

IN THE HIGH COURT OF LESOTHO

In the matter between:

‘MAFRET TUOANE	1ST APPLICANT
TOKELO SUPING	2ND APPLICANT
MOTLATSİ MOKHANTŠO	3RD APPLICANT
MAFA KHESA	4TH APPLICANT
‘MAKANANELO RASETHUNTŠA	5TH APPLICANT
‘MALICHABA MOTALINGOANE	6TH APPLICANT
‘MAPALESA KOESHE	7TH APPLICANT
MOLEBOHENG LETLOTLO	8TH APPLICANT
‘MAPHEELLO TŠULUBA	9TH APPLICANT

AND

NATIONAL EXECUTIVE COMMITTEE	1ST RESPONDENT
CHALANE PHORI	2ND RESPONDENT
‘MALIMPHO LEBONA	3RD RESPONDENT
‘MALEBOHANG MOKETE	4TH RESPONDENT
TŠELISO MOFOKA	5TH RESPONDENT
LETHOLA KHOBETHI	6TH RESPONDENT
‘MALEFA MOKHESENG	7TH RESPONDENT
MALEFANE THAKALEKOALA	8TH RESPONDENT
‘MAMOSAN THEJANE	9TH RESPONDENT
SENTŠO MOKOENA	10TH RESPONDENT
LERATO KOSIE	11TH RESPONDENT
MPHO MOEKETSE	12TH RESPONDENT
ABC/KOBO-TATA	13TH RESPONDENT
NTABOLE MONYANE	14TH RESPONDENT
MOKHACHANE THAMAE	15TH RESPONDENT

JUDGMENT

Coram : **Hon. Moiloa AJ**
Date of Hearing : **07 March 2012**
Date of Judgment : **11 April 2012**

HEADNOTE

Points in limine not raised in motion proceedings but raised for first time in respondents' heads of argument is wrong. Points in limine must be pleaded and must be linked to facts pleaded.

Constitution of a voluntary association is embodiment of a consensual contractual relationship between the voluntary association and its members. Any member of such voluntary association is entitled to a mandamus order against leadership of such association where such leadership or other member acts or fails to act in terms of the constitution of the association.

Election of nominees to Constituency Elective Conference done at an unconstitutional branch party elective conference is itself unconstitutional and invalid.

ANNOTATIONS

Reported cases

1. Hata-Butle (Pty) Limited vs Frasers Lesotho Ltd LAC 1995/99 @ 698
2. Makoala vs Makoala C of A (Civ) 04/2009
3. Pela-Tšoeu Constituency Committee of BCP vs BCP CIV/APN/360/08

STATUTES

Societies Act No.20 of 1966

BOOKS

Bamford B.R. The Law of Partnerships and Voluntary Association in South Africa

Introduction:

Applicants are all members of the Qoaling Constituency No.34 committee of the 13th Respondent (ABC Party) who bring this application both in their personal capacities as individuals and members of the ABC/Kobo-Tata Party as well as in their collective capacity as members of the Constituency Committee.

[2] At the commencement of the hearing I asked Counsel for both sides to consider arguing the matter holistically by arguing over their points in *limine*. They agreed and so the Applicants began with presentation of their arguments to the court in the process also arguing over the points in *limine* raised by the Respondents. I made this suggestion mindful of the need to avoid piecemeal hearings with concomitant delays and the incurring of additional costs. See remarks of **Melunsky JA** in **Makoala vs Makoala C of A (Civ)04/09** at paragraph 6. The gravamen of Applicants' application is that First Respondent had failed to adhere to 13th Respondent's Constitution especially Clause B.6 (h) and (i) thereof. In support of their complainant Applicants assert that on 6 December 2011 they wrote to First Respondent laying charges of alleged misconduct against 2nd Respondent, certain specified members of Besele Branch, certain specified members of Lekhaloaneng Branch and certain specified members of Seoli Branch, all of the Qoaling Constituency. This letter is annexed to Applicants Founding Affidavit of the First Applicant and marked "M2". It is under the hand of First Applicant as Secretary of the Qoaling Constituency Committee. The letter is written to First Respondent in terms of Clause B.5 (b) of 13th Respondent's Constitution.

