

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/412/19

In the Matter Between:-

ALL BASOTHO CONVENTION

APPLICANT

AND

**PRINCIPAL SECRETARY – MINISTRY OF LAW
CONSTITUTIONAL AFFAIRS AND HUMAN RIGHTS
MINISTER OF LAW, CONSTITUTIONAL AFFAIRS AND
HUMAN RIGHTS
NATIONAL REFORMS AUTHORITY
ATTORNEY GENERAL
SENTLE RABALE**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 16TH DECEMBER 2019

DATE OF JUDGMENT : 19TH DECEMBER 2019

CASE SUMMARY: *Civil Practice- Authority to represent a juristic person- Applicable principles- Principles of review restated*

ANNOTATIONS:

STATUTES : *National Reforms Authority Act No. 4 of 2019*

CASES : *Ganes and Another v Telecom Namibia Ltd [2004] 2 ALL SA 609 (SCA)*

Wing on Garment (PTY) v LNDC and Another LAC (1995–99) 752

Pepcor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA)

Per Mokhesi J

INTRODUCTION

The applicant, a political party, had lodged an urgent application seeking the following relief:

1. That the rules of this Honourable Court pertaining to normal modes and periods of the service be dispensed with on account of the urgency hereof.
2. That a rule nisi be and made returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why, an order in these terms shall not be made absolute:-
 - a) That the 2nd respondent be directed to dispatch record of all reasons why he neglected to include the appointee of the Applicant.
 - b) That the 5th respondent be interdicted from participating in the National Reforms Authority meetings as a representative of Applicant pending finalization of this application
 - c) That the publication of Legal notice No. 94 of 2019 be declared *null* and *void ab initio* to the extent 5th Respondent is purported to be an appointee of Applicant.
 - d) That the inclusion of the 5th Respondent as a representative of the applicant in the 3rd Respondent be declared unlawful, *null* and *void ab initio*.
 - e) That the representative endorsed by the applicant's secretary general be declared as a member of the 3rd Respondent.

f) That the Applicant be allowed to submit a representative in the event that the 3rd Respondent continues with its meetings while this matter remains unsolved.

g) That the respondents should pay costs of suit.”

[2] This application is opposed only by the 5th respondent. In a nutshell, the 2nd respondent, being the Minister of Law, Constitutional Affairs and Human Rights empowered by the provisions of section 7 of the **National Reforms Authority Act No. 4 of 2019** (hereinafter ‘the NRA Act’) had published a list of names of members of the National Reforms Authority. This body’s task is to carry out functions that are necessary for the achievement of the object of the **NRA Act**. The objectives of the Act are set out in section 3 of the same Act as being; safeguarding of the national reforms process by ensuring that citizens’ voices are heard and given effect to; promotion of stakeholder consensus of the national reforms; expecting the national transformation of Lesotho on independent, transparent and accountable structures of the law reform process in the implementation of the resolutions and decisions of Plenary II.

[3] It is common knowledge that the applicant party has been involved in a deeply divisive and tempestuous litigation, with two factions vying for its control following the disputed elective conference held in February 2019. It therefore, came as no surprise that nomination of membership of NRA was bound to be shrouded in controversy, and heavily contested. It is common cause that in one of the litany of litigation instalments involving the applicant, Mr Hlaele, who together with some officer-bearers of the ABC had been expelled by the party leader, challenged their expulsion before the courts of law. That matter served before My Brother Monapathi J, who in the interim had issued the following order (in relevant parts).

“3. The operation and execution of the decision of the 1st Respondent taken on the 17th June 2019 purporting to expel the Applicants as members of the ABC be stayed pending the final determination of this matter

4. The 1st Respondent be and is hereby interdicted from taking unilateral decisions and interfering with the affairs of the 3rd Respondent without

involvement of the full contingent of the 3rd Respondent (NEC) pending final determination of this matter.

5. The 1st Respondent be and is hereby interdicted from instructing any member of the 2nd or 3rd Respondent to discharge functions of the offices held by the Applicants pending the final determination of this matter.
6. That the 4th to 5th Respondent be interdicted, pending the outcome hereof, of holding themselves out as members of the 3rd Respondent and discharging any duties within the organization as members of the 2nd Respondent.
.....”

[4] It is common cause that when the process of nominating members to the NRA started with a letter dated 14th November 2019 in terms of which the Secretary General of the ABC wrote to the 2nd respondent nominating one Montoeli Masoetsa as a representative of the applicant, *alas*, when the list of representatives was published in a gazette on 27th November 2019 Masoetsa’s name was conspicuous by its absence. Mr Masoetsa’ name was replaced by that of the 5th Respondent. This unexplained change prompted the applicant to launch the current application seeking relief as outlined above.

[5] In opposing this application, the 5th respondent has raised a point *in limine* challenging the authority of Mr. Hlaele to institute these proceedings on authority of the ABC. In short the 5th respondent avers that, after Hlaele and his fellow ABC office-bearers were expelled, and their expulsion challenged in court, they merely got an interim order putting in abeyance their expulsion without being reinstated to their positions. Furthermore, at paras. 19 of his answering affidavit, the 5th respondent says:

“19. I therefore submit that Hlaele ***has no mandate from the National Executive Committee of ABC to depose to the founding affidavit*** herein, let alone the fact that the party has not resolved to institute the present proceedings.” (*emphasis added*)

[6] Authority to represent the Applicant.

