

**IN THE HIGH COURT OF LESOTHO**

**CIV/APN/216/2019**

**HELD AT MASERU**

In the matter between:

<b>ODILON CEKWANE</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>MOTHIBELI RANTEREKO</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>MANTHATI TLALI</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>SENATE BERENG</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>TANKI DANIEL RABOROKO</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>MAKHOTSO MAFETO</b>	<b>6<sup>TH</sup> APPLICANT</b>
<b>THABISO MAJALLE</b>	<b>7<sup>TH</sup> APPLICANT</b>

And

<b>BASOTHO NATIONAL PARTY</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>NATIONAL EXECUTIVE COMMITTEE OF BASOTHO NATIONAL PARTY</b>	<b>2<sup>ND</sup> RESPONDENT</b>

<b>BASOTHO NATIONAL PARTY CONSTITUENCY COMMITTEE FOR QACHA'S NEK</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>NTHABISENG MAKOA</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>MALEKHANOOE KEKELE</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>MATŠEPANG NTAOANA</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>MALEKHETHO MOTLOANG</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>MALIAU MOFAMMERE</b>	<b>8<sup>TH</sup> RESPONDENT</b>
<b>KOENEHO THATHO</b>	<b>9<sup>TH</sup> RESPONDENT</b>
<b>ELECTORAL OFFICER FOR QACHA'S NEK CONSTITUENCY NO. 69, MATSOSO TSOAELI</b>	<b>10<sup>TH</sup> RESPONDENT</b>

<b>BASOTHO NATIONAL PARTY CONSTITUENCY COMMITTEE FOR QOALING NO. 34</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>NKOE TAETSANE</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>MATHABO SEANELA</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>DAVID MASASA</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>THABISO NTSEKE</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>REITUMETSE MOKOKOANE</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>KHOTSANG LECHESA</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>THERESIA KOESHE</b>	<b>18<sup>TH</sup> RESPONDENT</b>

<b>NTHABELENG RASETHUNTŠA</b>	<b>19<sup>TH</sup> RESPONDENT</b>
<b>ELECTORAL OFFICER FOR GOALING</b>	
<b>NO. 34, SETOFOLO HLOLOANE</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>BASOTHO NATIONAL PARTY CONSTITUENCY</b>	
<b>COMMITTEE FOR QHALASI NO.57</b>	<b>21<sup>ST</sup> RESPONDENT</b>
<b>SOKO THABISI</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>MAKHETHANG CHAKA</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>MASECHABA RAMOTSUBANE</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>MAPITSO MONAKALALI</b>	<b>25<sup>TH</sup> RESPONDENT</b>
<b>MAMOLEBOHENG KOMETSI</b>	<b>26<sup>TH</sup> RESPONDENT</b>
<b>MAMOHATO LEKOENEHA</b>	<b>27<sup>TH</sup> RESPONDENT</b>
<b>LIMPHO TLHORISO</b>	<b>28<sup>TH</sup> RESPONDENT</b>
<b>MATHAPELO MPOKATHI</b>	<b>29<sup>TH</sup> RESPONDENT</b>
<b>ELECTORAL OFFICER FOR QHALASI</b>	
<b>NO. 57 SETOFOLO HLOLOANE</b>	<b>30<sup>TH</sup> RESPONDENT</b>
<b>BASOTHO NATIONAL PARTY CONSTITUENCY</b>	
<b>COMMITTEE FOR MAFETENG NO. 55</b>	<b>31<sup>ST</sup> RESPONDENT</b>
<b>PUSELETSO NCHELA</b>	<b>32<sup>ND</sup> RESPONDENT</b>
<b>TEBOHO MAOASA</b>	<b>33<sup>RD</sup> RESPONDENT</b>
<b>MASEKONE MATLOSA</b>	<b>34<sup>TH</sup> RESPONDENT</b>
<b>TEBELLO MOHLOKI</b>	<b>35<sup>TH</sup> RESPONDENT</b>
<b>SELLOANE MAYNELI</b>	<b>36<sup>TH</sup> RESPONDENT</b>
<b>MAMONTSENG NYAPHOLI</b>	<b>37<sup>TH</sup> RESPONDENT</b>
<b>ELECTORAL OFFICER FOR MAFETENG</b>	
<b>NO. 55 MATSOSO TŠOAELI</b>	<b>38<sup>TH</sup> RESPONDENT</b>

