CIV/APN/160/98

IN THE HIGH COURT OF LESOTHO

In the matter between

LESAO LEHOHLA	APPLICANT
and	
NATIONAL EXECUTIVE COMMITTEE OF THE LESOTHO CONGRESS FOR DEMOCRACY	1ST RESPONDENT
LESOTHO CONGRESS FOR DEMOCRACY	2ND RESPONDENT
INDEPENDENT ELECTORAL COMMISSION	3RD RESPONDENT
MOLAHLEHI LETLOTLO	4TH RESPONDENT
THE ATTORNEY GENERAL N.O.	5TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

On the 6th day of May, 1998

This case concerns democracy or lack thereof. I should state at the outset that for my part I have drawn comfort from the impressive name of Second Respondent - "Lesotho Congress for Democracy". Indeed I observe with keen interest that in the preamble to its Constitution the Second Respondent has set out to provide "education" for true democracy to the entire Basotho nation as a whole. For good measure Second Respondent has set out in Section 2 of its Constitution that its aims and objectives shall be to work for democracy in "Lesotho, Africa and

the whole world" with truth, justice and peace as the corner stones of such democracy. Noble aspirations indeed! It remains therefore to see whether the Second Respondent has practised what it advocates for in its Constitution. It is perhaps, rather surprising that the challenge to Second Respondent's claim to democracy in the instant matter should come from no other person than Second Respondent's own party member whom I shall hereinafter refer to as the Applicant. It should be remembered for that matter that Second Respondent is the ruling party in the country whether rightly or wrongly.

Now for the story of the litigation.

On the 19th April, 1998 the Applicant filed a Notice of Motion with this Court for an order couched in the following terms:-

"1. Dispensing with the Rules of Court concerning periods and notices and service of process on account of urgency of this matter.

2. A **Rule Nisi** issue returnable on the date and time to be determined by the above Honourable Court calling upon the Respondents to show cause (if any) why the following order shall not be made final, to wit:-

a) The decision of first Respondent purporting to nullify Applicant's election and/or to impose the fourth Respondent as the second Respondent's candidate in the Mafeteng Number 55 Constituency for the 1998 general

elections shall not be declared null and void on account of such decision being unlawful, irregular, inconstitutional (sic) as well as fraught with procedural and substantial injustice and impropriety;

b) The first Respondent shall not be restrained and interdicted from submitting the name of fourth Respondent as a candidate of second Respondent in the constituency of Mafeteng Number 55 to the third Respondent pending the finalisation hereof;

c) The third Respondent shall not be restrained and interdicted from nominating and/or confirming the fourth Respondent as a candidate of the second Respondent in the constituency of Mafeteng Number 55 pending the finalisation hereof;

d) The Applicant shall not be declared the lawful and duly elected candidate of second Respondent in the constituency of Mafeteng Number 55 for the forthcoming general elections;

e) The first, second and fourth Respondents shall not be ordered to pay costs hereof;

f) The Applicant shall not be granted further and/or alternative relief.

3. **THAT PRAYERS 1, 2(b)** and © operate with immediate effect as an Interim Order pending the finalisation hereof."

The matter initially came before my Brother Kheola C.J. who granted the Rule Nisi as prayed on the same day namely the 19th April 1998.

The matter is opposed by First, Second and Fourth Respondents only. It is reasonable to assume therefore that the Independent Electoral Commission (3rd Respondent) and the Attorney General (5th Respondent) will abide by the judgment of this Court.

It is not seriously disputed that on the 16th April, 1998 a meeting or conference (it does not matter which) of the Mafeteng Constituency No.55 took place at Mafeteng with a view to electing a candidate who would represent the Second Respondent at the forthcoming General Elections scheduled for the 23rd May 1998. Indeed nomination day was by then just around the corner namely the 20th April, 1998.

It is again common cause that the meeting in question proceeded again on the 17th April 1998.

Points of Dispute.

There is a serious point of dispute as to who chaired the meeting in question. The Applicant's version is that the meeting was chaired by the Chairman of the Constituency in question namely one Etsang Moeno. The Respondents on the other hand claim that the meeting was chaired by one Thebe Motebang. Again there is

a dispute whether there was a disorder at the meeting of the 17th April 1998 and if so whether such disorder did result in the closure of the meeting per se.

Once more there is a serious dispute of fact as to whether or not the meeting of the 17th April, 1998 was properly closed or whether it was lawfully adjourned to the 18th April, 1998. The Applicant's version supports the latter view while the Respondents are adamant that the meeting was abandoned and/or closed due to disorder. According to them the meeting was never lawfully reconvened on the 18th April 1998 or at all. The Applicant insists that the meeting having been lawfully adjourned on 17th April 1998 it was reconvened again on the 18th April 1998 when he was unanimously elected. I should perhaps mention at this stage that the Respondents do not seriously dispute that the Applicant was so elected but they contend that since the meeting of the 18th April, 1998 at which Applicant was elected was "unconstitutionally" held, such election is not binding on the First and Second Respondents.

