

IN THE HIGH COURT OF LESOTHO

In the matter between

GERARD KHOACHELE
MANYATHE NDABA
THABO 'MOTE
TSEKO LEKOENEHA

1ST PETITIONER
2ND PETITIONER
3RD PETITIONER
4TH PETITIONER

and

THE ATTORNEY GENERAL
MOTLATSİ KELLY MAHASE

1ST RESPONDENT
2ND RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice M.M. Ramodibedi,
Acting Judge, on 25th day of October, 1996.

This application is a sequel to Maseru Municipal elections held at Thamae Ward 7 on the 8th June 1996. The petitioners and Second Respondent featured as candidates at the said election which was won by the latter.

Then on 26th June 1996 the petitioners filed with the Registrar of Court "Notice of Motion" in which they prayed for an order in the following terms:-

- "1. (a) Declaring that the return of the Second Respondent was undue and
- (b) Declaring the petitioners to have been validly elected.
- (c) Further and/or alternative relief.

(d) Costs."

Immediately thereafter the following words appear in the said Notice of Motion "And that the accompanying petitions of Gerard Khoachele, Monyane Ndaba, Thabo Mote and Tseko Lekoeneha and annexures thereto will be used in support thereof." These last two words have left me in no doubt that what the petitioners have sought to present to this court is a Notice of Motion and not a petition as such. I am fortified in this view by the fact that all the four petitions in this matter were obviously only filed on the following day the 27th June 1996 judging by the date stamp of this court on each of those petitions.

Now it is clear beyond question in my judgment that the Municipal and Urban Councils Elections Regulations 1987 have prescribed that Municipal election applications must be made by way of petition as opposed to a Notice of Motion. The following sections in those regulations should serve as a guide in the matter:

Section 69 (1) thereof provides as follows:-

"An election petition shall be heard
by a judge."

Section 70 is to the following effect:-

"70. An election petition may be presented
to the High Court by one or more of the
following persons:

- (a) some person who voted or had a right
to vote at the election to which
the petition relates;

- (b) some person claiming to have a right to be returned or elected at such election;
- (c) some person alleging himself to have been a candidate at such election."

Section 71 also provides :-

"All or any of the following reliefs to which the petitioner may be entitled, may be claimed in an election petition:

- (a) a declaration that the election is void;
- (b) a declaration that the return of the person elected was undue;
- (c) a declaration that a candidate was duly elected and ought to have been returned;
- (d) a scrutiny if the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes."

Indeed without overburdening this judgment I observe that even all the subsequent sections from 72 to 78 inclusively refer to "election petition" and not Notice of Motion.

I come to the conclusion therefore that the Notice of Motion filed by the petitioners on 26th June 1996 is irregular and contrary to the letter and spirit of the Municipal and Urban Councils Elections Regulations 1987 as aforesaid.

Nor does this court approve of a hybrid type of application simultaneously embodying a Notice of Motion as well as a petition at the same time if that was the intention of the petitioners here.

In dealing with a somewhat similar situation Kotze AJ in

Hepker v National Gelatine & Glue (S.A.) (Pty) Ltd. 1963 (3)

S.A. 591 (WLD) had this to say "It seems to me that in an application of this nature where a petition is prescribed by law, it need not be accompanied by the prescribed notice of motion but by a notice of set down." With respect I observe that the learned Judge puts the matter rather mildly and that for this court the point needs to be straightened up by stating that a petition must not be accompanied by a notice of motion but by a notice of set down. That is the practice as I have always conceived it to be in this court as far as petitions are concerned.

Rule 8(1) of the High Court Rules 1980 significantly provides as follows:-

- "8. (1) Save where proceedings by way of petition are prescribed by any law, every application shall be brought by notice of motion supported by an affidavit setting out the facts upon which the applicant relies for reliefs."

In my view this section is a clear indication that a petition is an entirely different procedure altogether from a Notice of Motion. It is inexcusable to lump the two together in one and the same application. In fact I am of the view that it borders on disrespect to the court to have to read such papers as are presented to me in this matter. Nor do the petitioners' problems resulting from the nature of the application before me end there.

