

CIV/APN/343/97

IN THE HIGH COURT OF LESOTHO

In the matter between

Thabiso Molikeng**Applicant**

and

**Maseru City Council
Lepekola Mokemane****1st Respondent
2nd Respondent****JUDGMENT**

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

On the 8th day of October 1997.

In this matter the Applicant has applied for relief on an urgent basis in the following terms:-

1. Dispensing with the ordinary rules of Court pertaining to modes and periods of service.
2. Directing the respondent (sic) to file their opposing affidavits (if any) within five days of service upon them of the Order and founding papers in this matter.

3. A rule Nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondent (sic) to show cause (if any) why:
 - a) The second respondent shall not be interdicted forthwith from purporting to exercise the power and duties of the Mayor and Chairman of the first respondent pending finalisation hereof.
 - b) The application (sic) herein shall not continue to function as the Mayor and Chairman of first respondent pending finalisation hereof.
 - c) The purported removal of the applicant as the Mayor and Chairman of the first respondent shall not be declared Null and Void and of no force and effect.
 - d) The purported election of second respondent as the ~~Mayor of the Mayor (sic) and Chairman of the first~~ respondent shall not be declared Null and Void and of no force and effect.
 - e) The second respondent shall not be interdict (sic) from in anyway (sic) continuing to hold himself out as the Mayor of the first respondent pending finalisation of this application.
 - f) Respondent shall not be granted such further and/or alternative relief as this Honourable Court may deem meet.
 - g) Respondents shall not be Ordered to pay costs hereof.
4. Prayers 1,2,3, (a) (b) and (e) operate within immediate effect as interim orders against respondents.”

I should mention that no interim relief was granted as prayed but instead the Court ordered that the papers be filed upon the Respondents. This has been duly done and the matter which is opposed was argued before me on the 30th September 1997.

It will no doubt be convenient if I start this judgment by referring to the essential facts of the case which are common cause. These are the following:

On or about the 3rd July, 1997 the Applicant was re-elected as the Mayor of the 1st Respondent. He had been Mayor during the preceding year as from 3rd July 1996.

The Applicant avers in paragraph 4 of his founding affidavit, and indeed this ~~is common cause, that immediately after his re-election there appeared to exist some~~ lack of smooth cooperation between the Town Clerk and himself and that “the problem seems to be revolving around the power hunger on the part of the Town Clerk” adding that the latter did even during the Council re-election of the Mayor “lobby” other members of the Council not to elect the Applicant. In view of the seriousness of this allegation I shall return to this aspect later.

It is common cause that the Applicant duly informed the Honourable Minister for Local Government about his sour relations with the Town Clerk. The Honourable Minister in turn enjoined the Principal Secretary for Local Government “to conciliate” between the Town Clerk and the Applicant. The Principal Secretary succeeded only to solve the problem revolving around the Town Clerk’s “unreasonable” insistence on controlling the mayoral car. He promised to refer the other issue of disagreement “back to the Honourable Minister for resolution.”

Notwithstanding the fact that the disagreement between the Town Clerk and the Applicant had been referred back to the Honourable Minister concerned and before the latter had had an opportunity to deal with the matter the Town Clerk served the Applicant with Annextures "A" and "B" on the 22nd August 1997. It is necessary to reproduce these annextures here in order to place the whole fiasco in its proper perspective.

Annexure "A" is the agenda for the special meeting of Maseru City Council of 25th August 1997. It reads as follows:

“NOTICE IS HEREBY GIVEN THAT THERE WILL BE A SPECIAL MEETING OF MASERU CITY COUNCIL TO BE HELD IN THE BOARDROOM ON THE 25TH AUGUST 1997 AT 9:30 A.M.

AGENDA

1. Prayer
2. The Council to intervene between the Town Clerk/Chief Executive and His Lordship the Mayor, on administration issues.

N.B.

The report of the TC's complaints about the Mayor shall be distributed in the meeting.

M.M.N. wa Ntlaloe

TOWN CLERK/CHIEF EXECUTIVE.”

Annexure "B" is the Town Clerk's report to Council. It is a summary of

complaints by the Town Clerk as against the Applicant. It reads as follows:

**REPORT OF THE TOWN CLERK AND CHIEF EXECUTIVE TO
THE COUNCIL**

**“ THE UNHEALTHY STATE OF AFFAIRS WITHIN
THE COUNCIL CAUSED BY THE LORD MAYOR**

The Town Clerk and Chief Executive of Maseru City Council has increasingly found it impossible to execute his prime duties as embodied in the Urban Act 1983 due to the following problems caused by his Lordship the Mayor.

The following points are abridged and will be clarified in full before the Council.

1. ~~His Lordship the Mayor is aggressively fighting to take over and controlling the Council Administration by demanding to run the daily administration, and, giving direct orders to junior staff without prior discussion and or consultation with the Town Clerk and Chief Executive. He deliberately ignores the existence of the Town Clerk and Chief Executive.~~
2. His Lordship the Mayor is now prohibiting the progress of the Council by deliberately refusing to work with the Town Clerk and Chief Executive on all matters relating to the Council. i.e. The Town Clerk and Chief Executive does not write his speeches (sic) as he refuses, he does not want the Chief Executive advises (sic).
3. His Lordship the Mayor hides all the important correspondences which should be dealt with urgently when addressed to him; and this has caused the Council a lot of setbacks. i.e., UNIDO projects
4. His Lordship the Mayor had defied the orders of Special

Committee and the Council on the proper working conditions between the Mayor and the Town Clerk.