Rule 8 (14) of the High Court Rules

In view of the points of dispute as outlined above and acting in terms of Rule 8 (14) of the High Court Rules I directed that oral evidence be heard on the three (3) issues set out above and to that end I ordered that the deponents to these issues appear personally to be examined and cross examined as witnesses. I should mention that I did this in the interests of justice and in order to get to the truth in as much as it was not possible to decide which typewriter was telling the truth and which one lying on the printed material before me.

The evidence of the Applicant Mr. Lesao Lehohla who gave sworn evidence

as PW1 was briefly to the following effect:

He attended the meeting of the Mafeteng Constituency No.55 from the 16th April 1998 right through to the 18th April 1998 when he was elected as Second Respondent's candidate for the forthcoming General Elections.

Those who attended the meeting on the 16th April 1998 were the Applicant himself, a delegation from the National Executive Committee comprising of Mr. Maope, Mr. Motete and Mr. Molopo as well as members of Mafeteng Constituency No.55 Committee together with the Constituency branches. There were five such branches in attendance namely -

(1) The Central Branch
(2) Kotoanyane Branch
(3) Maboloka Branch
(4) Lifelekoaneng Branch and
(5) Controlled Branch.

This meeting started off with discussions between the Constituency and the delegation from the National Executive Committee from Headquarters. This was in fact "table discussions" which were chaired by the leader of the delegation from the Headquarters Mr. Maope. It was not part of the conference. Indeed the Applicant is unchallenged in this respect. The conference was then adjourned to the 17th April 1998 when it resumed under the chairmanship of Mr. Etsang Moeno the chairman of the Mafeteng Constituency No.55 Committee. The witness is adamant that other than Mr. Moeno no other person assumed the chairmanship on the 17th April, 1998.

Morning discussions went on on the 17th April, 1998 until delegates were led into the conference room where they raised questions from the floor still under the chairmanship of Mr. Moeno.

Meanwhile the Headquarters delegation "had said by 12 o'clock they would leave - they were hard pressed for time." The discussions however continued until the Headquarters delegation left together with the Central Branch at about 2.30 - 3 p.m.

The meeting continued even after the departure of the delegates mentioned above. It was still under the chairmanship of Mr. Moeno.

PW1 denies that Mr. Maope closed the meeting before the Headquarters delegation left. He denies that Mr. Thebe Motebang chaired the meeting of the 17th April 1998 nor did he close it. He contends that in terms of the Second Respondent's constitution they were entitled to continue with the meeting in that a minimum of three (3) Branches form a quorum. Four Branches remained in attendance. The conference decided to continue with the meeting the next day the 18th April, 1998. The witness is adamant that the meeting of the 17th April 1998 was closed by the chairman Mr. Moeno.

On the 18th April 1998 the four (4) remaining Branches continued the meeting under the chairmanship of Mr. Moeno. An elections committee was elected and it conducted elections for a candidate for Mafeteng Constituency No.55. The witness was elected as the Constituency candidate. It was still under the chairmanship of Mr. Moeno. PW1 is adamant that the Headquarters delegation's brief was to oversee the elections and not to conduct the meeting. It is his evidence

that the mood of the participants was one of "anticipation, happiness and songs." Indeed I observe that he is again unchallenged in this respect.

It is further PW1's evidence that he would not describe the mood of the delegates as rowdy. They were certainly not unruly. There was occasional noise under control "which is normal in a political discussion." Once more he is unchallenged on this version. He denies that the meeting had degenerated into anarchy, adding "up and until the delegation from Maseru left the meeting was still under control."

Under cross-examination PW1 agreed with Mr. Matsau for the Respondents that the sole purpose of the meeting (conference) was to elect a candidate to represent the party in the National Assembly Elections. After the Headquarters delegation had left the meeting discussed the departure of the delegates in question and what the meeting had to resolve. It was then finally agreed that the election of a candidate would proceed on the 18th April 1998.

PW1 readily admitted that "part" of the problem that engaged the attention of the meeting was participation of the Central Branch.

He denied the suggestion that the election did not take place on the 17th April 1998 because of the "hampering because people were not satisfied with Miss Moshabesha." According to PW1 people were entitled to ask questions as this was their democratic right. They could not be rushed into an election without first giving them an opportunity to air their views. He feels it is "ironic" that elections may not take place because of questions adding "the Maseru people (namely the Headquarters delegation) said they were hard pressed for time. Once more he is

unchallenged on this version that the Headquarters delegation were indeed so impatient. In my view probabilities are that this was the reason why they left the meeting before its conclusion.