Even assuming that I were to disregard the aforesaid Notice of Motion before me and only consider the petitions which were filed on the 27th June 1996, the biggest problem for the petitioners is that there are absolutely no prayers embodied in each of those "petitions" save for a reference to the prayers in the notice of motion itself. Each of the four "petitions" conclude with the following words:-

"Wherefore your petitioner prays that it may please the above Honourable Court to grant an order as prayed for in the notice of which this petition is attached."

This is yet another indication that this court is expected to consider both the Notice of Motion and the petition at the same time; the latter being only in support of the former. The other problem with the petitions before me is that there is absolutely no reference to the Respondents in the petitions save in the heading to the 1st Petitioner's petition. There is no description of the Respondents and in what capacity they are being sued, nor are there any averments to show that the Respondents have locus standi in judicio to be sued.

I can only conclude regrettably that this application was slackly presented and that this is a factor to which this court must inevitably have regard when exercising its discretion whether to grant the declaratory order sought.

At the hearing of the matter before me on 11th October, 1996 Mr. Phoofolo for the petitioners submitted that there were disputed facts in the matter. He identified two points of disputes as follows:-

1. That Second Respondent "was seen or heard" campaigning through a loud speaker on the polling day.
2. That Second Respondent distributed campaign pamphlets on polling day.

In the circumstances Mr. Phoofolo applied for viva voce evidence to be led on those issues.

The application for viva voce evidence was strenuously opposed by Mr. Makhetha for the Respondents on the ground that the afore-said dispute of facts was not material to the case in as much as the petitioners had not shown in their papers that the alleged use of loud speaker and pamphlets on polling day affected the result of the votes.

In the judicial exercise of my discretion I dismissed the application for the calling of viva voce evidence on the ground that the disputed facts were not material regard being had to

the nature and circumstances of the case before me. I took the following factors into consideration:

- (a) That the petitioners made bare, unsubstantiated allegations that the Second Respondent campaigned by use of a loud speaker and pamphlets on polling day yet they knew fully well at the stage when they launched the application that this was a hotly disputed fact. They had made similar allegations in writing on polling day. The said objection Annexure "KM1" was denied by the Second Respondent. It is significant that 1st petitioner himself admits in paragraph 7.2 of this "petition" that the Returning Officer "ruled that Second Respondent take an oath which qualified him to enter the race."

I found therefore that it was inexcusable for the petitioners whom bore the onus to have failed to substantiate their allegations with supporting affidavits when they launched this application. Such supporting affidavits could easily have come from the voters themselves if the version of the petitioners is correct.

- (b) That the petitioners failed to allege or make out a case that the alleged campaigning by Second Respondent did affect the result of the election.

In Hart v Pinetown Drive-in Cinema (Pty) Ltd.
1972 (1) S.A. 464 at 469 Miller J had this to say:-

"The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

I respectfully agree.

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- (c) That as a general rule the Applicant must stand or fall by his founding affidavit or petition. If he merely sets out a skeleton case in his application he cannot expect as of right that the court will come to his assistance and order viva voce evidence to close the gaps that he has left out.
- (d) That as will be seen later this was a fit case where a just decision could be reached on paper without hearing viva voce evidence.

I turn then to deal with the merits of the petition before me. It is significant that this petition is based entirely on Section 62 (1) of the Municipal and Urban Councils Elections Regulations, 1987. In this regard the 1st Petitioner states in paragraph 8 of his petition:

"Your petitioners respectfully avers (sic) that the second respondent Contravened Section 62 (1) of the Municipal and Urban Councils Election Regulations 1987, by using on a motor car a loudspeaker on polling day; and by furnishing on a paper scattered in the street (annexture A) his colours on a polling day in order to induce voters to elect him. In the circumstances second respondent's return was undue in as much as he should not have been competent to be elected as a member of the Council."