5. His Lordship the Mayor is no longer devoted to the Council's mission, in the provision (sic) of developments which the Town Clerk and Chief Executive had put to the Council.
6. The Town Clerk and Chief Executive is conscious to see Council properly functioning as the success of the Council depends entirely on the cooperation between the councilors and the Staff. If the Council (legislation) is fighting within it and Council is not properly informed by the Mayor, we have an immense problem.
7. His Lordship the Mayor does not convey and or speak positively about the Council which he temporarily leads; nor does he speak good about the Council servants, thus destroying the image of the Council.
8. His Lordship the Mayor even attempted to prohibit the Town Clerk and Chief executive from attending the New York Conference.

Under these circumstances, the Town Clerk and Chief Executive feels that, the council should meet in special meeting to discuss the above complaints against His Lordship the Mayor so that the Council can function effectively and efficiently.”

The Applicant responded to the Town Clerk's complaints in writing in terms of Annexure "C" in the following words:

“RESPONSE OF HIS LORDSHIP THE MAYOR OF MASERU CITY TO THE REPORT OF THE TOWN CLERK AND CHIEF EXECUTIVE OF MCC. ON WHAT THE TOWN CLERK TERMS ‘THE UNHEALTHY STATE OF AFFAIRS WITHIN THE COUNCIL CAUSED BY HIS LORDSHIP THE MAYOR.

The Mayor will respond here, point by point, as given by the Town

Clerk. but it must be pointed out at this stage, that the question of 'Unhealthy state of affairs within the Council' is quite eminent because the Council lives in the darkness of its Resolutions which are not implemented by its Town Clerk and Chief Executive. All the time, the Council is being deceived (sic) and betrayed. The Town Clerk cannot be controlled by the Mayor, the Council nor the Ministers.

POINT 1. This is but a bare statement. Without further particulars, it would be difficult to guess what is referred to here. It is not true that the Mayor is aggressively fighting to take over and controlling of Council Administration as alleged. Section 9 of the Standing Orders of the Council gives the Mayor the power of some access to the Staff. Nevertheless, the Mayor has never harshly uses (sic) this right by side-stepping the Town Clerk. e.g. When the Mayor demanded a brief on the Financial status of the Council, it was through the Town Clerk in writing.

The Mayor is of the feeling that The Town Clerk does not recognise the existence, not only of the Mayor, but the Council as a whole. e.g.

- a) ~~The Town Clerk ignores the Mayor in making the Council Agenda; example: The Agenda for the Council Meeting of the 28th August, which is this coming Thursday.~~
- b) He scarcely attends Council Meetings and perform Secretarial Services demanded by Council e.g. Recommendation No. 4.2.1 of the Mediation Committee.
- c) The Council has persistently demanded execution of its Resolutions with no avail.

POINTS 2. This is a vague accusation. If this refers to the case of Lithoteng Filter Clinic, it is unfair because the matter was threshed already at Council level. The Mayor was not required to make a speech on that occasion (sic) and at no other function thereafter, except for small invitations where the Mayor is invited to go and read a speech prepared for him already: e.g.

- MCC Health Department on AIDS Workshop at Maseru Cavanas (sic)
- Lesotho Girl Guides on 'Street Children, or Children in the Street' at their place near the Tennis Courts.

In this case, one forms an opinion that the term 'Speech' is a problem in the understanding of some people.

POINT 3. There is no way and no reason for the Mayor to hide the important correspondence especially if it is urgent.

The issue of UNIDO letter was raised in the Management Committee and the Mayor clearly explained how the Mail is normally handled, and this particular letter was in no way, an exception.

When the Mayor receives the Mail, the date received is inserted and initialled. Action taken is noted and initialled and dated.

~~It is not true that the Mayor hides the urgent Correspondence.~~

POINT 4. MEDIATION COMMITTEE - The mediation committee which is mentioned, made recommendations which the Town Clerk ignored (sic): e.g.

To mention a few:

4.2.1. He has not performed Secretarial Services for the Council

4.2.2. He does not consult with relevant organs of the Council:

- In recruitment of staff.
- Procurement of vehicles, cellular phones for Staff, taking expensive tours overseas, etc.

4.1.2 He still continues to belittle the Office of the Mayor. The Office ordered a computer. When

the new computer arrived, it goes to his office and his old one transferred to that of the Mayor. The Mayor's office is still in a shabby state.

- 4.6 HEARSAY: Despite the committee recommendation to stop using hearsay evidence in dealing with Council matters, the Town clerk still persists to use hearsay, as is so clear in what he terms 'Complaints'.

It is not true that 'His Lordship the Mayor had defied the orders of Special Committee on the proper working conditions between the Mayor and the Town Clerk.

It is surprising to hear a man who referred to the Mediation Committee as not legal before the Principal Secretary for Local Government, referring to its recommendations.

POINT 5. This is again a vague allegation. It is difficult to guess what the Town Clerk is referring to. His Lordship is very much ~~devoted to the Council's Missions as it is in fact, the missions of the electorate.~~

POINT 6. Here the Town Clerk is making a statement of fact. The question is, what exactly is he doing (sic) 'to see Council properly functioning as the success of the Council depends entirely on the Cooperation between the councillors and the Staff'?