[3] In response to the Applicants' complaint of alleged misconduct against Respondents, First and 13th Respondents say they dealt with the complaint in terms of annexure ABC "2" being a report by Messers Moseme Makhele and Moeketsane Lerata ("Moseme Report") dated 15 January 2012. I pause here to mention that "the Moseme Report" did not satisfy Applicants for the very next day the Applicants wrote to First Respondent complaining that Moseme delegation representing First Respondent did not address the misconduct allegations against 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Respondents.

[4] In *limine* Respondents have raised several points some of which were abandoned when the matter was argued before me while others were persisted in. I shall confine myself to those points in *limine* which were persisted in at the hearing. All of the Respondents points in *limine* were not raised in the Answering Affidavits of the Respondents filed on 24 February 2012 nor before Applicants had filed their heads on 20/2/2012. All of these points were for the first time raised in the Heads of Argument of the Respondents filed on 20th February 2012. Accordingly, the pleadings before me have not dealt with the factual foundation underpinning such points in *limine*. Respondents contended that the points in *limine* being points of law, they are entitled to raise them at any time and that they are entitled therefore to raise them in the manner they have done here. According to them, I need not bother about the pleadings; I must take up Respondents' defence, not from their pleadings but from their Heads of Argument. I do not agree; but I will return to this issue later.

[5] The first point in *limine* raised in Respondents' Heads of Argument is an alleged "lack of locus standi" of the Applicants. It is contended by Respondents that Applicants have no *locus standi* for they lack "direct and substantial interest"

in the dispute which they have brought to court. It is contended by Respondents that Applicants have no *locus standi* because it is not them that have a substantial (legal) interest in the dispute before court but the Constituency Committee of Qoaling No.34. Respondents assert that Constituency Committee of Qoaling No.34 has a separate and distinct personality from the members who form it like Applicants. For this proposition Respondents cite the case of **Pela-Tšoeu Constituency Committee vs BCP**. CIV/APN/360/08 Respondents concede that the Constitution of 13th Respondent (ABC Party) has no provision giving Constituency Committee of the party a legal status to sue and be sued in its own name. In my view this concession by Respondents puts an end to this issue for the relationship of members of ABC Party is governed by the Constitution of ABC Party and if that Constitution does not confer legal persona to a structure within the party then such structure cannot have legal persona. In the case of **Pela-Tšoeu Constituency Committee** case **Peete J** found as a fact at page 13 of the judgment that in terms of Clause 13.2 of the BCP Constitution, a Constituency Committee was clothed with *locus standi in judicio*. The **Pela-Tšoeu Constituency Committee vs BCP** case is distinguishable from the present case. I accordingly dismiss this point in *limine* raised by Respondents.

[6] A second point in *limine* raised by Respondents is one they term “Non Joinder”. In this regard Respondents contend that “the Leader” of 13th Respondent has not been cited as a party in his own right even though he is allegedly a party with an interest in the outcome of this application. Respondents conceded that “the leader” of 13th Respondent is in fact Chairman of First Respondent and that in fact he is the person who presided over the meeting of 15th December 2011, minutes of which are annexed to their Answer and marked “ABC 1”. It is also conceded by Counsel for Respondents that he is aware of the current application before court.

However, it is argued that he should have been made a party to these proceedings in his own right. The folly and tragedy of this point and the arguments which accompany it in support, is that it is not pleaded and it is being made from the bar at the hearing of the matter. It denies the Applicants an opportunity to deal with it by pleading facts to show it is ill-conceived, if they can, or by taking corrective measures as they might well choose to do before the hearing – See **Makoala vs Makoala C of A (Civ)04/09**. Given the circumstances of this case and the concession of the Respondents’ Counsel that “the Leader” of 13th Respondent is in fact a member of First Respondent and was at all material times aware of this application, I dismiss this point of *limine*. It is not pleaded in any case.