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### **JUDGMENT**

Coram : Honourable Justice E.F.M. Makara  
Date of Hearing : 10 July, 2019  
Date of Judgment : 11 July, 2019

### **SUMMARY**

The Applicants who are members of the Basotho National Party are suing its leadership structures for a declaratory order that a set of circulars announcing the forthcoming AGC and the holding of the preparatory constituencies elections were issued contrary to the constitution of the party. This applied to the identified insufficiency in their contents. Moreover, the Applicants identified procedural defects in the conduct of the elections within specified constituencies. These

included reference to indications of 'doctored' reports, crafty exclusion of some potential candidates from participating meaningfully in the election process and several suspiciously manipulated transactions. The Court found the charges credible and accordingly granted the relief sought for as prayed.

## ANNOTATIONS

### CITED CASES

1. **Yiba and Others v African Gospel Church** 1999 (2) SA 949
2. **Leonard Ntsoebea v. Basotho National Party** Civ/Apn/75/940
3. **Reverent Bokako Nyabela v The Lesotho Evangelical Church**  
Civ/Apn/150/1980
4. **Attorney General v The King** CONS/CASE/02/2015
5. **Makoala v Makoala** C of A (Civ/ Apn/04/09
6. **Swanepoel v City Council of Johannesburg, President Insurance Company Limited v Kruger**760/92,90/93 [1994] ZASCA 80; 1994 (3) SA 789

### STATUTES & SUBSIDIARY LEGISLATION

1. **Government Proceedings and Contracts** Act No.4 of 1965
2. **High Court rules** Legal Notice No.9 of 1980
3. **BNP call Circular** BNP/ ADM/ 60

## MAKARA J

### Introduction

[1] In this case the Applicants who are *bona fide* members of the Basotho National Party (BNP) and its constituency committee members for the constituencies of Qacha's Nek, Qoaling, Qhalasi and Mafeteng respectively, instituted urgent motion proceedings seeking for a *rule nisi* order against the Respondents in the following terms:

1. The rules of court on modes and period of service of process be dispensed with on account of the urgency herein;

2. A rule nisi be issued returnable on a date and time determinable by this court calling upon the respondents to show cause if any why the following prayers shall not be made absolute;

(a) That the above honourable court should issue directives on filing of pleadings in this matter and date of hearing.

(b) The decision of the National Executive Committee of the Basotho National Party (BNP) to announce and call for holding of annual conference of the 12<sup>th</sup> July, 2019 be stayed pending finalization of this application;

(c) The decision of the National Executive Committee of the BNP to announce or call for holding of annual general conference on the 12<sup>th</sup> July, 2019 be reviewed corrected and set aside.

(d) That the National Executive Committee of the BNP be and is hereby compelled by the strength of the order herein to announce and call for holding of annual general conference in full compliance with section 11 (16)(c) to ensure that the notice period given to members of BNP is full 90 days prior to the holding of the Annual General Conference or any other reasonable period.

(e) That the Basotho National Party Circular No.3 of 2019 be declared null and void *ab initio*.

(f) That the election for the nomination of candidates as constituencies committee members of Basotho National Party for Qacha's Nek, Qoaling, Qhalasi and Mafeteng be reviewed correct and set aside and fresh constituency elections be held.

3. That prayers 1, 2, 2 (a) and (b) herein should operate with immediate effect as an interim relief.

**[2]** Notwithstanding the prayers there was no interim order given by this Court. Instead, it expedited the hearing in relation to prayers (c), (d), (e) and (f) which remained relevant for Judicial consideration. In the meanwhile, prayers 1, 2(a) and (b) were

rendered irrelevant for having been overtaken by the developments.

