (e) Fourteenth to thirty respondents shall not be directed to make necessary arrangements for the holding of the Annual Conference of the thirty-first respondent and conduct same in accordance with the provisions of this constitution of the thirty-first respondent.
- (f) Respondents shall not be ordered to pay costs but only in the event of opposing the orders sought herein.
- (g) Applicants shall not be granted such further and/or alternative relief.

The application was lodged with the Registrar of this court on the 14th March, 1996 and the same day a Rule Nisi was granted in terms of prayers 2 (a) and (d) and made returnable on the 29th March, 1996. The application appears to have been served on some respondents on the 15th and 18th March, 1996 and was accordingly opposed. However, on the 28th March, 1996 a set of applications were lodged with the Registrar of this court seeking an order respectively:-

1. Disposing with the rules of this honourable court pertaining to notice and service and/or permitting short notice and hearing the matter as of urgency.
2. Granting the applicants leave to intervene as applicants in the proceedings pending before this honourable court in CIV/APN/84/96.
3. Directing any party opposing the granting of the orders sought to pay costs.

4. Granting the applicants such further and/or alternative relief.

and

- (a) First and second applicants shall not be granted leave to intervene in a certain matter, namely; CIV/APN/84/96 pending before the above honourable court and be joined as the 4th and 5th applicants respectively.
- (b) Respondents shall not be ordered to pay costs only in the event of contesting this application.
- (c) Applicants shall not be granted further and/or alternative relief.

The application having been opposed was, nevertheless, after argument, granted and the intervening parties were made respectively, applicants nos. 4, 5, 6 and 7.

The court being reluctant to decide the issues on paper listened to brief addresses by counsels for the applicants and respondents on the propriety or otherwise of referring specific issues to evidence and the court taking advantage of Rule 8 of the Rules of the High Court sub-rule 14, which reads:

If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or may make such an order as it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for his or any other person to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings and definition of issues, or otherwise as the court may deem fit.

ordered that oral evidence be led on specified issues.

The specified issues were spelled out by the court as:-

- (1) Membership
- (2) Reports
- (3) Delegation
- (4) Method of voting
- (5) Provincial Delegation.

The first witness of the applicants was Sehloho Sehloho who testified that he lived at 'Mahuu's at Rothe in the districts of Maseru. Was aware of the case he was facing and had filed an affidavit to the effect. He was a registered member of the B.C.P. and had a membership card which he showed the court. The membership card had been issued in 1995 and his constituency was Tlametlu No.29. He remembered the Annual General Conference of the 31st respondent which started on 8th March, 1996 in his presence though he was not a delegate.

The National Executive Committee had issued instructions that security personnel were to be detailed to monitor and control manner of entry at the conference hall gates ensuring that entry by delegates was by cards only at the Co-operative Conference Hall near the stadium. He had commenced his duties as security personnel on 8th March, 1996 at about 11.00 a.m. On the 9th March, 1996 he had resumed his duty to check on the delegates as for example, possession of dangerous weapons. The delegation had, like the leader to the Basutoland Congress Party, entered through the gates. It was after the leader went out that a commotion started at the gate for there were people who pressed

to enter without cards. A message had been relayed to Ntja Nchochoba a member of the Central Committee that the security was endangered.

The situation had deteriorated badly when he appealed to the 1st respondent and Deputy Premier. After the Deputy leader's car had gone out of the gate there were many people gathering at the gate. In about 3 - 4 minutes the deputy leader returned and when his car reached the gate they were not able to open the gates and the car could not pass for if it did so people were going to stream in Nchochoba had come on the scene and ordered the security to open gates so that the car could move in.

Members of the National Executive Committee present there were: Makhakhe; also present were Ramathebane, Mopeli and others from various constituencies. As they opened the gate people surged in without identifying themselves. Some men were wearing donkey-like blankets and were sjamboking everybody and the security left because of the sjamboking. He had flown away for the security of his life to some members of the executive committee who were already on the premises. He was actually sjamboked. On entering the gates he had found men in donkey-like blankets whom at the gate and had remarked to Ramathebane a security personnel; see, it's very bad. Ramathebane had said I was to go in and meet those responsible. He had encountered these men in donkey-like blankets whom he did not know. Nchochoba had nevertheless assured him he was aware of the situation and

would endeavour to maintain order. He had not gone back to the gate.

He had waited in the hall feeling a little scarry lest outside the situation had not improved.

In the hall he had heard noise which unnerved him. Remarks were being exchanged and some people were saying provinces were being over represented while others were saying constituency reports had not been read. He had immediately left. He was at his wits end for the situation outside was no better than in the hall. There were police outside and he calculated there would be some relief. At the gate were uniformed police scattered amongst the crowd - it was a complete thorough-force and gates were open and everybody was going in and out. His fear had subsided then.

Near the hall he had heard the leader's voice saying the conference had to be closed owing to the prevailing situation and the conference had closed. Conference Chairman Makhakhe had made an announcement to the effect that owing to the prevailing situation the conference had to close and would resume the following day on 10th March, 1996 at 7.00 a.m. People had left the hall though at the gate men in donkey-like blankets were there stopping people saying the election would proceed and voting commence. People were not allowed out of the gates it being claimed the election was going to be held.

Mopeli, Ramathebane, Nchochoba had arrived, opened gates and some people had left. They had in the end left. The following day on 10th March, 1996 he had woken up before 7.00 a.m. to inquire if he was going to proceed with his security job and he had discovered that people had already entered through the gates. The gates were however closed and people were not entering. In the hall premises there were, already, grey blanketed people - they seemed to be manning the gate. He had waited outside the gate though not for long. A vehicle had arrived and as it entered people streamed in and he had done likewise. In the hall he had seen Mphanya and the leader and the latter was talking about leadership affairs and conducting the conference. The leader was saying it didn't seem this was a conference since delegates were mingling with non-delegates and ordered that all those in the hall go out as only delegates were required in the hall. According to the leader it was necessary to start from scratch. Knowing he was not a delegate he had gone out. He had gone out of the gates never to return. He had been appointed by the Executive Committee in consultation with constituencies to be a security personnel.

Cross-examined by Mr. Pheko for some of the respondents he said he was member of the Basutoland Congress Party (for convenience sake to be hereinafter referred to as the B.C.P.) for 2 years being from March, 1994. He agrees it seems as he was only a year as a member in March, 1996 that in effect he is a year and not 2 years as a member of the B.C.P. He was familiar with the B.C.P. constitution in terms of which delegates were to



enter the conference hall. Delegates were elected at constituency conferences. According to him non-delegates including himself could not enter the conference hall. There were also no people screening people who entered through the gates.

At the time he was at the gate there was nobody there though there were people entering and going out and he did not know whether they were screened nor did he know whether people in the hall were entitled to be there or not. He agrees he entered the conference hall knowing he was not entitled to be there. He had been in the hall though he did not participate in the deliberation. Delegates to the Annual General Conference were elected at constituency conference. He knew nothing of provinces even whether they were part of the constitution. He had been appointed as an observer. He says as he was frightened he could have heard what was discussed though not properly.

The witness went on to say he could not say whether the General Secretary's report was read or not for he was at the gate. People who had sjamboked him were the same ones who had participated in the conference hall. He says he doesn't know whether there were members of the Credentials Committee at the gate. He also says there were no members of the Credentials Committee at the gate. He disagrees and agrees they would have been identifiable. He had not seen seated people in the hall though the hall was full to capacity. He says he had the right to be in the hall. No person had seen him in the conference hall

and he had not met Nchochoba. The witness says when he ran away only delegates had entered the conference premises and yet he found people in grey blankets! He says he doesn't know how the grey blanketed people entered the conference hall and speculates they could have jumped over the fence.

He says the grey blanketed men were carrying sticks and sticks are not allowed in the conference hall.

Re-examined by Mr. Khaue the witness says there were no such people at the gate. He doesn't know whether Nchochoba reported to the police.

The second witness for the applicants was Khotsang Moshoeshoe who testified that he resided at Salang in the Mokhotlong district. He was a member and chairman of Mokhotlong constituency No.64. He was appearing and giving evidence as chairman and in his personal capacity. He was a registered member of the B.C.P. and got involved in its activities in the 1970's as a youth. He had become a registered member in 1991 and had paid 25c. The gap in the years he has mentioned was occasioned by the fact that the B.C.P. was not operating in the country and it was only after the repeal of Order No.4 that the party resumed operations. He had shown the court his membership card for which he had paid M1-00 for 1995. The reason his card showed 1995 was because 1996 was not yet operative - there were also executive problems occasioned by the present application. He had attended 4 Annual Conferences of the 31st respondent. He

had attended such conferences in January, 1992, 1993, 1994, 1995 and conference of March, 1996 which was, constitutionally, to have been held in December, 1995. Conference of 1994 merged the years 1993 and 1994 for there was no conference in 1993.

At annual conferences recommendations on being voted on become resolutions and resolutions committees were elected to record resolutions. Recommendations emanated from constituencies. Where it was felt the agenda may not be followed a suggestion or proposal to the effect may be made and if the proposal is seconded and is not opposed the motion is taken as carried. If the proposal is opposed and seconded the matter must be put to a vote by show of hands. Conference was scheduled to proceed from 8th March, 1996 - 11th March, 1996. His constituency had 24 delegates. He had an assignment at the conference to move his constituency recommendations which if accepted by conference would have been resolutions of conference. He had not accomplished this because this agenda item had not been dealt with by conference. One side had proposed that these items be deferred or set aside and the Secretary-General's report be read and the suggestion had been seconded. The suggestion had been opposed and seconded. On voting the majority were in favour of the items being deferred and this became a resolution of conference. He says Mokhotlong proposal had been the establishment of an inquiry into the property and moneys of Lesotho Liberation Army (to be hereinafter referred to LLA). Another one concerned a recommendation to prevent the hijacking of the National Executive Committee. Another proposal had

concerned the flight of exiles who were not looked after and were scavenging and starving. The witness went on to testify that conference had the right to defer or suspend agenda items provided the conference amended constitutional provisions relating to the particular agenda items for the time being. A constitution is amended to remove or replace.

He says the procedural steps to amend the constitution were not followed but were trampled underfoot. The report of the Secretary-General would not be read through owing to the situation at the gate and the chairman of conference minister Makhakhe had said it was to stop. The Annual Conference was to adjourn at 6.30 p.m. according to the agenda but there had been a lot of noise; people were on their feet and raising hands including the 2nd respondent Thebe Motebang. The chairman was exhorting delegates not to go wrong in this conference of all conferences because of the vicissitudes the party and government had undergone. They had left the hall but at the gate he found the gate was closed and there were furious grey-blanketed people and others in victory blankets and red blankets and were saying come what may the committee was going to be elected. As the men were in fighting mood he had gone back including minister Molopo. He had seen uniformed police including a police woman with a talkie-talkie talking to people at the gate. He had eventually left.

He had attended conference on 10th March, 1996 at 6.30 a.m. At the gate but outside there were people and a great multitude

was singing and shouting to people in the hall - these people were about 80 - 100 metres away. Outside the gate were about 50 people and there were about 15 people close to the hall. He was shouting that they were to open for him and after some time Thabiso Melato had arrived at about 8.40 a.m. Melato was member of the Credentials Committee; he also shouted for the hall to be opened so that work could commence. A vehicle arrived bearing minister Makhakhe and another one bore minister Mphanya; the two vehicles including himself had not been admitted. When Thebe Motebang arrived Thabiso Melato protested that they were not being admitted including the workers. A man had then opened one small gate through which only one person could enter at a time. Melato and Thebe Motebang entered and the rest of them waited where they were; as soon as Motebang and Melato had entered the man closed the gate. Minister Makhakhe and minister Mphanya were still at the gate having not entered. Melato and Motebang had entered the gates about 5 - 10 minutes after 7.00 a.m. Melato and Thebe then went to the gate and Motebang said: 'in order to enter you are to be in two orderly lines and not in disorderly group like you are. The witness says he replied: 'people are crowding behind us and there is no way we can form a line. Maliehe, Molefe Moteetee, Tokelo Lets'ela and others joined in the chorus. As words were exchanged minister Shakhane Mokhehle arrived walking and the gate was opened for him by men who had crowded there. Minister Shakhane Mokhehle merely raised his hand and the gate was opened. The minister then met Thebe Motebang and Melato and proceeded in the witnesses direction saying: 'when we open for you, don't go to the left side, go to the right,

hand side as there is an open space there: the main gate was then opened. They had then entered crowding in without forming a line. Constituencies were then called by name by minister Shakhane Mokhehle and Thebe Motebang while Melato was reading from a paper - they were about 15 - 20 metres from the hall. Minister Makhakhe's vehicle had managed to sneak in. There was no screening in the hall. Minister Makhakhe and chairman of conferences then addressed the delegates saying the conference was opening. He went on to say as the previous day the Secretary-General's report was being read the agenda was to proceed from there but the Secretary-General was not there. Responding to a man who wandered who could read the Secretary's report in his absence, minister Mphanya responded that the Secretary-General's absence could be related to the difficulty of entering at the gate. Then there was an uproar. While on 9th March, 1996 according to the witness delegates had identified themselves there was no such identification at the conference on the 10th March, 1996.

As delegates made a noise chairman of conferences and his deputy tried to restore order. The deputy chairman had gone on to remark that they were not there on self-help projects could the conference behave to which minister Shakhane interposed: 'you are talking nonsense.' As things were getting out of order the chairman once more appealed for order and calm. Some people were saying they wanted to vote they were, after all, returning to work. The noise had started from 11.00 a.m. When the leader Dr. Ntsu Mokhehle arrived the noise subsided. He arrived at

11.00 a.m. exactly. The leader had then whispered to minister Makhakhe and the latter went out leaving the loudspeaker in minister Mphanya's hands. The leader had then snatched the loudspeaker from minister Mphanya; after snatching the loudspeaker the leader said he agreed with people who said they were to go into the election of the Executive Committee. A man then raised his hand and said the entire agenda except the election of the Executive Committee be set aside. The proposal was seconded by a man with beads on his head. A woman who said she came from Maputsoe proposed that the agenda be proceeded with and she was seconded by a man later identified as Ramathabane - chairman of Mohale's Hoek constituency and an applicant in the case. The leader then announced that he had sent Makhakhe to fetch ballot papers as the election was going to proceed. After this announcement by the leader another uproar had broken out and the leader had attempted to calm it.

The witness went on to say he had personally stood up saying he saw no point proceeding with the election leaving behind agenda items. He had also pointed out that the function of the Annual Conference was not to elect the Executive Committee only especially in view of the fact that the report of the Secretary-General was left with a few pages only and besides there was the extra day of the 11th included in delegates' letters. The leader had said he was to sit down because conference had decided election of the Executive Committee proceed. He says he doesn't know what decision of conference the leader was referring to.

The witness went on further to say the leader said the Elections Committee was to be elected. Names were suggested and seconded. Amongst those elected to the Elections Committee were: the witness, Monyane Moleleki, minister Lira Motete, minister Nots'i Molopo, minister Shakhane Mokhehle, Thebe Motebang, minister Moeketsi Senoana, Khachane Sekoto, Peo Molejange, Matlasi, Thulo Mahlakang and others.

According to the witness, they were not given a list of candidates; he knew only those candidates who were suggested by his constituency. The leader who, at the time, was conducting conference proceedings made an announcement to the effect that all those in the hall were to leave because it had been observed not all were delegates. Members of the Credentials Committee who, on the 9th March, 1996 had screened delegates allowed delegates into the hall. The delegation identified itself by means of cards. Thebe Motebang was appointed by the Elections Committee to be chairman while Monyane Moleleki and Lechesa were secretaries.

He says the list of candidates was not given delegates as is customary. He says the ballot box was not conspicuously placed to enable voters to place their votes. After voting the Executive Committee had not satisfied itself whether there was proper voting nor was there a special place for delegates to vote. Whether or not there was going to be an election and agenda items suspended matter not put to a vote though there were two sides. The leader had told him to sit down when he objected.



He says he could not quarrel with the procedure given the prevailing situation and having regard to who the role player was. In the leadership conference of 1995 Thulo Mahlakang had been assaulted by the same gang he had found outside the conference hall. Thulo Mahlakang had been assaulted in the presence of the Executive Committee and nothing had been done. Thebe Motebang had seemed satisfied with the result.

The witness says although Thebe Motebang was not a member of the Credentials Committee it is him who allowed people to enter through the gate. He could not object for Thebe Motebang was in a similar mood he displayed at Sun Cabanas where Mahlakang was assaulted. He had decided to participate at every level of the conference in order to be able to tell the court what he saw and not what he heard. He says votes to the National Executive Committee were counted by members of the Elections Committee i.e. himself, Moleleki and Senaoana. He says there were candidates standing for the National Executive Committee who were also members of the Elections Committee and these candidates had counted votes except Thebe Motebang who was chairman of the Elections Committee. He says it is wrong for a candidate to the National Executive Committee to count own votes. Monyane Moleleki had been elected to a position to which he was not recommended. He says as candidates to the N.E.C. were also members of the Elections Committee he cannot say the elections were free and fair. The witness then handed in a paper showing candidates and their proposed portfolios which was marked Exh.

The witness went on to say he knew B.C.P. structure and representation at the Annual Conference which consisted of members of the Executive Committee, Members of Parliament who are B.C.P.'s, Chairman, Secretary, Treasurer and all delegates from constituencies - a delegate representing 100 members of a constituency or each branch being represented by a delegate and 3 members. Chairman, Secretary and the Treasurer of the Women's League of the B.C.P. plus 3 additional members of the Women's League elected at Women's League Annual Conference; the Youth League had similar representation. In addition there were 14 delegates of all members of the Provincial Committee plus 5 members of societies affiliated to or aligned to the B.C.P. - in this category a delegate represented 1.000 members though this lot could not sent more than 5 delegates to the Annual Conference.

According to the witness, the delegation to the March, 1996 Annual Conference was not composed as outlined by him above. The Women and Youth League were represented by 19 delegates when it should have been sixteen (16) from each league and accordingly there was an excess of 6 delegates. While the Provincial delegation was to have been 14 delegates from each Province namely, the Transvaal, the Free State and Natal amounting in all to 42 delegates, there was over representation in that the Free State had 91 delegates and the Transvaal had 106 delegates. These delegates had participated in the election although so far as the Transvaal was concerned not all delegates participated when the deputy leader was elected because, according to the

Credentia Committee had given a lesser member, i.e. 91.

