

IN THE HIGH COURT OF LESOTHO

In the matter between

BASOTHO NATIONAL PARTY

Applicant

and

**THE MANAGEMENT BOARD, LESOTHO HIGHLANDS
REVENUE FUND**

1st Respondent

THE MINISTER OF FINANCE

2nd Respondent

THE ATTORNEY-GENERAL

3rd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 13th day of September, 1996.

This is an opposed application brought on Notice of Motion in which the Applicant seeks for an order in the following terms:-

1. Declaring the approval and consequent disbursement of monies out of the Lesotho Highlands Revenue Fund by First Respondent to individual Members of Parliament and Constituency Development Committees to be illegal, irregular, sectarian and contrary to the spirit and letter of Legal Notice No. 91 of 1992;
2. Prohibiting First Respondent from financially sponsoring any projects by any one political party or designed to enhance the image of such political party;;

3. In the absence of Parliamentary appropriation Prohibiting Second Respondent from authorising any further payments out of the Consolidated Fund into the Lesotho Highlands Revenue Fund in Pursuance of Regulation 5 (1) (a) of Legal Notice No. 91 of 1992;
4. Directing Respondents to pay the costs hereof.
5. Further or alternative relief.

On 28th August, 1996 when the matter was argued before me Mr. Makhetha for the respondents raised a point in limine to the effect that the Applicant has no locus standi in judicio to bring this application to court. He submitted, in a nutshell, that the Applicant has no legal standing to sue on behalf of the public as it is now settled law that the Roman Law "actio popularis" has long become obsolete.

I observe at once that the principle of law stated in Mr. Makhetha's submission as aforesaid is sound law indeed. It is now trite law that "the right of a private person, or association of persons, is limited to prosecuting actions in his or its own interest and he or it has no title to institute them in the interest of the public "per Tebbutt AJA in Lesotho Human Rights Alert Group v The Minister of Justice & Human Rights and 2 others C of A (CIV) No. 27 of 1994.

In my judgment the onus is on the Applicant to prove on a balance of probabilities that he has locus standi to bring this application.

In this regard I observe at once that the founding affidavit of Evaristus Rets'elisitsoe Sekhonyana does not deal with this aspect at all. There are absolutely no averments as such to show that the Applicant has locus standi to bring this application.

It is therefore necessary to examine the entire body of evidence from all the affidavits and documents before me to determine whether despite lack of specific averments thereto the Applicant nevertheless does have the required locus standi. It was partly for this reason that the court ruled that the question of locus standi be argued together with the merits of the case as deposed to in the affidavits and having regard to the law and any relevant statutes. The other reason of course was in case I found myself unable to make an immediate ruling on the point in limine which might have the effect of concluding the matter in favour of either party without the necessity of going into the merits. I find myself in very good company in this approach as it has become increasingly common for the question of locus standi to be considered together with the merits of the claim. See Kendrick v Community Development Board 1983 (4) S.A. 532. See also The Administrator, Transvaal and The Firs Investments (Pty) Ltd. v Johannesburg City Council 1971 (1) S.A. 56 (A) in which the question of locus standi was raised for the first time in the appeal.

It is convenient at this stage to examine the statutory provisions on which this application is based. I deem it necessary to reproduce the relevant sections of the Finance

(Lesotho Highlands Revenue Fund) Regulations, 1992) in full even at the risk of overburdening this judgment in order to determine where the Applicant features by way of locus standi if any. In doing so it is the task of this court to determine whether applicant has a direct or substantial interest capable of legal enforcement in the matter.

