

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

‘MALERIBE LELEKA
MAKARA SEUTLA
MPHOSONG MOKATI
‘MABAFOKENG MATEKANE

1st Applicant
2nd Applicant
3rd Applicant
4th Applicant

AND

MAHOBONG CONSTITUENCY
NATIONAL EXECUTIVE COMMITTEE
LESOTHO CONGRESS FOR DEMOCRACY (LCD)

1st Respondent
2nd Respondent
3rd Respondent

JUDGEMENT

Coram : Hon. Monapathi J.
Date of hearing : 12th December, 2011
Date of Decision : 19th December, 2011
Date of Judgement : 2nd August, 2012

Summary

Non-joinder of two (2) people who had interest in the outcome of constituency elections was fatal to the application. In addition no irregularities nor prejudice having been proved in any of the elections in sub-branches and branches of the constituency and no provisions of the party's constitution having been in any way breached that conduced to the failure of the application. The Applicants

approached it followed in some instances would make political party elections machinery unworkable and unnecessarily difficult.

CITED CASES

Lesotho National Olympic Committee and Others v Morolong LAC (2000-2004) 449,

Makharilele and Others v National Executive Committee and Others CIV/APN/82/2001

Lesotho District of the United Church v Moyeye and Others LAC 2007-2008

S v Miller 1939 AD 106

Maliehe and Others v R 1995-1999 LAC 258

National Executive of Basotho National Party and Others v Majara Jonathan Molapo. C of A (CIV) 34/2011

BOOKS

Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4th edition.

- [1] This application, which is about elections of sub-branches and branches of the Mahobong constituency is primarily that the conferences of the sub-branches be declared null and void. The sub-branches were Vukazenzele, Ha Khojane, Mohope and Litaung. In particular (in prayers 4 and 7) it is sought that it be directed and ordered that a re-election be arranged by the Respondents which include the NEC and the LCD Party; which shall be transparent and follow democratic values enshrined in the Third

Respondent's constitution for the areas of four (4) sub-branches complained of. Other prayers such as costs were also recorded.

- [2] Besides argument on the merits, two (2) *points-in-limine* were raised namely non-joinder and existence of material dispute facts that would disable the court from resolving the matter on the papers without aid of *viva voce* evidence. The last point was not pursued.
- [3] Starting with the plea of non-joinder, it was said Mr Mothejoa Metsing and one Khomoatsana Tau were improperly not joined in the proceedings. But that they had participated in the sub-branches and branches and are contestants in the constituency's election of the First Respondent Constituency. As I inferred, the Applicants must have known and they do not deny. This was so at the time of the launching of the application. Strangely enough the Applicants did not even ask for leave of court or rather they resisted the suggestion that they still could ask the court to grant them leave. Many cases were cited for the proposition that this kind of non-joinder was fatal to the application. These included ***Lesotho National Olympic Committee and Others v Morolong*** LAC (2000-2004) 449 and ***Makharilele and Others v National Executive Committee and Others*** CIV/APN/82/2001 (unreported). Joinder had to be done or sought. It is where obviously and inarguably a party or parties have a direct and substantial interest such as Mr Metsing and Tau. I thought this necessitated dismissal of the application. Clearly, without exaggeration, if the Applicants succeeded it would affect the rights and status of the two gentlemen.

- [4] This (non-joinder) is a matter that no court, even at the latest stage in proceedings, can overlook, because the court of appeal cannot allow orders to stand against persons who may be interested, but who had no opportunity to present their case. This court accordingly found that the Applicants should have been non-suited on this point alone. The above case was followed and applied in *Lesotho District of the United Church v Moyeye and Others LAC 2007-2008* at page 103. It was accordingly correctly submitted that on this ground alone the rule ought to be discharged with costs.
- [5] The alleged numerous and detailed irregularities were dealt with and addressed. The issue raised in the respective order of the sub-branches were as follows: The irregularities allegedly committed during the conference of Vukazenzele sub-branch were the following: That members of Makateng and Ha Lota sub-branch committees arrived at Vukazenzele in possession of a letter emanating from the constituency committee. That the aforesaid letter was read to members of party at the Vukazenzele sub-branch before the elections were held. The letter directed that the said members from Makateng and Ha Lota were to oversee and/or supervise the elective conference. That the aforesaid members did not only supervise the election but went further and cast their vote in contravention of clause 5.11.1 of the party constitution. The above represent all the complaints of alleged irregularities committed during the elective conference of the aforesaid sub-branch as shown in paras 9 and 10 of the founding affidavit.