It is PW1's evidence that the role of the National Executive Committee of the Second Respondent is merely to oversee the election. The constitution is however not clear. The witness gave the Court an example of a situation whereby the National Executive Committee did not attend an election of a candidate - that is Semena Constituency. This was in answer to the following question by Mr. Matsau:

"Q. Isn't it so that elections of this kind are supervised by NEC?
A. I put to counsel that in the Constituency of Semena they were not there and the election stood."

I consider that this was direct unchallenged evidence which serves to belie the Respondents' claim that elections of this kind are supervised by NEC. Nor do they necessarily have to be physically present at constituency elections. Conversely I hold that there is nothing in Second Respondent's constitution that precludes or invalidates the holding of an election at constituency level in the absence of the National Executive Committee members.

Indeed I observe that nowhere in Annexture "LM4" (which is a letter dated 15/4/98 addressed by the National Executive Committee to Mafeteng Constituency No.55) is it suggested that the National Executive Committee is going to conduct the elections itself.

I should mention that I watched PW1 as he gave evidence. He was very

impressive indeed. He gave evidence in a clear straightforward manner and always gave me the impression that he was all out to tell the truth. I believe his version of events. He readily admitted that the nature of the debate at the meeting in question "did get very hot" as happens in political meetings - but however it was "very keen and constructive. It needed answers."

He was asked the following questions by Mr. Matsau:

"Q. What I am putting to you is that according to the affidavit of Motete the meeting of the 17th also deteriorated into disorder."

A. That is not so. Mr. Motete and other Ministers of Government have security. We were safe. There were members of NSS, the police."

Indeed he is once more unchallenged in this respect and I accordingly make the finding that the delegates were safe at the meeting and that therefore there was no need at all to discontinue the meeting.

The sworn evidence of PW2 Etsang Moeno was much shorter. He is chairman of the Mafeteng Constituency No. 55. He corroborates PW1 in all material respects relating to the meeting in question. He was chairman thereof from the 16th April 1998 to the 18th April 1998. Mr. Thebe Motebang never chaired any of the meetings.

It is PW2's evidence that he is the one who closed the meeting of the 17th April 1998 as chairman. The business for which the meeting was held was not completed on that day. Around 3 o'clock the Headquarters delegation "walked

out." No reason was given. Those who remained behind namely four Branches hoped that the Headquarters delegation would come back but they did not. The understanding of the remaining delegates was that the meeting should proceed and so it did. It was chaired by him. The meeting proceeded until the evening when he adjourned it to the following day the 18th April 1998. He resumed the chairmanship on this latter date and the Applicant was elected as the constituency candidate.

PW2 is adamant that the meeting of the 17th April 1998 was not closed by Mr. Maope but by himself.

He describes the meeting as "a well conducted meeting." There were questions from the floor and they were being answered. This took some time. He denies that the meeting of the 17th April, 1998 degenerated. He was in control of the meeting even when tempers were high. He denies that there was terrible noise in the Conference hall.

Under cross examination from Mr. Matsau PW2 made a slight contradiction in that at first he said he chaired the table discussions but later retracted from this view point. Apart from this minor discrepancy he remained unshaken in cross examination and I have no reason to disbelieve him. He corroborates PW1 that the National Executive Committee merely acts as observer and does not conduct elections.

DW1 Lira Motete gave evidence under oath which can briefly be summarised as follows:

On the 16th April 1998 they spent the whole day at Mafeteng Constituency

No. 55. They sat with the constituency committee together with the Central Committee under the supervision of the National Executive Committee. They "worked to resolve grievances on both sides until evening."

On the 17th April 1998 they resumed duty with the same parties as on the previous day. They proceeded to General Conference. They inspected the list of villages in order to ensure correct delegation. Finally an agreement was reached on the credentials of the delegation.

According to DW1 "we asked the Constituency Committee then to supply us with voting papers." The delegates were then called into the Conference hall. The position of chairmanship was assumed by Thebe Motebang.

As they were about to issue ballot papers to the delegates some of the latter raised up their hands to ask some questions. It was at this time when questions were being asked that a lot of noise was heard next door. It was signing. The noise was very high and the building made up of corrugated iron was struck and the noise came inside. The witness adds "we asked the chairman of the constituency committee namely Moeno to assist to stop the noise. We received no help from Moeno." According to DW1 Moeno continued replying to those people outside "and he said he was going to listen to these people only and that he was going to listen to whatever they tell him to do."

While these people were still making noise they pushed one another until they entered the conference hall. Some of the people asking questions tried to stop them but they continued making noise.