[7] The penultimate point raised by Respondents in *limine* was that Applicants have not exhausted “local remedies”. It was urged on me by 1st -13th Respondents that Applicants have not appealed against the alleged non-action of 1st Respondent to the Annual General Conference of the 13th Respondent before approaching this court. Respondents purport to rely on Clause B.5 (f) of 13th Respondents Constitution. This clause provide in part that “where the behavior of members or member endangers ABC/Kobo-Tata and the Committees enjoined to take action fail to do so, then the Party Leader will use his powers to protect ABC/Kobo-Tata”. Nowhere in the Constitution of 13th Respondent is it spelled out the specific powers that the leader of 13th Respondent has over and above those that are conferred on the First Respondent (National Executive Committee). It is the behavior of this very committee which Applicants are complaining to this court about that it is refusing to take action on the recommendations of the Applicants in their capacity as members of Qoaling Constituency No.34 Committee against the alleged misconduct of 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th Respondents. I have come to the conclusion therefore that this point of *limine* is

misconceived not only in its nature but also in its application to the factual circumstances prevailing in this case. I hold that applicants were left with no option but to come to court for relief for their grievance.

[8] A final point in *limine* taken by 14 and 15th Respondents is to the effect that the affidavits of the Applicants do not comply with Regulation 4(4) of the Oaths and Declarations Regulations Notice No.80 of 1964. It was urged on me that because the affidavits of Applicants did not conclude by saying “I solemnly, sincerely and truly affirm and declare that the contents of this affidavit are true” the Applicants’ affidavits were fatally defective and I ought to expunge them from the record and dismiss their application. The Founding Affidavit of ‘Mafret Tuoane is commenced by stating that it is made under oath before stating what follows in the body of that affidavit. The affidavits of the Applicants in fact conclude by declaring that the affidavits were “signed and sworn to before me at Maseru this 3rd day of February 2012 by the deponent having declared and acknowledged that he knows and understands the contents of this affidavit”. The affidavits are then signed and attested by a Commissioner of Oaths. In other words what are contained in the Founding Affidavit are her averments made under oath whose contents she knows and understands. In my judgment if she knows the contents of the affidavit aforesaid it is the same as saying that the contents are within her personal knowledge. Equally, if statements are made under oath, as these are, they are purportedly true and correct, at least from the standpoint of the deponent to the affidavit. I determine that words used are not exactly those found in Regulation 4(4), Oaths and Declarations Regulation but in my view the essence is the same. Interestingly Respondents’ Answering Affidavits are commenced and concluded in the same fashion as the Founding Affidavits.

[9] Before I leave this matter of points being raised in litigation *in limine*, I want to dissuade litigants from resorting to this practice without paying attention to the principles that govern when it is appropriate to do so. Points in *limine* are not there for the taking whenever litigants feel like doing so without regard to the legal principles which apply to the raising of such points. It is instructive for counsel advising litigants to read and understand the guidance offered to them by **MELUNSKY JA** in **MAKOALA VS MAKOALA C of A (Civ)04/09** starting at paragraph 4 of that judgment. I want to warn and emphasize that points in *limine* must be pleaded and linked to the facts of the case at hand. In *casu* not a single point in *limine* argued before me had been pleaded nor had any facts been pleaded in Respondents' answers laying a foundation linking Respondents' case to their pleaded defence. This is exactly the kind of thing that **Gauntlett JA** condemned so strongly in **Hata-Butle (Pty) Ltd vs Frasers Lesotho Ltd LAC 1995/99 698**. **Gauntlett JA** strongly condemned the practice of pleading one thing in your pleadings and pursuing a completely different defence at the trial of your case in court. Non observance of the above cardinal principles was bound to lead to dismissal of Respondents points in *limine* in any case.

[10] I now turn to deal with the merits of the case. Two prayers of the Notice of Motion were on the table to be dealt with by the court at the date of hearing namely prayers 2(b) and (c). Prayers 2(b) asked for an order restraining 14-15th Respondents from standing as nominees for nomination of final candidates for 13 Respondent for the forthcoming General Elections. In arguments before me, Mr. Phoofole, realizing the primacy of prayer 2(c) in his case, in fact quickly subordinated prayer 2(b) to prayer 2(c) of the Notice of Motion. I will accordingly deal with it in that way. Prayer 2(c) asked the court to compel First Respondent to deal with various reports of the Qoaling No.34 Constituency Committee on the

misconduct of certain specified party members in terms of the Constitution of the 13th Respondent. These members were 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 14th and 15th Respondents.