[3] In the subsequent developments, the Respondents expeditiously filed their notice of opposition supported by a set of supporting affidavits. In recognition of the inherence of urgency in the matter, the Court adhered to the time limitations set by my brother Monaphathi J when the matter featured for the first time before him on the 2<sup>nd</sup> July, 2019. In consonance with that schedule, the Court directed the Applicants to file their replying affidavit not later than 12 o'clock noon on the same day, this was complied with and the case was heard late at night on the 10<sup>th</sup> July, 2019.

#### **Common Cause Facts**

[4] In summarized terms, the parties agree on the basic developments which culminated into this case. This commences from the fact that on the 17<sup>th</sup> June 2019, the National Executive Committee (NEC) of the BNP which is the 1<sup>st</sup> Respondent, proclaimed a holding of the Annual General Conference (AGC) of the party scheduled for the 12<sup>th</sup> – 14<sup>th</sup> July 2019. This was announced through BNP/Admin/60 Circular No. 3 of 2019 which is presented before the Court as Annexure 5.

[5] The related dimension of significance is that in preparation of the AGC, constituency committee elections were held in the

Qacha's Nek, Qoaling, Qhalasi and Mafeteng constituencies. *Ex facie* the papers before the Court, there is no indication or evidence presented on the same elections in other constituencies (if they were ever similarly held). A resultant understanding is that this case is founded and driven by the concerned party officials in the four constituencies.

**[6]** There is mutuality of understanding between the parties that a foundation of the case brought before Court by the Applicants hinges primarily upon their protestation that the said BNP call Circular<sup>1</sup> for the holding of the AGC, did not fully comply with Article 11 (16)(c) of the constitution of the party. It must be mentioned that they specifically charged that contrary to the provision in that Article, the notification had not accorded members of the party and its officials, a duration of 90 days prior to the intended AGC. A disagreement emerges on appropriate interpretation to be assigned to the Article and its legal effect.

**[7]** On a factual scenario, both parties acknowledge that the constituency elections were indeed held in the concerned four constituencies and their outcome officially declared and duly recorded in Form A2. In the same vein, both sides agree that in each of the involved constituencies, raised preliminary objections

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<sup>1</sup> BNP/ ADM/ 60

against the commencement of the election process and the results thereof. These were accordingly also recorded.

### **The Key Issues**

[8] The common cause revelations have already foreshadowed the legal and factual points of divergences between the litigants in the matter. The first controversy turns upon the compliance of the Circular issued by the NEC about the then forthcoming AGC with Article 11 (16)(c) of the constitution of the party. A factual oriented one relates to the question of fairness in the conduct of the elections, the authenticity of the process and its outcome.

[9] Incidentally, prior to the interrogation of the merits of the case, the Respondents augmented the main issues by raising legal points. These consists of the jurisdiction of this Court to review the matter and the *locus standi* of the Applicants to sue in their own right or purport to sue on behalf of other constituencies, failure to exhaust domestic remedies, lack of substantiation of the declaratory order sought for and a non-joinder of all the 9 members of each of the relevant constituency committees.

### **Arguments Presented by the Parties on Points of Law**

**[10]** These shall be recorded in a synopsis form. On *locus standi*, the Respondents contended that the Applicants lacked the credentials to have sued the National Executive Committee (NEC) of the BNP. They developed this point upon a reasoning that the Applicants are incapacitated to do so by operation of their membership into the Party. A rather intriguing dimension in their case on the same point was that in addition, the Applicants lacked a standing to sue on behalf of the other constituencies. The Applicants counter argued though that is so, they have a right to proceed against the NEC to protect the constitution of the party. They pointed out that in the instant case, they have proceeded against the NEC because it has itself violated the same constitution.

**[11]** On non - joinder, the Respondents maintained that the Applicants have insufficiency cited the Respondents. They attributed that to their complaint that all the 9 members in the concerned constituency committees, have not been joined as the Respondents yet they appreciably have a direct and substantial interest in the matter. The Applicants reacted to the statement by pointing out that the inclusion of the said members in this litigation would be superfluous since the relevant constituencies have all been cited as the Respondents. To reinforce that they brought it to the attention of the Court that actually, the constitution of the Party



provides for only 6 members of the constituency committee with an addition of 3 *ex officio* members and were all aware of the case for their individual reaction.