According to DW1 "we approached our leader Mr. Maope to consider the situation that prevented us from working. And we agreed that Ntate Maope should close down the meeting and that we should report to the NEC." Mr. Maope then "announced that the meeting was closed and we returned to Maseru."

Under cross examination byAdv. Phafane for the Applicant DW1 conceded that the functions of a constituency chairperson includes that of chairing constituency meetings. He further concedes that the meeting of the 17th April 1998 was not an annual conference of Second Respondent. He insists however that the meeting of the 17th April was chaired by Mr. Motebang.

DW1 insists that the procedure of his party is that it conducts elections at constituency level. Pressed on whether this was a constitutional provision or just a practice his reply was "it is a practice," adding "It is not written like that in the constitution but I say it is a practice." Indeed he was adamant that it was a practice of long standing. When it was put to him however that Second Respondent was only formed in 1997 his answer was startling to say the least. He insisted that his party was formed in 1952. Pressed further he finally conceded that it was formed in 1997. I have no doubt that DW1 was not prepared to tell the Court the truth. He gave me the impression that he was all out to mislead the Court. Worse still I found DW1 to be very evasive as a result of which I often had to warn him to answer counsel's questions directly.

Significantly DW1 does not dispute the Applicant's version that the National Executive Committee did not conduct or participate in the election of a candidate at Semena Constituency. In the circumstances I have no hesitation in rejecting the allegation that the National Executive Committee conducts elections of candidates

at constituency level.

Yielding to the pressure of cross examination by Adv. Phafane DW1 finally had to concede that indeed it was Mr. Moeno who called the meeting to order and introduced the delegation to the house. The Headquarters delegation was "working through the Constituency Committee." When DW1 became evasive once more he went something like this:

> "The meeting was chaired by us acting through the Constituency Committee."

He was inevitably asked:

"Q: In this regard you were making use of the chairman?

A: Yes.

Court: Which chairman?

A: Mr. Moeno the chairman."

Indeed DW1 added quite significantly "yes the functionary was Mr. Moeno, only that he was carrying out our instructions." In my view this corroborates PW1 and PW2 that the chairman of the meetings in question was Mr. Moeno himself and I so find.

Nor was this the end of DW1's bouts of evasiveness in cross examination. He was again asked by Adv. Phafane:

"Q: I am told on 17th April 1998 you had fixed a dead line -

something must have happened and that is the election.

A: Yes."

Yet when his attention was drawn to the fact that in his affidavit he had denied this DW1 immediately retracted and denied that a dead line had been set. This Court is not impressed with the credibility of this witness. He was badly shaken in cross examination.

I should also mention that it was interesting to hear the evidence of DW1 that in their apparent haste to leave the meeting the Headquarters delegation left the ballot cards lying on the table. In my view this clearly suggests that they had not gone there to conduct the election. They left the ballot cards behind in order that the election might proceed in their absence. I believe the evidence that they had set a dead line and when the meeting became protracted beyond the dead line as a result of the delegates exercising their democratic right to ask questions and debate issues they became impatient and left unceremoniously.

Having seen and heard the witnesses I believe the evidence of PW1 and PW2 and I am satisfied that there was no disorder at the meeting of the 17th April 1998 and that the meeting was not closed as a result of disorder. I disbelieve DW1 Mr. Lira Motete in this regard. I believe PW1's evidence that the delegates were safe. That being the case I am satisfied that there was no justifiable reason to close the meeting.

This is perhaps an appropriate stage to turn to Applicant's challenge to the affidavit of Mr. Lira Motete on the ground that he was not authorised to make it. It is indeed common cause that Mr. Lira Motete relied upon the Resolution of the

20th April 1998 "as evidence that I am duly authorised to depose to this affidavit." That resolution however does not authorise him anywhere; it reads:

> "Extract of Minutes of the Executive Committee of the Lesotho Congress for Democracy Held at Maseru on the 20th Day of April, 1998
>
> It was Resolved that:
>
> 1. The party should defend the action brought against it in the High Court of Lesotho under CIV/APN/160/98 by Lesao Lehohla;
>
> 2. Mr. Shakhane Mokhehle be and is hereby authorised to sign all documents necessary to bring the aforegoing resolution into effect.
>
> Signed
> Secretary General
> 20/4/98"

In fairness to Mr. Matsau for the Respondents he conceded, and rightly so in my view, that this resolution does not authorise Mr. Lira Motete to file an affidavit in the matter.

See Pretoria City Council v Meerlust Investments Ltd. 1962 (2) S.A. 321 where it was held that in the case of an artificial person the onus is on the person claiming authorisation to place before the Court an appropriately worded resolution of the artificial person in question.

See also Federal Convention of Namibia v Speaker National Assembly of Namibia and others 1994 (1) S.A. 177 AT 196.