The Mayor has always informed the Council at its Meeting, of the dangerous situation the Council is faced with. Maybe the Town Clerk does not know this because he scarcely attends Council Meetings. It would be unfortunate if any of the Hon. Councillors would go with this kind of allegations. Some of the addresses are even tape recorded by the Mayor in anticipation of this sort of allegations.

POINT 7. This is a wishfull (sic) thought and had no proven evidence. It is the usual hearsay style of the Town Clerk which was discouraged by the P.S. Local Government and the

Mediation Committee.

It is inconceivable and incredible that the Mayor can speak desparagingly (sic) of his own Council. This is a thought of someone who has never been a Mayor or ever thought of being one.

The Mayor denies this meaningless allegation very strongly.

POINT 8. This makes the pivot of Town Clerk's distortions. The Mayor made no attempt at all to prohibit the Town Clerk's going to New York.

All what the Mayor received from the Prime Minister's Office was an invitation for the Mayor to attend a conference in New York.

The Minister phoned the Mayor, stated that the journey was being stopped because the Council had not approved it. When the Mayor stated that it was due to time factor, the Minister said ~~he was allowing the Mayor only, to go ahead with the journey, but not the Town Clerk, who he said he had stopped.~~

It is clear in this case that the Town Clerk ignored the Ministers (sic) instructions and proceeded (sic) on the journey which was not authorised even by the Council.

To wrap up, the Mayor would like to put to the Hon. Council that, up to now, the Town Clerk has not taken the instruction of P.S. Local Government, to deliver IDM Management Audit to the Mayor which he should have received on the 20th August. Today is the 26th. August.

Does he not hide the important correspondence by so doing? He reverses these acts to look as if they are the acts of the Mayor.

The truth of the matter is that the Town Clerk is bittered by the democratic results of the last Mayoral election. He had his own favourites with whom he runs.

Mayor, MCC. 26/08/97.”

It appears from the papers before me that at the Special Meeting of Council of the 25th August 1997 the legal advisers of the 1st Respondent (three of them in number) advised that Council had no power to discipline the Town Clerk and that there was no procedure set out for the removal of the Mayor. As will appear later in this judgment this advice was grossly incorrect.

These legal advisers then advised that the Applicant could be removed by a Motion of no confidence. They based their advice on Section 34 (1) of the Interpretation Act 1977 which provides as follows:

- “34. (1) Where an Act confers a power or imposes a duty upon a person to make an appointment or to constitute or establish a board, tribunal, commission, committee, council or similar body the person having such power or duty shall also have the power
-
- (a) to remove, suspend, dismiss or revoke the appointment of, and to re-appoint or reinstate, any person appointed in exercise of such power or duty;
 - (b) to revoke the appointment, constitution or establishment of, or to dissolve, any board, tribunal commission, committee, council or similar body appointed, constituted or established, in exercise of such power or duty, and to re-appoint, re-constitute or re-establish the same; and
 - © to specify the period for which any person appointed in exercise such power or duty shall hold such appointment.”

A Motion of no confidence was then moved and carried against the Applicant on the 29th August 1997. This resulted in the Town Clerk addressing an undated report to the Honourable Minister of Local Government entitled "Resolution By The Council" Annexure "D". The last two paragraphs of this Report/Resolution are material and merit quoting here:

"Due to lack of procedure with regard to a motion of no confidence a report is submitted to you, Sir, for your approval or rejection of the resolution of the Council. It should be stated that Councillor Molikeng remains Mayor up until your response is received in this regard.

Due to the abnormal situation that exists as a result of the motion of no confidence we pray that you handle this matter expeditiously."

~~This Resolution Annexure "D" was followed by a letter Annexure "E"~~ addressed by the Principal Secretary for Local Government to the Town Clerk dated 3rd September 1997. In this letter the Principal Secretary wanted clarity on three (3) issues before he could transmit the resolution and to brief the Minister namely:

- (a) whether Council found the Mayor guilty on all counts or charges laid against him by the Town Clerk.
- (b) a summary of the Council reasoning, justification and evidence for finding him guilty on each of the charges against him.
- © whether the Council found the Town Clerk wholly and completely clean on all issues raised by him and the Mayor,

hence absolved him completely. If not, what action had been recommended.

On the 4th September 1997 the Town Clerk addressed a reply to the Principal Secretary for the Ministry of Local Government in Annexure "F" in the following terms:

"Regarding (a):

It was not the attitude of Council to deal with the grievances of the Town Clerk as separate counts or charges. Since Council is a political and not a judicial body, it sought to resolve the matter rather than to hold a quasi-judicial inquiry. Hence they resolved in the spirit of ~~finding a manner that would result in co-operation between the Town Clerk's office and that of the Mayor.~~

Regarding (b):

As is stated above the reasoning of the Council was geared at finding a lasting solution with regard to the matter it was seized with. Further, there was no judicial or quasi-judicial inquiry therefore no report may be given with regard to justification and evidence led, save to say that Council found it appropriate to remove the Mayor.

Regarding (c):

Council from the very beginning noted that the grievances were against

the Mayor. In his response the Mayor was requested not to make counter-allegations. As a result the counter-allegations made by the Mayor were not considered by the Council, the Mayor was merely informed that if he had any grievances against the Town Clerk, these he could write in a separate document which he could ask Council to consider. Therefore it was not a matter of the Town Clerk being “wholly and completely clean” however, of the liability of the Mayor on the grievances laid against him.”