The 5th respondent in the above excerpt alludes to the fact that Mr. Hlaele was not authorized to depose to an affidavit on behalf of the applicant. A person does not need authority to depose to an affidavit, what is needed as an authority to institute proceedings on behalf of a Juristic person, and this is trite, as it was authoritatively stated in ***Ganes and Another v Telecom Namibia Ltd [2004] 2 ALL SA 609 (SCA)*** at para. 19 where it was said:

“In my view it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised...”

[7] I turn now to consider whether Hlaele was authorized to institute these proceedings on behalf of the applicant.

It is trite that where a Juristic person is a party to the proceedings, it acts through the agency of human beings. Those human souls must be authorized to represent the Juristic person, and normally the best evidence of such authority is the formal resolution authorizing such a person to represent the juristic person. However, there is no invariable rule requiring such a resolution to be annexed to the papers if the existence of such authority appears clearly from the facts. In the ***Lesotho Revenue Authority and Others v Olympic Off Sales LAC (2005 – 2006)*** 535 it was said:

“The best evidence that proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the

respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required by the applicant.”

[8] In *Wing on Garment (PTY) v LNDC and Another LAC (1995 – 99) 752* Gauntlett JA (as he then was) said (referring to *Mall (Cape) (PTY) Ltd v Merino Ko-operasie Beperk 1957 (2) SA 347 (c)*)

“As that judgment explains, much depends on what a respondent’s own answer to the assertion of authority is. It is a bare denial, or otherwise not such as to cast particular doubt upon an applicant’s assertion of authority, a court will generally not be inclined to uphold the defence that the authority is not proven. It all depends on the affidavits as a whole...The present case however is very different. The answering affidavit positively asserted that no relationship existed between the applicant and International – a contention to which the appellant chose not to reply.”

[9] From the factual matrix sketched above regarding how Mr. Hlaele came to be still in office of the Secretary General of the ABC, there can be no arguing with the fact that the Monapathi J order maintained the *status quo* pending finalization of the case in which the expelled (some) office-bearers of the ABC had challenged their expulsion. The 5th respondent’s assertion that the Monapathi J’ order did not amount to reinstating the applicants in that matter is plainly disingenuous, and quite frankly, tantamount to splitting of hairs; when the applicants were expelled, on top of being ABC members, they were also National Executive Committee members party, the effect of the Monapathi J order was to maintain the *status quo ante* which operated before their expulsion. To interpret this order otherwise would lead to an absurdity of maintaining the applicants’ membership of the ABC while excluding them from occupying the positions they held in the party before their expulsion. In short, the *status quo ante* was that, they were office-bearers on top of being ABC members.

[10] In my considered view the factual matrix as alluded to lend itself to an ineluctable conclusion that Mr. Hlaele was authorized to institute these

proceedings on behalf of the ABC. The point in *limine* challenging the authority of Mr. Hlaele is therefore, dismissed.

[11] Judicial Review

I now turn to consider the main issue. The principles of judicial review are axiomatic, they were outlined in *Pepcor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA)* para. 32 thus:

“Hitherto, where jurisdiction is not in issue and there is not obvious transgression of the boundaries within which the functionary has been empowered to make decisions, our Courts have not permitted review solely on the basis of a material mistake of fact on the part of the person who made the decision. Judicial intention has been limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fides* or as a result of unwarranted adherence to fixed principle or in order to further an ulterior or improper purposes; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter; *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152 C – D; Hira and Another v Booyesen and Another 1992 (4) SA 69 (A) at 93 B – C...*”

[12] It is no doubt clear that the 2nd respondent is empowered by section 7 of the **NRA Act** to publish the names of the members of NRA, but his power to publish must be on the basis of the name submitted by a qualifying institution per the provisions of s.5(5) of the NRA Act. S.5 (5) provides that:

“(5) A person shall not become a member under subsection (1), unless the person has-

- (a) a proven record of contribution towards the advancement of ;and
- (b) been duly nominated by the sector he represents.”

From the correspondence exchanged between the 2nd respondent and Mr. Hlaele as the Secretary General of the ABC, it is abundantly clear that the 5th respondent was not nominated by the applicant. The 2nd respondent, in my considered view, in ignoring the nomination of Mr Masoetsa, acted both arbitrarily and capriciously, and therefore, his decision stands to be reviewed and set aside as *null and void ab initio*.

[13] In the result the following order is made:

- a) That the publication of Legal Notice No. 94 of 2019 is declared *null and void ab initio* to the extent that the 5th respondent is purported to be an appointee of the Applicant.
- b) That the inclusion of the 5th respondent is declared unlawful, *null and void ab initio*.
- c) That Mr. Montoeli Masoetsa is declared as a member of the 3rd respondent.
- d) The 5th respondent should pay the costs of suit.

MOKHESI J

**FOR THE APPLICANT : ADV. M. THIENYANE INSRUCTED BY K.J. NTHONTHO
ATTORNEYS**

**FOR THE RESPONDENT : ADV. D. THEHANE INSTRUCTED BY MOSOTHO
ATTORNEYS**