[11] As indicated earlier in this judgment, the crux of the Applicants' case is that First Respondent is neglecting to deal with the report of misconduct by the Applicants in their capacity as Qoaling Constituency Committee members against 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 14th and 15th Respondents. The report of alleged misconduct was made to First Respondent per letter dated 6 December 2011. It is annexed and marked "M2" to the Founding Affidavit of First Applicant. Annexure "M2" aforesaid alleges that on 4 December 2011 three branches within Qoaling Constituency, namely Besele, Lekhaloaneng and Seoli 1 held branch elective conferences without the knowledge and authority of Qoaling Constituency Committee consisting of Applicants contrary to the provisions of Clause B.6(i) of the Constitution of 13th Respondents. Clause B.6 (i) of 13th Respondents Constitution stipulates that one of the functions or responsibilities of the Constituency Committee is "to see that party branches do not meet without authority of Constituency Committee". In fact Clause B.6 (a) of 13th Respondents Constitution stipulated that one of the functions of the Constituency Committee is "to recommend to the National Executive Committee abolition of party branch, expulsion of a member of the party from the party". Clause B.6 (h) stipulates another function of Constituency Committee of the party as being "to oversee party branch committees and to ensure that party branch committees carry out their work properly".

[12] Applicants allege that in addition to dispatching their letter Annexure "MI" to the Founding Affidavit to 1st Respondent, they also summoned the alleged

transgressors before them on 17 December 2011 and informed them of the charges of alleged misconduct they had laid against them. Applicants allege that the alleged transgressors of the Constitution of 13th Respondent left the meeting spitefully without responding to the accusations leveled against them.

[13] On 15 January 2012, First Applicant in her capacity as Qoaling Constituency Secretary addressed another letter to the Secretary of First Respondent in which Applicants requested of the charges against the named respondents. This letter is annexed to the Founding Affidavit of First Applicant and marked “M3”. Applicants aver that despite all these efforts on their part First Respondent failed to address the complaint of misconduct against the alleged transgressors.

[14] On 17 January 2012, Applicants aver that they again wrote to First Respondent laying furthers charges of misconduct against 2nd Respondent and one other Bonang Khanyane. The report alleged that 2nd Respondent and Khanyane forced their way into a meeting where Applicants held a Constituency Committee meeting, entered the meeting in a fighting mood and attacked the Chairman and the Secretary. That letter of 17 January 2012 is attached so the Founding Affidavit and marked “M4”.

[15] On 24th January 2012, First Applicant wrote another letter to First Respondent urging First Respondent to urgently attend and deal with charges of misconduct leveled by the Constituency Committee against alleged transgressors who have been identified as respondents herein requesting they be dealt with in accordance with 13th Respondents’ Constitution. The letter aforesaid is annexed to the Founding Affidavit and marked “M5”.

[16] Applicants aver in their founding papers that First Respondent chose to do nothing about charges of misconduct against alleged transgressing respondents. Applicants aver that in doing nothing about Applicants' reported misconduct, First Respondent is deliberately neglecting to carry out a duty it is enjoined to perform by the Constitution of the 13th Respondent (the Party). In terms of Clause A.5 of 13th Respondents Constitution the Disciplinary Committee of the Party is set up by the Party Leader after consultation and with the advice of Executive Working Committee (EWC). The EWC is made up of 5 most senior members of the Party's Executive Committee plus two others appointed by the Party Leader. Effectively therefore it is First Respondent that is obliged to set up a Disciplinary Committee to attend to and deal with matters of misconduct emanating from constituencies like Qoaling Constituency.

[17] Respondents defence on the merits is that Applicants complaint of misconduct dated 6th December 2011 against 2nd Respondent and others was dealt with by First Respondent on 16 January 2012 in terms of annexure "ABC 2" to the Answering Affidavit. This annexure "ABC 2" is a report compiled by Messers Moseme Makhele and Moeketsane Lerata (Moseme Report) who were send to Qoaling Constituency at the behest of the First Respondent as members of Executive Working Committee.