When the chairman of conference was elected the chairman of the Elections Committee Theb. Motebang announced that the Transvaal delegation was 106 and not 91 as the Credentials Committee had stated. When the announcement was made there had been a dispute by the Provinces that the number of delegates exceeded that reflected on ballot papers. It appeared the Transvaal voted with 101 delegates when the deputy leader was elected when in fact the Transvaal ballot papers reflected 91 delegates: as for 91 and 106 delegates as announced by the chairman of the Elections Committee, this was merely an announcement by the chairman. The Elections Committee had then decided that the Transvaal and Free State votes be set aside and disregarded. The decision came when results of voting were announced amid claims that 200 ballot papers were spoiled: significantly, according to the witness, there were no deliberation on this issue. When it was queried why there were so many spoiled papers it was claimed it was because the Transvaal and Free State were over represented though there were no deliberations between the Elections Committee and Annual Conference.

When ballot papers came with the secretaries of Provincial Committees, they were counted from the first to the last ballot paper to determine whether the number was equal to that given the Provincial Secretary by the Elections Committee: if satisfied these numbers were equal, only then were they re-arranged or

sorted out as to how many voted for whom. As far as the counting of ballot papers was concerned, it was disjumbled and not conducted in the manner the witness had explained. He was referring specifically to the Transvaal and the Free State. Though an objection had been raised as to Women and Youth delegation, the leader had overruled objections and ordered that the voting proceed regardless - this is the reason he was asking the court to declare the election, invalid.

The witness further testified that during the counting of votes strange things had occurred for as ballot papers were counted it appeared ballot papers emanated from the Executive Committee, Youth League and Women's League and Parliamentarians: members of the Executive Committee were voting together and it seemed the number of ballot papers exceeded the number given by the Electoral Committee when the Elections Committee had ruled that each of these groups was to bring own ballot papers instead of this happening Monyane Moleleki who was Secretary of the Elections Committee got to the desk holding ballot papers in his two hands and this is when the witness, Peo Moejane and minister Moeketsi Senaoana inquired where Moleleki had found the ballot papers from and he claimed they had come from groups mentioned above. The ballot papers had been counted in the manner outlined by the witness and it had been found they had exceeded the given number.

The Elections Committee had then ruled that the groups mentioned were to stand up and be counted and as counting started

the leader had come on the scene inquiring what the problem was seeing the election was not being timeously completed. To which minister Senaoana had replied it seemed the groups had exceeded their representative quota. It was explained to him the difference was 9 votes and he said it seemed it wasn't much difference and the excess was to be included in the number of votes cast. When it came to the Provincial ballot papers it seemed the ballot papers exceeded the allotted number. To this Monyane Moleleki explained he had issued ballot papers exceeding the allotted number. In the presence of Thebe Motebang Moleleki said he had given the Free State and Transvaal ballot papers apart from those the Elections Committee has issued and Motebang denied he had given such an order to Moleleki. Motebang had the said: gentlemen, this is a mistake and I suggest we put these ballot papers aside completely'. When the leader came in they were complaining that even when the Deputy leader was elected they were rocked by these ongoing errors. The leader had then turned on the witness and said: 'Have you got any objections?' To which the witness had replied that they were elected to conduct the elections and now that they were ordered about it seemed they would not perform their duties as expected. To which minister Lira Motete interposed: 'Gentlemen, even when the Prime Minister has spoken, what more do you want?' The 11th respondent had agreed with minister Lira Motete. Thulo Mahlakeng and Peo Moejane had shown satisfaction of the attitude of the leader though they were on the Elections Committee. Hereafter the leader never gave an order.

In reply to Mr. Khauoe counsel for some of the applicants the witness agreed he saw Exh. "A" being agenda in relation to 10th March, 1996. The conference that started on the 10th March, 1996, had ended on the morning of 11th March 1996 between 4.00 and 6.00 a.m. and the last item was the election of the National Executive Committee. The conference had ended after the election of senior members of the National Executive Committee.

Moleleki had not been elected to a position to which he was recommended i.e. that of Vice Secretary. It was said Maliehe was publicity secretary and yet his name does not appear in Annexure "B". It was also said Mopshatle Mabitle was his assistant and yet his name under the column as Assistant Publicity Secretary in Annexure "B". The four (4) committee members announced to the conference namely: Nots'i Molopo, Letlotlo, Makatla Makatla and the 4th one whose name he forget were not announced to conference. Minister Kelebone Mape a senator did not appear in names recommended by constituencies to stand as a candidate though he was the last to be elected to the Executive Committee nor does the minister have a constituency. Nots'i Molopo in terms of Annexure "B" did not appear to have been recommended by any constituency committee to stand for an election.

According to the witness members of N.E.C. were not ipso facto members of the Elections Committee nor is the leader. He says when he said when the deputy leader was elected the Transvaal delegation had not participated he meant of the 106 Transvaal delegation following numbers given by the Credentials

Committee only 91 delegates were eligible to vote while 15 were excluded. Ballot papers were nevertheless 101 and the Elections Committee had decided the number had exceeded the given number of 91 by 10. After the election of the deputy leader the Credentials Committee had not published that the number of delegates was 106 for the announcement was by Chairman of the Elections Committee Motebang. Delegates could not choose candidates before the election. There was an assortment of clothing including others in grey blankets and party uniforms. There were also sticks and sjamboks. People with sticks were at the entrance of the hall and others one pace from the door into the hall. In all conferences he had attended no sticks were carried. Ballot papers were printed in different shades. As ballot papers were short the Elections Committee made its own ballot papers on ordinary paper. It was agreed Monyane Moleleki and Lechesa would sign them before distributing them to constituency secretaries. The ballot papers had to be signed to distinguish them from ordinary paper.

Printed ballot papers had been issued to the Transvaal and Free State provincial secretaries but it appeared even those signed by Moleleki had also been distributed though there was no report of how many had been distributed. There was no official voting box and members of constituencies filled their forms under shades of trees. According to him the procedure was not right to vote under trees while other delegates were in the hall.

According to the witness one qualifies to be a candidate if

one has served the constituency committee for at least 36 months. Members of the Constituency Committee were: Chairman, vice Chairman, Secretary, his vice, Treasurer, Publicity Secretary and his assistant who are elected at constituency conference and delegates from other bodies referred to above. A person became a parliamentarian after the announcement of an election. Election results had been announced after 27th March, 1993 being the date when elections were held. When the Annual Conference was held no member of Parliament had served 36 months in the constituency committee. The leader of the party had left when the conference dispersed i.e. between 4.00 a.m. and 6.00 a.m.

Cross-examined by Mr. Pheko the witness agreed he had produced no proof that he came from Mokhotlong nor was he supported by any member of the Mokhotlong constituency of the B.C.P. The witness testified he had personal interest in the matter and that this had arisen at the time of incidents referred to above. He had done Grade A at school. Put to the witness that the claim that he did Grade A betrayed him he insists he did Grade A. He says while it is true he did not complain of so many irregularities by the leader he says this was because of limited time at his disposal. He agreed he was making fresh allegations not contained in his papers and disagreed they were not part of his case for they were things which occurred.

The witness denies he made derogatory or snide remarks. He says he did not identify the man with beads on his head and doesn't even know whether he was a delegate. He agrees in papers



he did not specifically say who had denied him his rights. He wanted the court to make a finding about the provinces though they were not cited in the papers. The N.E.C. had done many wrong things and as a result he had been denied his rights. Regarding provinces the B.C.P. Constitution was silent save saying that provinces would be represented by their committees. There had been an Annual Conference in 1992 and provinces had delegations over and above Provincial Committees and this had caused a serious row. He had not been present in the 1993 Annual Conference. Though he had arrived late in the 1994 Annual Conference, he cannot deny that the Provinces were over represented. In terms of the Constitution vide (cl.17 (iv) Provinces had constituencies. He says though Provinces have constituencies there is no law that they may have delegates. He says when the constitution refers to a branch such a branch is contemplated in Lesotho and not in the provinces for in the Republic of South Africa there are no branches save compounds. Branches, according to the witness, were such as formed part of polling stations as was the case in the 1965 elections.

Before 1965 there had been delimitation commission which defined constituencies and present branches were created by delimited constituencies which were published in the gazette showing seats and polling stations. He agreed the Annual Conference had recognised the fact that there were Provincial branches. In terms of Clause 11 (c) of the Constitution the Provincial Committee represented the entire Province. He agrees the structure here at home and in the Republic of South Africa

is a little different. He agrees there are matters not provided for in constitution which the party nevertheless practices. He says there can be no branches in the Provinces for the constitution does not provide for this and he denies the party has recognised committee branches in the R.S.A. He says if a committee must exist this has to be in writing for it is part and parcel of the structure of the party.

The tenure of life of the Credentials Committee and the Elections Committee is short-lived for the structures come into existence just before the election of the N.E.C. and disappear after its election. According to him there was no time when the party stayed without an executive committee for the structure of the committee was permanent leaving no vacuum. The Executive Committee could not elect itself hence why the constitution stipulated that there should be proper counting of votes. The National Executive Committee, a Constituency Committee and a Provincial Committee were structures, while because they were short-lived, the Credentials and Election Committees were not structures. He says the leader denied him his right by directing that the report of the Secretary-General, Treasurer and other agenda items except the election of N.E.C. be dispensed with. He did not know whether on 10th March, 1996 at 7.00 a.m. as expected, the Secretary-General was present. The leader had arrived between 10.00 a.m. and 11.00 a.m. and on arrival conference had gone into session. He had himself arrived at about 7.00 a.m. and conference had resumed business minutes before the arrival of the leader. When the conference started

he had not seen the Secretary, his vice or Treasurer and when the leader arrived he had not seen them either.

After the conference was declared open by the chairman; he announced that he did not see the Secretary and delegates started making a noise saying: Where is this Secretary-General of yours

It was clear to everybody the Secretary-General was not there as he was expected to be on the stage. The Chairman then said: although you are shouting yourselves hoarse, you don't know what's holding him back for it took us a very long time to get in here. The noise continued unabated and some delegates were suggesting as the Secretary-General had not pitched up they were to go on with the election, while others were insisting reports were to be read. The conference was out of order but when the leader arrived the noise subsided. He agrees the leader's arrival gave them a respite though it was of short duration. Minister Shakhane was saying he did not want numbers given, for they seemed to have been given everybody in the hall. The witness denies it was suggested reports be suspended and the election proceed because the Secretary-General was absent. Although the Secretary-General's report could not be read there were other agenda items like members of LLA's appeal which was to have been discussed the previous day it could then be discussed instead of proceeding with elections. There had been suggestions to the contrary but these had not been put to a vote. He denies the matter was put to a vote. While it was true that the leader said the majority decision was to be respected the witness felt this was acceptable though there was no need for.

the leader to have said this. The witness says after the leader made this announcement he was booed. The conference had so much gone out of hand it was useless insisting on any particular course of action. The conference was conducted by a person other than the chairman irrespective of denials. It was the leader who flushed people out of the hall claiming that they were not delegates.

When the leader came in the chairman was making an example and was saying when you marry a girl, you don't know whether she wets blankets and that you would know these things on the first night he said - that these remarks went for the delegates in that all their discomforts could be aired but not noisily. He says proposals were made by accredited delegates who were displaying their numbers or cards. Delegates had, however, entered the hall like sheep. He agrees he cannot mention a single person who had a number - but was not a delegate - his denial was based on the fact that delegates were not ushered into the hall like they were the only delegates. Cards were issued at random without inquiring whether one was a delegate or not. Delegates were given a small number and a big number. The small one is obtained from the Credentials Committee and the big one is given in the hall though the two numbers are not related. The seats were not numbered. Seats they occupied were not equal to the number of delegates and some delegates were on their feet. Some delegates did not even have numbers or cards for they did not have them. Couldn't say that all people in the hall were delegates. On 10th March, 1996 and even when hands were raised no numbers had been

issued. Numbers had been issued on 9th March, 1996 and on 10th March, 1996 no members had been issued. He agrees a seconder was holding a card. He says there is no voting in the election of the Elections Committee. He had accepted the appointed without knowing whether the proposer or seconder was a delegate. Members of the Elections Committee were 21 - they were in groups - one was concerned with the number of ballots and whether these equalled the number of delegates; other functions were sorting out; another function was sorting out delegates by name and another group counted though the duties were interchangeable except for that of the secretary. One group verified the counting and passed the ballot papers to another to cross-check though the activity was within one group. When the counting is finished the result is given secretaries who pass it on to the chairman to announce the result. There was no way one could increase or decrease the number of votes. According to the witness, the counting was fair and correct on the desk; moreover, the counting was done publicly in full view of the delegates. No member of the Elections Committee could have influenced the counting - some tried but it did not work.

When the chairman pronounced the result nobody said anything save reference to spoilt papers. Members of the N.E.C. were not there and were not observing what was transpiring nor did they satisfy themselves that the counting was done properly. Members of the outgoing committee had been aware that Elections Committee members were checking votes amongst themselves. Mahlakeng was present as a member of the Elections Committee. The witness

nonetheless denies that the Elections Committee was satisfied that the counting was proper. He says he is now changing and saying the counting on the table was increased and decreased being the number of parliamentarians and the executive. It had been agreed the excess of 9 delegates referable to the Women and Youth league was wrong and was not to be included in the counting.

As to the number of delegates they varied from 1.200 + - 1.300 after the chairman announced the 91 and 106 complement. He had heard when the chairman made the announcement but could not say whether or not the number came from the Credentials Committee. He could not say whether at any time votes had exceeded the 1.300 mark. He says the Transvaal Provincial delegation did not raise a query as to its representation - at least not in his presence. He says when other office bearers were elected, Transvaal votes of 106 were included. He says he doesn't know whether there was rectification with regard to the Free State delegation. He had voted voluntarily and without force for candidates his constituency had recommended. He denied that Cl. 31 E (v) did not envisage a form like L.M. 14. He denies no form like Exh "A" was not sent to constituencies. Even if his candidates had won he would still have come to court because of irregularities that pervaded and tainted the 1996 Annual Conference. He says it is wrong to charge that he came to court because his candidates had lost. The witness says considering the amount of ladder climbing, it is wrong to say his candidates did not feature in the election. He says that that

his candidates did not receive expected support, was attributable to the amount of back door infiltration. He says if his candidates had won, it would have been a case of separating chaff from corn.

On 9th March, 1996 there was conference smooth-running and on 10th March 1996 the conference had not only started late, it closed 30 minutes earlier because of irregularities. Melato had given the number of delegates as 1,281. Melato had given the number of delegates on a Sunday without a breakdown. He says on Sunday minister Mphanya did not give the number of delegates as 1,276 but rather as 1,200 +. He says it is true the chairman had asked both ministers Shakhane Mokhehle and Mphanya to apologise for their remarks. He says though the leader had taken the speaker from Mphanya this was a worthless exercise because the chairman had calmed the conference. He says concerning minister Makhakhe's anecdote, the leader had just arrived. He agrees when the leader snatched the speaker from minister Mphanya the latter had not raised an objection. He says while the leader is entitled to address conference, he cannot say anything out of the hat. He could not say whether the snatching of the microphone was deliberate or not. He says he doesn't know whether the N.E.C. was unsure as to who was eligible for election. He says he does not recall whether the Secretary-General said he had no information as to the procedure in securing candidacy on account of reasons mentioned prior to 1991. He disagrees the compilation did not materialise because of factors attendant on the political statistics of the 1970s and consequent fleeing of people from the

country for, as he says, the list is compiled from year to year and after the 1992 Annual Conference people had not fled the country for political reasons so that the things mentioned did not fit into the pattern of 1992 - 1996 events. He says during conference individuals tout for their candidates. He says he did see a skeleton in 1992 but had not seen it in the 1996 Annual Conference. Skeletons were not part of the constitution. Ministers Qhobela and Mosisili names had appeared in a skeleton. He says some delegates were elected on the recommendations of their constituencies while others were not. Constituencies had recommended Qhobela and Mosisili for Deputy Presidency and this was out of one list. The National Executive Committee ruled Qhobela and Mosisili qualified to stand as candidates for the vice-Presidency. He says minister Mosisili did not qualify because when recommendations were made he was not a member of a constituency for a period of 36 months. His means of knowing was that results of the Delimitation Commission were published by Legal Notice No. 1/93 and by then he was not a member of any constituency committee. It was constituencies like Matala which had committees after the 1993 Annual Conference and their members of parliament not being members of constituency committees would not qualify for the party used steering committees to enlighten members and facilitate work. According to him a member of Parliament could not stand for election to the N.E.C. merely because he stood for parliament for the constitution says the candidate must have been a member of the constituency committee for 36 months. That minister Mosisili had not served the requisite 36 months he had learned from a member of the



constituency committee at Mpiti's when he was in Oacha's Nek for 6 months in 1992. Another reason was that when minister Mosisili was elected in 1993 no single person had been a member of the constituency committee of the B.C.P. for 36 months. Considering that from 1970 - 1992 the B.C.P. was inactive. Without the Annual Conference constituency committees could not be elected.

He had been a member of LLA from 1978 - 1987; was also a farmer breeding sheep and goats and had also gone into business. In 1991 they had decided to resuscitate the party. In 1992 he was chairman of the constituency until 1993. Asked by the court he said he had political science with the University of South Africa by private correspondence and before then he had been to Marian Hill High School. All candidates had been appointed in 1992 though he forgot the date and then his constituency had not existed in its present form. He denies the moment a candidate is nominated to Parliament he becomes member of the constituency committee for then in terms of the Delimitation Commission Constituency committees were not yet born. That these candidates were nominees and later became parliamentary candidates did not mean, according to the witness, that they automatically became members of their respective constituency committees. Minister Mosisili had not become a member of the constituency committee ex-officio because the constituency of which he would become member of the committee had not been delimited the reason being before he was recommended he was not a member of the constituency committee. He says there is no way prospective candidates could be deemed members of constituency committees for they could not

be members of no-existent entities. It was as a result of the delimitation commission that there were the so-called steering committees in lieu of constituency committees despite there being no steering committees in the constitution. He says an heir is one on assuming office.

The witness further testified that the B.C.P. constitution was rigid, immutable and unchangeable. Concerning minister Mosisili, a branch of which he was associated came into being in September, 1993 and had not become a member of the Constituency Committee by reason of being a nominee and not a candidate and only became a candidate after his name appeared on the list of candidates. Even after being elected to Parliament he was not a constituency committee member until September, 1993 because members of the constituency committees had not been elected and in any event they were then non-existent. He says nominees do not attend constituency committee meetings as of course. He says anything that the party does derives from the constitution and this is called administration.

He says right-wingers are people who do not want change within the party as was evidenced by the Annual General Conference of 1991 held in 1992 where it was suggested the B.C.P. constitution be revised or amended and conservatives objected saying they wanted their green constitution. The B.C.P. was divided into two (2) groups - the six (6) ministers who had vacated their positions were pressure group and the 4 who replaced them were right-wingers. The six (6) pressure group

to the N.E.C. because I could not give committee members of a pressure group money.' This is what was said in the General Secretary's report. As to who said the committee was pressure group, he did not know save what was contained in the General Secretary's report. He agrees members of the pressure group were not returned to office. He denies the outgoing committee did not satisfy delegates at the conference. He says the conference could never properly adjudge the outgoing committees performance unless the N.E.C. had laid bare its reports to a finish.