**[12]** Regarding failure to exhaust domestic remedies, and lack of substantiation of the declaratory order sought for, the Respondents had charged that the Applicants ought to have exhausted local remedies before they could resort to the Court. The response by the Applicant was that there was no room for the exhaustion of any domestic resolution mechanisms since the transgressions they complained about were committed by the NEC. To highlight their predicament, they cautioned that it resiliently refused to intervene in the impasse. They explained that this compelled them to resort to this Court for a review of the process in terms of Section 99 of the Constitution for it to review the election process and its results in the concerned constituencies.

**[13]** In challenging the jurisdiction of this Court to exercise its reviewing jurisdiction over the matter in terms of Section 99, the Respondents debated that the reviewing authority of this Court under the section is limited to public bodies and cannot be extended to voluntary organizations such as political parties.

[14] The Applicants rejected the proposition and maintained that the reviewing competency of this Court under the section transcends public organizations into voluntary entities.

**Arguments Presented by the Parties on the Merits**

[15] Logically, the Applicants were the first to interrogate the merits of their case. They throughout maintained that the call circular was issued contrary to the time limitations prescribed under Section 11 (16)(c) of the constitution of the party. They sought to sustain this upon the reasoning that contrary to the section, the circular was not issued 90 days before the day scheduled for the AGC. A *prima facie* impression given was that by operation of the same section, the elections held on the basis of that notification were null and void *ab initio*.

[16] The Applicants acting with reference to Form A2 which is a template for recording of the developments in the election process, contested the reporting therein. They basically protested that a substantial number of the forms were insufficiently completed and signed. In that perceptive, they gave an impression that the deficiencies rendered a conclusion that the results were manipulated or doctored and not reliably reflective of the will of the branch voters.

[17] The credibility and fairness of the elections were also challenged against the background of what they described as a misleading announcement made on or about the 6<sup>th</sup> February 2019, by a party electoral officer Matsoso Tsoaeli who stated that on the next day, the party leader will call a pitso. He explained that the agenda at the occasion would be the deliberations over the reforms and the unveiling of the statue of the late Prime Minister Chief Leabua Jonathan. To demonstrate the deceptiveness in the message, the Applicants cautioned that on the said next day, they were phenomenally suddenly informed that the constituency elections should be held in preparation of the forthcoming AGC and this was transacted despite objections by the outgoing committee members. The Court interpreted this dimension of the protestation to be suggestive that the message was deceptive and skilfully intended to exclude some of the illegible voters or render them participate in the process without having been accorded sufficient time to prepare themselves for the challenge.

### **Ruling on Points of Law**

[18] It is determined that the fact that the Applicants are members of the party inherently qualifies them to sue it through its structures where they entertain a founded conviction that it has either by conduct or omission violated its constitution. Their right and authority to do so originates from a supportive legal reality that a constitution of political party is actually a *sui generis* contract concluded both vertically and horizontally between its hierarchical

leadership and its membership *inter se*. Though, it is not a constitution in the classical sense of the law, it is termed as such because it is materially structured *mutatis mutandis* as a constitution of a sovereign state. This is evidenced by the fact that it *inter alia* embodies requirements for its membership analogous to that of citizenship, values of the party and its aspirations in a diversity of socio – political and economic spheres of life both locally and internationally. So, in considerable respects it somehow resonates a national constitution since in the main, it has to be in consonance with its *letter, spirit and purport*.