The aforesaid Regulations provide in part:-

- "3. The purpose of the Fund shall be to maintain and enhance, on a sustainable basis, the living standards of all the people of Lesotho.
4. The objectives of the Fund shall be,
 - (a) to promote economic development and diversification through capital expenditures on projects consistent with Lesotho's Public Sector Investment Programme, and through an enhancement of the capacity of public and private institutions to identify, prepare and implement suitable projects;
 - (b) to stabilise Government revenue under circumstances of a temporary reduction in non-project revenues; and
 - (c) to generate supplementary long-term revenue flows for the Government from income derived from investments.
5. (1) There shall be paid into the Fund,
 - (a) 75% of that part of the quarterly transfer payment received by the Government under the Southern African Customs Union Agreement which is properly attributable to imports into Lesotho for the water transfer part of the Project;
 - (b) all royalties and excess water payments paid to the Government for, or in relation to, the sale of water from the Project under the Treaty;

- (c) any interest or other earnings arising out of any investment of moneys of the Fund;
 - (d) any moneys received from the sale of the assets of the Fund or from repayments of loans made from the Fund;
 - (e) all donations, grants or loans received for the purposes of the Fund;
 - (f) any sums appropriated to the Fund.
- (2) The revenues referred to in sub-regulation (1) (a) shall, every year, be estimated by the Ministry of Finance and Planning in consultation with the Authority and the Director of Customs and Excise, and shall be paid into the Revenue Receiving Account referred to in regulation 20 (1) (a), at the beginning of every financial year.
6. Moneys shall be paid from the Fund for,
- (a) the payment of staff and other expenses connected with the administration of the Fund;
 - (b) the implementation of projects and consultancies approved by the Board for the purposes of the Fund;
 - (c) the making of investments or the acquisition of assets approved by the Board for the purposes of the Fund;
 - (d) payments to the Consolidated Fund made pursuant to regulations 23, 24 and 25.
7. The Fund shall be administered and managed by the Board.
8. (1) There shall be a Management Board comprising,
- (a) The Principal Secretary for the Ministry responsible for Planning, who shall be chairman;

- (b) the Principal Secretary for the Ministry responsible for Finance;
 - (c) the Governor of the Central Bank of Lesotho;
 - (d) two persons who shall be appointed by the Minister from among suitably qualified candidates from the private sector.
- (2) The Minister shall cause the names of the members of the Board appointed under sub-regulation (1) (d) to be published in the Gazette.
10. If a member of the Board acquires any pecuniary interest, direct or indirect, in any contract or proposed contract or in any other matter in which his private interests conflict with his duties as a member and which is the subject of consideration by the Board, he shall, as soon as he becomes aware of his interest in the contract or proposed contract or any other matter, disclose the facts relating thereto to the Board.
12. The Board shall be responsible for,
- (a) the establishment of such policies, strategies and procedures as may be necessary and appropriate to ensure that the objectives of the Fund are achieved in an effective and efficient manner;
 - (b) the determination of the limits of the powers delegated to the Development Committee and Investment Committee pursuant to regulations 17 and 19 respectively;
 - (c) the provision of general directives and guidelines to the Executive Secretary and the Secretariat;
 - (d) the approval of,
 - (i) an annual budget for the administration of the Fund;
 - (ii) such projects as may be referred to the Board by the Development Committee;

- (iii) such investments as may be referred to the Board by the Investment Committee;
 - (e) monitoring the performance of the Fund, including the activities of the Development Committee and the Investment Committee;
 - (f) the making of appointments to positions referred to in regulation 14(1) (b) and (c), after consultation with the Minister responsible for the public service.
13. (1) The Minister shall, after consultation with the Minister responsible for the public service, by notice in the Gazette, appoint an experienced senior public officer to be the Executive Secretary of the Board.
- (2) The Executive Secretary shall be the chief executive and accounting officer of the Fund.
- (3) The Executive Secretary shall attend meetings of the Board but he shall have no power to vote at such meetings.
- (4) The Executive Secretary shall perform such duties as are conferred on him by or under these regulations.
14. (1) There shall be a Secretariat of the Fund consisting of,
- (a) the Executive Secretary;
 - (b) two officers to be known respectively as a Development Director and a Finance Director;
 - (c) such number of employees as may be seconded or otherwise appointed to the Secretariat.
- (2) The Fund may grant pensions, gratuities or retiring benefits to the officers and employees of the Secretariat and require them to contribute to any pension, provident fund or superannuation scheme.

- (3) If an officer holding a pensionable office in the public service is seconded to the Secretariat, the period during which he serves with the Secretariat shall, for the purpose of computation of time and amount of pension payable to him in respect of his service as a public officer, be deemed to be service in a pensionable office.