Re-examined by Mr. Mda the witness said the Pressure Group was progressive while the Conservatives were retrogressive. The latter group had, however, not been new in the annuals of Lesotho's political life. There had been progressive parties before the inception of the B.C.P. In 1940 the present leader of the B.C.P. was a Youth with influences from South Africa. Unable to change the conservative attitude of Lekhotla-la-Bafo (Commoners Party), he formed the Basutoland Congress Party so that he did what young people are doing within the B.C.P. today. The witness said it was history repeating itself for while in yester year change was seen as necessary it was being frowned upon now for fear of losing power.

The third witness for the applicants was Jack Mopeli who testified that he resided at Koalebane in the Berea district and was heavily involved in B.C.P. politics. He was chairman of Boqate constituency No.22 and had joined the B.C.P. in 1957. He had B.C.P. political stint in the Eastern Transvaal as a

secretary.

Whilst in the Transvaal they had built branches in the compounds for they lived in compounds and other sections of the location and these together made a constituency. Branches were made of Brachen, Lesley, Kinross, Winkelhaak, de Wender Location and Kinross Location and he was in charge of these in the far-Eastern Transvaal and these together made a Province. The Provincial Committee in South Africa liaised with the National Executive Committee in Lesotho. In 1957 when he joined the 31st respondent it was Basutoland Congress Party and had not changed since then. While the Annual Conference was held in Lesotho they had their own conference in South Africa to prepare for the Annual Conference in Lesotho.

The Provincial Committee attended the conference representing constituencies and because of the then politics of South Africa branches were represented by constituencies. They only came as observers with no right to vote as this was reserved for Provincial delegates. He had been expelled from South Africa in the 1960s. According to the witness, the Provincial Committee voted in terms of the constitution of the B.C.P.

He had come to a conference here in Maseru in 1968 and he was elected member of the Khubetsoana constituency and in 1969 he was elected to represent Maseru constituency and towards 1970 he was elected to be Matela Thabane's agent at Ts'osane. In 1970 the B.C.P. had won the election with a huge majority but the

government of the time had suspended the constitution and installed itself in power -. There had been difficulties and miseries on an unprecedented scale because of the state of emergency. After the state of emergency was uplifted political activity had been banned and normal political dispensation had come after 1986 when the military took over. The order suspending political activity had been lifted in 1991 and flags started fluttering. He fell under Boqate No.30.

In 1992 there was an Annual Conference at Pitso ground which he attended. In this conference there had been a dispute by Gauda Khasu and Phoka Chaolana to the effect that people from the Transvaal had no right to speak in conference like Lesotho delegates for they said only the Provincial Committee represented the Provinces. The leader had stood up and ruled that the provinces would be represented on the same voting as Lesotho delegation. There had been considerable rancour and Khauda Khasu and Phoka Chaolane had stormed out of the conference and Steven Motlamelle had conducted conference as chairman. The objection by Khauda Khasu and Phoka Chaolana was abandoned and had not been resolved to date. In subsequent Annual Conferences the Provincial delegation has remained the same.

He had attended the 1996 Annual Conference representing Boqate No.22 as its chairman. He was also a member of the Credentials Committee. Boqate was born of a Delimitation Commission. The Credentials Committee was nominated by the Executive Committee. Thabiso Melato, Mohloki, Ntja Nchochoba,

Tjama, and the witness were members of the committee. The function of the Credentials Committee was to receive delegations from constituencies and there was a procedure to be followed in this regard.

The constituency delegation was to tally with figures lying with the Executive Secretary i.e. form L.M.14; each delegate is to have filled this form in own handwriting and must reach the General Secretary at least 30 days before the Annual Conference

The delegation is then checked against these forms. Delegates had been admitted on 8th March, 1996 in the afternoon. They had been off to a good start but problems had cropped up. They had difficulty with Taung delegation and the Transvaal delegation. The Secretary of Taung Rets'elisitsoe Letamo was saying the delegation was 13, while the Parliamentarian for Taung Dr. Malie was saying it was 33. On checking they had found the Secretary's report and Taung tickets bound together were 13 in all and 13 cards had been allocated to Taung constituency and the tickets and accompanying forms had been taken by the Taung M.P. It was not procedural to give tickets to the M.Ps. but this was countered by the fact that he had been with the Taung Secretary. It was the turn of certain constituencies to provide security and security guards were expected to work hand to hand with the Credentials Committee to screen delegates. The screening was at the gates and conference hall entrance. Delegates had to identify themselves by displaying their identity cards on the labels of their jackets or from the pockets as the case may be.

On 10th March, 1996 after the hall was cleared, he was at the door holding Melato's list and when he called Taung the number was 33. As on the 9th March, 1996 he had admitted 13, he inquired from Melato about the difference. When Dr. Malie was called to explain, he said it had been the Deputy Secretary's decision and the latter was absent then. He had allowed the 33 delegates to enter. When people started complaining he had approached Melato to the effect that there was a complaint they had admitted 33 delegates instead of 13. At this stage an objection had interfered with the witnesses's evidence and the matter does not appear to have been pursued further.

When, according to the witness, he entered the hall the General Secretary was reading the report and the chairman ex-minister Makhakhe was saying it was as if there was a row at the gate and asked the chairmen and secretaries of the constituencies to go to the gate to investigate. He was leading them. He had followed chairman and at the gate he had found many people outside the gate who were furious and he saw a white car. The gate was closed. In the car he had identified minister Pakalitha Mosisili the deputy leader. People outside the gate were pushing the gate. People placed there by Nchochoba were being pushed by people outside and the gate opened. The throng then surged forward with the vehicle and the witness said to ex-minister Makhakhe: 'What's happening?' It was at the time that security staff lawfully placed there were edged out by people who surged in. He was speaking as a member of the Credentials Committee who placed security staff at the gate.

The form of security at the gate had changed and it was during this commotion that blood could easily have been shed. The crowd had surged in with minister Mosisili and they had gone back to the hall. The crowd surging in was anybody, and he had explained to Ramathebane chairman of Mohale's Hoek constituency that security arrangements at the gate had been invaded. He had returned to the hall and there the chairman of conferences had explained that owing to the prevailing precarious situation, he was stopping or closing conference. According to the agenda conference was to close at 6.30 p.m. but after the announcement conference closed at 6.00 p.m. One group was saying they were not going anywhere they were, after all, going to elect and others were saying for the sake of their lives they were closing and the conference closed.

Some people, the witness included, left the hall towards the gate. At the gate were a group of men in grey blankets, B.C.P. colours and assorted colouring and they were saying: nobody is going to go out we are going to elect. Ex-minister Makhakhe and others were in their vehicles. To save his life he went to his vehicle. In 15 - 20 minutes police arrived. He had gone towards the gate and there the situation was still tense. Police then said people were to move aside and it was then people streamed out of the gates. The witness had left and according to him, that was the end of his duties for the 9th March, 1996.

He had attended conference on 10th March, 1996 at 6.15 a.m. and huge crowds had gathered slowing the witnesses's time to



reach the gate. He was in his vehicle and at the gate had requested men who had taken over control of the gate to allow him in. The Credentials Committee's security guards had been chased away by men in grey blankets and the security guards were wandering aimlessly in the garden. When he asked to be allowed in he had been questioned as to where he came from and after a long argument he was allowed in. They were saying he was not to be allowed in as he came at his own time. According to the witness, these men at the gate had overthrown his government and he was emasculated. He was then ordered to move out of his vehicle and he had moved out. It was said he was being searched and he was made to open the bonnet of his vehicle. He had told the men he was aware they were in a fighting mood but was not prepared to open his vehicle's bonnet. He was then surrounded. One Mapelepo from T.Y. had come on the scene and told them to leave him alone. The witness says Ntja Nchochoba a member of the National Executive Committee would confirm the harassment and the fact that a group had staged a coup d'etat of the security arrangements. After leaving his captors he had gone towards the hall and went to the front left door of the hall where he entered the conference hall. He had gone past Melato who was in his Committee and was then calling delegates to enter the conference hall: Melato was assisted by Thebe Motebang and next to Melato was one Taka.

Next to the hall he had found members of his committee absent. At about 11.15 a.m. the leader had arrived. In the conference hall there was a deafening noise and the leader was

seated. There were those who said they were going back to work they wanted to elect while others were saying they wanted to proceed with the agenda. According to the witness, it was at this time he saw ex-minister Makhakhe listening to the leader and thereafter he had seen ex-minister Makhakhe give ex-minister Mphanya the micro-phone or loudspeaker as the case may be. Ex-minister Makhakhe had then gone out. After ex-minister Makhakhe left the leader took the loudspeaker from ex-minister Mphanya - he merely took it. After the leader took the loudspeaker he said he agreed with those who said elections should go ahead. Nothing had transpired before the leader said he agreed with those who said elections should be gone with or conducted. A man then stood moving the election to go ahead and he was seconded: at the material time there was nobody on ex-minister Makhakhe's chair.

A woman had raised her hand saying we of Maputsoe constituency No.12 are saying we continue with the report of the Secretary-General and the Treasurer's report. She was seconded and the leader was saying: 'let's hear what you have to say 'm'e (mother). The matter was not put to a vote and the leader remarked: 'I have sent minister Makhakhe to collect tickets so that the election can proceed.'

One man had said: 'we have not agreed on the election we would like reports first.' To which the leader replied: 'my man, sit down the house has resolved that we proceed with the election.' According to the witness, the house had made no such resolution.

The leader having said now we are electing the Elections Committee it was elected; names were being suggested and seconded and the proceedings were conducted by the leader. Mahlakeng, Monyane Moleleki, Lefu Lechesa, Peo Moejane, Shakhane Mokhehle, Thebe Motebang, Moeketsi Senaoana, Maroala Maqelepo, Khotsang Moshoeshoe, Lira Motete and others were elected. He did not know what ex-minister Mphanya was doing during the election though the General Secretary and Treasurer were absent. After the election of the Elections Committee ballot papers arrived with Ramolahloane and ex-minister Makhakhe.

The leader had expressed the view that it looked like not all those in the conference hall were delegates and had consequently ordered that for the house to deal with business it was necessary for the hall to be cleared. The hall was cleared and people moved outside and he had stood on the doorway with Chairman of the Elections Committee Thebe Motebang.

The witness further testified himself and secretary of the Credentials Committee Melato and Chairman of the Electoral Committee were on the stage. He had called individual constituencies and delegates were responding and standing on the stage. The witness and Melato were to count delegates to ensure that they corresponded to the list the witness was holding. People from other constituencies co-operated ensuring that all was in order. Thebe Motebang and Melato were to show the delegates where to sit. He kept on calling in the delegates and as he kept on screening the delegates, the Transvaal delegation

was towards the end. When he came to the Transvaal delegation his list was 94 delegates and it tallied with that of the Secretary-General which he had recorded as 94 delegates. However, the Secretary of the Transvaal queried this saying his delegation was 106 and the witness had pleaded for patience while he consulted with Melato. He had then gone off see the Secretary-General at the headquarters accompanied by the Secretary of the Transvaal and Qoane Pitso - Chairman of the Credentials Committee. There they had found the Secretary-General and his deputy - it was just before lunch. There it had been confirmed that the Transvaal delegation was 94 and they had returned to the conference hall and he found only a section of the Transvaal delegation had entered the hall.

When the witness had inquired from Melato about the position of the Transvaal delegation and the latter had said he had allowed the delegation to enter as he was desirous of elections taking place. The Chairman of the Credentials Committee had, however, ruled that delegates were to use the other door as the hall was full. He had consulted Ramolahloane regarding the Taung delegation and the latter had said it was 13 and the election had proceeded. The Transvaal delegation had also participated and its delegation had been 94 + the ones who entered in his absence amounting in all to 106. The legal representation of the Provinces was 64 comprising the Provincial Committee.

In reply to Mr. Khaone for some of the applicants the witness testified that constituencies are those that are

delimited by government in terms of the country's constitution and constituency committees were built in accordance with the structuring of the constituencies. Members of these committees, i.e. constituency committees were people elected at constituency conferences and branches held conferences by the ration of 1:30 delegation. Members of the committee were: Chairman, Vice-Chairman, Secretary, Vice-Secretary, Treasurer, Publicity Officer, his vice, a member from the constituency, namely: parliamentary candidate in the constituency. Provincial representation had no candidate to the House of Assembly.

Cross-examined by Mr. Pheko for some respondents the witness testified that the B.C.P. existed outside Lesotho in the Republic of South Africa and it was accepted by members of the B.C.P. that the party existed both in Lesotho and in the Republic of South Africa and the witness also subscribed to the reality. He knew the political structure in Lesotho and the R.S.A. and had known for many years that the structure in the R.S.A. was different from that obtaining in Lesotho as for example Provinces did not return parliamentarians to Parliament. Since he left South Africa the retention of branches and constituencies had not changed. He agreed that the Annual Conference is in effect delegation of branches and it was true that the constitution laid down that branches were to be represented at the Annual Conference. He however disagreed that the constitution did not differentiate between branches in Lesotho and in the Republic of South Africa for there were differences. The difference was that S.15 of the B.C.P. constitution, with reference to branches.

stipulated that more than 2.000 resident citizens or villagers which according to elections of 1965 voted together formed a B.C.P. branch. According to the witness, in the R.S.A. there were no branches built to vote together. In the R.S.A. branches had no polling stations whereas there were such polling stations in Lesotho. Polling stations were in terms of a government gazette following delimitation so that in this regard the B.C.P. constitution conflicted with the country's constitution in that in the country branches and constituencies are delimited in accordance with the country's constitution, whereas in the R.S.A. they are made by the party representatives. He was not saying the constitution says there should be no such structures in the R.S.A. - all he was saying is that a party cannot be seen to do anything contrary to the provisions of the national constitution - all he was saying was no law can operate contrary to the national constitution for the law is made to govern conduct of its citizens and not outside its application.

Before Lesotho had own constitution, structures in the R.S.A. were unlawful and even after the present constitutional dispensation they remain unlawful. Structures in the R.S.A. were not consonant with the constitution of the country. According to him, there was no need for constituency or Provincial representation. Fourteen (14) Provincial delegation was standard practice so long as it did not conflict with the national constitution. In his opinion, the practice of admitting fourteen (14) Provincial committee delegation was wrong for the practice was against the spirit of the national constitution.

Establishing branches was alright so long as this was confined to Lesotho.

In the opinion of the witness, the party constitution was out-dated and superseded and brushed with the country's constitution which was modernistic and forward-looking. Because of delimitation, there were at present more branches and constituencies in the country and this could not be said of branches in the R.S.A. for while those in Lesotho sprang from the law, those in the R.S.A. sprouted from nowhere.

The witness says branches established in compounds it was rare to have 2,000 inmates in a compound. He says though previous practice vis-a-vis the provinces was not seriously called into question, it is now being called into question. It was wrong to say if he committed a crime and was not made accountable it meant he had not committed a crime. As for the election it was secret and by ballot. In conferences he had attended before from 1992 they had been by secret ballot. In 1992 they had been given a paper showing names of candidates and offices to be stood for. In the recent election they had been given names only and not names and offices to be stood for. Nobody in the last conference had been compelled to vote. Although some delegates voted, this was not to deprive them of the course they wanted to pursue.

The secretary of Qaqatu had been hijacked and when Lira Adams of Qaqatu was called outside by Thebe Motebang Lira Adams

had said he would only go out as a corpse. There really was nothing anybody could do for the situation was a state of emergency. Even were delegates free, in his view they were operating under extremely tense conditions. When he voted he had not been free. He says voting under threats cannot be said to be free. He says it is not correct to say if delegates were not happy with the conditions they should have refrained from voting or to have walked out for it was important to vote so that later they could testify to what transpired. He says there is nothing wrong in voting and complaining afterwards. He says it is an error if in his affidavit he did not say he wanted to lay a complaint to the Secretary-General regarding the Transvaal delegation.

The issue of the Transvaal delegation had cropped up when the Transvaal delegation was being ushered into the hall and when the Deputy leader was elected. The Chairman of the Elections Committee had announced that the Transvaal and Free State delegations were set aside for over-representation and this was when the deputy leader was elected though when the rest of the National Committee was elected the delegation was allowed to vote. The extra 12 delegates had been allowed by Melato. To his knowledge no people had entered the hall without cards. Delegates had been allowed into the hall except the 12 allowed by Melato. He had confronted Melato and Qoane Pitso about the extra 12 delegates but nothing had come of this. All irregularities had been reported after the conference. He **disagrees the delegation was 1.300 for Melato in his own**



handwriting had given the delegation as 1,281 and adding 15 had amounted to 1,296. This was the delegation reported to the Credentials Committee. Physical head count was 1,296.

He could not say how many branches Taung had because this was within the knowledge of Taung Secretary and the Secretary-General whose figures were to agree. According to him delegates admitted from Taung were 13. Melato had allowed 33 delegates to enter the hall. The extra 20 delegates had been allowed by Melato's misrepresentation for alleging that the General Secretary had approved the extra 20 delegates. The General Secretary had arrived when the election was already proceeding. He agrees ballot papers came with the vice Secretary-General. He also agrees the report of the Credentials Committee was given before the election and when ballot papers had already arrived and being immediately before the election. He does agree ex-minister Mphanva demanded the report be given. He says only 13 of Taung delegates were issued with identification cards. Having seen the Taung constituency report. The witness says he was convinced that 13 delegates were elected at Taung Constituency conference. The matter of Provincial representation was controversial as it was in 1992 that it was raised and had nevertheless not been voted on. He denies the figure for those who opposed Khasu's stand were 3,188. The witness agrees even if the leader did say he agreed with those who said voting was to commence this did not amount to an order. The witness reiterates the leader had said outstanding agenda items were to be set aside and that these were:

- (1) Secretary-General's Report
- (2) Treasurer's Report
- (3) Matters concerning LLA.

The leader had not mentioned items by name. He says he had heard that he was nominated to serve on the National Executive Committee though he failed. He had not objected when his name was suggested in spite of not having been recommended by his constituency. His name was suggested for the post of Assistant Publicity Secretary: he had obtained 477 votes. He could not remember how many votes were cast for him for the post of assistant publicity secretary. He says he does not believe there is this complaint because some people were not elected. Even if he had won he would still have come to court to give evidence. It was true everybody wanted to win though one had to win lawfully.

He had expected to win or lose. He had participated in the election to exercise his democratic right. He says anybody entering a race expects to win or lose.