[19] The characteristics ascribed to a constitution of a voluntary organization was adequately described by Schippers AJ in **Yiba and Others v African Gospel Church<sup>2</sup> 1999 (2) SA 949 (C)** in these learned words:

..... A voluntary association is founded on the basis of mutual agreement which entails an intention to associate and consensus on the essential characteristics and objectives of the association (Joubert (ed) *The Law of South Africa* first reissue vol 1 at 303 para 455; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645B-C, 645H-646A<sup>3</sup>

[20] What is of paramount significance is that the BNP contract styled a constitution is at the end of the day, a property of its members and, consequently, each member as is the case with the Applicant has an inherent legal right to protect it from violation by

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<sup>2</sup> 1999 (2) SA 949 (c)

<sup>3</sup> 960 E

its leadership, its individual members or collectively. Very commendably, Section 10 (2) (b) of the constitution of the party recognizes the right and obligation of its members to protect it.

[21] The authority of this Court to review decisions of public bodies and other entities is actually inherent since it primarily originates from common law. In our democratic dispensation, it has been constitutionalized under Section 119(1) of the Constitution which has also been reiterated under Rule 50 of the High Court rules<sup>4</sup>. The section provides:

There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law.

[22] Resultantly, there is abundance of case law incidences in the Kingdom where this Court reviewed the decisions by political parties, clubs and religious entities as voluntary organizations. In an exhaustive catalogue of them is the case of **Leonard Ntsoebea v. Basotho National Party**<sup>5</sup> (CIV/APN/75/940 (unreported)) where the late Mofolo J having fortified himself with reference to the decisions on the same question, pontificated over the law in these terms:

I might also remark at this juncture that with reference to individual members submitting themselves to the party and entrusting to it the fullest power of dealing in the interests of the party; what the judgment envisages is that such interests will be intra vires of the

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<sup>4</sup> Legal Notice No.9 of 1980

<sup>5</sup> Civ/Apr/75/940 page 712

party and not ultra vires of the power of the party and moreover, that in carrying out its duties Congress (in this case conference) will follow the letter of the constitution this court could never subscribe to the proposition that because individual members have surrendered their powers to the Party Congress or Conference they are thereby zombies and mummies never to raise their voices against unconstitutional acts of Congress or Conference.

I do not think that anyone can dispute this statement. It is absolutely correct in my view. In other words, I also cannot envisage a situation especially within a constitutional democracy such as ours, where any person would be expected to sit back and do nothing where he feels that the highest decision making body of an organization he voluntarily associated with, is acting in contravention of and against the letter and spirit of the organization's constitution and laws. Indeed, such an individual(s) has the right to challenge such unconstitutional and/or illegal acts<sup>6</sup>.

**[23]** In the case of **Reverent Bokako Nyabela v The Lesotho Evangelical Church**<sup>7</sup> this Court intervened by reviewing the administrative decisions that violated the procedural rights of the Applicant priest. The same applied in the case of **Reverent Morojele & Others v Lesotho Evangelical Church**<sup>8</sup>.

**[24]** The case of **Attorney General v The King**<sup>9</sup> which the Respondents relied upon in seeking to support the view that the Applicants do not have a *locus standi* over the matter, is clearly distinguishable from the instant case. In that litigation the contestation concerned the illegibility of the Attorney General to sue the Government and yet he is by operation of the Government Proceedings and

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<sup>6</sup> P712

<sup>7</sup> Civ/Apn/150/1980 LSHC 64

<sup>8</sup> Civ/Apn/268/2006 LSHC 160

<sup>9</sup> (CONS/CASE/02/2015) [2015] LSCA 1

Contracts Act<sup>10</sup>, a legal representative of the Government in court matters. It was determined that he could not for that reason litigate against the Government. Here, it is a different scenario since the Applicants as members of the party are simply proceeding against its leadership to protect a violation of the contract to which they are parties in their own right.

**[25]** The constitution of a political party is not an exclusive property of the higher echelons of the party. Instead, it is a property of all its members who must all observe and treat it *ubrima fides*. Moreover, the Court must be inclined to adopt an interpretation which renders it to have jurisdiction over a matter rather than otherwise. This will give effect to the entrenched common law maxim *ubi jus ibi remedium*. This denotes that there is a remedy for every violation of a right. In the context of this case, this is suggestive that the Court must be inclined to afford the Applicants a hearing to consider remedies they are seeking for before it instead of rendering them remediless.