On the 8th September, 1997 the Principal Secretary for Local Government once more wrote to the Town Clerk as per Annexure “G” and because of the importance of this letter in so far as it reflected a clear commitment and awareness to the principles of natural justice on which this judgment must inevitably be based ~~it is necessary to reproduce the letter which states:~~

“Mr. M.N. Ntlaloe
The Town Clerk
Maseru City Council
P.O. Box 911
MASERU - 100

Dear Sir,

Council Resolution to Remove the Mayor

I refer to a letter written on your behalf by a certain T.C. Sello (I assume he is the administrative secretary of council) dated 4th September, 1997 under reference AB/EX/1.11.

I am concerned that your office is not addressing this matter with the

seriousness it deserves and you have allowed that. For your information any situation where a judgment which affects an individual's rights or privileges is to be made a body or individual who is making that judgment is using judicial or quasis (sic) - judicial powers.

Your responses to the issues raised in my letter of the 3rd September, 1997 are too sarcastic under the circumstances and do not make sense.

I do not understand why you are doing that because in your report attached to your memo of the 2nd September 1997 under paragraph three(3) thereof, you fully recognise and appreciated the fact that Council was performing quasi judicial functions. In this paragraph you refer to the need for the ~~“Principles of Natural Justice” and Council~~ taking disciplinary action. These apply only when judicial powers are being invoked.

The questions I had raised in my letter of the 3rd September, 1997 are meant to enable the Minister to understand why Council had to take the resolution to remove the Mayor. If you are not prepared to provide the reasoning and justification of this decision the Minister will have great difficulty considering the resolution. He will only have before him the allegations made by yourself (you must remember you are the aggrieved person in this case) and the Mayor's response and nothing else.

I sincerely appeal to you to rethink and respond accordingly if you do

not address these questions I will have no alternative but to ask Council to respond directly.

Your last paragraph but one in your letter of the 2nd September 1997 is acceptable, but in a case where the very Town Clerk is involved it is only fair that the chairperson of the council and indeed council reports and I insist on the report. I must reiterate that the Minister will not be in a position to consider a resolution or decision which has no basis.

It is important therefore that you provide a full report as to the arguments, reasoning and basis for this decision.

~~Yours faithfully~~

S.H. SEKATLE

P.S. LOCAL GOVERNMENT

CC: HON PAKALITHA MOSISILI

HON MONERI NTŠABA

HON DEPUTY MAYOR MRS. M MOKOROSI”.

Notwithstanding the legitimate concerns by the Principal Secretary as fully set out in Annexure “G” Council met again in a special meeting in the absence of the Applicant who had a “health problem” and had not been going to his office at that stage. This was on the 12th September 1997. It is common cause that the

agenda Annexure “KA” was served upon the Applicant while at home due to a health problem. The agenda reads as follows:

**“NOTICE IS HEREBY GIVEN THAT THERE WILL BE
A SPECIAL MEETING OF THE MASERU CITY COUNCIL
TO BE HELD IN THE BOARDROOM
ON THE 12TH SEPTEMBER, 1997 AT 9.30 a.m.”**

AGENDA:

1. PRAYER
2. COUNCIL RESOLUTION ON THE REMOVAL OF HIS LORDSHIP, THE MAYOR.

T.C. SELLO:

for TOWN CLERK AND CHIEF EXECUTIVE.”

It is relevant to observe here that the agenda did not include an item for the election of a Mayor. More about this later.

At the said Special Meeting of the 12th September, 1997 the 1st Respondent purportedly elected the Second Respondent as a new Mayor. Once more this is common cause.

I should mention, for completeness, that the parties are indeed on common ground that in electing the Second Respondent as a new Mayor the respondents held the view that the effect of their “purported” vote of no confidence passed against the Applicant on the 29th August 1997 as earlier stated had the effect of removing the

Applicant from his position as 1st Respondent's Mayor. The Respondents have persisted in this attitude before me in argument presented on their behalf by Mr. Mosisili.

Against the above mentioned scenario which, I emphasise, is common cause the Applicant's complaint is best summarised in paragraph 16 of his founding affidavit in the following words:

“16.

I wish to inform this Honourable Court that the actions of the first respondent of purporting to have removed me are unlawful, null and void and of no force and effect for inter alia, the following reasons:

- (a) ~~The resolution of the first respondent that the said respondent thereby passed a vote of no confidence in me did not in law amount to my removal from the mayoral position. As indicated earlier on, the Council resolved to recommend the Minister either to accept or reject the Council's vote of no confidence in me.~~
- (b) I as the Mayor cannot cease to be a Mayor unless I resign or am disqualified. Otherwise I am peremptorily required to continue in office until my successor is elected and assumes office. This is in terms of Standing Order No.6(3) of the First respondent. A copy of the Standing orders is attached and marked Annexure “J”.

- © The Mayor and Deputy Mayor are mandatorily required to be elected annually by secret ballot from among the elected members of the Council present. I was myself, so elected, and there has never been any other mayor elected at the Annual Meeting of the Council hitherto. This is in terms of Standing Order No. 5 read with 6(1). The first respondent cannot therefore purport to elect a mayor at any other form (sic) other than the Annual Meeting of the Council.
- (d) There has never ever been a notice served on me or any of the Councillors calling upon me to show cause if any why I shall not be removed from the mayoral position. I was never given a fair opportunity to be heard on the issue of removal.”

The Respondent's answer to Applicant's complaint is contained in paragraph 10 of the opposing affidavit of the Town Clerk himself Makalo Wa Ntlaloe in the following words:-

“10.