He says he is not giving evidence because his candidates failed, but because rules and regulations were not followed. He says it was not possible to raise an objection there and then for the situation was not only tense, but in addition there was a coup d'etat and his government of the Credentials Committee had fallen. He says it is wiser to stay put so that later one may later testify. He says the scene in the conference hall was

typical for when a government falls some grieve and others rejoice. The witness says a hijacked man is the wiser to submit himself to his captors and the people who took over security arrangements made him submit to their will.

He says none of the outgoing committees and the incoming one is better in that they were unconstitutionally elected. He says the irregularities cannot be laid on the door of the outgoing committee, for it was not challenged. He says the outgoing National Executive Committee is not responsible for not giving its reports. The National Executive Committee had done nothing to stop the irregularities. In the witnesses view neither Executive Committee was better than the other - whether it was the outgoing one or the incoming one. He says the conference would not have solved the conflict save relying on S.10 of the B.C.P. Constitution which is amendment of the Constitution and in terms of the section proposals are to be placed before the General Secretary two (2) months before the conference; therefore, according to the witness, the conflict could only have been solved if the Executive Committee had placed present problems before the commencement of the Annual General Conference. Conference could only deal with matters placed before it by the National Executive Committee. The leadership conference having failed the only recourse was to court

The witness further testified that he had seen the leader and asked him to solve problems pertaining to some B.C.P. members and had drawn the leader's attention to the need to call

conference of constituency committees to address the situation in line with the leadership conference which was doing disgraceful things. The leader had said he would call the parties to effect reconciliation within the party. He agrees there is a constitutional mechanism for constituencies to call for a Special General Conference.

The witness agrees the constitution contains mechanisms that ought to be followed, but says these had been pocketed. He says the elected committees having pocketed the B.C.P. Constitution, are liable to be sued and in this regard he was referring to the outgoing and incoming committees. The outgoing committee had committed many errors and it was a pity it had not been sued. That at long last there was movement in this regard was because of their (applicants and witnesses's) influence. He was prepared to accept constitutionally elected committees.

The witness says members of the new committee were leaders and certain things which occurred in their presence should have been checkmated by them. He could not say the incoming committee frustrated the outgoing committee. He was satisfied he played his part. In his view, they had failed to do their duty. Every delegate had failed for it was their individual duty to ensure the conference was properly run. He says it is standard practice to elect delegates at constituency level and the number of delegates elected there, was to agree with the list submitted to the Secretary-General.

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Re-examined by Mr. Mda the witness said delegates who have not filled forms cannot be admitted to conference. Completed forms were sent to the Secretary-General on or before 15th November every year and it was his view that late reports were acceptable. The incoming National Executive Committee was in his view unconstitutional in that some of the people who voted were not entitled to do so. The leader of the party was elected, according to the witness, every five (5) years and had, as such, a special position within the party and could not be removed before the expiration of the period aforesaid.

The fourth witness for the applicants was Mrs. Aletta Mateboho Noko who testified that she was a B.C.P. member from 1991. She had been elected to the Women's League between 1991 and 1992. She had attended the 1992 conference as an observer though in 1993. 1995-96 she was a delegate and had participated in the proceedings. She remembered 9th March, 1996 when she had attended conference of the 31st respondent and the last item of the agenda was the General-Secretary's report - it was not short and an uproar had arisen. We had been informed that conference was going to adjourn at 6.30 p.m. by the Chairman. When the report of the Secretary-General was read it was calm but as time went on there was a noise - people were peering through windows and others were saying that voting should proceed and it was suggested because of the noise proceedings were to be halted.

The Chairman had closed the conference at 6.00 p.m.

Outside the gate was locked and people could not go out. Maboutsoe delegates stood aside as they were targets. When eventually gates were opened they had marched out.

On 10th March, 1996 she had once more attended conference. They had been told conference would resume at 7.00 a.m. but it was discovered the previous day's problems had persisted in that the gate they were to enter through was locked and had been referred to another gate where, finally, they went through. On entering they had not been asked to identify themselves as delegates.

On 9th March they had been a little late and the Secretary and other delegates had already been in the hall and they had asked that their identity cards be sent to the gate. On 9th March, 1996 entry had been easy and they had been requested to identify themselves by production of special cards. On the 10th March, 1996 they had not identified themselves as there had been no such requirement.

In the hall the Chairman explained the conference was to have started at 7.00 a.m. but said unfortunately because of the situation at the gate, it seemed secretaries had not arrived and conference could not proceed until the secretaries had arrived. The Chairman was saying the report of the Secretary-General was to be proceeded with and others were saying the Secretary-General is the one who stipulated time and now that he hadn't arrived he could not be waited for. She did not know why the Secretary was

not arriving. She had understood his difficulty but others were impatient saying it was getting late and it was better to elect the ensuing committee. It was at this juncture that the leader arrived. Delegates had paid their respects to the leader by standing and being quiet. Then the N.S.S. (police) wanted to meet members of the National Executive Committee. After a while the leader had gone to the Chairman and the Chairman had handed over his chairmanship to ex-minister Mphanya who was the chairman's deputy. The Chairman gave Mphanya the loudspeaker. Mphanya was enquiring whether anybody knew what had happened to the Secretary and why delegates were interested in proceeding with the election. He said there was difficulty in the Secretary getting in. Nobody had said there was an inquiry at the gate and the Secretary was held up there. As quarrels proceeded the leader took the speaker from Mphanya and said he agreed with those who said the election was to go on. The leader had simply taken the speaker from Mphanya - the leader merely took the speaker from Mphanya and said if the delegates were quiet they would quickly do the job. A proposal that elections go on was seconded. She had raised her hand and at the time the proceedings were chaired by the leader; she had proposed that the secretary's report be read and discussed and by then the Secretary-General was still absent. The leader had suggested she was to say we 'talk about it'. She had made the suggestion because in her view there were certain people who could not be elected to the N.E.C. and if a report was not read they might be elected to the N.E.C. She had pointed out somewhere it was said in the report the public was to contribute M2-00 and this was to



be from men and women who survived by brewing beer and selling apples in the street. The leader had stopped her at the same time inquiring from Mphanya what had happened about the (R2-00) malotis and Mphanya had replied owing to shortage of funds they had asked for the contributions.

The witness says she proceeded to point out that in 1993 a certain gentleman was Treasurer of N.E.C.; this man had not given a good report and a commission had been appointed to look into his affairs and yet regardless this man had been re-elected to the Secretary-General's office all because reports had not been tabled. As representing 500 members of the party, she insisted that the report of the Secretary-General was to be read. The person she was referring to had stood for the election subject-matter of the application. In 1993 the Treasurer was minister Shakhane Mokhehle. She had been seconded by a Mohale's Hoek delegate Ramathebane. There was another proposal to proceed with the election without reading reports and this was also seconded by an angry man whom the leader said was to get done with his tury. The leader then said the election was going to proceed after all, minister Makhakhe had been sent to fetch ballot papers. The proposals had not been voted on.

Moshoesnoe had stood up to ask how it was possible to elect without the General-Secretary's report and the leader had ordered Moshoesnoe to sit down for conference had decided to proceed with the election. Minister Mphanya was seated, doing nothing and the microphone was with the leader using it; the leader further said

whoever raised a hand was to be electing the committee. The leader then accepted nominations from the floor. The witness testified she was not particularly happy with the result of the election in that when the Deputy leader was elected the delegates had been informed there were 200 spoiled papers from the Provincial delegation and that these were excluded from votes cast. This was said by Thebe Motebang Chairman of the Elections Committee - who claimed over representation. According to the witness, the Chairman of the Elections Committee had changed his mind to say there was, after all, no over representation and the votes were to be included in the election of the chairman - the announcement was made by Thebe Motebang. The witness says she had objected to this procedure saying the constitution did not sanction this and Motebang said the leader had ruled the Provincial delegation was in order.

According to the witness, ballot papers to constituencies came through the secretary, who distributed them: in this instance it was the constituency secretary who filled them in - Tsikoane constituency had been sitting next to her and this is what happened. She would have been satisfied with the 1993 procedure by which once the Elections Committee was elected its members (the latter) who distributed ballot papers to delegates and returned them. In some constituencies ballot papers had been filled in for delegates instead of by the delegates themselves. This had not happened in respect of her constituency. The conference had been tense and not at ease.

In reply to Mr. Khauoe she said in the 1996 conference ballot papers had been collected by constituency secretaries. Her secretary had given her a ballot paper and he had not filled in the ballot paper for them as they filled them in themselves. She says she has said in the case of Tsikoane constituency ballot papers were filled in by the secretary and not by delegates unlike in the case of her constituency where delegates themselves filled in the ballot papers.

Cross-examined by Mr. Pheko she repeated Tsikoane secretary filled in ballot papers although she could not say for how many delegates. The secretary filled in forms seated on a bench next to her. The lines in front of her were not filling in ballot papers and she had not seen any of Tsikoane delegates filling in the ballot papers and could not have seen whether or not the secretary gave ballot papers to the delegates. The secretary had not distributed ballot papers to delegates. She says she was concerned with her own business and wasn't paying attention to what others were doing. A Tsikoane female delegate not having a ballot paper herself was anxious to see a booklet in her hands. She had given her her booklet to see. She says she did not know Tsikoane delegate by name. She had with 'Mampho Ranyaole. 'Mamosa Moabi and Neo Mafa discussed the issue. The Tsikoane delegate referred to knew 'Mampho Ranyaole. The Tsikoane delegate had been sitting, when her line was No.3. from the far side and her row was the third while the Tsikoane delegate was on the third row facing the stage and on the right hand side: the Tsikoane lady was in party colours and she could not remember

what she was wearing on her head nor could she say whether she was older or younger than herself though possibly she could have been older. That this Tsikoane secretary was voting for some delegates, was not brought to the attention of the chair: the chairman then was Thebe Motebang. It would have been a waste of time to bring this irregularity to the notice of the chairman. She says if she did not say this in her papers it was inadvertent and could have been caused by a rush for she had mentioned the fact to her lawyer: she had raised her hand and had done so twice previously and she had felt it was worthless pursuing the matter. She says the occurrence had been discussed amongst the Maputsoe delegates as to what Tsikoane had done.

The witness said Maputsoe delegation was made up of chairman: Likhetho Rantjana: Secretary: Liau Rabele: Treasure: Sebotsa Sebotsa and all other delegates. She says by saying the atmosphere was tense she means conference was divided into factions. Maputsoe constituency was a target in that it was labelled a Pressure Group and the latter called those who disagreed with them 'Majela-Thoko' (literally those who don't eat with others) Within Tsikoane constituency there were those who agreed or disagreed with Pressure Group political stance. Because of these divisions the rightwingers were considering themselves to be blue-blooded B.C.P.'s and members of the Pressure Group are looked upon as scum and enemies of the establishment - this accounted for interparty insensate hatred though the Pressure Group had nothing against the Rightwingers.

On 10th March, 1996 she had arrived at the conference premises at about 7.00 a.m.: it could have been between 6.30 a.m. and 7.00 a.m. Going through the gates could have taken her 30 minutes. They had been admitted without identification by people who were empowered to do so. She had not known members of the Credentials Committee though in the end she knew them. She had seen members of the Credentials Committee controlling people in the hall. These were Thabiso Melato, minister Shakhane Mokhehle and Thebe Motebang. They had not been identified they merely said: let Maputsoe pass.

When Maputsoe was called nobody who was not a delegate entered the premises with us. The hall had been cleared on 10th March, 1996 for the leader had said it seemed there were people who were not delegates and it was desirable that people be checked before entering. She says after the hall was cleared they were checked at the gate before entering and this is the time she saw Jack Mopeli - : she changes her mind and says she saw Thabiso Melato inside the premises of the conference hall.

She had seen Jack Mopeli at the conference hall with members of the Elections Committee who were screening delegates. It was not true that ex-minister Mphanya said after the election of the Elections Committee he ordered delegates out. She also denies that the leader said they were to go out. She says she was satisfied with screening on 10th March, 1996 for it was normal.

On 10th March, 1996 the conference had started between 9 -

10 a.m. the leader had arrived just after 10 00 a.m. being 30 - 45 minutes after the conference had started. The Secretary-General was absent and it was not known why he was absent: when the leader arrived there was this riff-raff about whether or not to go on with reports or elect and nobody was able to restore order. Her view is that the leader restored order. Before the leader arrived there had been no proposals. All that happened was people expressing their views as to what was to take place or not to take place - there were no proposals or counter-proposals nor was there any voting on the suggestions. The witness is of the view that the consensus method of voting entailing the ayes and noes does seem to have functioned on this occasion. She is positive this happened because the leader said the outcome was determined by people who made more noise in favour of deferring agenda reports. She testified she remembered somebody saying before the leader arrived that the matter had been dealt with and it was no use going back to it. This was said after she had made a proposal and was seconded. Moshoeshoe of Moknotlong had responded to what a man said before the arrival of the leader, by asking how could there be an election as it was desirable to have the report of the Secretary-General read. She understood Moshoeshoe as denying that there was such a decision.

All that happened, according to the witness, was that the leader had said he agreed with the suggestion that the committee be elected and that time minister Makhakhe had left. On arrival of the leader the house was divided some saying the committee be elected while others were saying they wanted the Secretary-

General to read the report. She could not agree that there was a decision to elect or that minister Makhakhe fetching ballot papers tied up with the fact that there was a decision to elect - for if this is the case then Makhakhe and the leader were in collusion. The witness could not understand how, if there was a decision to hold the election the leader had allowed proposals and counter proposals only to tell the delegates there had been a decision to proceed with the elections, after all. Nobody, according to the witness, said the conference had not made a decision. She could not remember anybody saying it was better to elect the Elections Committee while ballot papers were being awaited nor does she remember whether it was said while ballot papers were being awaited the General-Secretary's report was to be read. She denies the General-Secretary's report was discussed.

When the leader said Makhakhe was to fetch ballot papers he was scolding Makhakhe. The leader did say that he had sent Makhakhe to fetch ballot papers. She denies conference decided what to do after Makhakhe left. The Elections Committee had been elected after Mosnoeshoe had been told to sit down and be silent. It was by the order of the leader that the Elections Committee was elected - it was not conference decision. She had been momentarily confused when it had been suggested to have the General-Secretary's report read and this could well have accounted for her having failed to observe what exactly transpired. She had not seen Mphanva direct deliberations after the leader took over conference proceedings. Nobody had

complained of Mphanya being sectional for he had not directed conference deliberations in any way nor had Mphanya taken the microphone from the leader. She denies Makhakhe was seated. She denies the leader was between Mphanya and Makhakhe. Makhakhe and Mphanya had been sitting on the opposite side of where the Women's league were and denies Mphanya was on the side of the Women's league. Though Makhakhe was not long in conference that day, he had been on Mphanya's left hand side.

When she protested about the Provincial delegation she was on the floor and Thebe Motebang was on the stage - she had been loud. She says she did protest. This is what she had told people who took her statement - : she had read her statement but only now realises it is not what she said but insists the leader instructed conference to do certain things. She had not been in court when evidence was led. She had not been forced to vote and had not gone out of conference hall while it was in session.

Re-examined by Mr. Mda she says there was no reason for anybody to complain that Mphanya was sectional because he did not chair anything. She had done Standard VIII at school. In the B.C.P. if one opposed the leader one was branded Pressure Group or wanting to overthrow the leader. The leader had not threatened anybody. In conference the vice-secretary took minutes but on this occasion everything said was not recorded. On 9th March, 1996 the Secretary-General and his vice had been present. No secretary or vice were chosen on 10th March, 1996. On 9th March, 1996 the Resolutions Committee was elected though



she would not remember names. No resolutions had been taken in terms of the B.C.P. Constitution. She had said the B.C.P. leader was not criticised for if you did so you were branded a traitor or Pressure Group and frowned upon.

The fifth witness for applicants was Gilbert Rathala Ramolahloane who testified that he lived at Thamae's, Maseru. He was a member of Parliament for Boqate No.22 constituency. He had become a member of Parliament after the 1993 elections. He was a member of the B.C.P. and had become a member in 1952 when the B.C.P. had been formed in October, 1952. He claimed to be foundation member of the B.C.P. and was familiar with the structures of the party.

The B.C.P. had external structures: when the party was formed the external structures were there. For the years 1952 - 1971 he had been outside the country. He had played a role in conferences that were held. From 1952 - 59 he was an ordinary member of the party in the Transvaal and in 1960 he had joined branch committees in the Transvaal. Up to 1963 he had attended conferences as an observer. During the period under review Provincial Committees had represented Provinces at annual Conference of the party: the structures had branches but no constituencies. Branches were not represented in Annual Conferences.

In the 1964 - 66 Annual Conference he was a committee member of the Transvaal Province. From 1967 - 71 when he returned home

he was leader of the Transvaal Province. He had attended the 1967 - 69 annual Conference of the party and as leader of the party in the Transvaal had led the Provincial Committee. No conferences had been held except in 1991 when the first conference was held. He had been deported from South Africa because of B.C.P. politics.

In 1991 he had attended the Annual Conference and the external wing of the party was represented by the Provincial Committee and its branches namely: the Transvaal. It was surprising how branches were represented and the issue had been debated. There was a dispute as to this participation. The Chairman was Khauda Khasu and his vice was Phoka Chaolana. The dispute was between Khauda Khasu and Phoka Chaolana on the one hand and the leader of the party on the other. Khasu was arguing branches could not be represented as they were represented by their committees and the leader was saying they should be represented. In those circumstances the conference was expected to make a ruling but had made no ruling. There had been considerable misunderstanding and Khasu, Chaolana and Ramoreboli had left the conference. The conference being divided on the issue was not able to make a decision.

The matter had not been put to a vote and after Khasu and Chaolana left the conference proceeded with its business. He had attended the March, 1996 conference as vice-secretary. The external wing of the party was represented by Provincial Committees and branches. He was responsible for compilation of

representation. The Transvaal was represented by 94 delegates and the Free State 97 delegates; Natal was under represented and had 2 delegates. The representation comprised the Provincial Committees plus branches.

Mopeli as Chairman of the Credentials Committee had approached him about the Transvaal representation of 94 delegates on the last day of the conference. He said it was claimed this was not the right representation for the right figure was 106 according to the Transvaal representation. The issue was resolved for he had ruled the representation was 94 being representation reported to the N.E.C. a week before the General Election. In his records he had 94 delegates. The only query affected the Transvaal there having been no queries regarding the external representation. He had not discussed Taung delegation or anything with Melato except Mopeli nor had he discussed anything with Thebe Motebang. He had discussed the Transvaal delegation with Mopeli and the discussion concerning Taung delegation had come after the conference. Taung delegation was 13 and he had not authorised any additional number. Provinces had not been properly represented for the representation was not in accordance with the B.C.P. constitution. He had allowed the representation because of the sensitivity of the 1991 Annual Conference. The matter was so sensitive that it could have easily split the party. He had broken the rules for the sake of the unity of the party. The right representation was the Provincial Committee. Although he had compiled records he was not in a position to hand them in for they were in party offices

and out of reach. He could not for there were people who had closed offices and were stopping him from having access to the records.

