

IN THE HIGH COURT OF LESOTHO

In the matter between:

DOREEN CHAOANA-MAPETJA

PETITIONER

AND

**NDIWUHLELE NDLOMOSE
DEMOCRATIC CONGRESS**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Coram : **Hon. Peete J
Hon. Moiloa J
Hon. Molete J**

Dates of Hearing : **December 2012 – 4,5,6,7,10,11,13,14, & 19**
Date of Judgment : **24 April 2013**

Summary

General Elections – National Assembly Electoral Act No.14 of 2011 – Requirements under Section 86 of the Act – Assistance to be given to blind or physically incapacitated voter – Duty of the Voting Station Manager to verify veracity thereof. Assisting voters not envisaged under Section 86 of the Act. Effect of Section 130 (3) of the Act – Illegal practice/misconduct – Section 172 (1) (c) of the Act – Effect on the result of the elections – Assessment of where during a general elections, a Voting Station Manager permits or facilitated the assistance of voters who are not blind nor had a physical disability, such constitutes an illegal practice or misconduct. If such illegal practice or misconduct can affect the result of election, the court can set aside the election and direct fresh election to be held.

Where an illegal practice or misconduct committed during an election would or could have affected the results of the election and such effect will depend upon the facts and circumstances of each particular case.

While recognizing the sacrosanct principle of secrecy of voting, the number of people assisted is of greater importance where the electoral margins are quite slim.

ANNOTATIONS

1. The Constitution of Lesotho 1993
2. Fourth Amendment to Constitution Act No.4 of 2001
3. National Assembly Electoral Act No.14 of 2011
4. The Court of Disputed Returns (National Assembly Election Petitions Rules 1993)
5. Putter vs Tighy 1949 (2) SA 400 (A.D)
6. R vs Rowe, Ex parte Mainwaring [1992] 4 AER
7. Snyman vs Schoeman & Another 1949 27 SA 1 (A.D)
8. Halsburys Laws of England 3rd Edition Vol.14 Para 300 at Page 169
9. Gunn & Others vs Sharper & Others 1974 (2) ALL ER 1058
10. Shidiack vs Union Government (Minister of the Interior) 1912 A.D 642

PER MOILOA J

[1] On 26 May 2012 Lesotho held a General Election for its seventh democratic Parliament. In this election 80 constituencies were contested for on the basis of the First Past The Post Electoral System (FPP). See **4th Amendment to Constitution Act No.4 of 2001**, Section 3 (c) (i) amending Section 57 of the Constitution. This petition before us concerns the result at the PFP election in respect of Tele Constituency No.64.

[2] The petitioner is Mrs DOREEN CHAOANA-MAPETJA who was candidate for Lesotho Congress for Democracy (“LCD”) in the Tele Constituency. She has brought her petition in terms of Section 126 of the **National Assembly Electoral Act No.14 of 2011** (“the Act”) read with **The Court of Disputed Returns (National Assembly Election Petition Rules 1993)**. The orders she seeks from this court are set out in her petition to the following effect:-

- (a) That the election of the First Respondent be declared invalid;
- (b) That the court order setting aside the election of First Respondent in respect of Tele Constituency N0.64 and direct that a fresh election should be held at Tele Constituency No.64;
- (c) Costs;
- (d) Further and/or alternative relief.

[3] First Respondent is Mr. NDIWUHLELI NDLOMOSE who stood as a candidate for Democratic Congress, (“the DC”) Second Respondent. The citation of the parties is as prescribed by Rule 3 (2) of the Court of Dispute Returns Rules.

[4] At the end of counting of votes on 26 May 2012, First Respondent was declared winner over Petitioner by a margin of 14 votes. Thus the result of Tele Constituency No.64 was very close indeed.

[5] **THE ISSUES**

The petition alleges a number of malpractices and contraventions of the Act common at Maleka Tsekoa Primary School Voting Station.

5.1. Petitioner alleges violation of Section 85 read with Section 86 of the Act. The allegation is that the Station Manager allowed people who

were not suffering from physical disabilities set out in Section 86 to be assisted to cast their votes.

- 5.2. It furthermore alleges that one person was allowed to help several voters to cast their votes in violation of Section 86. The petition listed names of persons that allegedly rendered assistance to at least 25 other voters to cast their votes.
- 5.3. The petition also alleges that those that rendered assistance to others to cast their votes did so without enquiring about the choice of those that were being helped.
- 5.4. The second major complaint of the petition alleges that on voting day a DC party agent, one Lebohang 'Molaoa had a bundle of other voters' cards in his possession at the polling station and was seen distributing same to their owners after whispering to them in the voting lines in circumstances that were suspicious that he was giving instructions to those card owners who to vote for. Lebohang 'Molaoa was alleged to be a local community councilor, and also DC official party agent on 26 May 2012 observing election process at Maleka Tsekoa Voting Station.
- 5.5. The third major complaint of the petition was that the petitioner's agents at Maleka Tsekoa were denied RESULT/OBJECTION FORMS when her agents requested same to lodge their protest against the alleged election malpractices being committed at Maleka Tsekoa.

[6] THE EVIDENCE

At the outset this court recognized that it had to observe the demeanor of witnesses giving evidence in support of each version of the parties in order to determine issues of credibility and the like. Petitioner led 5 witnesses in support of her petition.

- [7] PW1 testified that she was the Returning Officer for Tele Constituency No.64. On voting day Station Manager is required to keep voting Station

Diary. The Diary records all important events that happen on voting day at the station. She testified that on voting day the Station Manager (Leopa Vincent Ntsibolane DW7) must note in his diary names of each person requesting to be assisted in terms of the Act, their voters 'cards numbers and reasons why they had to be assisted, as well as persons who assisted them and the relationship of such person to the voter requesting assistance. On 27 May 2012 she received a complaint from the petitioner (PW2) that she had received a report from her agents at Maleka Tsekoa Voting Station that the Station Manager refused her party agents OBJECTION FORMS when they wished to lodge their objection to a number of irregularities which allegedly were permitted to take place at that voting station. PW1 (Ms Ramakatsa) attempted to communicate with the Station Manager (DW7) there and then upon receiving the complaint of PW2. As she (PW1) could not communicate with the Station Manager (DW7) nor the petitioner's agents on account of communication network problems in the Maleka Tsekoa area, she requested the petitioner to tell her agents to see her as soon as they arrived back. The agents indeed saw her (PW1) on 28th May 2012 and reported their complaint to her and the attitude of Station Manager when they had sought forms to lodge their objection to the Result of the Maleka Tsekoa Primary School Voting Station. Classrooms at Maleka Tsekoa Primary School were used for voting purposes at the 2012 General Elections on 26th May, 2012. PW1 testified that she duly issued the petitioner's agents with OBJECTION FORMS which were duly lodged with her. She reported the matter to the District Electoral Officer and also passed the lodged OBJECTION FORMS to that officer.

When the Maleka Tsekoa Voting Station Manager (DW7) eventually arrived she asked him about the alleged irregularities and his alleged refusal to issue the LCD party agents with OBJECTION FORMS. She testified that the Station Manager refuted all allegations against him and against any alleged irregularities at his station.