15.
 - (1) The Secretariat shall be responsible for the management of the Fund in accordance with the decisions of the Board.

 - (2) Without prejudice to the generality of sub-regulation (1), the Secretariat shall be responsible for,
 - (a) arranging meetings of the Board;
 - (b) providing briefing papers, reports and other documentation for the Board and its committees;
 - (c) preparing and appraising development projects;
 - (d) accounting for all transactions;
 - (e) managing incomes, expenditures and resources of the fund;
 - (f) managing technical assistance for the operations of the Fund;
 - (g) liaising with relevant departments of the Government and other bodies in connection with development projects;
 - (h) monitoring project and investment performance; and
 - (i) facilitating the timely completion of annual accounts and effective audits of the Fund.

16.
 - (1) There shall be a Development Committee comprising,
 - (a) the Executive Secretary, who shall be chairman;
 - (b) the officer for the time being responsible for the control of the budget in the Ministry of Finance and Planning;

- (c) the officer for the time being responsible for Aid Coordination in the Ministry of Finance and Planning; and
 - (d) two other persons who shall be appointed by the Board, with the approval of the Minister from among suitably qualified candidates from the private sector.
17. (1) The Development Committee shall carry out, in accordance with policies and guidelines issued by the Board, such duties as may be delegated to it by the Board with respect to development projects.
- (2) Without prejudice to the generality of sub-regulation (1), the Development Committee shall be responsible for,
- (a) selecting the projects to be funded in accordance with the criteria of the Fund and authorizing project expenditure;
 - (b) deciding when project preparation facilities and associated technical assistance shall be provided;
 - (c) monitoring project implementation;
 - (d) submitting routine reports to the Board; and
 - (e) seeking the approval of the Board whenever required to do so."

A close examination of the above-mentioned sections of the Finance (Lesotho Highlands Revenue Fund) Regulations 1992 has left me in no doubt that the Regulations were intended for the best of motives namely to ensure that the fund established therein maintained and enhanced "the living standards of all the people of Lesotho " (See section 3 thereof) as well as to "promote economic development.." (see section 4 thereof). I observe at once therefore that there is no question of discrimination based on political affiliation or at all raised in these Regulations.

I turn now to deal with the facts of the matter. In paragraph 4 of his founding affidavit Evaristus Rets'elisitsoe Sekhonyana acknowledges the fact that "in terms of Legal Notice No. 91 of 1992, First Respondent is charged with the administration of the Lesotho Highlands Revenue Fund. First Respondent is further charged with receipt of monies from specified sources and disbursing such monies for specified purposes."

The applicant's complaints can best be highlighted by referring to paragraphs 5 - 7 of the Founding Affidavit of Evaristus Rets'elisitsoe Sekhonyana to the following effect:

- "5. Since April 1995, First Respondent has been what it refers to as development projects in Constituencies. The funds are handed over to Parliamentarians who are members of the ruling Basutoland Congress Party only irrespective of whether or not some of them have Constituencies. Second Respondent is a Senator and has not been elected from any Constituency. First Respondent has approved funding for Qeme Constituency to be executed by Second Respondent. A copy of the letter of approval is hereto attached and marked annexure "BNP2".
6. First Respondent further issued circular letters to all Parliamentarians whom it referred to as Principal Executives of Projects in Constituencies. The circular letters laid down conditions governing the implementation of development projects in Constituencies. Copies of the circular letters are hereto attached together with fair translations thereto and are marked annexures "BNP3" and "BNP4" respectively.