N.E.C. candidates were nominated in accordance with constituency recommendations. The executive committee sent out L.M. 14. Exh. "A" was L.M.14 sent to the constituencies to make recommendations to N.E.C. for election to the Executive Committee and the post thereof. Having received L.M. 14 from constituencies, he had compiled a list of candidates and offices they stood for. A candidate could not be elected to an office not recommended by a constituency. It was unconstitutional for a candidate to be elected to an office not recommended by a constituency. Offices for which candidates stood were reflected in his compiled list.

In answer to Mr. Khauoe the witness further testified where a person had not been recommended for an office by constituencies such a person could not validly stand for an election. V. for example, if recommended to stand as Secretary-General cannot switch positions and be elected as Chairman. If K is recommended as a candidate for N.E.C. he cannot be a member of the Elections Committee for this is irregular. In all the conferences he had attended, it had never happened for a person to be elected to a position for which he was not recommended. A man nominated as candidate to the N.E.C. has never served on the Elections Committee.

The leader of the party was not, ipso facto, as leader of the party, chairman of conferences.

The leader had a role to play at conference which was to open conference with a speech which is debated. Other than this there was nothing else. After his speech the leader is a delegate and can participate in proceedings of conference like any other delegate. If the conference goes out of hand he was entitled to address the situation like any other delegate. He can say or do what he likes but as an ordinary delegate. If there is absolute chaos as happened in the 1991 conference he can take over proceedings for in the event there would be neither chairman or his vice. Having calmed a rowdy conference the leader is expected to hand over proceedings to proper officials. One is expected to object if a leader acts unprocedurally. As a delegate he would take anything a leader says as an order or instruction as it is what is expected of delegates. A conference misdirects itself if it follows the leader's order. There was nothing in conflict for the earlier question was an assumption: a delegate who blindly followed the leaders order was not bona fide. He was saying this because delegates are supposed to know the constitution and structures of the party, for those who attend these conferences profess to know the party structures and constitution.

He had said while he was in the R.S.A. there were no constituencies except in 1991. He admitted there could be no provinces without constituencies. That a committee could be

formed by 3 constituencies was from 1968. For from 1967 there were no external constituencies. In Lesotho the structure of the party aligned itself with 9 districts. Up to 1991 there were no constituencies but districts in the R.S.A. He did not know when constituencies were established in the Republic. From 1970 - 91 there had been no conferences. In 1991 conference had been attended by provincial delegation per an amended constitution. There was dispute in the 1991 conference for the conference was dealing with a new matter. He says there was nothing odd for the conference not to have rectified the situation for the matter was so sensitive it could easily split the party. According to the witness, successive conferences had been rubber stamping unconstitutional committees of the B.C.P. The witness denies 3.388 votes were cast in favour of the provincial delegation. He disagrees even if this was the total number of delegates, the vote was overwhelmingly in favour of provincial delegation as at the 1996 conference. The witness says it was not only the provincial delegation that has remained unresolved, but that there are other issues which have not been resolved. He says when he spoke of the 94 Transvaal delegation he had included the 15 members of the Provincial Committee. He nevertheless agreed 15 + 91 was 106.

The witness had expected 1.255 delegates and the Credentials and Elections Committees knew how many delegates had attended conference. He says Provincial delegation is not a matter of interpretation but what the constitution says. Much as there were constituencies in the country there were also constituencies

in the Republic of South Africa for the administration of the party.

After the closure of the Annual Conference the outgoing committee ceased to function. It was not after the election of the Election Committee that the National Executive Committee ceased to exist though after the election of the Elections Committee the chairman handed over to the Chairman of the Elections Committee and the National Chairman ceased to conduct affairs of conference. At the end of the election the Chairman of Elections Committee hands over to the new National Chairman and the next step is for the outgoing committee to hand over to the incoming committee. He agrees on the election of the Chairman of the Elections Committee the old committee effectively ceases to function. His committee was still functioning following the order of court.

According to the witness, where there is a dispute as to delegation the disputants should have come to him as he has records of the delegation to confirm or reject the dispute. The Credentials Committee had the record which had come from him.

He says the secretary of Taung had not said there were 33 branches and these could not be represented for there were 13 branches at Taung constituency. He says he knows of skeletons though they must be circulated prior or during conference and so long as they are recommendations from constituencies. He denies people are elected according to skeletons. Skeletons could be

used but were to be used in accordance with computation received from L.M.14 and were not to differ from L.M.14. He says while he was recommended for deputy propagandist, he was elected member of the National Executive Committee and did not know if this happened to any other candidate. He agrees his was an exceptional case. Spoiled votes were announced to conference.

He says the chairman had warned him that he had been elected to an office to which he was not recommended and he did this as a warning for others not to be voted for outside office for which they were recommended. L.M.14 was filled by constituency secretaries though not all constituencies filled it. It was, however, wrong to say the form was new and had not been in use. The form L.M.14 was to be sent to his office before 15th November if a conference is held in December. Without the form he could not know how to act and would be lost. He says he is emphatic that it has never happened for a candidate to be a member of the Elections Committee at the same time though he would not dispute this had happened before.

Re-examined by Mr. Mda.

Before a person attended conference, there were procedural steps to be followed amongst which a form of delegation was filled in. A person who has not filled this form may not attend conference. He had received 10 delegation forms from Taung and not 30 forms. It was unconstitutional for a candidate to the National Executive Committee to also serve on the Elections Committee. Failure to object to what the leader said could have



been induced by fear.

Questioned by the court the witness says he arrived at conference hall on 10th March, 1996 between 4.00 - 5.00 p.m. He was late attending because he was not well. He could not say when the General-Secretary got to the conference hall. Delegates were given tickets pinned to their jackets and had been issued by him to the Credentials Committee. He had issued 94 badges to the Transvaal delegation. Delegates were screened on entering the gate and conference hall and were screened by security. The Credentials Committee had done this. The administration of party participation in the Provinces was the same as in the country though in the Provinces there existed a Provincial Committee not found in Lesotho composed of 15 members. In Lesotho at branch level the committee consisted of 11 members whereas at constituency level it was 7+ an elected member of Parliament.

Applicants had then closed their case.

The first witness for respondents was Thabiso Mela<sup>o</sup> who testified he was a member of the National Assembly representing Waama constituency of the B.C.P. He had attended conference which brought them to court and he was a member of the Credentials Committee. There were 8 of them and he was secretary while the others were Jack Mopeli, Nchochoba and Pitso Qooane who was chairman. On 10th March, 1996 he had arrived at conference premises between the hours of 6.00 a.m. and 7.00 a.m. and at the

main gate there had been people. He had been denied entry until after 7.00 a.m. towards 8.00 a.m. When he got in he was followed by ex-ministers Makhakhe and Mphanya who were Chairman and vice respectively. The security refusing him entry were the same men who had manned the gate the previous day and men who had been assigned duty by his committee. There had been no people in the hall. He had made inquiries as Jack Mopeli hadn't arrived either.

Mphanya had said as a member of the Credentials Committee the witness had to see what to do and the witness had said he would rather he took instructions from the Chairman and his vice. On their advise he had secured the assistance of Letele of Thupa-Kubu, Taka of Sea-Point and Thebe Motebang of Khafung. The duty of the men was to screen delegates by their appearance and badges or tickets at the main gate. They were to come in single row displaying their constituency tickets. They were to be led by their constituency secretaries but this had not happened. He had then told the delegation the 3 men would allow them in and waited to ensure that they did not pass into the hall. Jack Mopeli had then arrived at about 9.00 - 10.00 a.m. They had agreed the witness was to call constituencies and to ensure the number agreed with that with Jack Mopeli. Once a constituency was called out delegates would then follow each other into the hall. Delegates had been screened twice by himself and Jack Mopeli and the process had ended between 10.00 - 10.30 a.m.

The conference had then commenced business. It was not true

there was security at the gate nor were people erratically moving into the hall. The conference had started at 11.00 a.m. Because of the non-arrival of the Secretary-General delegates were impatient and some were saying elections be proceeded with and reports read later if there was time and others were saying the Secretary-General has to be waited for. A vote had been taken on the proposals and more than 1.000 votes were cast. The leader had left for lunch and the vice-chairman said the election was to proceed with the election of the Elections Committee. The election had been conducted by the vice-chairman ex-minister Mphanya. It was said there being something wrong with the delegation the hall was to clear. According to the witness, the delegation was not right if non-delegates had entered the hall but, according to the witness, this was not the case.

While delegates were outside he had been given a microphone to call back delegates constituency by constituency and he had given Jack Mopeli a list of the constituencies compiled by the Credentials Committee. The secretary of each constituency had said what number of delegates came from his constituency under the direction of N.E.C. His committee has seen the list as prepared by N.E.C. theirs was merely to satisfy themselves that the lists submitted were correct and lists were the same throughout. Jack Mopeli and other committee members were to check delegates against the list for admission into the hall. His list had shown 106 delegates from the Transvaal. There had been a query to the effect that delegates had been left out being members of the Transvaal executive Committee. He had referred

the matter for resolution to Jack Mopeli in consultation with the Secretary-General and 106 delegates had entered the hall. He had been given the number 106 by the Transvaal Secretary and N.E.C.

The issue of 94 delegates had arisen at the B.C.P. offices but the number had been rectified by Ramolahloane to read 106.

It was not true Mopeli had queried the 33 Taung delegation or informed him of this. The Taung M.P. had played no part regarding Taung delegation for he was not a member of the Credentials Committee. To his knowledge the registered Taung delegation was 33. During the election there had been a query about the Transvaal and Free State delegation it being claimed there was over-representation. After the election of the Deputy President, Chairman of the Elections Committee had said, as it seemed the Transvaal and Free State were over-represented, it had been decided to nullify these votes. After the Transvaal delegation raised an objection the Chairman of the Elections Committee had made announcement to the effect that it had been a mistake to exclude the Transvaal and Free State votes when the Deputy President was elected. The correct delegation for the Transvaal was 106 and 97 for the Free State though only 91 delegates for the Free State had turned up.

The witness further testified he had been a member of the B.C.P. from 1954. He had attended the 1992 conference after a lapse of a number of years owing to political instability in the country. An objection had arisen in the conference to the effect that the Transvaal and Free State could only be represented by

their Provincial Committees and a vote had been taken to resolve the objection. Since this conference there had been no query regarding the Provincial delegation.

He says being a candidate to the Executive Committee is no restriction being elected to the Elections Committee. He says all members of the Elections Committee have to satisfy themselves that votes cast for a candidate are correct making it impossible for a member of the Elections Committee to cheat. He says he had voted for candidates of his choice by writing their names on the ballot paper and in all the conferences he had attended this was the only method of voting.

Cross-examined by Mda the witness said votes for the Transvaal and Free State were excluded when the deputy leader was elected and included when other office-bearers were elected. He says he does not know whether the election of the deputy leader was irregular. He says the Transvaal delegation had reported itself to his committee on the Friday and his committee had compiled a list of delegates by collating information from the constituency secretary's reports and the General-Secretary's report. He says the query regarding the Transvaal had arisen on 10th March, 1996 and not on 8th March, 1996. That the Transvaal delegation was excessive he had obtained the information from Jack Mopeli. He says he doesn't know how the query was resolved. The witness says the query arose because the Transvaal wanted to add 14 more delegates to make it 120.

He says he is conversant with the structures of the party and that pursuant thereof every delegate is to fill form of delegation with his own hand (vide S.18 and 21 (d) of the constitution) and that in conference deliberations the constitution must be followed. He says as to representation the Deputy Secretary-General's knowledge was primary, while his knowledge was secondary. He says he cannot deny the Secretary-General had received 13 forms from Taung though he denies Taung was issued with 13 identification cards. He says he had never discussed Taung delegation with Mopeli or that he misled Mopeli into accepting 33 delegates instead of 13 delegates. He denies he changed the delegation of 13 into 33 in his own hand.

He says he had held no portfolios between 1970 and 1991 for, after all, the party was non-existent. He says he does not know whether the question of Provincial delegation was settled in 1992 for he was not in the National Executive Committee. In another breath he insists there was such a resolution.

He says at the gate the situation was not tense though the security at the gate had said they would not open for him for these were their instructions not to open. He knew neither the names of the security men or identified them as faces were unfamiliar. He agrees on 9th March, 1996 conference was to close at 6.30 p.m. but closed earlier at 6.00 p.m., in spite of the fact that it was pressed for time. The conference had been closed by the deputy leader and no explanation had been given for its closure. Pressed he says the conference was closed by the

chairman Makhakhe. He says security at the gates was in place from the 8th - 10th March, 1996 and received no report of any changes there at the gate. He says it is possible he could have forgotten some occurrences for conference had taken place a long time now. He agrees after the closure of conference people at the gate had prevented delegates from going out. He says they were all surprised why delegates were prevented from leaving the premises.

He says that Mopeli was harassed at the gate he finds this funny for in his case there were reasons for stopping him. He says the leader being democratic is challengeable and that he has to consult the N.E.C. and cabinet for any policy decisions. He says the leader did say the nation was to turn their backs on ex-ministers Chobela, Makhakhe, Mphanya and Toloane; he says it could not be said that they were not given chance to defend themselves for they were holding pitsos all over the country.

Cross-examined by Mr. Khauoe, he says he did say before 1992 he was not aware of Provincial Structures. To him a constituency and parliamentary candidate was one and the same thing. A parliamentarian was ex-officio of the constituency committee. There were no structural differences in the R.S.A. and Lesotho. He says unless there is a law to the contrary there is nothing preventing a candidate to N.E.C. to be an electoral-officer. A candidates eligibility was dependant on having served on the constituency committee for 36 months or served diplomatically for 36 months. A candidate could not be elected to N.E.C. without

having served on the constituency committee for the requisite period.

Re-examined by Mr. Pheko the witness says he agrees there were a number of irregularities. According to party practice, in the event of an unprocedural slip which is unconstitutional delegates are expected to raise objections in conference.

Questioned by the court the witness says he identified some of the security at the gate on 8th March, 1996. In looking at them he did not know their names.

The second witness for respondents Thebe Motebang testified he was a member of the B.C.P. from 1962. He had attended Annual Conferences from 1962 until the 1970 state of emergency. He had also attended conference subject-matter of the proceedings where he was elected Chairman of Party conferences. He says S.20 of the constitution says the leader is Chairman of the Executive Committee - hence why there is Chairman of Party conferences.

In conferences he had attended Provinces had been represented by Provincial delegation from constituencies made up of branches. The delegation was accompanied by Provincial Committee members. The reason Khasu and Chaolana had left was because they had been away for a long time, had turned against those in the R.S.A. and pretended they had walked away from the B.C.P. when, in fact, things did not favour them. He was member of the Credentials Committee in 1992. Khasu and co. were saying



provinces could not be represented except by their provincial committees. This was a plot to weaken Provincial delegation. 3668 delegates had approved provincial delegation and in making this decision had relied on the practice and policy of the party for years on end. 12 people counted and 2 gave figures: the enumerators were Monyane Moleleki and Molapo Qhobela. Molapo Qhobela was then deputy leader in 1992 as in 1995. It was not surprising for people to complain against party decisions. After 1992 there was never a complaint about provinces except now that an election has been lost. There had never been a suggestion that Provinces be represented by their committees only. He had been a member of the National Executive Committee for the period 1992 - 1993.

In the B.C.P. executive members were not invited to do certain things, but did what they had to do during conferences. The N.E.C. did not invite people other than delegates. He was member and Chairman of Elections Committee. Ramolahloane never said he had invited certain people. After he was elected to the Elections Committee elections had commenced. He had received no report that certain people from the provinces were not to be in conference, nor was it said provinces were to be represented by their committees. There had been a report by one of the Elections Committee member namely Mahlakeng that it was said the Transvaal representation was 91 and not 96 according to the reports. He had based his figure on head count of the provincial delegation. It was then that the Free State and Transvaal delegation was set aside and he had published this during the

election of the deputy leader. Following a complaint lodged by the Transvaal, it had been agreed the right delegation was 106. As nobody queried the results of the Deputy leadership Transvaal and Free State votes had not been added. He says members of the Elections Committee all knew the Free State and Transvaal votes were all for minister Mosisili though there was no publication to the effect. Publication would not have affected the result for in any event Mosisili had won. He says after the election of the Elections Committee the vice chairman of conferences said the entire delegation was to leave the hall. According to the witness, it was customary for the chairman or vice chairman to order delegates out.

He says the leader arrived at between 11.00 - 12.00 noon while he had arrived at 6.30 a.m. When the leader arrived conference had started though there was a noise. Conference had been going on for 1 - 1 1/2 hours when the leader arrived on 10th March, 1996. Conference was to have started at 7.00 a.m. and according to the programme the National Executive Committee was to be elected. On 9th March, 1996 it had been decided to continue with the Secretary-General's report at 7.00 a.m. because the Secretary-General had not read his report through. The Secretary-General had been present when the announcement was made by Chairman of conferences. When the conference started between 10.00 - 11.00 a.m. not only the Secretary-General, but his vice and treasurer were absent. Before the leader arrived on 10th March, 1996 nothing had transpired except arguments for some delegates were saying now that the Secretary-General and his vice

were absent it was better to go ahead with elections and the vice-chairman was objecting saying conference was to wait maybe the Secretary-General was on his way. Conference was protesting saying the Chairman was to take over Chairmanship as Mphanya was rude. Mphanya had chided delegates saying it was not self-help projects in conference. Minister Shakhane Mokhehle had appealed to the Chairman to take over chairmanship as Mphanya was rude and abusive. The minister never said Mphanya was talking nonsense. Ex-minister Makhakhe had seized the loudspeaker saying nothing.

A message had been published that the V.S.S. wished to meet the N.E.C. Members of N.E.C. were few then. A loud noise had erupted and just then the leader arrived and set between the Chairman and vice Chairman. The leader and ex-minister Makhakhe had conferred and as a result the ex-minister had given the leader the microphone. The leader had not snatched the microphone from the minister Mphanya.

The leader had then called conference to order saying if they were silent work would be done sooner, after all, some of them came from afar. The noise had subsided considerably. It was not true the leader said he agreed with those who said the V.E.C. should be elected. It was malicious propaganda to say the leader had said certain agenda items were to be set aside and the election proceeded with. A suggestion had been made that elections be proceeded with without reports. It was said reports would be gone into after the election, the reason being some delegates were returning to work and were anxious to elect before

returning. A suggestion and a counter one had been seconded and voting had taken place. Those in favour of proceeding with the election were over 1.000 and those who objected were 65. The Election Committee having been elected the hall was cleared by vice Chairman of conferences. It was not true the leader had chaired conference deliberations. The leader had not participated in the conduct of the conference in any way.