- [8]** PW2 is the petitioner herself. She basically gave evidence in support of her petition. This petition alleges that at least 25 people were permitted by the Station Manager to be assisted by others to cast their votes in circumstances that did not qualify in terms of Section 86 (1) and (a). She petitions this court to declare that the election of First Respondent is invalid and that the court should order the setting aside of the election in respect of Tele Constituency No.64 and direct that fresh elections be held. She contends in her petition that regard being had to the margin of the First Respondent's success in Tele Constituency No.64, the serious irregularities committed at Maleka Tsekoa Voting Station would or could have affected the results of the election as contemplated by Section 130 (1) (b) read with Section 130 (3) (a). PW2 annexed to her petition two supporting affidavits of her party agents at Maleka Tsekoa Voting Station, namely Nomzimkulu Tseloa and 'Maakofang Mohale. In her petition she lists 25 names of voters who allegedly were assisted by primarily 3 individuals (Zoligikile Joni otherwise popularly known as "Qhaqhazela"), Nowandile Mbizo and by Chieftainess 'Maatisang Tsekoa. It is alleged in the petition that "Qhaqhazela" assisted 9 voters, and that Nowandile assisted 5 people, and that Chieftainess 'Maatisang assisted 8 voters to cast their votes. Cross-examination of this witness did not shake her testimony at all. Besides these, a number of other voters were permitted by the Station Manager to be assisted to cast their

votes on the grounds that the aforesaid voters claimed to be illiterate or claimed not see properly.

PW2 testified that to her knowledge literacy rate in the Mphojoa area in particular is very low. Although initially challenged by counsel for Respondent but by all accounts the evidence of PW2 was confirmed by witnesses for both petitioner and respondents. She also testified that literacy rate in Sixondo which includes Mphojoa (where Maleka Tsekoa Voting Station was located) is generally low. Accordingly it became eventually common cause that Sixondo area has poor literacy rate and that Mphojoa in particular has a particularly low literacy rate.

[9] PW3 was Advocate Chris Lephuthing. He was dispatched from Maseru by the IEC as a conciliator following the IEC's receipt of the petitioner's complaint about how voting had been conducted at Maleka Tsekoa Voting Station. Mr. Lephuthing therefore did not testify about matters that he had firsthand knowledge of about the voting process at Maleka Tsekoa Voting Station. However he interviewed and recorded verbatim statements made to him by some of the persons who had been participants in the voting process at Maleka Tsekoa. He presented that document to the court as Exbt "D". Six of those individuals that he had interviewed testified before us in this court. They were Ayanda Faniso (PW4), 'Matšepo Lebitsa (DW4), Molebatsi Somsoeu (DW3), Leopa Ntsibolane (DW7), Nomzimkulu Tseloa (PW5) and Lebohang 'Molaoa (DW1). In the interviews Mr. Lephuthing conducted in his conciliation exercise, electors admitted to having been assisted and others admitted to having helped others to vote. PW3's interviews in this connexion took place on 24th June 2012. The value and relevance of PW3's evidence in this inquiry lies in its circumstantial confirmation of testimony

by those who were present on both sides during voting process who had firsthand knowledge of what happened.

[10] PW4 was Mr. Ayanda Faniso. He testified that he had been an IEC Election Officer at Maleka Tsekoa Voting Station on 26 May 2012. His primary duty had been to mark voters with indelible ink on their eighth finger when they had been issued with ballot paper to cast their vote in terms of Section 85 (5) (e). This was to identify voters who had voted to prevent people from voting more than once. He testified that several voters were assisted to cast their vote. The main reason why people were helped, he told us, was on account of illiteracy. He observed that in many cases a voter would follow all the processes through IEC Officers 1, 2 and 3 until he got into the Voting Booth and whilst there would appear stranded. When Station Manager inquired what his/her problem was, a voter would answer that he/she did not know how to read or write. The Voting Station Manager simply asked the voter who the voter wished to be assisted by. The voter would give a name and immediately thereafter the Station Manager would go and stand at the doorway of the Voting Room and call out the name of such person outside from the queue of voters awaiting their turn outside to come in to vote, and the other person being called came in and assisted the voter without the Station Manager establishing the relationship of the voter to the person being asked to assist. Furthermore, those that rendered assistance to others to cast their votes did so without enquiring about the choice of those that were being assisted. PW4 testified that he estimated that people who were assisted to cast their votes on account of illiteracy were between 10 and 20. Again, I observe that DW7 eventually accepted that this estimate of PW4 could be correct. PW4 testified that he complained to Station Manager

(DW7) that people that were being called to assist were not being properly identified and confirmed to establish their relation with the voters that they were being called to assist. He testified further that DW7 replied that he PW4 must mind his own business. I pause here to observe that DW7 at first denied this evidence of PW4 but later admitted it under cross-examination.

- [11] Mrs Nomzimkulu Tseloa (PW5) told the court that on 26 May 2012 she was one of two LCD party agents at Maleka Tsekoa Voting Station at Mphojoa. The other LCD agent for the petitioner was Mrs ‘Maakofang Mohale. She testified that the Voting Station opened at 7.00am and closed at 5pm. She had begun her duties of observing the voting process outside the classroom used by electors to cast their votes. At about 10am that morning she changed places with ‘Maakofang inside the classroom being used for voting. Her evidence is important to petitioner in several respects. While she had been observing voting process from outside, the Station Manager (DW7) appeared at the doorway of the Voting Room and made two public announcement regarding voting. He told voters in the lines that persons who had physical disabilities should enter with their preferred fellow voters to assist them cast their votes. Sometime later during the course of the morning DW7 appeared at the doorstep of the voting classroom and made a second announcement to the effect that voters who could not read or write should also enter the voting room with persons who they wished to be assisted by to cast their votes. She testified that on no less than 9 occasions she had seen Station Manager (DW7) appear at the door of the classroom and heard him call Zoligekeli Joni (“Qhaqhazela”) from the lines to go in and assist voters inside to cast their votes. Each time Joni left the voters’ line outside, went in, assisted a voter as requested and thereafter came back

to the queue to await his turn to vote. This pattern was true also in regard to one Nowandile Mbizo, who was called in also several times by DW7 to go in and assist a voter inside. She testified that she objected to this conduct to DW7 but was ignored by DW7. Her objections were primarily two fold. First, people being assisted were normal voters with no disability save for a lady who had fallen and injured her hand as she approached the Polling Station; possibly also another man who came to Polling Station on horseback and who had requested those in the line to assist him to dismount his steed and was said to have been recovering from a recent stroke. Otherwise at least 25 voters were permitted by Station Manager to be assisted by others in circumstances that did not qualify in terms of the Act. Secondly PW5 objected to the same person being called in many times over to assist voters inside. She said according to their training by IEC this was not permissible. She said according to their training by IEC, a voter who had been called in to assist another voter inside had to also be allowed to vote while inside so that by the time he/she returns from inside he/she had voted and was required to leave the Voting Station immediately. Thirdly, she objected because “Qhaqhazela” and Nowandile (and one or two other persons) were called in to assist more than once, came back to the lines each time instead going in once to assist and then voting themselves and leaving the Voting Station thereafter having voted.

She testified that she wrote down names of persons being assisted each time by “Qhaqhazela”, Nowandile and others as they were being called in by DW7 to go inside to assist other electors.