AD PARAGRAPH 16

It is denied that the election of the Mayor was unlawfull (sic) therefore null and void.

AD 16. (a) Vote of no confidence if passed in a person by the people who elected such a person to a certain portfolio has the effect of removing such a person from such a portfolio.

Therefore the vote of no confidence passed by the 1st Respondent in the Applicant had the effect of removing him from the Mayoral position.

Further Council has the powers to confirm, alter or cancel it's (sic) own resolution. Council initially took a resolution at its meeting of the 12th September, 1997 to make a recommendation to the Honourable Minister of Local Government to accept or reject it's (sic) decision, a resolution which Council later altered and decided to proceed with the election of the Mayor.

AD 16.(b) The applicant is not the Mayor, in that he was ~~disqualified-a-(sic)-such-by-the-motion-of-no-confidence moved and passed in him.~~

Further the applicant's successor has been elected and has assumed office, this successor being the 2nd Respondent.

AD 16.(c) The election of the Mayor at the Annual Meeting of the Council is the normal procedure. In this instance it was not the election of the Mayor annually. It was the election of the Mayor as a result of a motion of no confidence passed in the then Mayor. Therefore Standing Orders No. 5 and 6 (1) do not apply in this regard. In circumstances such as this, the mentioned

Standing Orders or the Urban Government Act make no provision.

AD 16 (d) When the Applicant was elected Mayor he was not called upon to show cause why he should be Mayor. Similarly when he is removed from such a position he is not expected to show cause why he can not be removed.”

It proves convenient at this stage then to refer to the relevant legislation in the matter. In this regard I shall bear in mind the Urban Government Act 1983 on which this case revolves. The Act makes provision for the establishment and regulation of urban local authorities.

~~Section 19 of the Urban Government Act 1983 deals with meetings of Councils and Committees as follows.-~~

- “19. (1) Every council shall hold an ordinary meeting for the transaction of business at least once in every month, or such longer period of time, not exceeding six months, as the Minister may, in his discretion in any particular instance, authorise.
- (2) The date, time and place of the first meeting of a council shall be fixed by the Minister.
- (3) Subject to be giving (sic) of such prior notice as may be required by its standing orders, a special meeting of the council -

- (a) may be convened by the chairman at any time;
- (b) shall be convened by the chairman upon request in writing of not less than one third of the members of the council; and
- © shall be convened by the Town Clerk where he is required by law to do so,

and the notice convening any such meeting shall state the purpose of the meeting, and no business other than that for which the special meeting was convened shall be transacted. (My underlining).

- (4) Every meeting of the council shall be open to the public ~~and to the representatives of the press, but this subsection shall not apply to the council when in committee~~
- (5) The Town Clerk or other officer deputed by him, and such other officers as may be prescribed in the standing orders of the council shall attend every meeting of the council but such officers shall not be entitled to vote thereat.”

Section 20 of the Act provides for Standing Orders of Council in the following terms:

- “20. (1) Subject to this Act, every council shall make standing orders for -

- (a) the regulation, conduct and convening of the meetings of the council and of its committees; and as to the chairmanship of such meetings; and as to the quorum for the conduct of business;
 - (b) preserving order at such meetings, including the power to suspend and exclude a councillor who disregards the authority of the chair or wilfully obstructs the business of the council or any committee;
 - (c) the remission, alteration or review of resolutions of the council;
 - ~~(d) the good management of the council's financial business; and~~
 - (e) such other matters as may be necessary for the purposes of this Act or as may be directed by the Minister from time to time, including the amendment or repeal of any standing order or the suspension of a councillor who is guilty of a breach of any standing order.
- (2) The Minister shall, within 30 days of the passing of this Act, publish standing orders for councils constituted under this Act, and no council shall depart from such standing orders except with the prior consent of the Minister.

- (3) The Town Clerk shall cause a certified true copy of the standing orders of the council and of all amendments to such standing orders to be forwarded to the Minister for his approval, and no such standing orders or amendments thereto shall take effect unless approved by the Minister.
- (4) If a council fails within 30 days to make standing orders which have been approved by the Minister under this Section, the Minister may direct the council in writing to make standing orders.
- (5) If within 30 days of receipt of such directive the council has not made such standing orders, the Minister may make standing orders for the council and such standing orders shall be deemed to have been made under sub-section (1).

Pursuant to Section 20 of the Urban Government Act 1983 the Minister concerned has duly published standing orders for Council Annexure “J” to Applicant’s founding affidavit.

Now Standing Order No.5(I) specifically deals with the election of a Mayor/Chairman in the following terms:-

- “5. (I) The Annual Meeting of the Council shall take place on a date, at a time and a place as the Council may by resolution appoint.

The order of business to be transacted at such meeting shall be as follows:-

- (a) Election of a Mayor/Chairman and a Deputy Mayor/Vice Chairman for the ensuing year.
- (b) The appointment of a Management Committee and other Standing Committees.
- © Such other business as shall be required by or be consistent with the Act and these standing orders.”

As there is no other provision dealing with the election of a Mayor I am ~~satisfied that such election can only take place at the Annual Meeting of the Council in terms of Standing Order No. 5(I). I am fortified in the view that I take of the matter by Standing Order No. 6(1) (2) and (3) which provides as follows:-~~

“ELECTION OF MAYOR AND DEPUTY MAYOR

- 6. (1) The Mayor and Deputy Mayor of the Council shall be elected annually by secret ballot from among the elected members present.
- (2) A retiring Mayor or Deputy Mayor shall be eligible for re-election.
- (3) The Mayor shall, unless he resigns or is disqualified,

continue in office until his successor is elected and assumes office.” (My underlining).