**[26]** Incidentally, it is a lamentable state of affairs that our lawyers have hitherto not proactively under deserving circumstances, seized the opportunity to holistically challenge some of the provisions in the constitutions of parties that are *prima facie* suspect of being unconstitutional. This appears for incidence where such provisions purport to sanction dictatorship and unilateralism within

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<sup>10</sup> No.4 of 1965

the party despite the fact that the Constitution of the land does not countenance that. It could be different in matters of religious organizations but not within political spheres where the emphasis is on democratic governance and practices so that in the event a political party becomes a government it would replicate those ideals into its governance.

[27] On the raised legal issue of the non-joinder of some of the members of the committee despite their direct and substantial interest in the matter, it should suffice to be inscribed that in the circumstances of this case, they themselves should have been aware of pending proceedings and intervened accordingly. In any event, circumstances permitting, the Court had a discretion to have simply ordered that those members be joined as some of the Respondents and then be accorded time to subsequently file their papers. The dispensation for the Court to discretionarily give the indulgence was *inter alia* sanctioned in **Makoala v Makoala**<sup>11</sup>. It appears that the Respondents ought to have been aware that this is a typical case where the Court would not dismiss the application merely because the other members were not joined in the proceedings. It further seems that the point was simply to take a chance. There is no merit in it.

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<sup>11</sup> C of A (Civ/ Aprn/04/09 (unreported) @ para 6



[28] In the same case of Makoala, the Court of Appeal denounced what it described as an emerging practice by lawyers to raise this point in order to confuse preliminary points with those pertaining to the merits. The Court of Appeal deprecated the practice in these words:

Unfortunately the practice of converting defences on the merits into preliminary points has become so prevalent in motion proceedings that the process may be regarded as being akin to the Pavlovian response.<sup>12</sup>

[29] The analysis ascribed by the Court to the points of law raised in *limine* by the Respondents and the submissions thereof, are, consequently, found to have no merit in law and are, accordingly, all dismissed.

### **Decision on the Merits**

[30] It appears from the Notice of Motion and its supportive papers that the Applicant is principally seeking for a declaratory order invalidating a pronouncement of the BNP National Executive Committee concerning the forthcoming AGC of the party and a preparation for the holding of the constituency elections. Initially, this was communicated to the relevant structures of the party through Circular No.3 of 2019 and subsequently per Circular No. 5 of 2019. The basis of the relief was that the announcements were inconsistent with Article 11: 16(c) of the constitution of the party. So, it would be prudent for the two circulars to be considered together

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<sup>12</sup> Supra, para 4

due to their reciprocal complementarity and presentation of a holistic picture on the subject. Thereafter, they would, in that context, be tested for their harmony with the Article.

[31] At this juncture, the details of the fair translated version of each circular, should be revealed. Circular No.3 is in *verbatim* wording inscribed as follows:

**Circular No3 of 2019**

BNP/ADMIN/60

**To:**

Chairpersons of Constituencies  
Secretaries of Constituencies  
Organizers of Constituencies  
Members of the regional committee  
Members of the village committee

**Copy:**

Organizers of the Country  
Organizers in different sections in the country  
Chairperson of the Committee of Women  
Chairperson of the Youth Committee  
Political Representatives  
Parliamentarians

Sirs/Madam,

**RE: ELECTORAL CAMPAIGN FOR THE EXECUTIVE COMMITTEE**

I greet you with the great truth of triumph

It has come to the realization of the executive committee that campaigning in constituencies for the elections of the executive committee do not follow the behavioural laws of the political party as

per section 10 (1) (a) (b) (d) (e)(9) of the constitution, therefore, the executive committee has reached the conclusion that:

1. Campaigners that enter constituencies should have a LETTER OF AUTHORITY signed by the leader.
2. Supporters of the campaigners when entering the constituencies should be together with the campaigners: **they should not be alone.**

Campaigners should not enter the constituencies at the time of the committee elections.