Faced with this problem Mr. Matsau then made an application from the bar to amend the Resolution.

Not surprisingly this application was strenuously opposed and after hearing submissions from both counsel I dismissed the application on the following grounds:

(1) that in effect what the intended amendment was seeking to do was to indirectly amend the affidavit of Mr. Lira Motete which in law he could not do. See Semakaleng Khongoanyane and Another v The Director of Prisons and 3 Others CIV/APN/229/93 (unreported).

(2) the application went at the heart of Applicant's objection.

(3) the application was not properly motivated by a Notice of Motion supported by an affidavit to explain and justify the amendment.

Indeed authorities are legion that an application for an amendment is not just there for the taking. It must be fully explained and justified. The convenience of the Court as well as the need for finality must also be considered. (The list is not exhaustive).

It should be borne in mind however that although Mr. Motete has not been

authorised to file an affidavit in this matter, the Court did allow him to give viva voce evidence in the interests of justice. I have however approached his evidence with due caution to the extent that he is an uninvited witness in the matter.

It is no doubt important to bear in mind that the meeting in question was not a meeting of the National Executive Committee. It was and always remained a meeting of the Mafeteng Constituency No.55 throughout. I have no reason to doubt this version.

It is perhaps appropriate at this stage to refer to relevant sections of the Constitution of Second Respondent. Firstly I observe that nowhere does the constitution prescribe who should chair Constituency meetings where members of the National Executive Committee are in attendance. Secondly and more importantly the Constitution does not prohibit the chairman of a Constituency Committee to chair such meetings.

Section 12(d) of the Constitution provides that a minimum of three (3) branches shall form a quorum for a meeting of any Constituency Committee <u>under</u> the approved Constituency Committee. A proper reading of this section has left me in no doubt that a meeting of a Constituency Committee is in terms of the constitution chaired by the chairman of the Constituency Committee in question.

I am indeed fortified in the view that I take of the matter by Section 21 (q) which, in my judgment leaves the National Executive Committee in the position of a watchdog only in the election of a party candidate at a Constituency meeting.

In all probabilities therefore I am satisfied even quite apart from the evidence

of PW1 which I believe that the meetings in question resulting in the election of the Applicant were chaired by the chairman of Mafeteng Constituency No.55 Committee namely Etsang Moeno.

Regarding the second point of dispute I have already held that there was no disorder at the meeting of the 17th April 1998 and that the meeting was not closed as a result of any disorder.

I turn then to determine the third point of dispute namely: was the meeting of 17th April, 1998 properly closed or not or was it lawfully adjourned to 18th April, 1998 when elections were held?

It will be recalled that Respondents' version is to the effect that the meeting of the 17th April, 1998 was closed due to disorder. In his opposing affidavit Mr. Lira Motete makes a startling statement that the meeting was actually closed by Mr. Maope (see paragraph 11). Indeed he avers that during the course of the meeting "Mr. Maope who was the head of the delegation of the National Executive Committee stood up and announced that as a result of this unruliness the meeting could not proceed and it was therefore closed."

I cannot understand how anyone, be it a member of the National Executive Committee or not, could ever close a lawful meeting without any recourse to the chairman. I cannot but imagine that the chairman would simply ignore him and proceed with the meeting. This is exactly what happened here. The delegation of the National Executive Committee departed from the meeting. I think this was a tactical blunder which they may yet rue. It was in my view a clear abdication of their duty as a watchdog in the election.

I find that this case has a striking similarity to the case of John v Rees 1969 (2) ALL ER 274. Referring to this case My Brother Maqutu J. in Ntsu Mokhehle v Molapo Qhobela & 15 Others CIV/APN/75.97 (unreported) stated the following remarks with which I am in respectful agreement:

> "In John v Rees (supra) a Court in Britain would not allow a chairman to postpone a Meeting of Penbroke Labour Party Constituency merely because there was disorder. The Court ruled that the chairman should have adjourned the conference for a short time to enable order to be restored. It therefore held that the Committee that was subsequently elected at the same meeting under a different chairman (which the delegates appointed in order to continue the conference) was properly elected. What I am trying to emphasise is that once a conference has been duly convened, the participants are obliged to see to it that its business is transacted. The chairman although an important member is not expected to withdraw or abort it merely because there are problems. He is expected to strive to solve them so that the conference can complete its business."