In my view the use of the word “shall” in the standing orders referred to above clearly indicates that the provisions thereof are mandatory. Accordingly I hold that the purported special meeting at which the Second Respondent was “elected” Mayor was ultra vires the Urban Government Act 1983 and the standing orders thereof.

In particular I point to Section 20 (2) of the Urban Government Act 1983 which merits repetition here in the following words:

“20. (2) The Minister shall, within 30 days of the passing of this ~~Act, publish standing orders for councils constituted under this Act, and no council shall depart from such standing orders~~ except with the prior consent of the Minister.” (My underlining).

Consequently the purported election of the Second Respondent is null and void and of no force and effect on that ground alone.

As I see it there is another reason why the purported election of the Second Respondent cannot stand in law under any circumstances. It is this. As earlier stated the agenda Annexure “KA” leading to the meeting of the 12th September, 1997 did not include an item for election of a Mayor. Accordingly I consider that the election of Second Respondent was in direct conflict with Section 19(3)(c) of the Urban Government Act 1983 which clearly and unambiguously provides that

“no business other than that for which the special meeting was convened shall be transacted.” Accordingly I hold that the purported election of Second Respondent is a nullity and of no force and effect.

See **Lesotho Congress of Free Trade Unions v Tšeliso Ramochela and others**
C of A (Civ) No.2 of 1985.

VOTE OF NO CONFIDENCE

As earlier stated it is Respondents’ case that the vote of no confidence passed by the 1st Respondent against the Applicant had the effect of removing the latter from the Mayoral position. I cannot accept this argument. A Motion or Vote of no confidence is not a binding legal concept unless it is specifically included in a statute or constitution indicating the nature, extent and legal effect thereof. Otherwise it is ~~merely a moral expression by majority votes indicating dissatisfaction or lack of confidence against the person concerned. It hinges on the conscience of an individual person against whom it is passed. Reaction to it must therefore vary according to individuals.~~

I draw comfort for the view that I take of the matter from the following remarks of Jacobs J in Bredenkamp v van der Westhuizen 1968 (4) S.A. 358 (GW) at 365 (in Afrikaanse but thanks to the English translation by Arthur Lewis: The Law of Procedure and Conduct of Meetings in South Africa 5th Ed 1985 at P74):

“Now it is clear to me that second applicant was not obliged to resign, as a result of the so-called “motion of no confidence” or acceptance of the proposal that he should resign, although most persons under such circumstances would not be keen to remain as chairman of a meeting

which had no confidence in the occupant of the chair.”

I accept that nowhere either in the Urban Government Act 1983 or in the Standing Orders is the 1st Respondent given power or right to pass a vote of no confidence in the Mayor. Accordingly I find Mr. Mosito's submission on behalf of the Applicant that this power existed only in the respective minds of the concerned Councillors “as figments of their imaginations” to be unanswerable indeed. The purported vote of no confidence against the Applicant is itself null and void and of no force and effect.

In the same breath I reject the Respondents' claim that the Applicant was “disqualified” by the so called vote of no confidence. In this regard it is necessary to bear in mind Section 10 of the Urban Government Act 1983 on “Disqualification for election or appointment as councillor.” ~~The Section provides as follows:~~

- ”10 (1) Subject to sub-sections (2) and (3), a person shall be disqualified from being elected or appointed or from continuing in office as a councillor if he -
- (a) holds any office or place of profit,
 - (i) under or in the gift or disposal of the council or is the spouse of a person holding any such office or place of profit; or
 - (ii) under the Government, unless he has the written approval of the head of the

Government department in which he is serving;

- (b) is the spouse of a councillor;
- © is an unrehabilitated insolvent;
- (d) has been certified or otherwise adjudged to be of unsound mind;
- (e) has been convicted of an offence -
 - (i) relating to corrupt or illegal practices at an election under the provisions of this or any other law, or
 - (ii) under Sections 25, 26, or 94 within five years immediately preceding the date of election or ~~appointment, as the case may be, or since his election or appointment;~~
- (f) has been convicted of an offence under this or any other law and sentenced to imprisonment, without option of a fine, for a period of twelve months or more, within three years immediately preceding the date of election or appointment, unless he has obtained a pardon;
- (g) is in default of payment of any rates, charges or other debts due to the council for a period exceeding three months after the same shall have become due;
- (h) is debarred from membership of the council as provided

in Section 80 (3) (b); or

(i) himself or his spouse, partner or business associate, has a direct or indirect pecuniary interest (whether by way of participation in the profits or other benefits or otherwise) in any contract with the council or work being done or to be done for the council.

(2) Sub-section (1) (i) shall not apply in respect of -

- (a) any contract entered into or work undertaken by a company, co-operative company, or co-operative society incorporated or registered as such under any law, merely ~~by reason of the fact that such person or his spouse, partner or business associate is a director, shareholder, stockholder, employee or agent of such company, co-operative company or co-operative society, unless such company is a private company as defined in the Companies Act, 1967, or such person either by himself owns, or together with his spouse or minor children or both control, more than one half of the shares or stock of such company, co-operative company or co-operative society;~~
- (b) the purchase of anything sold by the council by public competition;

- © the purchase by the council of anything at a public auction;
 - (d) the supply of goods or services commonly supplied or rendered by the council to the public at a charge fixed by the law or resolution of the council; or
 - (e) the purchase or holding of council stock.
- (3) The Minister may, if satisfied that it is desirable in the public interest, exempt a person from sub-section (1) (i).”