- [12] While still observing election process outside she saw Lebohang ‘Molaoa, (DW1), a local councilor of the area and a party agent of First and Second

Respondents on the day, produce from his wallet a bundle of voters' cards and deliver some of these cards to voters in the voter's lines on Election Day at Voting Station. She testified that as 'Molaoa did so she saw him whisper something to such voters as if to tell them who to cast their votes for. She objected to this conduct of 'Molaoa (DW1) to policeman Nxceba Poqoane (DW2) and his assistant 'Matšepo Lebitsa (DW4). She testified that when Nxceba (DW2) questioned 'Molaoa (DW1), the latter had given an explanation that he had held these voters' cards in connection with the processing of persons who receive pension stipends from Government. He added that he was merely returning the cards to their owners. Nomzimkulu told the court that she retorted to this explanation of 'Molaoa by demanding to know how that explanation could possibly be true in the light of the fact that one of the persons to whom 'Molaoa had just delivered a voter's card to in the line was a young light complexioned woman who did not qualify to receive pension payment. She told the court that 'Molaoa simply turned his back on her and walked away. She complained to Nxceba (DW2) and Lebitsa (DW3). Nxceba and Lebitsa took no action. She testified that in fact Lebitsa responded at one point by saying that she (Nomzimkulu) should not complain because before the split of DC from LCD this was a common fraudulent practice employed by LCD to win elections. She said she was surprised by this allegation of Lebitsa. She says she knew nothing of the sort alleged by Lebitsa. Nomzimkulu said she continued her protests about 'Molaoa's conduct. Nxceba and Lebitsa ignored her. Both Nxceba and Lebitsa did not report the incident to DW7 (The Station Manager) they told us when they testified before us later. Both offered us no explanation whatsoever why they did not report the occurrence to DW7. I mention in passing that 'Molaoa (DW1) denies that he ever had other people's voters'

cards in his possession. Indeed he denies that such an incident ever happened on that day involving him. Nxceba and Lebisa say the person who had other people's voters' cards with him on that day was Molebatsi Somsoeu (DW3). Somsoeu was a second party agent of First and Second Respondents. Somsoeu told us that he had 4 voters' cards of his children in his possession on that day and that he went out to the voting lines outside to deliver these cards to their owners. The ages of these children range between 19 and 27 years. The third is a married woman who lives with her husband and her in-laws in their own home. The reason given by Somsoeu for being in possession of these cards is that he had an agreement with the owners of the voter's card that he retains them in his possession for safe keeping. This reasoning is strange in the extreme to me and does not make DW3's possession of these voters' cards any less unlawful even if, for a moment, I work on the assumption of his version (and that of DW2 and DW4).

[13] When Nomzimkulu Tseloa had taken her position inside the Voting Hall as the petitioner's agent she testified that she saw more voters being assisted to vote on account of being illiterate. The persons who assisted were various and they included Chieftainess 'Maatisang Tsekoa who assisted 8 voters to cast their votes. Her objections to continued assistance of voters with no disabilities continued to be ignored by DW7.

[14] Nomzimkulu further testified that she asked Station Manager (DW7) for "Objection Form" to enable her lodge her candidate's protest to the vote at Maleka Tsekoa Voting Station but was ignored. In short she was refused a Protest/Objection Form by DW7 to lodge her complaint. She had earlier during the course of the morning that day already felt compelled to report

DW7's actions to her candidate, the petitioner. She had not been able to contact her candidate to report her frustration at being denied "Protest Form" by DW7 on account of absence of cell phone network in the area. It is common cause that this station is situated near the border with Eastern Cape of the Republic of South Africa. She had left the Voting Station during the course of the morning and climbed some hills in search of network signal. At one point she succeeded and obtained an MTN signal. She called the petitioner intending to report problems they were encountering at their Voting Station. She was unable to connect with the petitioner. She then called another party member (Mrs 'Matoka Ramaru) and reported to her the alleged irregularities taking place at Maleka Tsekoa and requested Mrs Ramaru to relay her message to the petitioner. According to testimony of PW2 we know that the petitioner got PW5's message through Mrs Ramaru of problems at Maleka Tsekoa at about 3 or 4 pm on 26 May 2012 when petitioner got to Dili Dili. PW2 told us that she tried to contact PW5 but did not succeed, again, on account of absence of network availability in the area. According to PW2's testimony she had been criss-crossing her constituency visiting various polling stations on the day. There had been 27 polling stations for the Constituency. She did not manage to visit Maleka Tsekoa on the day. PW2 had arrived back home at Mabitseng late that day between 6 and 7pm. On 27 May 2012, PW2 had visited PW1 (Returning Officer) at Alwynskop to protest DW7's alleged serious irregular voting at Maleka Tsekoa and his denial of Protest/Objection Form to her agents at Maleka Tsekoa. Both PW1 and PW2 testified that it was agreed between them that PW5 and 'Maakofang would be issued with Objection Form upon their arrival from Sixondo at PW1's office at Alwynskop. PW5 and 'Maakofang did arrive at PW1's offices on 28 May and were indeed issued with

Objection/Protest Form by PW1 on which they noted their candidates Objection/Protest. On the issue of why she signed for the result of the Polling Station at the end of the counting, she explained that at their training by the IEC they had been taught that party agents had to sign for the result at the end of the counting as confirmation that the result was in accordance with the counting because if they had failed to sign for result of counting they would not be allowed to pursue their objection to the manner of the voting process which they contended was done contrary to the law.

[15] On this aspect of the evidence then there is corroboration as to what had happened at Maleka Tsekoa Voting Station on 26 May 2012 and the persistence of PW5's assertion that DW7 permitted serious irregularities at Maleka Tsekoa Polling Station and the fact that no Protest/Objection Forms were availed to PW5. On the latter issue the versions differ as to whether PW7 ever requested objection forms or not.

[16] PW5 was subjected to intense cross-examination by Mr. Letsika for Respondents. She answered all questions straight forwardly without difficulty. On the issue why she signed for result if she had quarrel with it her answer is understandable in the light of provisions of Section 97 (1) (f). Her answer is most likely to have been informed by this Section. In short in my assessment PW5 acquitted herself very well and to my satisfaction in her testimony before court. I have no reason to doubt her testimony.

[17] Mr. Lebohang 'Molaoa was Respondent's first witness. He testified that on 26 May 2012 he was First and Second Respondent's agent at Maleka Tsekoa Polling Station. His co-party agent was Molebatsi Somsoeu. He confirmed that he was local councillor for Mtjanyane Council. As a Councillor he

admitted that he sometimes assists his constituents with accessing Government pension for old people. He said he did so by accepting voters' cards as identifying documents where people did not have passports. But since new Government after elections of 26 May 2012, Councillors are no longer allowed to handle issues relating to accessing of pensions. He denied that on voting day he had in his possession other voters' cards and that he had distributed such cards to certain voters on the voting lines on 26 May 2012. He had been with PW5 outside observing the voting process there while Somsoeu and 'Maakofang had been inside from the start of voting at 7am to about 10am when he and PW5 relieved their respective colleagues inside.

[18] On the issue of people assisting others he testified in chief that only 2 people were assisted. He mentioned that Phathekile Rasemene was assisted by Palesa Mothopi. He said only Phathekile's left eye is not properly sighted but that his right eye sees properly. He testified that the second person assisted was Bonakele Welkom. He said Welkom had a boil on his right hand. However his left hand had no problem. He said Bonakele was assisted by Nowanda Doti.

[19] Under cross-examination however he conceded that the following persons were assisted also. Betere Sefuba by Sehlabo; Toti Mphemba was assisted by "Qhaqhazela"; Nowakele Phasumane was assisted Noziphiwe Mawanga; Nozibenzile Joni was assisted by "Qhaqhazela"; Taelo Tsekoa ("Bobby") was assisted by Chieftainess 'Maatisang Tsekoa; Machende Mathobane was assisted by Chieftainess 'Maatisang Tsekoa; Ndumiso Ziqu also assisted by Chieftainess Tsekoa; Limakatso Somsoeu was assisted by Nozizane Fafo. Finally he testified that all of these assisted persons were not blind and could

see properly. Significantly though, Dw1 testified in chief to only 2 people having been assisted but under cross-examination he conceded to at least 8 others that he was aware had been assisted to cast their votes though suffering from no physical impediment to themselves that prevented them from casting their votes personally. This deliberate concealment of truth by this witness, in my assessment of his evidence puts him in very poor light. Accordingly where his evidence is in conflict with other testimony, I prefer to believe other testimony especially where there is corroboration from other testimony or other circumstances tending to make other version more probable.