Indeed even at the expense of overburdining this judgment I should like to respectfully adopt the remarks of the Learned Judge himself Megarry J in the case of John v Rees (supra) on the duties of a chairman of a meeting. This is what he said at p293:

> "The first duty of the chairman of a meeting is to keep order if he can. If there is disorder, his duty , I think, is to make earnest and sustained efforts to restore order, and for this purpose to summon to

his aid any officers or others whose assistance is available. If all his efforts are in vain, he should endeavour to put into operation whatever provisions for adjournment there are in the rules, as by obtaining a resolution to adjourn. If this proves impossible, he should exercise his inherent power to adjourn the meeting for a short while, such as 15 minutes, taking due steps to ensure so far as possible that all present know of this adjournment. If instead of mere disorder there is violence, I think that he should take similar steps, save that the greater the violence the less prolonged should be his efforts to restore order before adjourning. In my judgment, he has not merely a power but a duty to adjourn in this way, in the interests of those who fear for their safety. I am not suggesting that there is a power and a duty to adjourn if the violence consists of no more than a few technical assaults and batteries. Mere pushing and jostling is one thing; it is another when people are put in fear, where there is heavy punching, or the knives are out, so that blood may flow, and there are prospects, or more, of grievous bodily harm. In the latter case, the sooner the chairman adjourns the meeting the better. At meetings, as elsewhere, the Queen's Peace must be kept.

If, then, the chairman has this inherent power and duty, what limitations, if any, are there on its exercise? First, I think that the power and duty must be exercised bona fide for the purpose of forwarding and facilitating the meeting, and not for the purpose of interruption or procrastination. Second, I think that the adjournment must be for no longer than the necessities appear to dictate. If the adjournment is merely for such period as the chairman considers to be

reasonably necessary for the restoration of order, it would be within his power and his duty; a longer adjournment would not. One must remember that to attend a meeting may for some mean travelling far and giving up much leisure. An adjournment to another day when a mere 15 minutes might suffice to restore order may well impose an unjustifiable burden on many; for they must either once more travel far and give up their leisure, or else remain away and lose their chance to speak and vote at the meeting."

Now on the version of DW1 Mr. Lira Motete the meeting of the 17th April 1998 was not adjourned for a reasonable period for the restoration of order but it was completely "closed" - obviously sine die. I hold that Mr. Maope had no colour of right to do so both in terms of second Respondent's constitution and on the authority of John v Rees case which I subscribe to. In any event as earlier stated I have already found as a fact that the meeting of the 17th April 1998 was not closed by Mr. Maope.

What I believe happened is that the chairman of the Mafeteng Constituency No.55 Committee continued with the meeting until in the evening when he adjourned it to the 18th April, 1998. I hold that he was acting within his rights as chairman. He cannot be faulted. The meeting remained competent to transact business. After all indications are that the chairman's decision to continue with the meeting and adjourn it as aforesaid had the support of members of the Constituency in attendance. A quorum for that matter had been met. In the circumstances I have no hesitation in holding the third point of dispute in favour of the Applicant namely that the meeting of the 17th April, 1998 was properly closed by the chairman of the Constituency Committee in question and that it was lawfully adjourned by him to

the 18th April 1998.

As indicated earlier, the Applicant was unanimously elected at the meeting of the 18th April 1998.

Again as earlier stated the Respondents contend that the election of Applicant is not binding on them by virtue of the fact that the meeting in question was, so the argument goes, unconstitutional. I cannot accept this argument for reasons fully set out above.

See also John v Rees (supra) at 294-295 wherein the Learned judge held as follows:

> "The elections conducted after the departure of the plaintiff (the NEC delegation in this case) were accordingly valid."

These words apply with equal force to the present case.

Once more the Respondents base their challenge to Applicant's election on Section 21(m) and 23(d) of the Constitution of Second Respondent.

I proceed then to examine these sections.

Section 21(m) deals with the functions of the National Executive Committee which are stated to be the following:

> "To consider and confirm from the lists prepared by the Constituencies

of the Lesotho Congress for Democracy candidates who will represent it at elections for a Court of Laws including small courts for districts. Following the procedure for appointment of representatives fully described in Part 1; sections 18 and 19 and their sections."

I must honestly confess that this Section has given me problems because of the ambiguous and inelegant manner in which it is drafted. Seldom in my experience both at the Bar, Side/Bar and as a judge have I come across worse draftsmanship as is reflected in this section and indeed in the whole constitution (e.g. the individual powers of committee members at any level are not even spelt out). The Constitution is not only untidy and contradictory in terms but it is also replete with ambiguous references such as "Lekhotla la Melao" (Court of Laws) for which the Court is expected to surmise "Lekhotla la Ketsa Melao (Parliament). That is unacceptable. Such is the unsatisfactory nature of the Section on which the Respondents so heavily rely for their contention that they are free to "appoint" anyone for "any constituency for as long as he is a member of the 2nd Respondent" (paragraph 17 of the founding affidavit of Lira Motete)!

Yet Part V Section E (b) of Second Respondent's Constitution clearly outlaws any nominations as opposed to election of candidates. It reads as follows : "candidates of the Lesotho Congress for Democracy shall not be nominated."