[6] The constituency committee did not deny that it sent a delegation to oversee and supervise the conference of the sub-branch and a full explanation was recorded why that measure had to be taken, namely that the relations between the sub-branch and its relevant branch of London, which was supposed to oversee the process at the sub-branch, were not conducive, as a result of which the constituency had to intervene.

6.1 The question really would be whether the constituency's intervention in the circumstances constituted an irregularity and/or whether the provisions of the constitution of the party were thereby contravened. In terms of clause 7.6.1 of the party constitution, the duties of the constituency committee amongst others include the establishment of branches of the constituency and to see that those branches establish sub-branches within each branch and more particularly to oversee and to inspect the work of the branches committees, to see that the party is alive at the branches. This is more clearly reflected in clause 7.6.1 (a) and (b) of the LCD constitution.

[7] It was correctly submitted that, as clause 7.6.1 aforesaid provides, it is the duty of the constituency committee to ensure that the business and affairs of the party throughout the constituency level are properly managed and to intervene where and when necessary as it did in the conflicts between the London branch and its sub-branch of Vukazenzele. Significantly, no member of the sub-branch supported first Applicant in her allegations that any irregularities took place during the conference. It is also significant that First Applicant's testimony entirely emanated from an alleged report of the irregularities and that the said report is not corroborated by any member.

[8] On the contrary, the constituency committee has been supported by a member of the Vukazenzele sub-branch committee who confirms that the

sub-branch could not work in harmony with its supervising branch as a result of which, as the sub-branch committee, they sought the constituency committee's intervention. Reference was made to supporting affidavit of Maselone Rathebe.

- [9] It was furthermore submitted that First Applicant's averment's of alleged irregularities at the conference of the sub-branch of Vukazenzele were inadmissible, since they were based on an alleged report emanating from an undisclosed source who has not supported First Applicant, more so since it was clear that First Applicant herself was not present at the sub-branch conference on the 5th November 2011. This was particularly so because First Applicant's intention on relying on the alleged report is so that the report can be taken on its value i.e. that the alleged report should be treated by the court as the truth of the alleged irregularities. If that was the purpose then it was submitted that her averments in that regard are inadmissible. I agreed with respect. See *S v Miller 1939 AD 106* at 119. In that case Watermeyer J stated as follows statements made by non-witnesses are not always hearsay.

“Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e. as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of theasserter which can be trusted only by his appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they intended to prove is relevant to the enquiry.”

The decision was followed and applied in *Maliehe and Others v R LAC 1995-1999* at page 258.

- [10] The only aspect of the alleged irregularities that could have some merit, if it had been proved, was the allegation namely that the delegates sent by the constituency committee to oversee the sub-branch conference also voted in the process, even those that do not live at Vukazenzele. This would have had a direct bearing on the result of the elections and had that happened, an irregularity would have been committed. This is so since clause 5.11.1 is clear in its terms, that the sub-branch will be attended by all members of the LCD who live in the sub-branch, and who qualify in their rights for the particular year. Unfortunately the allegation was similarly inadmissible since it emanated from First Applicant who was not present at the conference of the sub-branch. See *Maliehe's case (supra)* I agreed.
- [11] In support the above submission was that, on the contrary, one of the delegates that had been sent by the constituency committee, namely Mr. Lira Kotsi, had filed an affidavit and it was only him who voted as he was ordinarily resident at Vukazenzele and would be entitled to vote in terms of clause 5.11.1 of the party's constitution. In all the circumstances therefore, it was submitted that the alleged irregularities in the conduct of the conference for the sub-branch of Vukazenzele were without merit and from the evidence of Lira Kotsi, and 'Maselone Rathebe, the conference was properly conducted. This was credible.
- [12] The complaints of alleged irregularities during the conference of Ha Khojane sub-branch were the following: That the Mahobong Constituency member of Parliament, Secretary to Second Respondent, ordered that the committee for the Ha Khojane sub-branch be dissolved and a new one be elected which was in his favour. That a member of Somololo sub-branch ordered members of Ha Khojane who were at the conference to sign forms without the elections being held.