[20] On the issue whether or not he had other people's cards in his possession on voting day, he continued to deny this allegation under cross-examination. But he acknowledged that he and PW5 know each other very well. He also acknowledged that PW5 and Somsoeu know each other well. He also acknowledged and confirmed that in his capacity as councilor for Mtjanyane he received other people's voting cards to assist them access pension stipend from government in cases where such people did not produce their passports for identification purposes. He could not explain to us why PW5 would say it was him who had a bundle of other voters' cards in his possession when in fact it was Somsoeu. He told us that he has good relations with PW5. Interestingly enough, he testified that PW5 would not have seen voters' cards in Somsoeu's possession because, so went DW1's reasoning, when Somsoeu was inside Nomzimkulu was outside. But Somsoeu himself acknowledged that he had voter's cards of his children in his possession on 26 May 2012. I got a distinct impression from this witness that he and perhaps others too, was anxious to deflect attention from himself regarding

this issue that he was seen in possession of a bundle of other peoples voting cards on Election Day at the polling station. As I have indicated earlier where his evidence differs from other testimony, I prefer to accept other testimony contrary to his. He did not impress me as a truthful witness.

[21] DW2 was Policeman Nxceba Poqoane. He was overall in charge of security and orderliness at Maleka Tsekoa Primary School Voting Station from 22-27 May 2012. Nxceba testified that he was assisted in that task by ‘Matšepo Lebitsa (DW4), a reservist recruited for the purposes of the election period only. On the issue of respondent’s party agent who had other voters’ cards in his possession on Election Day, he was adamant that it was Somsoeu and not ‘Molaoa who had 4 voters’ cards belonging to his children and who he called away from the voting lines while he was distributing them to their owners. He told the court that upon a complaint of Nomzimkulu he called away Somsoeu and instructed him to deliver the said cards to police assistant Lebitsa (DW4). Under cross-examination Nxceba denied that it was ‘Molaoa who had other people’s voter’s cards in his possession and said it was Somsoeu. He said furthermore that although he knew that this incident was significant he told us that he, ‘Matšepo and Nomzimkulu decided to keep it localized between them. He did not inform the Station Manager about it. When pressed by Mr. Teele KC to explain why he had done so, Nxceba offered no credible explanation. Nxceba admitted it was wrong for voters’ cards to have been in the possession of non-owners on Election Day. He conceded that it could conduce to fraud. This witness did not impress me as a reliable and credible witness upon whom I could place reliance. I got a distinct impression that he and others were anxious to keep away from us the full and truthful facts of what happened at Maleka Tsekoa Polling Station.

[22] Molebatsi Somsoeu was the next defence witness to testify. He was the second party agent of First and Second Respondents at Maleka Tsekoa Polling Station on 26 May 2012. His co-agent was Lebohang 'Molaoa. He lives at Mphojoa Ha Machakela where his family also lives. He has 4 children ranging in ages between 26 and 19 years. He also has a shop where he spends most of his time. His third daughter, Noxolisane, aged 22, is a married woman who lives with her husband and his family at her in-laws in the village. The other children are unmarried and live with him. He keeps voters cards of all his 4 children with him at the shop. On Election Day on 26 May 2012 he was in possession of his 4 children's voters' cards and he went to Polling Station with the cards. He attempted to deliver the cards to them in the lines on voting day. Nxceba asked him about them and asked him to surrender them to him. Under cross-examination he was adamant that during the conversation with Nxceba, 'Matšepo was present. He insisted Nomzimkulu was not there. He insisted also that he gave the 4 voters' cards to Nxceba and not to 'Matšepo. Nxceba testified that he did not give the cards to 'Matšepo either at any time. He confirmed that Nomzimkulu and himself know each other very well; in fact they regard each other as brother and sister as both are descendants of Bulane. Their relationship is very good and has always been so. He wouldn't dispute FANISO's estimate that between 10-20 people were assisted to vote on Election Day. Neither was he able to dispute Nomzimkulu assertion that 'Molaoa had a bundle of voters' cards in his possession on election day. When told that Nxceba had told the court that he told Somsoeu that he was worried that his being in possession of other people's voters' cards might cause disorder in that it is conducive to fraud, Somsoeu emphatically denied that any conversation of the sort had taken place between him and Nxceba.

- [23] In regard to his daughter Limakatso, Somsoeu told the court that Limakatso was troubled by intermittent fits which occur without warning sometimes after weeks or even months of relative good health. Otherwise Limakatso was his brightest daughter who had gone up to Standard 5 at school. She was intelligent and assertive in her own right.
- [24] Somsoeu denied that Nomzimkulu (PW5) ever protested about him being in possession of his daughters' voters' cards. He also asserted that Nomzimkulu never demanded a Protest Form to lodge the petitioner's protest against the result or voting process at Maleka Tsekoa Polling Station. He told the court that Ntsibolane the Station Manager asked simply if everyone were satisfied with the result of the "counting" when it was completed. Pressed whether Ntsibolane (DW7) offered to issue any party agent with a "Protest Form" if they desired to lodge an "Objection" to the Result, he replied that Ntsibolane did not.
- [25] On the issue whether he had seen any blind person come to vote on 26 May 2012 at Maleka Tsekoa Polling Station he said there had not been any.
- [26] 'Matšepo Lebitsa, Assistant Policewoman on the day, was the fourth witness for respondents. Her evidence in chief was fairly short. She lives at Sixondo, Ha Silas. She is unemployed. But she got a job as police assistant for 2 weeks to assist oversee order over the period immediately leading up to and during Election Day on 26 May 2012. She was assistant to policeman Nxceba. On Election Day Nxceba had called her to where he was speaking to Somsoeu in relation to 4 voters cards in Somsoeu's possession that allegedly belonged to Somsoeu's children. Nxceba had asked her if she knew Somsoeu's children and she had confirmed that she knew them.

Nxceba had asked Somsoeu to handover the 4 cards to her with an instruction from Nxceba that when the owners of those cards arrived she should deliver them to their owners. Somsoeu did release the 4 cards to her and she in turn did deliver all the 4 cards to their respective owners when they arrived. All of them did arrive.

[27] Under cross-examination the following facts were elicited. At training as police assistants they were taught to be on the look-out for election malpractices that could impair the genuineness/fairness of election process. She had heard when Nxceba told Somsoeu that his possession of other people's voters' cards could cause suspicion, discontent and disorder. He said so in the presence of herself, and 'Maakofang (LCD agent). All 4 were standing together when this conversation took place. She was adamant PW5 was not there and therefore not part of their discussion concerning voter's cards found in the possession of Somsoeu. But later on under cross-examination this witness said she had heard Nomzimkulu whining about other voters being in possession of other voters' cards. She did not explain when Nomzimkulu had suddenly arrived on the scene nor why Nxceba had noticed voters' cards in possession of Molebatsi Somsoeu when apparently she, Somsoeu, 'Maakofang had been in conversation together away from Nxceba and had not noticed Somsoeu being in possession of other people's voters' cards. The 4 cards were given to her by Somsoeu and not Nxceba. She was firm on this even when told that Nxceba had said it had been him that gave her the 4 cards from Somsoeu. She confirmed that post the election she had voluntarily given a statement to Mr. Lephuthing when he visited the constituency in June 2012 in connection with his mediation efforts. This

witness struggled considerably with her evidence. She did not impress me and I am not relying on her testimony where it contradicts that of PW5.