For my part, I should like to state that Section 21(m) of Second Respondent's Constitution must obviously be read with Part V Section E (b) and must be interpreted meaningfully and purposively in order to give effect to the avowed aspirations, aims and objectives of Second Respondent as earlier stated namely democracy. It must therefore not be interpreted to condone oppression and/or

dictatorship. Indeed there lies the test.

The meaningful and purposive interpretative approach was adopted by this Court in Lepoqo Seoehla Molapo v Director of Public Prosecutions CRI/T/1/97 (reported in Butterworths Constitutional Law Reports - 1997(8) BCLR 1154 (Lesotho). I see no reason why I should depart from this approach in the instant matter.

Democracy as I have always perceived it to be is the will of the people themselves. Indeed vox populi vox Dei hence a government in a democracy is a government of the people by the people and for the people. These elections are aimed in that direction and must be viewed in that spirit as well. In the same breath this Court rejects the argument that in terms of Section 23(b) or 23(q) of the Constitution of Second Respondent the Constituency Committee merely proposes names of candidates. It does not propose but elects its own candidate. Such election must be given effect to in a democracy. It is the very will of the people. The Respondents cannot ignore such election but they are bound by it. There is in my view no room for appointment or nomination in those circumstances as suggested by the Respondents or at all.

In the circumstances I consider that it is both unreasonable and undemocratic and therefore contrary to the tenor and spirit of the Constitution read as a whole for the First and Second Respondents to appoint anyone (namely Fourth Respondent in this case) other than the person democratically elected by the people themselves at the latter's constituency (namely the Applicant).

As to the pedigree of the Fourth Respondent it will be convenient if I

reproduce paragraph 19 of the Applicant's founding affidavit which is not challenged at all. It reads:

"19

> As far as I am aware, the fourth Respondent does not even belong to the second Respondent's Mafeteng Number 55 Constituency. He belongs to the Thaba-Phechela constituency where he stood for similar elections and lost twice. He does not feature anywhere in the structure of our constituency and his imposition on the people of Mafeteng Number 55 Constituency has come as a shock to say the least in as much as he would not even have qualified to stand for elections thereat."

That the First and Second Respondents would indeed secretly seek to impose a complete outsider who is discredited for that matter namely the Fourth Respondent on the people of Mafeteng Constituency No.55 and without their consent as has been the case here until late in the proceedings must belong in the realm of dictatorship which is alien to democracy. The Court is appalled by this behaviour coming from the ruling party which as earlier stated has set itself high standards of "educating" the Basotho people as a whole what true democracy is and which party is campaigning to be returned to power. It seems to me that in this instance the respondents have moved in the wrong direction and it is thus the duty of the Court to bring them back into line in accordance with the Constitutional principles of democracy. The Applicant is the people's choice. Indeed I find that the Respondent's actions are out of step and contrary to the tenor and spirit of the

Constitution of Lesotho itself which is based on democratic principles of transparency, openness, accountability and respect for human rights as well as the will of the people.

In this regard it is necessary to bear in mind Section 16 of the Constitution of Lesotho. It reads:

> "16. (1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes."

Again Section 2 of the Constitution provides as follows:

> "This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

The Court was informed very late in the proceedings by Mr. Matsau that the Fourth Respondent is now standing as an independent candidate in the forthcoming General Elections. He was thus withdrawing his opposition from the matter. That however, I observe, cannot be to the credit of the First and Second Respondents who have stuck to their guns. I consider that untold damage has already been done and that regrettably the Fourth Respondent himself cannot even avoid costs in the matter for having gone this far with his opposition.

Mr. Matsau for the Respondents has argued that since nomination day has already passed or closed this application must be dismissed on that ground alone. I cannot accept this argument.

I was referred to cases from foreign jurisdictions dealing with legislation or statutes in those countries namely Howes v Turner & Writ (1876) CPD 670 and Beckmann v Minister of the Interior and Others 1962 (2) S.A. 233. Such statutes were however not drawn to the attention of the Court to determine if they bear any similarity to the present case. In the result I remain unpersuaded that those cases have any persuasive value to this Court. Moreover I observe that those cases dealt with entirely different situations from the instant case. For example in Howes v Turner & Wright (supra) the nomination of the candidate in question was out of time and there had been no recourse to the Court to stay the nomination day.

In Beckmann v Minister of the Interior and others (supra) it was purely an application for postponement of an election. The two cases are thus distinguishable from the instant case. This case is not about postponement of the General Elections.

The Applicant obtained an interim Court Order of interdict from a competent Court against all the Respondents including the Independent Electoral Commission (Third Respondent).