I deem it necessary at this stage to refer to the said section 62 (1) which provides as follows:-

- "62. (1) No person shall furnish or supply any loud speaker, bunting, ensign, banner, standard, or set of colours, or any other flag, to a person with intent that it be carried, worn or used on a motor car, truck or other vehicle as political propaganda on polling day and no person shall with any such intent carry, wear or use on a motor car, truck or other vehicle any such loud speaker, bunting, ensign, banner, standard or set of colours, or any other flag, on polling day."

Sub-section (3) thereof provides punishment for the offence in the following terms:-

"(3) A person who contravenes any of the provisions of this regulation shall be guilty of an offence and shall on conviction be liable to a fine not exceeding four hundred Maloti or to imprisonment for a period not exceeding one year."

It will thus be seen that nowhere does this section state that an offence therein shall also be visited with disqualification of the offender from being elected as a member of the Municipal Council.

In contrast see Section 63 which reads thus :-

"63. (1) A person who is found guilty of an offence under sub-regulation (4) or regulation 7, sub-regulation (2), (3) and (4) of regulation 58 or sub-regulation (2) of regulation 59, shall be liable to a fine not exceeding two hundred Maloti.

(2) A person who is convicted of an offence specified in this regulation shall be deemed to have been guilty of an illegal practice and shall become incompetent from the date of his conviction to be registered as a voter or to vote at an election under these Regulations or to be elected a member of a Council, and if at that date he has been elected a member of a Council his election shall be deemed void from the date of such conviction. Every practice which is an offence under any provision specified in this regulation shall be an illegal practice for the purposes of these Regulations."

The marginal note to section 63 significantly states :
"Punishment on conviction for illegal practice" and indeed I observe that all the subsections referred to in section 63 relate to illegal practices.

As to what an illegal practice entails Section 2 of the Municipal and Urban Councils Elections Regulations 1987 defines

the word "illegal practice" as "any illegal practice specified in sub-regulation (2) of regulation 63."

Section 2 of the Regulations define the words "corrupt practice" to mean "any corrupt practice specified in part 4 of these Regulations." The said part 4 deals with section 53 (Personation), Section 54 (Treating), Section 55 (Undue influence) Section 56 (Bribery) and Section 57 (Penalty). It is obvious therefore that Section 62 (1) on which this application is based does not feature as either an illegal practice or a corrupt practice.

I am of the firm view therefore that it is not every offence in the Municipal and Urban Councils Elections Regulations, 1987 that disqualifies a person from being elected as a member of Council. It is only those specified offences relating to corrupt and illegal practices that lead to a disqualification of such a candidate.

Indeed Section 66 of the Municipal and Urban Councils Elections Regulations 1987 provides for "grounds for avoiding Elections." It reads as follows:-

"The election of a candidate as a member of Council is avoided by his conviction for an offence deemed to be corrupt or illegal practice."

There is however no conviction proved in the case before me.

Section 67 of the said Regulations is even more to the point. It reads thus:-

"67. The election of a candidate as a member of Council shall be declared void on an election petition on any of the following grounds which are proved to the satisfaction of the Judge,

- (a) that by reason of general bribery, general treating or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of voters were or may have been prevented from electing the candidate whom they preferred;
- (b) non-compliance with the provisions of these Regulations relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;
- (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by an agent of the candidate;
- (d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent knowing that such person had within seven years previous to such engagement been found guilty of an offence deemed to be a corrupt practice, by a Court or by the report of the Judge;
- (e) that the candidate was at the time of his election a person disqualified for election as a member of Council."

Significantly even Section 13 of the Urban Government Act 1983 which is the parent Act to the Regulations in question provides as follows:-

"13 No election shall be invalid or set aside by reason merely of -

- (a) a defect in the appointment, or want of due appointment or title, of the returning officer or of any person assisting him at any election; or
- (b) a mistake or non-compliance with this Act, if it appears that the election was conducted substantially in accordance with the principles laid down herein

and that the mistake or non-compliance is not likely to have affected the result of the election."

Section 50 (1) of the Regulations is in the same vein as it reads thus:-

"No election shall be invalid by reason of failure to comply with any provision of these Regulations relating to elections if it appears that the election was conducted in accordance with the principles laid down in such provision and that such failure did not affect the result of the election."