[28] Nolwazi Bobo was Respondents' fifth witness. Her evidence was short and to the effect that she voted unassisted contrary to petitioner's allegation that she was assisted to vote. Secondly, she testified that 'Mamothetho Fafo did not come to vote on 26 May 2012 as alleged. She said 'Mamothetho was sickly. In cross-examination she conceded that 'Mamothetho lives metres away from the Voting Station and that she might have not seen her coming in to vote either before she came to the Station herself or after she had voted and left.

[29] Phathekile Rasemene was sixth witness for respondents to testify. In chief, Mr. Rasemene told the court that he cast his vote assisted by his daughter Palesa. He said he did so because he could not see clearly things that were far. He could only see things that were near. Under cross-examination this witness cut a pathetic figure. He was asked for his passport. He produced it. He was asked to identify his own signature on the passport which he did with ease. He was asked to identify the signature of the passport officer on his passport which he again promptly did without any difficulty. He was compelled to concede that he is not blind. He conceded that he can see. In this exercise over the witness's passport the court observed for itself that Mr. Phathekile Rasemene can see properly. The court observed for itself that this witness did not meet the requirements of Section 86 (1) (b) of the Act. It was a classic example of the inherent dangers present in the approach adopted by DW7 in terms of which Ntsibolane (Station Manager) took voter's claims at face value and made no effort himself to establish whether such voter's claims met the criteria set by Section 86 (1) and (2). Testimony

of this witness gave classic demonstration of the wholesale maladministration of the voting practices that the Station Manager at Maleka Tsekoa implemented at this station.

[30] The last witness for respondents was the Station Manager at Maleka Tsekoa Voting Station , Mr. Vincent Leopa Ntsibolane. His testimony in chief was that if a voter stood puzzled in the voting booth he asked such voter if he has problem voting. If the voter answered in the affirmative, he inquired if the voter was accompanied to the station by a friend or relative. If the voter answered in the affirmative, he requested his/her name and went out to call such person to come in and assist a stranded voter. Nobody complained. At the end of voting votes were counted and result declared. Nobody asked for an Objection Form. He had such forms in his possession on Election Day. Nobody reported to him about any voter having other peoples voting cards in his possession. Neither Nxceba or Nomzimkulu did. The first he heard of complaints about voting irregularities at his station was from a policeman at Dili Dili on Sunday afternoon.

[31] Under cross-examination he conceded that none of the people that he had permitted to be assisted were blind or walked into the station assisted due to sight problems. Although at first he said only those (2) people were assisted to vote he eventually admitted that such number was in fact higher than 20 voters. Once again although at first he had denied that he had made a public announcement to voters in the lines that any voter who could not read or write should come in with a friend or relative he/she trusted to assist them cast their votes, he eventually conceded that he had made such announcement. It was suggested to him that he had resorted to this extraordinary announcement because he had been frustrated by the slow

progress of voting inside as too many voters at this station were either illiterate or semi illiterate and slowed the progress of voting as a result. Although he had earlier denied that he had made a second announcement during the course of the morning that voters who were illiterate or semi illiterate should enter the voting room accompanied by persons that they wished to assist them to cast their votes, under cross-examination he conceded this fact.

[32] On the issue of voter's cards in the possession of party agents he conceded that it was a serious matter that Nxceba and Lebitsa should have reported to him. Asked to state why he considered such incident serious he correctly pointed out that on Election Day each voter must be in possession of his/her voters card because otherwise it could promote fraud and taint such election and render it to be not free and fair. This witness continued to insist that he had first heard of the issue of DC party agents being in possession of other voter's cards when he and Nxceba met a policeman at Dili Dili. He did not know the name of that policeman. He did not ask for such policeman's name nor inquire from him details of what he was talking about or follow up on it at all. He did not ask Nxceba if he knew anything about what the Dili Dili policeman was talking about. When asked why he appeared to have had no interest at all on the issue of voter's cards being in possession of party agents of contesting candidate, he replied that he had no reason. By this time this witness was distinctly and visibly in difficulties to justify the cavalier manner in which he handled election processes at Maleka Tsekoa. He continued to deny that any party agent raised any objection or protest to the election process at Maleka Tsekoa or that the Petitioner's agents requested OBJECTION/PROTEST FORMS from him and refused their

request as Nomzimkulu alleged. But when asked whether, at the end of voting process and counting of votes, he had invited candidates or their agents to register their protest if any, he replied that he had not issued such invitation. He told the court that he had simply invited all agents to sign the VOTING STATION RESULTS FORM 11G (Exbit "D"19-20).

Asked by Mr. Teele why he did not record in his Voting Station Diary the fact that he had allowed some voters to vote assisted by others, he could not provide us with an answer. He accepted though that this occurrence was an important event as Miss Ramakatsa (PW1) had told us earlier. He conceded that he should have recorded the occurrence in the Voting Station Diary.

[33] I gained a distinct impression that DW1, DW2, DW3, DW4 and DW7 were not truthfully disclosing to the court their full knowledge of facts regarding, firstly, issues involving DC party agents at the voting station being in possession of other voters' cards on Election Day. Secondly, the true magnitude of the number of illiterate/semi illiterate voters permitted by DW7 to be assisted by others repeatedly contrary to provision of Sections 85 and 86. Thirdly, treatment of petitioner's agents protests of election process and result. These 4 witnesses knew a lot more than they were willing to tell us: otherwise why would PW5 Nomzimkulu say it was DW1 Lebohang 'Molaoa who had a bundle of other people's voters' cards when it was Molebatsi Somsoeu when both are individuals who are well known to PW5 so that there is no issue of mistaken identity here. Why do policemen on the scene at voting station catch party agents of one of the candidates distributing voter's cards in the voting lines and that fact is not reported to the Station Manager; why is there such disinterest on the part of Nxceba and Ntsibolane to the inquiry of the Dili Dili policeman who asked them about

alleged persons being in possession of other voter's cards on Election Day and being seen distributing same on the voting lines. Ntsibolane (DW7) the Station Manager and policeman Nxceba (DW2) want us to believe that between them they did not even talk about this issue. The fact that it may have been DW3 and not DW1 makes no difference to me in as much as it remained an election malpractice that a party agent of a candidate contesting an election was found in possession of a bundle of voters' cards of others at the polling station on Election Day. It remains the case that owners of these voters' cards were adult individuals well capable of keeping their own voters' cards. In the case of Noxolisane (DW3's daughter) she was a married woman living in her own household with her husband and her in-laws. No plausible reason was given by DW3 why he should have been in possession of her voters' card only to be released to them on Election Day at the polling station.

- [34] The attitude of Nxceba and Ntsibolane puzzles me that when the Dili Dili policeman mentioned to them that there were allegations that people were having other people's voters' cards at Maleka Tsekoa Voting Station, neither Nxceba nor Ntsibolane seemed bothered or at least confirm it in the correct perspective. Neither of them asked the policeman to provide details concerning these allegations. Even at that stage Nxceba did not tell Ntsibolane that Somsoeu (or 'Molaoa if you like) was caught by him in possession of 4 cards belonging to his daughters. Nxceba did not explain to the Dili Dili policeman that it was a harmless case (if that were indeed the case) of a parent being in possession of his daughters voter's cards. All these incongruities leave a permanent impression that DW1, DW3, DW4

and DW7 know perfectly well the scheme of things concerning voter's cards in the possession of DC agents.