Campaigners are cautioned to respect all changes brought up by the leader at the time of elections by:

1. Not campaigning before the conference for elections, or to do any last minute convincing.
2. Not campaigning at the time of elections
3. Not campaigning after the elections.
4. Constituencies are expected to notify the police and get a permit for where the elections shall be held at.
5. Campaigners are expected to notify National Executive Committee about their entry in constituencies and when they initiate the entry.
6. All members of the Party are advised to indulge in using the internet respectably and to respect other users with remembrance of the oath of loyalty and the behavioural laws as enlisted.

The campaigning agreement for the party is attached to this letter to remind the members of the Party of the regulatory rules. All are expected to abide by this conclusion made by the executive committee.

**FORWARDS WE GO EVEN UNDER HARDSHIPS**

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TSEPO MONETHI (MOHL.)  
DEPUTY GENERAL SECRETARY

[32] On the other hand, a fair translated English version of Circular No. 5 of 2019 reads:

**BNP/ADMMIN/60**

TO:

CHAIRPERSONS OF CONSTITUENCIES  
SECRETARIES OF CONSTITUENCIES  
ORGANISERS OF CONSTITUENCIES  
MEMBERS OF REGIONAL COMMITTEES  
MEMBERS OF VILLAGE COMMITTEES

CC:

NATIONAL ORGANISER  
ORGANISERS OF NATIONAL DIMENSIONS  
CHAIRPERSON OF WOMEN'S LEAGUE  
CHAIRPERSON – YOUTH LEAGUE  
MEMBERS OF WORKING COMMITTEE  
CONSTITUENCY NOMINEES  
MEMBERS OF PARLIAMENT  
CONCILORS

Dear Sirs/Madams

**RE: GENERAL ANNUAL CONFERENCE**

I greet you in the name of truthful triumph over tribulations.

In accordance with the Constitution of Basotho National Party (BNP), chapter 16 (c), the executive informs you that the party shall host the Annual General Conference on the 12 – 14 July 2019, the conference that was supposed to be held on the 28 – 30 June 2019. The tenure of working committee comes to its three-year duration end as per the resolution made at Ladybrand Conference as at 7 June 2016.

The reasons for the postponement of this conference, the party has held a number of rallies for youths and women's leagues respectively. The conference shall also receive the financial reports.

The agenda for the conference is to elect a working committee from the position of the deputy leader to members of the committee.

As per the Constitution section 16 (a), the delegation shall be as follows:

1. Chairperson
2. Secretary
3. Treasurer
4. Two members appointed by the constituency.

Constituencies are made aware that disputes and all cases which are within the powers of constituencies be resolved and end at that level; such should not be brought to the conference since the conference is meant for elections not to resolve disputes nor adjudicate cases.

Constituencies are further reminded that they should pay M100 subscription for the success of the conference.

Delegates are expected to arrive on Friday the 12<sup>th</sup> so that the business of the day begins timeously; they are informed that they should bear their membership cards which have not prescribed.

FORWARD WE GO EVEN UNDER COMPLICATIONS

.....  
T'SEPO MONETHI  
DEPUTY SECRETARY GENERAL

### **Analysis of Both Circulars Vis a Vis Article 11:16 (C)**

[33] The Court recognizes that Circular No.3 represents a notification to all the structures of the party in their hierarchical order, its officials and functionaries concerning a need for the campaigning in the constituencies for the elections of the Executive Committee, to adhere to the behavioural laws of the party. Thereafter, it details the *modus operandi* for observing that.

[34] This is further reiterated in the campaigning agreement for the general meeting that is attached to the same Circular. It simply prepares a playing field towards the holding of the constituency elections.

[35] Circular No.3 should be read together with Circular No. 5. This thinking is justified by the reality that the latter is an implementing instrument of the former. So, the question of their compliance with Article 11: 16 (c) document is an antecedent of the latter because it actually directs the same addressees as in the former one to commence with the electioneering process already foreshadowed in the preceding one.