When he arrived at the gate there was a throng at the main gate at 6.30 a.m. He says at the gate there were people like those allowing people to enter but delegates were not entering yet and this was the reason people were gathered there. The gate, according to him, was manned. When he asked why people were not entering the reply had been it was not yet time and in due course delegates would enter. At 7.00 a.m. he was still at the gate and Melato arrived but he was not allowed to get in until ex-ministers Makhakhe and Mphanya had arrived. Melato then asked for assistance to help usher in delegates. After the security searched them they had proceeded with their work and it was then about 8.00 or past 8.00 a.m. He says they had agreed with Melato that the men manning the gate were the ones to let people through for, as he says, they did not want to interfere with people coming in and out.

People who were able to identify themselves were searched by security. Delegates went to the right hand side of the gate and not directly into the hall. Those who entered through the gate did so as delegates only. There was a throng at the gate

and the possibility of requesting people to enter according to constituencies was ruled out owing to the huge concourse that had gathered at the gate. It was untrue to say after ex-minister Makhakhe entered people surged in erratically. He says it is unfortunate the court had been told on 10th March, 1996 the conference was hijacked. He says there was no hijacking for himself and minister Shakhane Mokhehle were asked for assistance by Melato, as his committee members had not arrived. When delegates went to the conference hall it was Jack Mopeli and Thabiso Melato and when Melato's committee were arrived they had played no role at all. Delegates had been given tickets and in proposing names they raised these and the Chairman would then call out a number. He had objected against this method, after all, the method used had not been by resolution of conference. His objection had however not been seconded. The only complaint was that the Deputy Chairman was paying attention to a particular section of the delegates. There was no specific number of election committee members to be elected for the number depends on the size of the conference and in this case 21 members of the Elections Committee had been elected.

Before elections started, ex-minister Makhakhe delegated powers of the Executive Committee to the Elections Committee. Powers of the Executive Committee were ending and Makhakhe had to hand over to the Elections Committee and this, according to the witness, was practice of the party over the years. He says to have been dubbed something like 'mats'olo-a-ikeketsetse' (self-help projects) belittled such an august gathering.

Nonsense did not, to him, import hostility. He says it cannot be said that the conference was so tense that it did not allow some people to exercise their democratic rights. The atmosphere in conference could not have made anybody feel bitter. It was those who were losing the election that left the conference hall. Songs sung in conference were melodious songs in tune with the atmosphere in the hall. No serious songs were sung signifying national danger. Delegates had not voted as if they were tense or afraid. None of his committee or for that matter delegates had drawn his attention to the tense atmosphere in the hall. He says the allegation of the atmosphere being tense in the hall arises for the first time in court. He says he did not see any people in grey blankets. He says he made an announcement about the Women and Youth league which each had 9 delegates instead of 6. He says the Youth who supported ex-minister Makhakhe had argued with him about this representation. The N.E.C. did not help for its powers had expired and the Credentials Committee had also been unhelpful and it had been said the delegation be not disturbed and he had made an announcement to this effect. He says the conference had accepted the wrong delegation.

He says it was not the first time that the Youth and Women were represented in this manner and that where such a slip occurred in terms of the practice and procedure of the party and unprocedural slip has been accepted. Sometimes such a slip is dismissed, or straightened or rectified.

He says it is B.C.P. practice for matters which crop in

conference to be raised there, discussed and resolved. He says it is only suggestions affecting the constitution that are made before conference and circulated to members a month before the conference and any other problems that can crop up in conference are resolved in the particular conference.

S.10 (b) about changes to the constitution, proposals are sent 2 months in advance to the Secretary-General before conference sits. Khasu's affair in 1992 had cropped up during conference and had been discussed and resolved. When matters of the kind arose, conference had always lived to expectations and resolved matters. There was a big gulf in the ranks of the B.C.P. and whether it can be breached was quite a task for people who lost the election on 10 March, 1996 called themselves leaders of the B.C.P. and yet their leadership ceased on 10th March, 1996. The situation had prevailed during the conference but was worse now. It was a terrible mistake to have come to court for it was in this court that the leader of the party had been called all sorts of names. The problem before court was a political and not a judicial one and could not be solved by a court of law. Where courts interfered in purely political matters the situation was worsened as was happening. Political organs were capable of solving their own problems and where courts tried to solve these problems such solutions would not be kindly taken to for they would always be the complaint that, it was not our decision but courts decision. A court could not deprive a political party of its inherent powers. He suggested matter return whence it came for solution.

There was no prohibition to one being a candidate to N.E.C. and being elected to the Elections Committee at the same time. after all. the constitution did not prohibit this. Counting was done openly and members of the Elections Committee have to satisfy themselves that counting is proper. B.C.P. candidates to the N.E.C. are recommended by their respective constituencies. the criteria was whether a candidate is qualified though the constitution says a person can only be elected to the post to which he is recommended.

He says if people were elected only to proposed offices this would blight ballot secrecy. He says all that was required and was in tune with the constitution. was to recommend names and not offices for recommendation of office was derived more from practice than the constitution. He says the conference is at large to depart from recommended offices so long as the candidate qualifies. He says he had attended the 1992 Annual General Conference and it was not true that Ramonrahloane had lost his votes because he had stood for an office other than that recommended by his constituency. He says he had been elected vice Publicity Secretary although his name had appeared as running for Publicity Secretary.

According to the witness. it does happen that in conference there are important people who had not been recommended but is now advisable to elect them: according to him. it would be wrong for such people to be ignored simply because they had not been recommended by their constituencies. No complaint had come to



his committee concerning Taung and he heard of the complaint for the first time in court papers.

In 1962 there were no constituencies in the R.S.A. like in Lesotho where there were branches only. 1966 saw the birth of constituencies: before then branches were responsible to District Committees and in the R.S.A. to Provinces. Provinces were formed by branches. In terms of the constitution Provinces have committees. He was not sure whether the constitution provided for 15 Provincial Committee members. According to the constitution, the Provincial Committee was responsible to the National Executive Committee.

Cross-examined by Mr. Mda the witness said the decision to leave out votes cast when the Deputy leader was elected, was made by the Elections Committee. He says despite the exclusion, it didn't mean that delegates from the Free State and Transvaal were disqualified, for all that was said was the Provinces had been over-represented. He admits the setting aside of the votes had affected the result of the election of the Deputy leader. He denies votes in this regard were null and void. He says he cannot deny that Ramolahloane was responsible for preparation of conference documentation and cannot deny that Ramolahloane was given 13 delegates from Taung though he denies delegates from the Transvaal were 94 for he had been given the number 100.

Witness now says he cannot say that Melato did not say what is said in court. Actually Melato was wrong when he said he

the witness had met Ramolahloane. He says the Central Committee was not always correct. The Credentials Committee did not have to rely on Central Committee reports only as it was not limited by them for delegation emanated from the constituencies. This happens when the N.E.C. and delegates differ. He says he is challenging applicants in having brought matter to court, for the conference could have resolved the complaints. There was nothing stopping applicants from lodging their complaints with conference. He disagrees the Annual Conference was a judge in its own cause and says this is being said because Pressure Group is losing out. He says applicants could only have come to this court if they had exhausted internal remedies. He says he cannot agree that the impartial forum is this court because it has no interest. It was not true some delegates were denied their fundamental right of association and participation. He says he does not know the High Court is the custodian of the constitution. He says this is not the right forum to determine the issues in favour of, for example, Moshoesnoe, who is Pressure Group. He says bringing political cases to court is misuse of courts process. He says since the abolition of district committees, the internal wing has had more representation than the external wing.

He agrees conference was unruly before the leader made an appeal and that after his appeal the noise had abated. When people were many and not satisfied, it is understandable why they are noisy. It was to be expected such unruly behaviour would occur if leaders did not lead well. He says there are no

individual rights for rights belong to the conference. Resolutions if tabled might have been useful.

While he could not claim to know the essentials of democracy he was nevertheless a democrat. If the party fails to address grievances an aggrieved party was entitled to go to court.

Cross-examined by Mr. Khauoe he says there is a clause in the constitution for exhaustion of remedies and not such a clause is the Annual Conference. According to the constitution members were sued and suspended. He says in terms of the constitution nobody can be expelled without being charged and if the clause was not included in the constitution it could be a case of bad draughtsmanship. The green booklet was not registered with the Law Office for the only registered document was the white paper.

It was not true during the last conference the green booklet had been followed. When he had placed the matter of the Youth and Women's League to the delegates, conference was silent and he had taken this to amount to consent. He had done St. VI at school. He says the conference had consented to the extra delegation of the Youth and Women's League by its silence: the constitution had not been amended to this effect.

Regarding S.10 of the Constitution, he says he agrees the operative sub-sections of the constitution are (a) (b) and (k) with operative words 'retola' (change) and 'enela ka thoko' (set aside). Such amendments were not done before the annual

Conference set but during the Annual Conference and this had been the practice for years as enshrined in the constitution. The 'benela ka thoko' (set aside) appeared in the constitution but this had not been practice for years. The General-Secretary could never prophesy a situation and hence why amendments were made during the conference. The General-Secretary did not present reports and resolutions to the Annual Conference. Where a constitution was going to be amended, the suggestions to the effect were to reach the General-Secretary before conference. Resolutions were not from constituencies alone, but also from individual members.

The witness says S.14 contemplates recommendations from constituencies to amend the constitution and that in this regard the N.E.C. has to be informed, so that it may inform constituencies. Constituencies could not amend the constitution by resolution. Such recommendations by constituencies or individuals could be submitted to the N.E.C. and it was these that are forwarded to the General-Secretary to reach the Annual Conference before sitting.

He says S.14 of the Constitution referred to suggestions from constituencies to the Annual Conference. Resolutions of constituencies were only internal. He says at conference the resolutions committee was elected and it was after the election of this committee that resolutions were made. He says no clause in the constitution can inhibit the progress or decisions of conference. He says to say the Annual Conference could not

before the conference but could be amplified by constituency delegates. He says the list of delegates could not be amended. Lists were to reach the N.E.C. before 15 November: there was, however, no hard and fast rules regarding the deadline. He says he had read Dr. Ntsu Mokhehle's affidavit. He says the Credentials Committee is not a creature of the N.E.C. but an arm of conference. That though the Women and Youth League were over-represented he agrees they participated in conference regardless. He says conference was right to allow excessive Women and Youth delegation for the law was made for man and not man for the law. He says the law is not above man. He says he agrees parliamentarians are not above the constitution. He says suggestions from constituencies need not necessarily be supported by delegates from which they emanate and delegates are free to vote for or against them. He says there were no grey-blanketed people in steel hats in the hall nor were there such disturbances in the hall. He says Moshoeshoe is a rebel from LLA and believed he was trying to get a dig at him (the witness) as he (the witness) had criticised Moshoeshoe for his rebellious exploits.

The witness says he knows rebels and not bogeymen. He says he was LLA but did not belong to the rebel group. He says his regiment never had anything to do with rebels.

The General-Secretary Kolisang had given a draft report to the delegates, saying what problems the N.E.C. had encountered. He says he does not agree the outgoing committee was called 'Pressure Group': it was them who called themselves 'Pressure

Group.' Mr. Kolisang had said in his report the committee was given the name 'Pressure Group' to ostracize them. He agrees these complaints should have been tabled and discussed in conference. They had been placed before conference and not discussed.

Re-examined by Mr. Pheko the witness said concerning matters not debated in conference. owing to time factor. it was customary for the incoming committee to call a special conference to complete outstanding business. This had happened on several occasions as in 1966 onwards. Minutes were taken which would show incomplete business from a previous conference. The conference would then discuss matters arising from the conference. It was wrong for a delegate to say he was denied his constitutional right because there is always an avenue for their discussion and resolution. He says a man acting otherwise than as outlined above. would be acting against the interests of the B.C.P. He says it is stretching matters too far to say if business is not finished in one conference. that renders the conference unconstitutional for the conferences he had attended. where business was not completed. this had not been held against the conference because it is known what procedure to follow.

The constitution did not spell out what party practice was. He says when it was said the Women and Youth league were to vote over-represented as they were. he had understood this to mean that provisions of the constitution were set aside. He says if a problem is posed and the majority agree. he takes it as agreed.

If the majority were against he would not have followed it. He says there was no set pattern of how resolutions were passed or not passed.

He says conference can vote by secret ballot or show of hands. Where a proposal is not opposed, it is taken as carried. This method of voting had been applied in the case of Women and the Youth league.

Respondents had then closed their case.

In their address counsels for applicants 1, 2, 3, 4, 5, 6 and 7 concentrated on a number of issues and so was the answer from counsel for respondents 2, 3, 5, 6, 7, 9, 10, 11, 14 and 23. The issues raised and the answer thereof are important and I intend, as far as is possible, to deal with them seriatim.

It was conceded on behalf of applicants that the decision to shelve or suspend temporarily reports and to proceed with the election was by resolution of conference but argued conference had over-stepped its limits for it oppressed the rights of the minorities: that in allowing over-representation of the Women and Youth League the Elections Committee had over-stepped its mark for only conference could do so by resolution and provided the relevant section of the constitution of the 31st respondent was amended:

It was further argued that Section 8(b) and (e) read with

it (c) laid down that Provincial representation at the Annual Conference could only be by the Provincial Committee.

As the B.C.P. Constitution did not say what a constituency is, its construction was to be with reference to the Lesotho's constitution, a construction which tied up with Dr. Nts'u Moknenle's understanding of a constituency.

If there was a resolution allowing present Provincial delegation the constitution would have been amended in this regard and if there were such an amendment the 31st respondent having been registered under the Society's Act, 1966 there would be proof of such a resolution in the Law Office. Having regard to the doctrine of severability the advocacy of the external wing as apart from the internal wing did not fit into the overall structure of the party and this was the reason this external wing was cause of so much quibbling and woes of the 31st respondent.

There was credible and prima facie evidence before court that Taung had accredited 13 delegates to the Annual General Conference of 8th March, 1996.

It was in addition submitted that any reference to acts flowing from the practice of the 31st respondent were ultra vires of the party's constitution for practice held good only where there were no constitutional provisions.

The Election Committee had no right to act on its own as its



powers flowed from the conference which elected it. Further, that deferred agenda items should have been recalled or conference informed of their reason for not recalling them for discussion and at worst conference should have been informed of when they would be discussed. It was not even clear who, if the deferred agenda items were to be recalled would recall them for it was claimed the National Executive Committees powers ended when the Elections Committee was elected and powers of the latter after conference disposed of its business.

Behaviour at conference was riotous and intimidatory enough to have rendered conference and its deliberation null and void.

Members of the outgoing committee were prejudiced in that reports were not read.

Non-delegates had participated in conference proceedings. It was also argued respondents No.1 and 13 did not qualify to stand for election into the National Executive Committee.

As candidates had been elected to serve on the Elections Committee, this was a case of one being a judge in one's own cause.

There was no secret ballot.

"Lekala" and 'sechaba' as found in sections 16 and 17 of the constitution were key words and it followed that there being no 'sechaba' in the Republic of South Africa there could consequently be no 'Lekala' and hence constituency.

The Elections Committee acted outside its powers to have set aside 197 Provincial votes when the deputy leader was elected and to have re-instated the votes when other office-bearers were elected. This, according to counsel for applicants, smacked of discrimination, selective morality and double - standards enough to set aside the entire electoral process.

To these submissions Mr. Pheko for respondents 2, 3, 5, 6, 7, 10, 12, 14 and 23 had answered that

The application had been brought ex-parte requiring uttermost fair amounting to uberrima fides. There had been no full disclosure and as in part the application was in the form of an interdict and applicants hadn't alleged a clear right nor had they asserted that they had no other remedy save proceeding as herein or that they would suffer irreparable harm on this ground alone the rule was to be discharged with costs.

According to Mr. Pheko, rights of the individual were subservient to those of the organ. (in this case the party which an individual had submitted his will to).

Applicants had laid no foundation for the allegations and tended to make a new case as facts from the respondents emerged. Applicants were accordingly guilty of snatching the judgment.

Even where non-delegates attended the conference, it was wrong to say they vitiated the proceedings to an extent where

they had to be set aside.

It was not that the conference was rowdy, but that respondents were embittered by losing the election.

Respondents had not said why the Secretary-General read the report the first day and failed to pitch up as expected the following day.

There was good reason for Thebe Motebang and minister Shakhane Mokhehle to have acted as they did and it could not be said they usurped the powers of the Credentials Committee. Counsel says although the result was not published when 197 Provincial votes were set aside, minister Mosisile had nevertheless obtained more votes and Election officers knew this plus how the Provinces had voted. He says where business of a society is not concluded it is automatically postponed to the next sitting. Counsel further says, there was no ploy to irrevocably suspend the agenda items for constituencies could always convene a special meeting.

Ex-minister Qhobela who was candidate for the deputy leader never complained about the process set in motion by the chairman Thebe Motebang and applicants were estopped from raising the issue.

On the question of the Elections Committee and the allegation of their being judges in own cause, this was not part

of applicants case when the order was granted. Although this particular aspect had been referred to evidence it was competent for a candidate to be also a Returning Officer.

Skeletons other than the requirement for a candidate to be nominated by his constituency for a particular post was the order of the day. So called violated rights being in the nature of personal rights an individual could not be heard to say he is protecting same and accordingly Moshoeshoe and Mokhotlong, constituency had no locus standi.

By referring stated matters to evidence issues had been narrowed and these could neither be amplified nor new issues canvassed. Question of the re-election of the committee not having been raised whoever raised the issue was estopped from doing so for B.C.P.'s are claimed to know their constitution and hence their rights.

Counsel posed the question whether the Elections Committee should not have been made party to the proceedings.

The court must now turn its attention on points of law raised by both the applicants and respondents though, in doing so, a particular order need not be followed.

In *KAHN v. LOUW N.O.* 1951 (2) S.A. 194 (C.P.D.) the salient features of the constitution of a political party were summarised as follows:

- (1) Members of the Central Committee may attend the National Conference ex-officio with the right to speak and vote.
- (2) Delegates vote as representative members of the conference.
- (3) Proposed amendments to the constitution may be submitted to the National Conference only by the National Central Committee, District Committees and Provincial Districts.
- (4) A special Annual Conference may be called between the Annual conference if the Central Committee so desires or by request from one district which request is circulated to all Districts by the Central Committee if the majority of districts support it.
- (5) Constitution of the party is amended by majority vote at a National Conference.

In this context regarding the 31st respondent district is to be read as constituency.

WESSELS, C.J. in WILKEN v. BREBNER and Others, 1935 A.D. 175 said:

The nature of a voluntary organisation, assuming it to be such, was more important in deciding upon the rights of an individual member.

Concerning a political party it was remarked as follows in KAHN v. LOUW above:

A political party being formed for the purpose of furthering the political objects of a party can only attain its purpose by constituting a party machine, which would necessarily contain various agents or bodies which would in turn be controlled by a supreme council.