I am satisfied from a proper reading of this section that a vote of no confidence ~~does not in itself disqualify a person from being elected or appointed or from continuing in office as a Councillor.~~ I am further satisfied that if the Legislature had intended a vote of no confidence to have the effect suggested by the Respondents in this case it would have said so in clear and unambiguous terms.

Nor has this Court lost sight of the fact that the purported vote of no confidence was, on the basis of the above mentioned evidence which I accept, clearly intended by its authors to be a mere recommendation by 1st Respondent to the Minister for Local Government. It was never intended to have the removing effect that the Respondents now claim without the approval of the Minister concerned. It is significant that the latter has never had occasion to approve or reject the said recommendation.

It is true that in paragraph 10(a) of his opposing affidavit the Town Clerk

Makalo wa Ntlaloe suggests the recommendation to the Minister was later “altered.” There is however no resolution to that effect. Moreover I attach weight to the fact that nowhere in his opposing affidavit does the deponent say that the contents of his affidavit are true and correct as well as within his personal knowledge. Consequently this Court has no confidence in the veracity or correctness of the deponent’s allegation particularly in view of his admitted power hunger and potential bias against the Applicant.

As I see it the whole problem in this case was caused by the Respondents’ legal advisers’ misconception of the law. The advice that the Urban Government Act 1983 made no provision for the removal of the Mayor was obviously wrong in law and contrary to Section 80 (3) of the Act which provides for a commission of inquiry from which a member of the Council may be removed from office. The whole section reads-as-follows:-

“80 (1) If the Minister -

- (a) has cause to suspect that a council has failed to observe and perform any of its functions;
- (b) has cause to suspect that a council has done or performed any act, matter, or thing without due authority in that behalf;
- © has cause to suspect that any present or former member of a council has abused his position as a member or neglected to perform his duties as a member; or

- (d) is otherwise of the opinion that an investigation should be made into the affairs of a council,

He may, in his discretion, appoint a Commission of one or more persons to enquire into and report to him the findings of fact on such matters and any recommendations they may feel disposed to make thereon.

- (2) Save that the chairman of the Commission shall be the Solicitor General or a law officer appointed by him, the Commissions Powers Proclamation, 1955 shall apply to an enquiry under this section.

~~(3). On receipt of the Commission's report, the Minister may~~

- (a) make such order as he may consider just or expedient in the light of the facts found by the Commission and the council shall, without delay, comply with the requirements of such order;
- (b) if satisfied on the facts as determined by the Commission that any present or former member of the council is not a fit or proper person to hold office as a member, serve notice upon him determining his membership of the council if he is a present member himself thereof, and declaring, whether he is a present or former member, that he shall not be eligible for re-election or re-appointment

for any period stated in such notice, and advise the council accordingly; or

- © require the Commission to enquire into, determine and report upon either such new or additional matters or more fully upon matters already considered by the Commission, as he may specify in writing.

(4) The Minister may, pending the report of the Commission or if a council fails to comply with the terms of an order made by him under subsection (3) (a), in addition to any other powers conferred upon him under this Act -

~~(a) suspend the exercise by the council of any of the powers conferred upon it by this Act or any other law for such period as he may think fit;~~

(b) dissolve the council; or

- © in his discretion appoint or direct the election of new councillors, and

During such period, or, as the case may be, pending the appointment or election of new councillors, confer upon any person or persons the right to exercise any powers so suspended or the powers of the council so dissolved.

- (5) The expenses incidental to,
- (a) any enquiry under this section; or
 - (b) the exercise of any of the powers of the council under this Section,

shall be a debt due by the council to the Government, and shall be paid and discharged out of the funds or revenue of the council in such manner as the Minister shall direct and any such direction may include a direction that the expenses shall be deducted from any grant or rates payable by the Government to the council.”

~~I am satisfied from a proper reading of this section that the Minister for Local Government plays an important role statutorily and thus cannot be side stepped as the Respondents have done in the purported removal of the Applicant.~~

It is perhaps pertinent to observe that this section was in fact resorted to by the Minister in the purported dismissal of the then Mayor Sobhuza Sopenge and his Councillors in 1992.

See **Sobhuza Sopenge and 3 others v Minister of Interior and Another**
C of A (Civ) No. 15/1992.

I turn then to determine whether the Applicant was entitled to be heard prior to his removal as Mayor. I start from the premise that the election of the Second Respondent by the first Respondent had the effect of removing the Applicant from his office. The real and pertinent question which the Court has to determine is

whether such removal was lawful. I observe from the outset that the election took place in the absence of the Applicant while he admittedly had a health problem. Accordingly he cannot be said to have acquiesced to the election. Bredenkamp v van der Weisthuizer (supra) would thus be distinguishable on this point.

As is apparent from the above mentioned admitted facts the 1st Respondent never served the Applicant with notice to show cause why he shall not be removed from the Mayoral position. It is indeed common cause that he was “never given a fair opportunity to be heard on the issue of removal” (paragraph 16(d) of Applicant’s founding affidavit).