- [13] These two (2) were the only complaints raised. These were questioned on the following basis: Firstly, the lack of details in the first complaint was glaring, to wit: whether it was on the day of the conference when the Ha Khojane sub-branch's committee was allegedly dissolved; The identity of its members that there so unceremoniously kicked out; The identity of the members of the alleged new committee in favour of the Member of Parliament. In what manner the alleged order of dissolution of the committee was made, etc. All these details were highly relevant and necessary for credence to be lent to these allegations.
- [14] On the contrary, the chairperson of the constituency committee in his affidavit explained the circumstances under which the Secretary General of the party became involved in the affairs of the sub-branch, namely, to intervene and give advice. It had to be noted that he was competent to intervene in an advisory capacity, in his capacity as Member of Parliament for the constituency under which the sub-branch falls and as Secretary-General of the party. It would be noted that Second Applicant seemed to suggest that the Member of Parliament from the constituency of Mahobong ordered dissolution of the committee in his capacity as Secretary-General of the party in terms of the circular annexure 'ML1'. See Second Applicant's affidavit at para 4. It was submitted that this suggestion was totally misleading as no where in the circular does the Secretary-General order a dissolution of the sub-branch committee. I agreed with respect.
- [15] Regarding the second allegation that a member from the Somololo branch ordered the members who were at the conference to sign forms without elections, it was submitted that this was a complete distortion of the truth.
- [16] First of all it was not stated in terms of which powers or authority the said member would order members at an elective conference to sign forms without elections having been held.

[17] Secondly, it was not stated why the members of the party there to elect would comply with the alleged order.

[18] Thirdly, it was not stated what forms the members that were at the conference were allegedly made to sign without elections.

[19] And fourthly, what the members were being ordered to sign on the forms. As this court observed the law is trite that an applicant in *ex parte* motion proceedings is enjoined to make a full disclosure of all the relevant and necessary facts to enable the court to determine whether a good and sufficient foundation exists to afford him relief and that such failure of full disclosure is damaging to an applicant's case. See Herbstein and Van Winsen, the *Civil Practice of the Supreme Court of South Africa* 4th edition, page 367.

It was accordingly submitted that these complaints were without merit and that the conference of the Ha Khojane sub branch was properly conducted. I agreed with respect.

[20] Before dealing with the complaints of alleged irregularities at the conference of Mohope sub branch it was, as submitted, imperative to have regard to and take notice of the fact that the complaints were registered by Third Applicant, who describes himself as the Secretary of the youth league committee at the sub branch. Unfortunately he was not supported in his allegations by not even one member of the sub branch committee. It was quite strange that the serious concerns of the sub branch would be entrusted to the youth when there is in place the sub branch committee with members who can register the sub branch's complaints on behalf of the sub branch. The complaints of alleged irregularities were however the following:

Firstly, that the sub branch conference was held on the 4th November 2011 as opposed to the 5th without knowledge of members of the sub branch and contrary to the circular issued by the NEC and the party constitution;

Secondly, that elections were not conducted but members were only counted and instructed to sign forms;

[21] The court was asked to observe that second complaint was identical with the complaint in the preceding sub branch of Ha Khojane. Similarly, the absence of material details to the complaint could be noted, namely non disclosure of the identity of the persons that instructed members who were at the conference to elect not to do so but only to fill in or sign forms, the identity of the eighteen (18) members who were only counted without the process of elections, which forms they were instructed to fill and what they were instructed to fill in the forms. It was significant that Third Applicant did not say he was one of the members at the conference who was also counted, and ordered to fill in a form and not to vote. It was correctly submitted that there was no substance in this allegation and it had to be rejected.