The presumption would be that a political party, being cumbersome in its nature, intends that the opinion of the individual member should be subservient to the bodies appointed to carry out the objects of the party - P 200

Wesseis, C.J. (as he then was) had gone on to say that it was quite clear that members of the party by its very constitution had entrusted to the party congress the fullest power of dealing in the interests of the party. He went on to say the Congress as Parliament of the party and prima facie it would seem that the members of the party have entrusted the carrying out of the objects of the party to the various committees and have given to the Yearly Congress the plenary power to alter the constitution of the party to suit varying conditions and then the learned judge concluded:

'There is no provision by which the individual member can make his voice heard. As I have said, there is no referendum - p.210 Kahn above.'

Mr. Pheko for some respondents spend a considerable period of time on this theme and severely criticised the applicants for going against the spirit of this decision. Against this is the judgment of my brother Monapathi who, in LEONARD NTSOEBE v. BASOTHO NATIONAL PARTY (CIV/APN/75/94) (unreported) said:

'All members are bound by the decision of the majority at a properly convened meeting; but any individual member may act to protect the interest belonging to all, in his personal capacity.'

Which is precisely what has happened in the present application. I might also remark at this juncture that with reference to individual members submitting themselves to the party and entrusting to it the fullest power of dealing in the interests of the party: what the judgment envisages is that such interests will be intra vires of the party and not ultra vires of the power

or the party and moreover, that in carrying out its duties Congress (in this case conference) will follow the letter of the constitution this court could never subscribe to the proposition that because individual members have surrendered their powers to the Party Congress or Conference they are thereby zombies and mummies never to raise their voices against unconstitutional acts of Congress or Conference.

In the quotations there is also clear reference to the creation of committees like the Credentials and Election Committee so that in this respect Mr. Khaue's submission that the Election Committee is not born of the constitution is ambulatory.

Significantly de Villers, J.P. drove the point home when he said as he read the case in the view that members having subordinated themselves on the basis of contract to the machinery created by themselves making them bound thereby whether by a vote taken unanimously or at a Congress called for that purpose he found nothing in the case to suggest where amendment to the constitution is provided, that individuals of such a party can merely of their own volition individually and by their own volition and independently -

amend such constitution by silent and unexpressed consent - p.110H.

In the view of this court the rationale of this case is that where there is in the constitution, power to amend this power

is to be averted to other than relying on the unexpressed consent of members as happened when over-represented Women and Youth League votes were allowed and 197 votes were set aside when the deputy leader was elected and re-instated when other officials of the National Executive Committee were elected.

In the course of his judgment the learned judge also said he had found himself at odds with the suggestion justifying a submission that a voluntary organisation with proprietary rights and liabilities and with a constitution agreed to by its members can simply disregard the provisions of the constitution and by silent and unexpressed individual concurrence of members dissolve into the air.

Nor have I found similar authority where by silent and unexpressed concurrence of members votes, enshrined in the constitution can be set aside simply because delegates were silent in the circumstances or for that matter an individual declaring that as the unconstitutional practice and irregularity has been ignored in the past it was save to ignore it as has been represented in this inquiry.

Applicants seem to have placed considerable reliance on the fact that the atmosphere at the conference was rowdy, riotous and such that coupled with intimidation these acts could have affected the result of the election. In fairness to the applicants, the only evidence pointing to this was that of Mopeli whose evidence I have outlined and need not repeat here. Melato



for the respondents merely said he was not allowed entry but that it was on reasonable grounds by security placed thereon by the Credentials Committee.

It is the view of this court that rowdy and riotous behaviour and especially where it induces voters not to vote it cannot be said the election was free and fair. In this instance, although the atmosphere was not so pleasant it is not contended that some delegates refrained from voting. In this regard the case of SNYMAN v. SCHOEMAN and Another, 1949 (2) S.A. 1 (1.D.) appears to be the leading case where there was riotous behaviour of the crowd outside the polling station. Van der Heever, J. quoting a passage from the judgment of De Villiers, J. had said:

No assault was committed on any person. There is no evidence of any threat to any voter either bodily or other injury. Not one person was called as a witness to state that he refrained from voting on account of the behaviour of the crowd. . . . (nor has it been proved)" that a single voter has abstained from voting to the possible prejudice of the petitioner." - p.6.

I need not comment on this aspect of rioting as conditions are no different to what occurred during the conference subject-matter of this inquiry.

As to riotous behaviour the principles seem to be that:-

- (1) to this end the behaviour must have been so grave as to amount to intimidation liable to induce persons of ordinary courage to refrain from exercising their votes:
- (2) it must be general and of such a nature that the result of the election might reasonably be supposed to have been affected. Without proof that it was in fact affected - in other words, conditions must have prevailed which negate the concept of free election.

Sporadic assaults and acts of intimidation will not justify the setting aside of an election (Rogers on Elections (20th Ed. p. 341 et. seq.).

Well, the closest conference to have come to was sporadic assaults but even these were conspicuous by their absence.

The South African Electoral Act S.91 of the Electoral Consolidated Act. 46 of 1946 provided:

'No election shall be set aside by the court by reason of any mistake or non-compliance with the provisions of this Chapter, if it appears to the court that the election was conducted in accordance with the principles laid down therein and that such mistake or non-compliance did not affect the result of the election.'

Well, this provision is from the South African statute; unfortunately, I was not able to get hold of our own Electoral Act. In the event, because this is a foreign statutory provision it has in no way influenced this court in reaching its decision save as illustrating a principle.

Allied to the above complaint was the claim by applicants that although the constitution provided for secrecy the balloting was not secret it being claimed that Tsikoane delegates had their ballot papers filled in by the secretary while other delegates filled in their ballot papers under shadows of trees.

In *WOODWARD V. SARSONS* (1875. L.R. W.C.P. 733) where there had been potential infringement of the principles of secrecy, but the court refused to set aside the election, Lord Coleridge, C.J. observing at p.744 said:

Whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as a matter of fact, that the election was not an election under the existing law, it is not enough that great mistakes were made in carrying out the election under those laws: it is necessary to be able to say that: either wilfully or erroneously, the election was not carried out under those laws but under some other method.

It was said what the Lord Chief Justice said was clear from the example he gave, e.g. if by consent of the whole constituency the candidate is elected not by ballot at all but by the tossing of a coin or upon the result of a horse-race: quoting Lord Coleridge in Woodward supra van den Heever, J. continued at p.8: it might well have been said

that the electors had exercised their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election law, which prescribed an election by voting \_\_\_\_\_. But if in the opinion of the tribunal the election was substantially an election by ballot, then no mistake or misconduct, however great, in the use of machinery of the Ballot Act, would justify the tribunal in declaring the election void by the common law of Parliament.

Coming to the non-observance of statutory provisions he says:

If this proposition is closely examined, it will be found to be equivalent to this: that non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, in other words, the result of the election - p.8.

Also said:

It cannot be said that there has been non-observance of a great 'principle' in an election when owing to an oversight a person was allowed to be in a position where he could in a few instances act contrary to the principle - p.8.

It was said to say of the election as a whole that the

principle of secret voting was not observed one would require a situation like this: say the Presiding Officer were to pronounce: 'away with this namby-pamby of secret voting.' A man should have the courage of this convictions', and then were to insist upon each voter publicly and boldly announcing his choice upon pain of having his vote rejected.

Also quoting De Villier. J.'s dictum on an election petition, van den Heever. J. said:

'In my judgment an election is conducted in accordance with the principles of the Electoral Act if the electors concerned entitled to vote have had a full, fair and free opportunity of expressing by a majority of votes secretly and by ballot their choice of parliamentary representative'.

Lastly Van den Heever said:

'Similarly the conclusion that in view of the first respondent's overwhelming majority the irregularities proved could not conceivably have affected the result is beyond cavil.' - p.9.

One might say (although I am making no finding), that applicants arguments in this regard are put paid.? Unfortunately in this case the court was not given results of voting except that of the Deputy leader which was a slim majority of 20 votes when the Provincial votes had been excluded. Noticeably, in GERBER v. STANDER & HALL & Co., 1960 (4) S.A. 480 (C.P.D.) where the majorities were narrow it was said this could have affected the result of the election for non-compliance. And where a substantial number of votes were invalidly cast, held:

An election properly conducted in the sense of being confined to qualified votes only might have had a different result.

I have said that applicants have said that they had rights which were violated and had come to court to protect these rights. To this Mr. Pheko's submitted that rights complained of being personal rights the court could not intervene to protect them. In the leading case of CAPE INDIAN CONGRESS & Ors. v. TRANSVAAL INDIAN CONGRESS. 1946 (2) S.A. 595 (A.D.) Stratford. J. is claimed to have said:

that a right which is alleged to have been infringed is a personal right and that a court of law will not intervene to protect such a right.

But in de WAAL and OTHERS v. VAN DER HORST (1918. T.P.D. 277 at p.263) it was said the right which will justify intervention by a court of law need not necessarily be a right of property. The right to freely participate in conference proceedings conducted by duly elected officials is also worth protecting.

I do not think that applicants are claiming that they were denied the right to freely participate in conference proceedings (unless their freedom was frustrated by claimed riotous behaviour). Applicants appear to have been more concerned with irregularities and failure to follow the letter of the constitution. The chief irregularity was that the conference had been hijacked - ostensibly by the leader, but when the case progressed the claim tailed - off until it petered out in the end with counsel for applicants claiming that the claim was not well

established and whether or not it existed was a matter of credibility.

So far as this court is concerned, I hasten to say that there was not sufficient evidence in this regard, save to add that there would have been such evidence, had ex-ministers Makhakhe and Mphanya who were claimed to have been abused given evidence. This court will under no circumstances allow evidence by proxy or representation. Accordingly, the leader is cleared of any wrong-doing.

Clearing the leader of wrong doing has nothing to do, though with perceived and actual dirty tricks and subterfuge. This court was most dissatisfied with the resolution of conference to suspend or shelve some of the agenda items. While no order of precedence is required in discussing agenda items, common sense does also dictate requirements. The General-Secretary was to have finished presenting his report a day after the first presentation. He did not pitch up and it is not known when he attended conference if he did at all. In his affidavit he does not explain himself though late in the day when a deputation was sent about the Transvaal delegation the Secretary-General was lounging in his offices and no explanation was given to the deputation why he was not attending conference. For reasons that I cannot explain the vice-Secretary and Treasurer were not attending either and the vice-Secretary has found it fit to inform the court that he was indisposed. I do not believe this.

And then it was half-heatedly claimed, here again by representation that the possibility existed that the Secretary-General, his vice and the Treasurer could have been held up at the gate because of unfavourable conditions there. Well, I take this evidence with the pinch of salt it deserves. It appears to me the Secretary-General, his vice and Treasurer got holed up in their offices so as to make political capital of the riotous and dangerous conditions at the conference gates. I agree this is an inference though I fail to appreciate a more plausible one in the absence of reasonable explanation where there should have been one. Even if I am wrong in my surmise, it is undoubtedly the reason why conference did not get off to a good start and the reason conference got edgy and uncontrollable. Applicants would have this court believe that for no reason or rather to deny applicants their democratic right of freely and fearlessly participating in conference some elements deliberately set in motion events which skewed the otherwise tranquil atmosphere of conference. I do not agree: it was the unexplained absence of the Secretary-General, his vice and Treasurer who upset conference temperament and but for their absence conference would have been peaceful.

Having said this, this court does not understand why conference did not proceed with some other agenda items excerpting the Secretary-General's and Treasurer's reports. Most disturbing in the considered view of this court was the Election of candidates to act as Returning Officers. This court needs no authority for the proposition that a candidate cannot be a

Returning Officer in the very seat in which he is going to be elected. If so, how can he impartially count his own votes and those of other candidates. It is not a question of whether one will be biased but that it is an irregularity and an act which offends a sense of justice and good morality.

It was made as if candidates to the National Executive Committee were not known when some candidates were elected to the Elections Committee. The denial is exploded by S.32 (a) of the 31st respondents constitution which reads:

'Names of candidates to reach the Head office before 30th November. Those whose names are received late will not be eligible to stand for elections though names will be displayed and the reasons stopping them from standing for elections.'

There is therefore no question that candidates who stood for the Election Committee were not eligible to stand as candidates.

Prof-Wiechers in his Administrative Law at P.214 says:

'The rule that no one may be a judge in his own cause is included in the requirement of impartiality. An organ that has personal interest in the matter in which it must exercise a discretion is regarded as partial, that is, as lacking qualifications or qualities required of it by law.'

This quotation fits in with candidates for the National Executive Committee who stood for the election of the 31st respondent's Elections Committee because 'they had to exercise a discretion' in a matter in which they had personal interest. They therefore lacked 'qualifications and qualities required of them by law.'



Equally disturbing is the case of votes cast for the deputy leader and here again the court is of the view that no authorities are required to make the act of the Chairman of the Elections Committee above board for it smacks of discriminatory practice, selective morality and double standards. The incident has been fully discussed elsewhere in this judgment.

I turn now to the assertion by Mr. Pheko that parties were limited to issues referred to evidence.

In WEPENER v. NORTON, 1949 (1) S.A. 657 9S.W.A.) Ramsbottom, J. as he then was said at p.658 - 59:

Ordinarily, where oral evidence is taken, on application, the parties are limited in their evidence to the proof of the allegations made in the petition and replying affidavits. The fact that the court orders oral evidence does not enlarge the scope of the inquiry; the rule provides a method of deciding conflicts of fact raised in affidavits.

But in DUBLIN v. DINER, 1964 (2) S.A. 304 (D., C.L.D.) Miller, J. appears to have taken a different view saying though rules pertaining to decisions were different, what was material was the fact that where an applicant in his replying affidavit raised a new issue this was not acceptable because courts not allowing a four set of affidavits the respondent would not have an opportunity to respond to a new matter, introduced in a final affidavit. The learned judge then went on:

But at this stage of the proceedings, where the disputed facts are to be determined by oral evidence, a witness for the applicant may well give a material and relevant fact not previously mentioned and which might not have been

permitted in a replying affidavit: the respondent has every opportunity to meet such new fact when he leads his evidence. - p. 307 G. ( I have underlined).

I agree with the learned judge though, in the opinion of this court, this in no way gives the parties carte blanche authority to introduce hybrid proceedings which know no rules or limitations.

It was also said on behalf of some respondents that respondents had failed to disclose material facts and were in breach of the principles of uberrima fides. In COMETAL - MOMETAL. S.A. R.L. v. CORLANA ENTERPRISES (Pty) Ltd. 1981 (2) S.A. 412 (W.L.D.) while the court accepted the principle and said it was disposed to take a strong view of the non-disclosure Margo. J. nevertheless observed:

It seems to me the affidavit of Damelo indicated that information which was prima facie material had deliberately been withheld from the court which heard the application for an attachment. However, I have been persuaded by Mr. Selvan that there is a reasonable explanation for the failure to put before the court the full circumstances.

This observation was made against the backdrop of argument that had full facts been placed before court, the court might have asked for additional information or, as Mr. Pheko contended, dismissed the application. It was said in Cometal's case that:

It was only where it is quite clear that the applicant has no action, or cannot succeed, that the attachment should be refused or discharged.

By the same token, this court is not able to discharge this

application on this ground because it cannot be said that applicants have no action or could not succeed.

And then there was also raised in argument that there was no proper joinder of parties it being argued that for example the Provinces should have been joined as respondents for they might be adversely affected by a judgment in which they were not parties. In this regard the case of SINGH v. TEXTILE WORKER'S INDUSTRIAL UNION (S.A.) DURBAN BRANCH AND ANOTHER. 1962 (4) (S.A.) 693 (D. & C.L.D.) is relevant.

Ensemble: A voluntary Association. Application against a branch of a Union - Declaratory order to set aside election. Union itself to be joined as a party.

Note on the prayers:

That first respondent be and he is hereby ordered forthwith to re-constitute the Annual General Meeting of the first respondent for the purpose of electing the executive committee of the first respondent in terms of the constitution of the first respondent.

Order:

Provided that if the matter is not proceeded with within a period of two months after the date of this order, any party desiring to do so may set the matter down to have questions determined after giving notice in writing to the Registrar of this Court and the other parties concerned.

In this case the court was also asked to:

- (1) Interpret provisions of the Constitution.
- (2) Determine whether a branch is capable of instituting or defending proceedings in its own name  
and, also
- (3) Whether it is capable of owning property in its own name. Questions, it was said, could also arise

whether the branch or Union is entitled to the subscriptions paid by members.

The court had granted the application for joinder in the application for intervention where in the AMALGAMATED ENGINEERING UNION v. MINISTER OF LABOUR. 1969 (3) S.A. 631 Fagan. J. had said:

"Indeed it seems clear to me that the court has consistently refrained from dealing with issues in which third parties may have a direct and substantial interest without having that party joined in the suit, or, if the circumstance of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect the party's interest."

and as was said by Addleson, A.J. referring to what was said in HENRI VILJOEN (Pty) Ltd. v. AWER BUSH BROTHERS. 1953 (2) S.A. 151 (O) at pp. 165 - 7 and MARAIS and OTHERS v. PONGOLA SUGAR MILLING Co. Ltd AND OTHERS. 1961 (2) S.A. 698 (N.) at p.702

"even in those cases where the court has discretion when the matter of joinder of party is raised, it must be shown that the party is a necessary party in the sense that he is directly and substantially interested in the issues raised in proceedings before the court and that his rights may be affected by the judgment of the court."

To resolve this question one could go back to the dicta found in KAHN v. LOUW supra to the effect that the Central Committee is the supreme executive power for ordinary purposes. That it controls committees and calls yearly congresses while the yearly congress is the highest power in the party.

Branches and constituencies being subordinate to the National Executive Committee and the latter being responsible to the Yearly Congress or Conference of the party, it would not be

necessary in the circumstances to cite a branch, a constituency or for that matter a Province for their interests are subordinated to that of the National Executive Committee which may be said to represent interests of subordinate organs of the party.

So long as the Executive Committee and the Basutoland Congress Party is itself cited there would be no need in the view of this court to cite organs subordinate to these simply because their interest may be affected for, according to this court, interests of subordinate organs are interest of supreme organs within a body politic. Indeed it would be quite ridiculous and would make fun of court procedures if for any wrong everybody associated with an organ would be cited. It would amount to citing all the shareholders in a company instead of citing the company alone or its Managing Director.

In WYNNE v. DIVISIONAL COMMISSIONER OF Police, 1973 (2) S.A. 770 (E.C.D.) Addleston, J. said when there is an attack on the character of a person who is not a party to the litigation, it was possible there could be a limited right to intervene provided this will be necessary for purposes of judgment.