For their part I find that the Respondents are labouring under a misconception that because when the Applicant was elected Mayor “he was not called upon to show cause why he should be Mayor, similarly when he is removed from such a position he is not expected to show cause why he cannot be removed” (Paragraph 10 (d) of opposing affidavit of Makalo wa Ntlaloe). As will be shown in a moment this argument is a clear non sequitur and is far removed from the principles of natural justice relating to accrued rights or at the very least a situation where a person has a legitimate expectation to be heard before a decision prejudicial to his interests may be taken such as is the case here.

I pause here to observe that in his belated Heads of Argument filed a day after having heard submissions in the matter Mr. Mosisili has written:

“It is submitted that the Mayor is a political appointee not an administrative one, therefore the administrative procedures are not adhered to.”

I cannot accept this argument which is in my view, flawed both factually and legally. There is no evidence before me that the Applicant is a political appointee not an administrative one. But then even if the Applicant is indeed a political appointee I reject the notion that such an appointee is not entitled to be treated fairly in accordance with the principles of natural justice including the right to be heard.

As earlier stated it is common cause that the Applicant was re-elected as Mayor of 1st Respondent on the 3rd July, 1997. I consider therefore that this is a position of status.

In Chief N.S. Maseribane and 3 others v Joseph Riffat Larry Kotsokoane and Solicitor-General C of A (Civ) No. 6 of 1977 the Learned Ogilvie Thompson JA expressed the following remarks with which I am in full respectful agreement:

“Although the maxim audi-alteram-partem is mainly encountered in cases involving decisions relating to the property or liberty of an individual, the maxim, based as it is upon a principle of natural justice, has been extended to cover cases where loss of rights and status, rather than loss of liberty or property, has been the primary consideration”
(my underlining).

It is also relevant to observe that in dealing with Section 9 of the General Interpretation Proclamation No.12 of 1942 which was substantially similar to Section 34 (I) of the Interpretation Act 1977 which the Respondents seek to rely upon the Learned Judge of Appeal stated the following:

“Section 9 of the General Interpretation Proclamation No.12 of 1942

does not, in my opinion, defeat Appellants' contention. The true operation of that Section may well be - I express no final opinion on the point - in the realm of ordinary government appointments. In any event, however, even if the Section be considered in isolation, the mere correlation in the section of the power to dismiss with the power to appoint would, in my view by itself be insufficient to exclude the operation of the maxim audi alteram partem."

In Libe Moima v The Minister of Interior and 2 others CIV/APN/293/97 I had occasion to state the following:

"The principle that no man is to be judged unheard is obviously no empty slogan. It is the very foundation of the rule of law and the audi alteram partem rule. Nor does it matter that the Applicant only holds a temporary office. He is, in the words of Gauntlett AJA in Rakhoboso v Rakhoboso (supra) "entitled to be treated fairly, and in particular, to have notice of the contemplated steps against him and an opportunity to be heard in that regard. None of these were accorded to him. In my judgment that is a travesty of justice."

These remarks are apposite to the case before me. First Respondent's bias against the Applicant can be gathered from the fact that it unreasonably refused when the latter made counter allegations against the biased Town Clerk himself as Annexure "F" shows. Hence the Applicant was denied an opportunity to expose the Town Clerk.

Accordingly I hold that the Applicant was treated unfairly in the matter and

that in any event the 1st Respondent flouted the principle of natural justice by failing to accord the Applicant notice and an opportunity to be heard before the prejudicial decision to remove him as Mayor was taken. In the circumstances the purported removal of Applicant as Mayor was unlawful and of no legal force and effect.

It is further pertinent to note that in Monaheng Rakhoboso v Simon Rakhoboso C of A (Civ) No. 37/96 Gauntlett AJA expressed the following principle:

“The result is that the subsequent purported appointment of the respondent as headman, without a valid revocation of the appointment of the appellant as acting headman, must itself be legally ineffective.”

I respectfully agree:

Applying this principle to the instant case I consider that since there was no valid revocation of Applicant’s position as Mayor for reasons set out above the subsequent purported election of the Second Respondent as Mayor, must itself be legally ineffective.

Lastly Mr. Mosisili submits in his written Heads of Argument:

“Further the anomaly created by the Urban Government Act has been rectified in the 1997 Local Government Act at Section 16(1) 16(2) 16(3).”

This Court is not aware of such Act. I suspect that Mr. Mosisili is having in

mind the Local Government Act No.6 of 1996. Section 1 of this Act however provides that the Act shall come into operation in respect of all or any of its provisions on such date or dates as the Minister may appoint by notice published in the Gazette. As at the time of delivering this judgment the date of coming into operation of the Act had not yet been published in the Gazette.

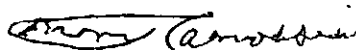
In the circumstances of this case I have come to the conclusion that the Applicant has succeeded to make out a case for the relief sought in the notice of Motion.

Accordingly the application is granted with costs.

For the avoidance of doubt it is hereby ordered as follows:

- (a) The Second Respondent is hereby interdicted forthwith from purporting to exercise the power and duties of the Mayor and Chairman of the First Respondent.
- (b) The purported removal of the Applicant as the Mayor and Chairman of the First Respondent is hereby declared null and void and of no force and effect.
- © The purported election of Second Respondent as the Mayor and Chairman of the First Respondent is hereby declared null and void and of no force and effect.
- (d) Respondents are hereby ordered to pay costs of this application

to the Applicant.



M.M. Ramodibedi

JUDGE

8th October, 1997

For Applicant : Mr. Mosito

For Respondents : Mr. Mosisili