[35] It is equally puzzling to me that Nomzimkulu would take the trouble of climbing hills to report to the petitioner that serious election malpractices were being permitted by Ntsibolane at Maleka Tsekoa Voting Station and that Ntsibolane was denying her OBJECTION/PROTEST FORM to record their grievance, if in fact she had not attempted to register the petitioner's protest and been denied by Ntsibolane. We know that she tried to call the petitioner that morning during voting and when she could not connect with her due to network problems she called and found Mrs 'Matoka Ramaru with a request to relay the message to petitioner. We also have corroborative evidence of this fact from the petitioner that on the afternoon of 26 May 2012 she received a call from Mrs Ramaru relaying Nomzimkulu's message regarding problems at Maleka Tsekoa including Ntsibolane's refusal to issue them with OBJECTION/PROTEST FORMS.

[36] PW5 was subjected to intense cross-examination by Mr. Letsika for respondents. Mr. Letsika primarily sought to challenge her on her evidence that Ntsibolane made announcement that people who were illiterate could come into Voting Booth with their preferred helpers to cast their votes. Secondly, the witness was challenged that the number of voters who were assisted were far less than the alleged number of 25. Thirdly, she was challenged on her evidence that she raised any OBJECTION/PROTEST to the result or the manner in which voting had been conducted, it being pointed out to her that in fact she had signed the Election Result Form willingly. Fourthly, she was challenged on her evidence that Lebohang 'Molaoa had had other voters' cards in his possession on voting day and that

she had seen him delivering those voter's cards to voters on the line awaiting their turn to go in to vote, it being suggested to her that the person who had his children's voter's cards with him on Election Day was Somsoeu who was delivering such cards to his children on that day.

- [37] On the issue that Ntsibolane (the Station Manager) did not make a public announcement that people who could not read or write should bring with them persons to assist them, this evidence by the end of the trial became common cause that Ntsibolane had done so. Other witnesses including respondents' witnesses and Ntsibolane himself eventually confirmed it. The challenge on whether or not 25 people who had no physical disability were assisted also fizzled out because by all accounts witnesses on both sides confirmed that at least more than 20 voters were assisted by others. Also, by all accounts some individuals each assisted several voters to cast their votes. On the issue whether she ever protested at the manner in which voting was being conducted and specifically whether she requested from Ntsibolane Protest/Objection Forms to lodge her petitioner's protest on the election irregularities committed during election process at Maleka Tsekoa, a number of things emerged that PW5 Nomzimkulu felt compelled to climb the hills to find a network connection to report to petitioner that she was being refused Protest/Objection Forms by Ntsibolane the Station Manager. Uncontested testimony confirms that she did indeed relay the message to petitioner (PW2). DW4 ('Matšepo Lebitsa) confirmed that DW7 came out to call people in voting lines to come in and assist others and did so, many time over and over again. She called PW5 protestations "whining" not specifically directed to anyone but made generally to police and DW7. Dw7 confirmed that he did not offer party agents Protest Forms if any of them

wished to lodge protest. It is indeed evident from various witnesses' testimony that a party agent of First Respondent had with him voting cards of other voters on Election Day and was seen attempting to distribute them to their owners in the voters' lines. PW5 says it was party agent Lebohang 'Molaoa (DW1) while DW2, DW3 and DW4 say it was DW3 (Molebatsi Somsoeu). PW5 was clear and forthright that it was DW1 Lebohang 'Molaoa) that she saw in possession of a bundle of voters' cards distributing them among voters in the lines after whispering some words to them. It was about this conduct of 'Molaoa that she complained to Nxceba (DW2) and Lebitsa (DW3). Both DW1 and DW3 agree that PW5 knows them well and that they know her well. Neither DW1 nor DW3 could give us a reason why PW5 would say it was DW1 who had a bundle of cards when it was DW3. On this issue of possession of voters' cards I prefer the evidence of PW5 to that of DW1, DW2 and DW3. She was a much better witness compared to DW1, DW3 and DW4.

[38] I must state here that in terms of the Election Act, a voter is not required to write anything in order to cast his/her vote. A voter is merely required to tick or mark his/her preferred candidate in the box opposite his/her preferred candidate's symbol. The mark can be in the form of a tick, or a cross or an x or other form of mark which would clearly identify the preference of such voter among the candidates on the ballot paper contesting elections. Clearly, illiterate voters were not incapacitated to vote by any physical cause. All they were required to do was to put a mark on the box opposite their preferred candidate's symbol on the ballot box. They were not required to write. The Station Manager made no effort whatsoever to investigate a

voter's claim to be assisted that indeed the claimed physical disability existed and that it is covered by Sections 85 and 86 of the Act.

[39] THE LAW

In arguments before us there was a debate whether this court has jurisdiction to determine this petition. It was submitted by Mr. Letsika for respondents that this court does not have jurisdiction to determine this petition in terms of Section 130 (4) (b) (v) and (iv) of the Act. Mr. Letsika argued that on the evidence tendered this court does not have powers to entertain this petition in the manner envisaged by the petitioner. He urged on us that in terms of Section 130 (4) (a) (b) (v) and (vi) the court cannot make an order under Section 130 (1) (b):-

- (a) unless the court is satisfied that a failure to comply or an irregularity in compliance with a procedure or requirement prescribed under the Act would or could have affected the results of the election; or
- (b) if the court concludes on the evidence tendered that an omission or error of an electoral officer did not affect the results of the elections; or
- (c) if the court concludes the evidence that non-compliance or irregular compliance with a procedure or requirement did not affect the results of the election.

We agree with the principles set out above. However, it was in the application of the above principles to the facts of this case that our paths with Mr. Letsika began to separate.

[40] Mr. Letsika submitted that on the evidence tendered in court Zoligikeli Joni (“Qhaqhazela”), Chieftainess ‘Maatisang Tsekoa and Nowandile Mbizo among them assisted no more than 3 persons in total. In our view this assessment of the evidence by Mr. Letsika is incorrect. PW5 testified that

she estimated that she observed about 25 people that were assisted this estimate being based on the number of times that DW7 (Ntsibolane) called in “Qhaqhazela” and others to come and assist persons in the Voting Booth. It was accepted by Nomzimkulu Tseloa (PW5) that perhaps 2 voters could be exempted as legitimately suffering from a physical disability in terms of Section 86 (1). PW5 mentioned a woman voter who had fallen and injured her right hand rather severely as she entered the Voting Station prescient. This voter had to be assisted to cast her vote. This voter the evidence before us showed that she was in such pain that she voted while sobbing. The second voter that Nomzimkulu conceded could be excused was an elderly man who arrived on horseback with a recent history of a stroke. This voter by all accounts had to be assisted to dismount his horse on account of being unsteady in his movements. Apparently this voter had a severe tremor. Besides these 2 voters, all other voters approximating at least 23 persons were assisted on account of being illiterate or semi-illiterate. We accept as an uncontroverted fact that no blind voter came to Maleka Tsekoa Voting Station to vote. All witnesses are agreed on this fact. The evidence which we accept as credible is that at the least more than 20 persons were assisted in this way. Pw5 testified that Joni (“Qhaqhazela”) was called in to assist at least 9 times while Chieftainess ‘Maatisang Tsekoa was seen assisting 8 voters and Nowandile assisted at least 5 illiterate/semi-illiterate voters. Apart from these 23 voters, uncontested evidence also is to the effect that there were other illiterate voters who were assisted by other voters singly. In our view there is no credible evidence before us to gainsay these estimates. There is nothing wrong in relying on estimates as to how many people were assisted (See **Putter vs Tighy 1949 (2) SA 400**) at **405 per Tindaal JA**.