7. First Respondent's decision to approve and authorise funding of Constituency development projects is illegal, ultra vires, sectarian and biased, discriminatory and unconstitutional in that:
 - 7.1 the delimitation of Lesotho into Constituencies is purely for purposes of elections only. Any financial assistance to a group of persons on the basis of their Constituency affiliation is ultimately designed to influence their voting decision in elections. In the circumstances of the present case, First Respondent is using public funds for Constituency projects whose alleged principal executives are Parliamentarians of the ruling Basutoland Congress Party. First Respondent is effectively lending financial assistance to the said party.
 - 7.2 Community projects in rural areas are statutorily the responsibility of Village and Ward Development Councils. In urban areas they are the responsibility of municipal Councils. There is no legislation making provision for the establishment of Constituency Development Committees since these are purely organisational structures of individual political parties. First Respondent is using public funds for purposes of political party structures and blatantly by-passes statutory bodies charged with community projects having no linkages with party political structures.
 - 7.3 Parliamentarians are financial watchdogs over the Executive branch of Government. The Public Accounts Committee reports directly to Parliament. Members of Parliament have no

executive functions to disburse public funds personally, even at their respective Constituencies. Their function of disbursements of public funds is formally through Parliamentary appropriations only. The current decision by First Respondent to approve and fund Constituency projects executed by Parliamentarians allows members of Parliament to take advantage of their Parliamentary positions to act in a manner benefitting their Constituencies in a politically sectarian manner.

7.4 The projects funded by First Respondent are not consistent with the Public Sector Investment Programme as currently prepared by the Ministry of Planning. The communities identify the projects. First Respondent is supposed to fund part of the Public Sector Investment Programme and not similar, analogous nor additional programmes as this violates the regulations of the Fund.

7.5 Seventy-five per cent (75%) of the quarterly transfer payment received by the Government of Lesotho under the Customs Union Agreement and which is properly attributable to imports into Lesotho for water transfer part of the project accrues to the Lesotho Highlands Revenue Fund. All the Customs Union Agreement revenue accrues to the Consolidated Revenue Fund. All withdrawals from the Consolidated Revenue Fund are by means of Parliamentary appropriation.

There has been no Parliamentary appropriation of the seventy-five per cent (75%) of the quarterly transfer payment derived from the Customs Union Agreement. Without such appropriation the monies received by the Lesotho Highlands Revenue Fund have been illegally and unconstitutionally drawn

from the Consolidated Revenue Account and are not disburseable for any purpose.

7.6 Despite the monies disbursed by First Respondent being public funds, there are no accountability procedures and mechanism put in place to ensure that they are properly disbursed. Government tender procedures are not even followed where ordinarily this would be the case.

All in all public funds are being thrown into the air for the benefit of the Basutoland Congress Party in Constituencies. This party draws benefits for its purposes under the hand of Government and the First Respondent. This is prejudicial and harmful to other political parties including in particular the Applicant Party. This is unfair since Applicant Party has no access to public funds."

It seems to me that the main thrust of applicant's case from the foregoing and particularly the last paragraph quoted above is, in a nutshell, that public funds are being misused and that "this is prejudicial and harmful to other political parties including in particular the Applicant Party." I am satisfied therefore that the applicant is in fact seeking to play the role of a general watchdog over the executive and thus to vindicate the public interest. I find that there is merit in Mr. Makhetha's submission on behalf of the Respondents that the applicant is in fact indirectly seeking for the right to govern the country.

Lawrence Baxter: Administrative Law at p 647 has this to say:-

"Just as a court might decline to rule on a policy issue because it considers this to be a matter for the legislature, so it might decline to recognize

the standing of an individual who seeks to vindicate the public interest because it considers its role to be one of settling disputes between individuals whose private interests have been harmed, not one of acting as a general watchdog over the executive."

These words are apposite to the case before me.

In all the circumstances of this case I am satisfied that this application runs counter to the test laid down in Lesotho Human Rights Alert Group v The Minister of Justice & Human Rights & 2 others (supra) namely that the right of a private person or association of persons is limited to prosecuting actions in his or its own interest and he or it has no title to institute them in the interests of the public.

Now the test, as I conceive it to be, is not merely whether a person seeking to institute an action must have a personal interest but whether such interest is direct and substantial as well as being capable of legal enforcement.

In P.E. Bosman Transport Works Committee and others v Piet Bosman Transport (Pty) Ltd. 1980 (4) S.A. 801 (T) at 804 B Eloff J. puts the principle succinctly in the following terms:-

"It is well settled that, in order to justify its participation in a suit such as the present, a party such as second applicant has to show that it has a direct and substantial interest in the subject-matter and outcome of the application."