As I see it this application is clearly for a declaration of rights. See Section 119 of the Constitution of Lesotho which reads thus:

"119 (1) There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal

proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law."

See also Section 2(1) (a) and © of the High Court Act 1978 which provides as follows:

"2 (1) The High Court of Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have,

(a) unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho;

:

:

© in its discretion and at the instance of any interested person, power to inquire into and determine any existing future or contigent (sic) right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination."

I consider that by virtue of his election by the Mafeteng Constituency No.55 the Applicant has a clear right and has accordingly made out a case for a declaration of rights.

Regarding the claim of interdict I consider that the Applicant has established the principles thereof as fully set out in the leading case of Setlogelo v Setlogelo 1914 AD 221 namely a clear right, an injury actually committed and absence of alternative adequate remedy.

It is submitted on behalf of the Respondents that the Applicant had an alternative remedy in that he could have stood for the forthcoming General Elections as an independent candidate. I cannot accept this argument. Why should the Applicant be forced to stand as an independent candidate when he has a party of his own choice and when the people of Mafeteng Constituency No.55 who support Applicant clearly want him as their candidate? To accede to the Respondents' argument would clearly amount to a denial of the fundamental human right of freedom of association to the Applicant. As earlier stated this right is protected and entrenched in Section 16 of the Constitution of Lesotho. In the circumstances I consider that there is no alternative adequate remedy available to the Applicant.

There is again the aspect that admittedly the Applicant was not heard before the prejudicial decision to cancel the elections in question was taken. I attach due weight to the unchallenged version of the Applicant as contained in paragraph 20 of his founding affidavit wherein he states as follows:

"20

> I respectfully aver that the first Respondent's decision aforesaid which was made without affording both the Constituency Committee and I in particular a hearing is by all accounts a compete travesty of elementary principles of justice and fairness. It is based clearly on a one sided version of events as presented by first Respondent's own members.

It is biased, high-handed and unsupportable in law and in terms of the letter and spirit of the constitution of second Respondent and the constitution of Lesotho. It is a glaring irregularity and impropriety and altogether undemocratic of an organization that seeks political office in a democratic framework. Above all it is highly prejudicial and harmful to the interest and aspirations of the members of second Respondent in the Mafeteng Number 55 constituency and myself as the elected constituency candidate. It also sows seeds of confusion anarchy and discort (sic) within members of second Respondent in the constituency of Mafeteng Number 55."

The Applicant's sentiments expressed in this paragraph are indeed well taken.

As the elected candidate for the second Respondent I consider that the Applicant had a legitimate expectation to be heard. This omission again vitiates Respondent's actions as contrary to the principles of natural justice and therefore as unlawful.

I should mention, for completeness, that in the course of his address to the Court Adv. Mda for the Applicant made an application from the Bar for amendment of prayer 2(d) of the Notice of Motion to add the following words at the end thereof:

"And the third Respondent reflect same in its register of candidates accordingly."

The amendment was opposed by Mr. Matsau. After hearing submissions from both counsel I duly granted the application in as much as I could perceive no real

counsel I duly granted the application in as much as I could perceive no real prejudice to the First and Second Respondents and none was shown to exist. I considered that the amendment was in accordance with the whole import of the prayer as it stood then.

This brings me to the end.

In the circumstances of the case I am satisfied that the Applicant has succeeded to make out a case for the relief sought in the Notice of Motion as amended. I consider that this was a very important constitutional matter which justified the employment of two Counsel.

Accordingly the Rule is confirmed and the application granted as prayed with costs including costs of two (2) Counsel.

For the avoidance of doubt I make the following Order:

(a) It is declared that the decision of First Respondent purporting to nullify Applicant's election and/or to impose the Fourth Respondent as the Second Respondent's candidate in the Mafeteng Number 55 Constituency for the 1998 General Elections is null and void on account of such decision being unlawful, irregular, unconstitutional, as well as fraught with procedural and substantial injustice and impropriety;

(b) The Third Respondent is hereby restrained and interdicted from nominating and/or confirming the Fourth Respondent as a

candidate of the Second Respondent in the Constituency of Mafeteng Number 55 for the forthcoming General Elections.

© In particular it is declared that the Applicant is the lawful and duly elected candidate of the Second Respondent in the Constituency of Mafeteng Number 55 for the forthcoming General Elections and that the Third Respondent shall reflect same in its register of candidates accordingly.

(d) The First, Second and Fourth Respondents are ordered to pay, jointly and severally, the one paying the others to be absolved, the costs of the Applicant including costs of two (2) Counsel.

M.M. Ramodibedi

JUDGE

6th May 1998

For Applicant	**:**	**Adv. Phafane and Adv.Mda**
For First, Second and Fourth Respondents:		**Mr. Matsau**