Faced with the reality that the petitioners misconceived their claim by relying on section 62 (1) of the said Regulations Mr. Phoofolo then belatedly sought to rely on section 67 (a) and (b) of the Regulations by arguing that the use of a loud speaker and pamphlets on polling day is "other misconduct," and that there was non-compliance with the provisions of these regulations. The problem with this submission is that the petitioners do not rely on Section 67 in their petitions. They clearly limit their case to Section 62 (1). Be that as it may, however, I proceed to examine these submissions in detail.

That the use of a loud speaker and pamphlets on polling day amounts to "other misconduct".

In my view the words "other misconduct" must not be read in isolation or out of context. They must be read in line with the whole sub-regulation relating to "general bribery, general treating or general intimidation."

The words "other misconduct" in the said Section 67 came for determination by Cullinan CJ in Elliot Mokhethi Matlakeng v Sobhuza Sopeno and 3 others CIV/APN/89/89 (unreported) in which

the learned Chief Justice expressed the following remarks:

"It will be seen that regulation 67(a), section 164 and section 17(2)(a) above all contemplate general corruption, or simply a corrupt or illegal practice. Section 17(2)(a) and indeed regulation 67(a) embrace not alone election offences, but "other misconduct". There is a whole body of authority in the Republic of Zambia on the meaning of that term, but suffice it to say that it was initially defined by the late Hughes J. (as he then was) in 1968 in Re Three Election Petitions 1968/HP/EP/15, 21, 22 (Un-reported) as "wrong behaviour," or "improper conduct". It will be seen however that regulation 67 (a) goes on to speak of "other circumstances", which seems to extend the provisions to other than misconduct."

The Learned Chief Justice also stated:-

"All electoral legislation in Lesotho and elsewhere lays emphasis upon the freedom and fairness of elections. Regulation 67 indeed, in every paragraph thereof, envisages conduct contrary to such principles, I cannot imagine therefore that it was ever intended to extent regulation 67(a) to a situation where no mala fides or misconduct was involved or where the principles laid down in the Regulations had in fact been observed."

With respect I agree entirely. As earlier stated I may add that the misconduct envisaged to disqualify a person from being elected a member of Council is one that has to do with corrupt or illegal practice such as bribery, general treating or general intimidation.

That there was non-compliance with the provisions of the Regulations.

I have already found that the use of a loud speaker and pamphlets on polling day is not such an offence as is envisaged by section 67 to have the election of a candidate as a member of Council declared void.

In any event even if I may be wrong on the view that I take of the matter it is clear from section 67(b) that in order to

succeed the petitioners must show that "such non-compliance affected the result of the election." The onus of proof is clearly upon them on the principle that he who alleges must prove. There is however absolutely no iota of evidence in the case before me that the alleged non compliance with Regulation 62 (1) affected the result of the election. Indeed in fairness to Mr. Phoofolo for the Petitioners he conceded as much and properly so in my view. This in my judgment is sufficient reason to dismiss the petitions before me. Indeed there is absolutely no evidence that the alleged use of a loud speaker by Second Respondent was heard by any of the voters nor is there evidence that they saw any pamphlets on polling day.

I have earlier in my judgment observed that the petitioners have made bare, unsubstantiated allegations that the Second Respondent campaigned through a loud speaker and pamphlets on polling day notwithstanding the fact that they already knew of the dispute in the matter and that a ruling had already been made against them by the Supervisor of the Elections one Bereng Qhobela. The latter significantly states in part in paragraph 3 of his supporting affidavit to Second Respondent's opposition:

"I heard both sides to the dispute. There was not really much to substantiate the petitioners' complaint. It was just a vague, general and inconsistent allegation that 2nd Respondent had been seen/heard shouting with a loud speaker that the voters should go for the red colour. 2nd Respondent denied these allegations."

Later in the same paragraph the deponent Bereng Qhobela states:

"

I found the whole story of the petitioners hazy and unconvincing. I did not there and then make a ruling, I decided to give the matter a further thought and consideration. Later in the following days, I ultimately decided that the petitioners' claim was most frivolous and declared 2nd Respondent the winner."