With respect I entirely agree.

I observe that in the case of Lesotho Congress of Free Trade Unions v Ramochela and others C of A (Civ) No.2 of 1985 Aaron J.A. had this to say:-

"Appellant's interests may be affected by a decision on these matters, but it has no legal rights capable of enforcement arising therefrom."

Likewise I find that the applicant has no legal rights capable of enforcement in the matter before me. Applicant's interest is no more than that of any other member of the public.

The subject matter in the present application is the right to administer the Fund established under Legal Notice No. 91 of 1992 as aforesaid. I am satisfied on the facts before me that the Applicant has no direct and substantial interest capable of legal enforcement in the matter. I emphasise that Applicant's interest is no more than that of any member of the public. In fact Applicant has not even alleged or shown that such a right exists. I am not surprised because the applicant's real remedy lies in the political arena and not before courts of law in a matter of this nature. It would be a different thing if the court was dealing with the question of the liberty of the subject which is not the case before me.

Again I observe that this is not a case in which the applicant is relying on a statute which confers rights on any member of the public to bring the matter to court for any transgressions thereof. For that reason the applicant cannot

have the benefit of the doctrine laid down in Patz v Greene & Co. 1907 T.S. 427 namely that "where legislation has been enacted in the interests of a particular individual or class of persons, the courts will presume that a violation of the legislation will automatically affect the interests of such individual or class and anyone falling within the protected category will have standing to challenge action taken in violation of the legislation without having to establish that his interests are in fact affected."

Lawrence Baxter: Administrative Law p 659 - 660. As earlier stated section 3 of the Finance (Lesotho Highlands Revenue Fund) No. 91 of 1992 makes it abundantly clear that the purpose of the Fund was not to individualise or discriminate in any way but "to maintain and enhance, on a sustainable basis, the living standards of all the people of Lesotho."

In all the circumstances of the case before me the Applicant, in my view, has not discharged the onus of proving that it had locus standi to bring this application which is accordingly dismissed with costs.

Because of the conclusion to which I have come on the question of locus standi it is strictly unnecessary for me to deal with the merits of the case. But since I have heard full argument therein as well I may however state that the application further falls to be dismissed with costs on the principle laid down in Plascon-Evans Paints v Van Riebeeck 1984 (3) S.A. 623 at 634 namely that "the court is entitled to assume the correctness of the version of the Respondent where there is a

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 p19. With respect I adopt the same approach in this matter.

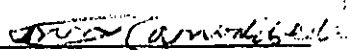
I observe that the allegations in the founding affidavit of Evaristus Rets'elisitsoe Sekhonyana which are denied remain unsubstantiated. I attach due weight to paragraph 16 of the answering affidavit of Motlatsi Matekane in which he deposes in part ".....It was the clear instruction of the Board that no cheques should be issued to members of Parliament" who according to the deponent were mere facilitators in the implementation of the projects by the project committees" - see paragraph 15 of the said answering affidavit. I find that the deponent Motlatsi Matekane is supported by the report of the World Bank Annexure "MMB" particularly page 5 thereof to the following effect:

"Members of Parliament currently function as promoters and monitors of the Fund's activities in their respective constituencies. Through their right of access to public information, they fulfill an essential catalytic function, both in facilitating the two-way flow of information between the central operations of the Development Fund and communities, and in signaling and helping to resolve problems in prompt service delivery to communities by Government agencies, donors, NGOs and private contractors.

The current role of MPs is entirely appropriate. Whereas instances may have occurred in which MPs have handled the finances disbursed under the Development Fund operations, the mission did not obtain concrete proof of such transactions. Moreover, the Government's policy on this issue is clear: MPs role is to monitor the operations of the Fund in their constituencies, not to take part in any of its financial operations."

Well nothing can be clearer. In the circumstances I assume the correctness of the version of the Respondent in this matter.

In the result this application is dismissed with costs.


M.M. RAMODIBEDI
Acting Judge

For the Applicant : Mr. Ntlhoki
For the Respondent : Mr. T. Makhetha