[18] During submissions at the hearing of this matter, I asked Mr. Mohapi, Counsel for 1st-13th Respondents to refer me in "ABC 2 or ABC 1" to any part where the misconduct complaints of Applicants Qoaling Constituency Committee were addressed and dealt with. He was unable to point the specific portions in ABC 1 and ABC 2 safe to refer me to paragraph 2(d) of annexure "ABC1" and the last paragraph of annexure "ABC 2". Frankly, in none of the places pointed out by

Mr. Mohapi in annexure “ABC 1” and “ABC 2” is the issue of alleged misconduct of 2nd-12th Respondents dealt with. Accordingly, I find as a fact that the NWC of First Respondent headed by Mr. Moseme Makhele never dealt with disciplinary complaint of Applicants and Qoaling Constituency Committee referred to First Respondent by Applicants. I also find as a fact that nowhere in annexure “ABC1” is Applicants complaint against 2nd-12th Respondents addressed and dealt with. “ABC I” simply resolves to send a delegation of NWC to Qoaling Constituency on 17 December 2011 to go and resolve the dispute regarding elective conference at the Constituency. In “ABC 2” the NWC devoted its energies on composition of delegates to Party Branch elective conferences which they directed should be held on 21 January 2012 and constituency elective conference which they directed should be held on 22 January 2012. The NWC visit to Qoaling Constituency can be accurately described as a preparatory meeting with Qoaling Constituency party branches for the holding of elective conference at branch level and constituency level. Little wonder then that the Applicants remained behind with the NWC after closure of the meeting on 17 December 2011 and complained to the NWC that their complaint of misconduct against certain members of branches had not been dealt with. NWC simply denied this complaint. But the simple truth of the matter on the facts is that the NWC on behalf of First Respondent had not dealt with Applicants’ complaint of misconduct against 2nd-12th Respondents.

[19] It is common cause that 13th Respondent (the ABC/Kobo-Tata Party) is a voluntary association with a constitution (Annexure “MI”). A constitution of a voluntary association, in this case the political party called ABC/Kobo-Tata, is the embodiment of a consensual contractual relationship between the party and its members. See **Bamford: Law of Partnerships and Law of Voluntary Associations in South Africa**. Members have rights and obligations inter se and

with the party and vice versa. All have agreed, in joining the party to be bound to each other by the terms and conditions of that constitution; all have agreed to be bound by the precepts and procedures of their party's constitution. It is available to a member of the party to approach this court and seek a mandamus against his party and any of its structures where such member is aggrieved by the conduct of his party in breach of the party's constitution. In the circumstances of this case, I have come to the conclusion that First Respondent has failed and/or neglected to carry out its duties in terms of Clause B.5(4) and clause read with Clause A.5 of 13th Respondent's Constitution.

[20] As regards the positions of 14th and 15th Respondents I proceed as follows. 14th Respondent has been raised by Monyane Branch while 15th Respondent has been raised by Lekhaloaneng Branch of Qoaling Constituency at their unauthorized branch elective conference. In both instances these two respondents have been nominated by these branches to contest constituency elective conference for nomination of a candidate for the party's upcoming General Election contrary to the provisions of Clause B.6(i) of the party constitution. The branch conferences at which they were nominated was not sanctioned or authorized by the Constituency Committee which is presently made up of Applicants herein. It stands to reason therefore that eligibility to be elected at those branch elective conferences is tainted in the sense that those branch elective conferences were unconstitutional and must await the outcome of a disciplinary inquiry request placed before the First Respondent by the Applicant. I hold that election of nominees to a constituency elective conference done at an unconstitutional branch party elective conference is itself unconstitutional and invalid.

[21] But, additionally, Applicants aver that, contrary to Clause 19 M.iii (a) of the Party's Constitution, 14th and 15th Respondents had not been members of the party's branch committees of their respective branches for 24 months prior to their being nominated to stand as candidates for Qoaling Constituency at the Qoaling Constituency elective conference. Both Monyane and Thamae do not controvert this fact in their answering affidavits. All they say is that they are paid up members of 13th Respondent. I accordingly accept as a fact that 14th and 15th Respondents had not been members of branch committees of their respective party branches for a period of 24 months prior to their being nominated as candidates for Qoaling Constituency at the forthcoming Qoaling Constituency Elective Conference. Accordingly, 14th and 15th Respondents nominations by their branches, for this reason also cannot stand. For this reason also I grant Applicants prayer 2(b) of the Notice of Motion.

[22] Accordingly, I grant Applicants' prayers 2(b) and (c) of the Notice of Motion with costs.

J.M. MOILOA
ACTING JUDGE

Mr. E.H. Phoofolo for Applicants

Mr. P.L. Mohapi for Respondents 1-13

Adv. T.V. Masasa for Respondents 14 and 15