Indeed I find that Bereng Qhobela does not stand alone in his support of the 2nd Respondent's version. The Returning Officer Lefa Lipholo also supported the 2nd Respondent and ruled that the latter take the oath and proceed with the voting. This is common cause.

In my judgment this is a fit case where the Rule laid down in Plascon-Evans Paints v van Riebeeck 1984 (3) S.A. 623 at 634 must apply namely that "the court is entitled to assume the correctness of the version of the Respondent where there is conflict of fact in motion proceedings designed to secure final relief" per Mahomed P, in National University of Lesotho Students Union v National University of Lesotho and others C of A (CIV) No.10 of 1990 (unreported) at p 19. I respectfully agree. I don't see that it makes any difference for the application of this principle whether the matter concerned is a petition or a Notice of Motion.

In the circumstances I assume the correctness of the version of the 2nd Respondent in this matter and reject the unsubstantiated one of the petitioners. I do so on a balance of probabilities in the matter as I consider that there is overwhelming evidence to support the case for the former.

In Elliot Mokhethi Matlakeng v Sobhuza Sopeng and 3 others (supra) Cullinan CJ remarked as follows on p 25 of his judgment:-

"The whole basis for the avoidance of an election, by Statute and at common law, is that the election was not free and fair."

With respect I share the same view.

There is absolutely no evidence before me that the election

was not free and fair. As I see it the petitioners were soundly beaten by the Second Respondent and it is not disputed that out of 299 votes he obtained 90 votes, 3rd petitioner got 34 votes, 2nd petitioner got 32 votes and the last petitioner "got the lowest, or the lowest but one vote" (see paragraph 6 of the answering affidavit of Motlatsi Kelly Mahase. I am satisfied that the poll was conducted in secrecy through a secret ballot box and that the voters exercised their choice as they saw fit. This court is not prepared to deny them that choice.

There is then the aspect of the petitioners' delay in launching this application. As earlier stated the election took place on 8th June 1996 but they only filed this application either on 26th June 1996 or on 27th June 1996 as afforesaid. By then a lot of water had already gone under the bridge.

Indeed in paragraph 12 of his answering affidavit Motlatsi Kelly Mahase avers in part:-

"On or about 18th June, 1996 the elected candidates including myself took an oath of office and we were formally and officially introduced to the Town Clerk, who is the Chief Executive Officer of the Council. The occasion was at the Municipal Hall at Ha Thamae."

And later in the same paragraph he states:-

"At the least the petitioners ought to have been aware as the processes were publicly announced."

I observe that these allegations are unchallenged. The ^{petitioners} respondents seem to hang on to the claim that they had lodged a protest.

I am satisfied however that the said protest had long been disposed of as earlier stated. That is precisely the reason why the petitioners did not object to the Second Respondent taking

the oath of office nor did they seek a court interdict against the latter at that stage. I find that the balance of convenience is against the petitioners in their belated attempt to unseat the Second Respondent.

There was another strange turn of events in this matter that needs to be commented upon. It is this.

The court asked Mr. Phoofolo during his submission in reply as to what was the basis of prayer (b) of the Notice of Motion as far as 2nd, 3rd and 4th ^{petitioners} ~~respondents~~ were concerned. How could they seek to have their own undisputed election declared as valid? Or was it the case that each of them was claiming to have been the winner despite the admitted vote count? Mr. Phoofolo's response was to inform the court that those petitioners were "dropping" their petitions in the circumstances. This in itself indicates how misconceived their petitions were. They deserve to be punished with costs as they pursued their baseless petitions right up to the end.

In the result therefore all the four petitions before me are hereby dismissed with costs.

In terms of regulation 72 of the Municipal and Urban Councils Electins Regulations, 1987 I do hereby determine and certify that the Second Respondent Motlatsi Kelly Mahase was duly elected.



M.M. RAMODIBEDI

ACTING JUDGE

25th day of October, 1996.

For Petitioners: Mr. Phoofolo
For Respondents: Mr. Makhetha