[22] Regarding the first complaint that the conference was held on the 4th November as opposed to the date in the circular, it was significant to note that this was conceded by the chairperson of the constituency committee, who says they were informed by the demise of a member of the party at Mohope whose corpse was arriving at the village on the 5th November 2011 for burial on the 6th November 2011 as a result of which consensus was reached by members of the party at the sub branch that the conference be held on the 4th November 2011, which date the constituency committee most wisely approved.

[23] The issue therefore was whether members of the party at the sub branch were duly advised and informed of the change in the date and whether the date fixed by the NEC in the circular could be changed. From the chairperson's explanation it was clear that the change of date received wide publication and that all members became aware of the fact that the conference was no longer being held on the 5th but on the 4th. They acquiesced .They accepted after wide coverage and publication of the charge. There could not therefore in my view had been any irregularity or prejudice.

[24] In addition that the constituency committee in its power could approve of the change in the date of the conference admits of no doubt as clause 5.1 provides that:

“each sub-branch shall hold a sub-branch conference annually to prepare the mandate/affairs/business of the sub-branch for the year and to prepare the delegation to the branch conference. The NEC or the constituency committee will publicize and inform/notify of the conference”.

[25] The duties of the constituency committee therefore included appointing dates of sub-branch conferences and communicating those to the branches for transmission to the sub-branches. It was accordingly submitted that no contravention of the constitution as alleged occurred in the change on the date of the sub-branch conference from 5th to 4th November 2011. It accordingly followed therefore that the alleged complaints of alleged irregularities in this sub-branch, as in the others had no merit and ought to be dismissed.

[26] As was argued further, it is fundamental to note that whereas Third Applicant had alleged in the main supporting affidavit that he had been instructed by members of the Mohope sub-branch committee to forward their grievances, that he later in reply alleged that his mandate emanated from members of the Youth League who were members of Mohope sub-branch. The sudden change came after the constituency committee challenged his authority to register the concerns of or complaints of the sub-branch.

[27] It was submitted that the complaints of alleged irregularities regarding the conference of Litaung Sub-branch are the following: Firstly, that the results of the conference were announced in the absence of members; Secondly, that the president of the branch committee used abusive language on members of the sub branch and nominated the elections supervisory committee of his choice.

[28] It would be noted that Fourth Applicant was an ordinary member and not secretary of the Litaung sub branch committee. The letter that she purported to address to the Secretary of the sub branch committee was signed by four members who allegedly instructed her to raise complaints on their behalf. That the entire sub branch was not made up of the aforesaid four persons, and four applicants and not say these four persons represent the majority of members of the party at the sub branch. It was strange that none of the sub branch committee members complain about the alleged irregularities i.e that the result of the election was announced in the absence of all other members. This allegation was totally without merit as submitted. I agreed.

- [29] Regarding the alleged abusive language by the President of the branch to members of the sub-branch committee, again no member of the sub-branch committee complains that he or she was insulted at the conference. The allegation that the President of the branch appointed the election supervisory committee all on his own has no foundation much as it was uncorroborated.
- [30] I agreed that in all circumstances as submitted that no irregularities existed during the elective conference of this four sub-branches. The allegations were totally without merit and bordered on frivolity.
- [31] The Applicants approach if followed in most instances would make the political parties election machinery and constitution unworkable and unnecessarily difficult. See *National Executive of Basotho National Party and Others v Majara Jonathan Molapo. C of A (CIV) 34/2011* per Farlam JA 21/10/2011.
- [32] This application was dismissed with costs as I ordered.

T. E. MONAPATHI
JUDGE

For Applicants : Adv. Tlapane
For Respondents : Adv. Ratau
Judgment noted by Adv. Tšenoli