[41] Bearing in mind that the margin of winning/losing was only 14 votes and that irregularly cast votes were significantly higher than this margin, in our opinion the irregularity was very serious and it affected more than 20 votes that were not cast in secrecy as prescribed by Section 85 (1) but were being allowed by DW7 to be cast in contravention of Section 86 (1). This failure to comply with the Act could have affected the result of election at Tele Constituency No.64 to the detriment of the petitioner. This is so particularly regard being had to small margin separating the winner from the loser. The margin in *casu* is 14 votes while the votes cast contrary to Sections 85 (1) and 86 (1) are at least more than 20. We accordingly conclude that this court does have jurisdiction to determine this petition in terms of Section 130 (4) (a) of the Act. On this ground and on the facts of this case I would grant petitioner's prayers 1 (a) (b) and (c). There is another matter we feel compelled to address in this petition. In terms of Section 85 (1) voting is to be by secret ballot. Indeed the whole of the architecture of the Act is constructed to protect this sacrosanct feature of secret ballot of our elections in Lesotho. A reason for this architecture of the Act is not hard to fathom. It is intended to guarantee as much as possible a free and fair election that is credible. It is not a triviality that Section 85 (1) and 86 (1) and (2) are enacted in the manner that they have been. Compare them to the situation in **Gunn & Others vs Sharper & Others 1974 ALL ER 1058**. Section 85 (1) and 86 (1) and (2) are intended to protect the secrecy of voters' votes to ensure that their exercise is done in strict privacy in free and fair circumstances that guarantee such secrecy and freedom of its exercise. This is a serious matter which is being legislated for here. Compliance with Section 85 and 86 form important bedrock of an election in that it ensures secrecy and avoids fraud at an election. It is not a matter of a junior

official's discretion. It is a matter of prescription of law as to who qualified in terms of provisions of Section 85 (1) and Section 86 (1) of the Act. See **Shidiack vs Union Government (Minister of Interior) 1912 A.D 642**. In our view it is imperative that the IEC pays particular and serious attention to the integrity and caliber of individuals it appoints to supervise elections. Equally, we suggest that IEC pays particular attention to voter education of communities in remote rural areas where literacy and voter sophistication may be wanting.

- [42] In this petition, the petitioner, inter alia, complains that her agents at Maleka Tsekoa Voting Station were denied Protest/Objection Forms by the Voting Station Manager. Of course the Station Manager denies this fact. But there is corroborating evidence tending to support the complaint because on voting day, voting was being managed and conducted in such cavalier fashion by the Station Manager that important provisions of the Act designed to protect the sacrosanct character of balloting was seriously compromised in that provisions of Section 85 (1) (6) and (7) as well as Sections 86 (1) and 97 (1) (d) of the Act were ignored by the Station Manager. The petitioner's agent had to climb hills in search of network in order to report to petitioner unhelpful attitude of Station Manager to her protests regarding breaches of voting procedures prescribed by Act including the refusal of Station Manager to issue her with Protest/Objection Forms to lodge petitioner's protest. There is confirmatory evidence from DW4 that petitioner's agent Nomzimkulu (PW5) protested at the manner voting was being conducted and in particular at the fact many voters with no physical disability were being assisted to vote by a circle of few individuals over and over again. We know that this special cycle of individuals consisted of Joni

(“Qhaqhazela”), Nowandile Mbizo and Chieftainess ‘Maatisang Tsekoa. DW4 described PW5’s protests “whinings”. But added to this there is uncontroverted evidence that PW5 did phone and give a message to Mrs ‘Matoka Ramaru to relay the message to petitioner and that in fact the petitioner did eventually get the message from PW5 late on afternoon of 26 May 2012 and that on 28 May 2012 petitioner did lodge her complaint with PW1 (‘MaPaulosi Ramakatsa) who was the Constituency Returning Officer and that as a result eventually when PW5 arrived from the remote station of Maleka Tsekoa she was given Protest/Objection Form by PW1 to formally register the petitioner’s Protest with Pw1. On the evidence we heard from various witnesses, I have no doubt that indeed DW7 (Ntsibolane) refused PW5 (Nomzimkulu) a Protest/Objection Form on 26 May 2013 at Maleka Tsekoa Voting Station. I applaud the intervention of PW1 (Returning Officer Ramakatsa) in affording petitioner’s agents opportunity to formally lodge petitioner’s objection to Maleka Tsekoa Voting Station result under the circumstances. Ms Ramakatsa acted correctly in the circumstances. The cavalier manner in which this station was run by DW7 must be “a wake up call” to IEC to take serious note that voting in remote stations in the rural areas is difficult to access and that illiteracy may be prevalent in such areas and that they require intensive voter education and support with IEC officials of credible credentials.

[43] ILLEGAL PRACTICE AND MISCONDUCT AND/OR IRREGULARITIES

“Illegal practice” is defined as “a practice that constitutes an offence under Part III of Chapter 11 of the Act.”

A person would commit an offence if such person contravened Section 86 (see Section 171 (1) (4)). A person would commit an offence and an illegal practice under Part III of the Act if such person assisted or communicated with an elector who is about to vote during the election unless such person were authorized to do so under Section 172 (1) (c) of the Act. I agree with Mr. Teele's submission that conduct constituting an offence under Part III of Chapter 3 need not necessarily be an offence. I also agree with Mr. Teele's submission that under our system of criminal law mens rea is an essential element of a statutory offence. Accordingly, unless the contrary clearly appears from the statute itself, it will be presumed that mens rea is an element of the offence. I agree with Mr. Teele that concepts of "misconduct" and "irregularity" fall short of concept of "illegal practice" in the sense of a crime. Mr. Teele, correctly in my view, contends that as "misconduct" is not defined in the Act but is employed as an alternative to illegal practice under Section 130 (3) (a) of the Act dealing with powers of the High Court in respect of election petitioner, the use of the words "illegal practice" or misconduct in the Act contemplates gradation of acts according to their seriousness. In this context, conduct accompanied by mens rea constitutes an "illegal practice" but would merely constitute misconduct when mens rea is absent. Mr. Teele argues that this distinction is not an idle academic exercise but does have bearing on two important legal issues. Firstly, the characteristic of an act as "illegal" practice or mere misconduct will affect the question of standard of proof. Before the court finds that "illegal practice" was committed, that fact ought to have been proved beyond a reasonable doubt, as is required in the criminal law (see **R vs Rowe, Ex parte Mainwaring [1992] 4 AER) 821**). I agree with this submission. Secondly, in terms of Section 132 (2) of the Act, the court is

precluded from making “a finding to the effect that a person has committed, or consented to or connived at the commission of an illegal practice unless it has given the person an opportunity to be heard, to give and to call evidence on the matter.” It is so because the persons adjudged to have consented to or connived at the commission of an illegal practice are themselves as guilty of the illegal practice as the principal who committed the illegal practice, being guilty of aiding and abetting or as accessory to the crime. Section 132 (2) does not apply to the finding of the court where no criminal intent (*mens rea*) is not required in the Act in Section 130 (4). Finally, for the first time we come across the concept of “irregularity” in compliance with a procedure or requirement prescribed under the Act which would or could have affected the results of the elections.