And then the learned judge went on at p.776

However, when the attack in question is totally irrelevant to the issue which the court has to decide and cannot pertinently arise for consideration in the course of the judgment, it does not seem to me to be possible to argue that the person attacked has any interest in the right which is the subject-matter of the judgment.

True: the Provinces are under attack though. in my view, they have no substantial interest in the result of this inquiry for, as I have said, they are represented by their National Executive Committee. Apart from this, I do not see that the issue which this court has to decide can pertinently arise for consideration in the course of this judgment.

There was also considerable attention directed at the proprietary or otherwise of

- (1) having suspended or shelved agenda items consisting of reports and suggestions or resolutions to be tabled before conference
- (2) failing to discuss these to have informed conference as to when they would be discussed owing to their importance and urgency.

It was Mr. Pheko's submission that conference having run out of time and therefore not being possible to discuss these items, it was automatically taken that by necessary implication they were postponed to the next sitting of the Annual General Conference. The difficulty with this assumption is that there is no assurance that the items would indeed be discussed although it might be said, as Mr. Pheko submits, the people interested are at liberty to call such a conference for their deliberation. This court was at first inclined to go along with this view and especially where, as in this case, it appeared circumstances had made it impossible to attend to the items until the court came across the case of *SIGH v. UMZINTO RURAL LICENSING BOARD AND OTHERS*, 1963 (1) S.A. 872 (D., C.L.D.).

The respondent in this case is a statutory body following its own rules under which the jurisdiction of courts is ousted as its acts are reviewable by specific bodies. Singh had applied to the respondent for a licence and the Chairman had convened a meeting to hear the application. On the appointed day the vice-Chairman had acted in the absence of the Chairman. Instead of hearing Singh's representation the vice-chairman had announced that as there was an opposed application Singh's application would be heard along with this other application in the Annual meeting of the Licensing Board which was not far off. Of significance is that the vice-Chairman had said when the application would be heard although he had not given Singh an opportunity to present his case.

Miller, J. in his judgment severely criticised the vice-Chairman's act, saying, amongst other things, that the vice-Chairman had failed to perform a duty he was bound to perform and secondly that he had not observed the 'audi alteram' rule. The learned judge is quoted as having said:

"I am prepared to accept, too that it may, in certain circumstances, be necessary, for a board to adjourn a meeting without hearing any of the parties before it, for example, where the exigencies of the business of the board are such that an application cannot be dealt with on the appointed day and must stand over to be dealt with on a later date, or where, due to other circumstances beyond its control the board finds itself unable to hear the application on the appointed day. I may say in passing that where the board adjourns the meeting in those circumstances, and even though it may not be obliged to inform the parties of the reasons for the adjournment or to consult regarding a suitable date for the resumption of the meeting, ordinary courtesy and consideration of fairness would seem to require it to do so which fortunately, in the vast majority of cases it does and I suggest that in this case the first respondent merely

exercised such a power of adjourning the meeting to a later date, is to take a completely unrealistic (and I might say euphemistic) view of the facts." p.575 A - C. I have underlined

In the instant case it was claimed conference had set aside or shelved the agenda items for a while and until after the election of the N.E.C. It was also claimed that the N.E.C. was elected overwhelmingly by the delegates. And yet not only was the conference not officially closed, even if it was in the morning-hours of 11th March, 1996 there were very few delegates left after the election making it impossible to make necessary announcements. The difference, of course, in the present case and Sing's case is that in the former there was no announcement whereas there was such an announcement in the latter.

It was further said in Sing's case as the court would not be reviewing a decision of the licensing authority but making an order directing the licensing authority to exercise its jurisdiction and perform its duty, there could be no question of an ouster of the courts jurisdiction to interfere.

Significantly, although this court's jurisdiction is not specifically ousted, it does seem, other considerations apart, that this court can properly interfere in these proceedings.

In a long line of cases including LUTCHMAN v. UMZINTO RURAL LICENSING BOARD AND OTHERS, 1936 N.P.D. at p.613, courts appeared to recognise that it would be competent for the court to interfere if it appeared the board failed to exercise its -



jurisdiction or to exercise it properly.

A question which arises for the determination of this inquiry is whether it can be said that the Annual Conference failed to perform its functions and to deal with matters before it as was required in law to do or put in another way, whether by virtue of conference having failed to perform its duty this court is obliged to order it to perform its duty.

In RED HILL GARAGE and OTHERS v. BUCHAN'S GARAGE and ANOTHER 1954 (4) S.A. 777 (N.) at p. 780 BROOME. J.P. said that if an aggrieved party could establish that one of the members of the board was in fact disqualified

The court would have power to set aside the proceedings on the ground that an element similar to fraud was present, or because a decision arrived at by a board so constituted was no decision at all.'

It has been said an element which connotes fraud, having regard to Broome. J.P.'s dictum need not be one imputing actual dishonesty or bad faith of the board and that it is enough if the board were guilty of

an irregularity so gross that the aggrieved party did not receive a hearing at all; in other words, the board reached a decision without 'honestly' applying its mind to the matter in the sense that it refused to receive facts or information or to hear parties in regard to matters which were necessary for the honest application of its mind to the issue which it was obliged to consider and determine.'

I would say the case of reports. Women & Youth League

representation plus the election of the deputy leader (despite my strictures on the Secretary-General and his vice) falls under this category and more so because conference did not have the courtesy (despite some evidence that it was orderly) to say when the reports would be discussed considering their pressing and urgent nature. I am saying this because I have believed applicants case that these issues were pressing and urgent and if not expeditiously dealt with could affect them adversely.

It was also said in Singh above at p.878 A -B :

'I do not think there is room for doubting that the first respondent's conduct in deciding in private that the application should be referred to the annual meeting without giving applicant any opportunity of dealing with his application or the objections, was an irregularity which was gross in a superlative degree.'

The learned judge continued *ibid* p.878 :

'Applicant had a *prima facie* right to have his application dealt with on its merits, by the first respondent sitting in a special meeting on a date prior to the date of the annual meeting. The right was afforded him by the Chairman, acting in terms of the law. First respondent obliterated his right without affording him the opportunity of defending his right. I do not understand how it can be said such an irregularity was not calculated to prejudice the applicant.'

It is useless to expatiate on the similarity of this case and the present inquiry - especially considering this addition:

'Nor could it be disputed by either of them that the right which had been given to applicant to have his application considered and determined at a special meeting held before the date of the annual meeting was one which carried an advantage to him.' - p.878.

I have said elsewhere in this judgment at least if the Secretary-

general was not arriving conference should have gone on with items other than those involving the General-Secretary, his vice and the Treasurer. Normally dates assigned to conference having regard to previous conferences can be said to meet more or less demands of conference and it is not clear why other agenda items having nothing to do with the Secretary-General, his vice and Treasurer were deferred and having been deferred why, if the conference was normal, an announcement was not made as to the fate of deferred or shelved agenda items.

From a review of all the circumstances, there is the suspicion that the intention was to sweep these agenda items under the carpet.

Whether they are Pressure Group or some other oddity, so long as they are members of the B.C.P. these people must be heard and not ostracised as has in some quarters been claimed.

A brief note may be said on estoppel which was said to operate against some of the respondents.

When this defence was raised, I wondered to myself whether if "A" seized "X" by his scruff and the latter was so petrified that he did nothing it could be said X when he raised the unlawful act after he recovered it could be said he was estopped from doing so for he was silent when he should have cried out. I don't think so because in the view of this court estoppel is excluded by unlawfulness or illegality. Because a victim was

silent it cannot be said he acquiesced in the act. This was the finding of De Villiers, C.J. (as he then was) when he said in BRADY v. SOUTH AFRICAN TURF CLUB, 1906 (23) Sc. 385 at p.389:

'If the conduct of the defendant club was illegal or ultra vires, the plaintiff's acquiescence could not make it legal or intra vires, nor can such acquiescence deprive him of the right as a member of the club, he has to prevent the continuance of a system which, whatever his motives might be, he no longer approves of.'

Substantially applicants' case is that it is immaterial whether when the Elections Committee was elected, in spite of itself, there was no protest or whether Qhobela was silent when it was said by the Chairman of the Elections Committee that, while in his (Qhobela's) case the Provincial votes were going to be set aside, they would be added when other committee members were elected. What is material according to him is that this process was irregular.

In consideration of Mr. Pheko's technical points by which he has asked this court to discharge the rule, as far as this concerned, the moot question is as to what standard this court is called upon to apply in a matter like this. I have said again and again during the progress of this matter that I am attracted by the standard as enunciated and ably advocated for in GARMENT WORKER'S UNION v. DE VRIES where Price, J. quoting from KRUSE v. JOHNSON (1892) Q.B. 91) said:

'In considering questions concerning the administration of a lay society governed by rules, it seems to me that a court must look at the matter broadly and benevolently and not in a carping, critical and narrow way. A court should not lay down a standard of observance that would make it

always unnecessarily difficult - and sometimes, impossible to carry out the constitution. I think that one should approach such inquiries at the present in a reasonable commonsense way and not in a fault-finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary of the constitution. If such a narrow and close attention to rules of the constitution are demanded, a very large number of administrative acts done by lay bodies could be upset by the courts. Such a state of affairs would be in the highest degree calamitous - for every disappointed member would be encouraged to drag his society into court for every trifling failure to observe the exact letter of every regulation. There is no reason why the same benevolent rules should not be applied to the interpreting of the conduct of governing bodies of societies as one applies to the interpretation of bye-laws.

When Mr. Pheko made the submission I was surprised because in the cause of his address he kept on referring to this case thus inducing the court to believe that as to the standard to be applied in this inquiry i.e. a benevolent one, we were one with him. Be this as it may, I am not prepared to lay down hard and fast rules in the determination of an inquiry like this.

I was most impressed by a judgment of my brother Maqutu J. in LESOTHO HUMAN RIGHTS ALERT GROUP AND 2 OTHERS v. THE MINISTER OF JUSTICE & HUMAN RIGHTS and 2 OTHERS - CIV/APN/173/92 (unreported). Quoting from a passage in WILLEM KOK and Another, 1879 Buch. 45 at p.66 he says:

'The disturbed state of the country ought not, in my opinion, to influence the court for its most secret duty is to administer justice to those who seek it and not to preserve the peace of the country \_\_\_\_\_. The Civil Courts have but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of consequences which may ensue.'

This observation is spot on though, in spite of it, I intend making a few remarks on the B.C.P. Constitution

This court was astounded by the evidence that it is presumed that members of the B.C.P. know or profess to know the constitution thus making them depositories and custodians of the Constitution. This happens in the background of there being no criteria and methods to gauge such knowledge. The result is that constitutional experts spring up like mushrooms overnight in every branch and constituency of the B.C.P.

One can well understand why Roman Catholics forbade their followers to read the Bible secret as it is like the constitution, followers were claiming to know it like anybody and religious sects were springing up everywhere.

It is better to have a Select Committee to review the Constitution from time to time and to appoint a Panel of Experts to interpret the constitution for politicians being what they are and a law unto themselves, it is better that the constitution be interpreted by men and women of their choice and a conflict arising thereon be referred to the empiricism and strict interpretation by the courts of law.

Again, in a purely contextual approach, it is true as Mr. Pheko has submitted that by reason of contractual relationship between the individual and his organisation of which he is a member, individual interests have to be subordinated to and be

subservient to those of the organisation. This also extends to politicians who are constantly reminded that they serve the public-at-large and not individual interest and that to succeed they must subject self-interest to general interest. The trials and tribulations of politicians are complex and many and these can only be assuaged by transparency, comradeship and a spirit of give-and-take.

I looked at Thebe Motebang and Khotsang Moshoeshe on whose otherwise young faces ravages of time and life's adversities seemed to have taken their toll. These men, the very antipodes of life as they seemed, nevertheless symbolise power within them which, properly channelled and utilised could augur well for all.

It has been said the aggregate of individual reasoning in any organisation is less likely to be blatantly erroneous than the separate judgments of a single man.

The following passage written in 1895 is attributed to Gaetano Mosca.

It may seem strange at first glance that, in general, people should insist that their rulers have the loftiest and most delicate moral qualities and think much of the public interest and little of their own, but when they themselves are in question, and especially when they are trying to get ahead and reach the highest positions, they are at no pains whatever to observe the precepts which they insist should be the unfailing guides of their superiors.

As a matter of fact, all that we can justly ask our superiors is that they should not fall below the average moral level of the society they govern, that they should harmonise their interest to a certain extent with the public interest and that they should not fall below the

average moral level of the society they govern that they should not do anything that is base too cheap too repulsive -anything, in short that would disqualify the man who does it in the environment in which he lives

The Revisionist Theses Revisited see Comparative Political Studies. A quality journal - 1974 Ed Vol.7 No 1. April. 1974.

Considering that this essay was written in the last century, it does seem to be uncunningly accurate.

It is claimed that the social norm that political conflicts should predominantly be solved by amicable agreement and not by majority rule has the support of top leaders than activists

Writers explain that the hypothesis is probably derived from socialization theory, group theory and utility theory and that, from the perspective of socialization theory one may expect that the top leaders, in climbing the political ladder, have had the experience that many political problems are too complex to be solved by a simple voting mechanism.

Top leaders may have learned in their political careers that successful politics often consists of bargaining with a mutual exchange of gains and losses. Moreover, it could also be true that actors who have learned to bargain already outside the political arena have a better chance to enter the political stratum and that actors who tend to reject the norms of bargaining are probably screened from out at lower levels in the career line.



It is also said that a second explanation why top leaders would prefer amicable agreement to majority rule may be derived from group theory as it is expected that top leaders interact more often among each other than do activists. It is pointed out that interactions among the top leaders may lead to personal friendships and even to a certain group solidarity. It is also emphasised that too much insistence on majority rule may endanger group solidarity. More importantly, as a rule, top leaders will prefer to resolve their conflicts by amicable agreement, because this method does not divide a winning group from a losing group and thus threaten group solidarity

The utilitarian theory has more to do with maximization of power: if the top leaders are rational actors, which utility theory presumes, they should be concerned more with possible losses than with possible gains, because they have more to lose than to gain. It is this asymmetrical situation with regard to gain and losses that makes a strategy of amicable agreement a most rational option.

An interesting and relevant case is found in W. Lockhart's Constitutional Law, Cases, Comments and Questions (vide *COLEGROVE v. GREEN* - 328 U.S. 549, 90 L.E.D. 1432, 66 Sct. 1196 (1946)) where the court refused to entertain a controversy because due regard for the effective working of Government revealed the issue to be of a peculiar political nature and therefore not meet for judicial determination. In this case the court also found

of course no court can affirmatively re-map Illinois

districts so as to bring them more in conformity with the standards of fairness for a representative system. Lockhart p.114.

Note that the upshot of judicial action may defeat the vital political principle which led the B.C.P. more than 40 years ago, to require districting today called constituencies.

In the words of Justice Frankfurter.

'This requirement, in the language of Chancellor Kent, was recommended by the wisdom and justice of giving, as far as possible, the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatsoever, in the national councils.' *ibid.*

And in the words of this court the requirement was recommended by the wisdom and justice of giving, as far as possible, to local subdivisions of the people of each district in Lesotho and outside Lesotho but especially the migrant workers in the Republic of South Africa, a due influence in the choice of representatives to the Annual General Conference of the B.C.P. to ensure that these migrant worker's voice is heard in B.C.P. Councils.

It was also said in Colegrove case above that:

In the exercise of its powers to judge qualifications for its own members the House of Representatives may reject a delegation of Representatives-at-large. Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination

of such issues this court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention is an essentially political contest dressed up in the abstract phrases of the law. Lockhart p.114

The judge in the above case continued saying at p.114 above that for the appellants it has been urged with zeal that the conditions of which they complain are grave evils and offend public morality. It was said the constitution of the United States gave ample power to provide against these evils and that due regard for the constitution as a viable system precluded judicial correction as authority for dealing with such problems lied elsewhere.

Frankfurter had proceeded:

The short of it is that the constitution has conferred upon Congress exclusive authority to secure fair representation of states in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed to exercise its powers, whereby standards of fairness are offended, the ultimate remedy lies with the people. pp.114 - 115.

In the same judgment Mr. Justice RUTLEDGE observed:

Moreover, we have but recently been admonished again that it is the very essence of our duty to avoid decision upon grave constitutional questions, especially when this may bring our function into clash with the political departments of the Government, if any tenable alternative ground for disposition of the controversy is presented. - p.115

To say constitutional questions brought before this court for resolution are not grave would be an understatement of the year.

Applicants are properly before this court: this, notwithstanding, this court is not prepared to stand in benediction or condemnation over the affairs of the 31st respondent on account of the intractability of problems involved. The problems are tenuous and long-standing and this court lacks the necessary experience and expertise to solve them, they being political other than judicial problems. This consideration apart, the court is not inclined to do for politicians what they can do for themselves. Importantly, conditions are not ripe, at the moment, to enable this court to reach a definitive finding on all issues raised.

Evidence was confused as on whom, after the elections, power fell. As there was no evidence of the outgoing committee having handed over to the incoming committee moreover as it was established by evidence that there were two rival groups within the B.C.P. with no group willing to yield to the other, and moreover as it was established by evidence which this court believed that members of the Elections Committee at the March, 1996 conference belonged to the rival groups, and more importantly as it was not established by evidence that the leader of the B.C.P. Dr. Ntsu Mokhehle belongs to any of the rival factions, for reasons already stated above this court orders that:

- (1) The entire proceedings of the B.C.P. Conference of 8 - 11th March, 1996 be referred to the leader of the B.C.P. Dr. Ntsu Mokhehle for amicable

settlement.

- (2) The said amicable settlement to have been completed within fourteen (14) days from the date of this judgment provided that if amicable settlement has not been reached within the aforesaid fourteen (14) days the said leader may himself or by his counsel approach the court for further extension of the period which request shall not be unreasonably refused provided it is not extended beyond thirty (30) days from the date of this judgment.
- (3) The leader of the B.C.P. Dr. Ntsu Mokhehle is to notify, in writing, affected parties in these proceedings or such other people as may be necessary for the determination of the dispute of the date, time and venue of appointed place where the said amicable settlement is to take place
- (4) By order of this court should the amicable settlement not be proceeded with within the stipulated time or such extension of time as may have been granted by court, or for any reason a party wishes to approach court, a party desiring to do so may set the matter down to have such questions and matters incidental thereto determined after giving notice in writing to the Registrar of this court and to the other parties concerned

- (5) All the property of the B.C.P. moveable and immovable and wherever situate. will vest in the leader, Dr. Ntsu Mokhehle in trust for the B.C.P. pending the result of the amicable settlement and any order made by this court pursuant thereto.
- (6) As this is a domestic matter and as it were among family members. and moreover. both parties having succeeded and/or failed. it is ordered that there be no order as to costs.

  
G. V. MOFOLO  
JUDGE

18th October. 1996.