- [44] That there was widespread misconduct and/or irregularities and/or non compliance with the Act has been amply demonstrated by the petitioner on a balance of probabilities in the evidence presented to us in respect of at least 20 to 23 votes cast contrary to Section 86 (1). As I have pointed out earlier these irregularities of non compliance with the Act are of such a serious nature that they negatively impacted on the sacrosanct character of the secret vote of these voters. The secrecy of a vote is a pillar of our election procedures and processes. The burden of proof then shifted to Respondents to satisfy us in terms of Section 130 (4) of the Act such failure or irregularities in compliance with statutory requirements of the Act could not have affected the result of the elections (see **Tindaal JA in Putter vs Tingy** supra at page 410; see **Snyman vs Schoeman & Another 1949 (2) SA 1 per Van den Heever JA at page 9**. Mr. Letsika sought to persuade the court that voters who were permitted by DW7 (Station Manager) to cast

their votes contrary to Section 86 (1) in fact did so in accordance with such voters instruction. But that we do not know for certain.

[45] VOTER CARDS ALLEGEDLY IN POSSESSION OF RESPONDENTS AGENTS ON VOTING DAY

Nomzimkulu (PW5) testified that she saw Lebohang ‘Molaoa (DW1) with a bundle of voters’ cards in his possession distributing them among voters in the lines on voting day. ‘Molaoa denied Nomzimkulu’s testimony that he was at any time in possession of other voters’ cards in his possession on voting day. He did admit however that sometimes in his capacity as local councilor for Mphojoa ward he takes possession of voters’ cards in order to register them for pension grants from government. Nomzimkulu testified that this piece of explanation was proffered to her and Nxceba when she confronted ‘Molaoa about other voters’ cards in his possession and demanded to know how it could be possibly innocuous as one of the voters to whom ‘Molaoa had just delivered her card was a young light complexioned lady who did not qualify to receive pension. The testimony of Nomzimkulu was that ‘Molaoa and Nxceba turned their backs on her and left her. ‘Matšepo Lebitsa (PW4) admits to Nomzimkulu protests about, inter alia, people having other people’s voters’ cards and distributing them to their owners in the voter’s lines on voting day. But she says Nomzimkulu’s complaint was a “general whining” not directed to any person in particular. She took no notice of it. She took no interest in her protests. It is this disinterest of policemen on site and IEC officials on duty at this Polling Station that are a worrying feature of the manner voting was managed at Maleka Tsekoa Polling Station. She (DW4) also says it was Molebatsi Somsoeu who had in his possession the voters’ cards belonging to his

daughters that was distributing these to them on voting day. They stopped him but did not report the incident to Station Manager (DW7). PW5, DW3 and DW4 all agree that they knew each other very well and that there is no reason why PW5 could mistake DW1 for DW3. PW5 herself testified that she did not see DW3 in possession of other voters' cards. She saw DW1 in such possession. This is probable because from other evidence we know that Somsoeu was observing voting process inside classroom along with 'Maatisang Mohale from 7am to about 10am while Nomzimkulu and 'Molaoa were observing voting process from outside the voting classroom. This therefore places Nomzimkulu in and 'Molaoa outside voting classroom together with 'Molaoa, Nxceba and 'Matsepo at the time when Samsoueu was inside. Nomzimkulu was unshaken in her testimony despite best efforts of the Letsika to discredit her that it was Lebohang 'Molaoa that she saw in possession of a bundle of voters' cards distributing them to their owners on voting day. I believe Nomzimkulu in this regard and disbelieve denials of Somsoeu, Nxceba and Lebetsa on this point especially when I consider how this trio decided to treat to secrecy. This issue of respondents' party agents in possession of other voters' cards in their possession on voting day and being seen by their distributing some to voters in the lines on voting day.

On a balance of probabilities I conclude that 'Molaoa and Somsoeu both had in their possession other voters' cards and that they were seen distributing these voters' cards to their owners on voting day.

- [46] The burden of proof then shifts to Respondents to satisfy the court that despite this happening (i.e respondents party agents) at Maleka Tsekoa Polling Station on voting day, respondents misconduct could not or would not affect the election result. Mr. Letsika's response to this aspect of the

case was that the court must disbelieve Nomzimkulu and believe ‘Molaoa, Somsoeu, Nxceba and Lebitsa. In other words his submission to us was that the court must conclude that petitioner has failed to establish a *prima facie* case in support of her petition that Somsoeu’s possession of his daughters’ voters’ cards on them on voting day could or would affect the voting result. I do not agree with Mr. Letsika on his assessment of the evidence. In the view I take of the evidence on this aspect of the case it does not help respondents cause that it may have been Somsoeu in possession of his daughters’ voters’ cards on voting day. As indicated earlier I believe that on a balance of probabilities ‘Molaoa also had a bundle of voters’ cards in his possession and was seen distributing them among voters in the lines on voting day. It is not permissible conduct for a party agent at a polling station to be in possession of other voters’ cards on election day and to be caught distributing such cards in the voters’ lines on voting day. Both Somsoeu and ‘Molaoa were respondents’ party agents. As I have indicated earlier I prefer to believe the evidence of Nomzimkulu (PW5) that indeed she saw Somsoeu on voting day in possession of a bundle of voters’ cards and distributing them to their owners in the voting lines. In any case I believe that in all probability ‘Molaoa and Somsoeu both had other voters’ cards in their possession on voting day and distributed them to the card owners on voting day. In my view this being the case it voids the result in that it could have affected the result of Tele No.64 Constituency where the margin of defeat of the petitioner was only 14 votes. On this ground also I would grant prayers (a) (b) and (d) of petitioner’s petition herein.

[47] Party agents are appointed by the candidate or political party in terms of Section 52 of the Act. It is common cause that ‘Molaoa (DW1) and

Somsoeu (DW3) are party agents of Respondents herein. They have been appointed by them. It has been authoritatively stated that “a candidate’s liability to have his election avoided under the doctrine of elections agency is distinct from and wider than, his ability under criminal or civil law of agency. Once the agency is established a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorized by the candidate or was expressly forbidden.” See **Halsbury’s Laws of England 3rd Edition Vol.14 Para 300 at page 169.**

On this basis since the act of the agent is the act of the candidate, the misconduct of the agents in this case is the act of the candidate under Section 130 (2) (a) of Act. The election must be avoided even if not a single vote is corrupted where the conduct complained about is that of the candidate agent in an election. On this ground also I would grant the petitioner in terms of prayers (a) (b) and (d) of the Petitioner’s petition herein.

[48] Costs

Costs in relation to arguments before us in relation to the points *in limine* were reserved to the end of the trial of this petition. The point *in limine* was dismissed. In my view it is proper and fair that the principle that costs must follow the result should apply and accordingly award costs of that leg of the case to the petitioner.

Costs of the main trial of this petitioner are also awarded to the petitioner.

[49] **Conclusion**

In conclusion the following orders are made:-

1. Prayers (a) and (b) of the petition are hereby granted to petitioner as prayed.
2. Prayer (d) of the petition is granted, such costs to include costs consequent upon employment of two counsel.

[50] In terms of Section 131 of the National Assembly Act No.14 of 2011 the Registrar of the High Court should cause a copy of this determination and orders to be delivered to Independent Electoral Commission and the Speaker of the National Assembly of the Parliament of Lesotho.

J.T.M. MOILOA
JUDGE OF THE HIGH COURT

I concur:

S.N. PEETE
JUDGE OF THE HIGH COURT

I concur:

L.A. MOLETE
JUDGE OF THE HIGH COURT

For the Petitioner : Adv. M. Teele KC
(With him Adv. Ntakatsane)
(Instructed by Sello Mafatle Attorneys)

For the Respondents : Mr. Q. Letsika
(Instructed by Mei & Mei Attorneys)