[36] To this end, it would be logical to cite Article 11:16 (c) for the Court to determine if the two notifications comply with it. This would be approached through the protestations directed against both circulars by the concerned constituencies. The Article provides:

The Annual General Conference shall be held during the month of February to March **and the exact days shall be announced within a period of 90 days prior to the day of sitting. The notice shall include the venue where the conference shall be held.**

[37] The bolded words signify the material elements for any circular issued by the NEC concerning a notification to the relevant structures of the party on the forthcoming AGC. It is further clear

from its text that the event should be scheduled for specified dates during February to March including the day of its sitting and venue. It also contemplates that the sitting of the AGC should happen 90 days after the issuance of the relevant circular. And further, it contextually appears that the Article is schemed to lay down a healthy democratic foundation for the constituencies elections that are a prelude to the AGC since delegations thereat will in the main, constitute of representatives elected from the constituencies. The overall underlying philosophy is that all the applicable processes should operate within a situation of transparency and certainty as to date and the venue of the AGC.

**[38]** In the instant case, both circulars authored by the NEC, had not specified venue for the event. All that Circular No. 5 says is that the AGC shall take place in Maseru. It does not mention a specific place within the district of Maseru. This is necessary for those concerned to plan the logistics, campaigns for the preferred candidates ahead of the schedule to be at the place on time and participate meaningfully.

**[39]** Article 11:16 (c) is found to be expressed simplistically and straightforwardly without any technical words or necessary implications. Anyone with a basic command of English can understand the requirements in the Article. The same applies to its Sesotho version. Resultantly, the intention of its drafters is

discernible through the application of the literal tool of interpretation simpliciter as opposed to the golden or mischievous rules of interpretation of a legislative provision or a legal document. In **Swanepoel v City Council of Johannesburg, President Insurance Company Limited v Kruger**<sup>13</sup> where a legal provision was inscribed in clear words as in the instant case, it was explained that:

In any event we must bear in mind that these rules of statutory exegesis are intended as aids in resolving any doubts as to the Legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought.

**[40]** Assuming that the purposive canon was relevant in identifying the intention in the Article, it would not by any stretch of legal imagination, reveal that it envisaged a *vis major* occurrence as a ground upon which there could be a deviation from it. Certainly, its architects were aware of such a possibility but they, in their wisdom, elected not to include it in the Article. The maxim *expressio unis exclusio alterus* (a mention of one excludes the rest) provides guidance that emergency situations are not provided for in the Article.

**[41]** A proposition by the Respondents that a literal interpretation of the Article, would lead to absurdity since it would, contrary to the BNP constitution, prolong the tenure of office of the outgoing committees, is held to be incorrect in law. This is attributable to the

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<sup>13</sup> (760/92,90/93) [1994] ZASCA 80; 1994 (3) SA 789 (AD) page 6



common law position that in the circumstances where the extension of a duration of a committee is legally justifiable, such a committee assumes an interim status. This is a typical case in *casu*.

**[42]** In any event, if there was an emergency justifying any non-compliance with the strict requirements of the Article, the Respondents ought to have pleaded that to enable the Court to make a decision on informed basis. They should have responded so, in the face of the accusations for non-compliance with the Article levelled against them by the Qacha's Nek, Qoaling, Qhalasi and Mafeteng constituencies respectively. These are the constituencies which have challenged the compliance of the circulars with the Article. This applies to the timing of the elections held, the procedures followed and the authenticity of their processes and the outcome.

**[43]** In any event, if there was an emergency, it should have been clearly pleaded to justify a departure from the strict requirements of the Article particularly regarding the 90 days' time limitation and the venue. In the alternative, the NEC and/or any authorized authority could have convened a special conference to plead for an indulgence not to strictly comply with the Article and advance reasons for that. Consequently, there is no case made for a determination whether there was a suggested emergency.

## **Surveying of the Elections for Qacha's Nek, Qoaling, Qhalasi and Mafeteng constituencies**

**[44]** Now that the judgment heads towards its final stage, it is worthwhile to be remembered that the *imprimatur* of this case, is the application brought by the Applicants as the members of the party and outgoing members of the committees for the aforementioned constituencies. It is also worthwhile to be highlighted that basically the initiative was triggered by the protestation that the elections of candidates for the membership of the four (4) constituencies, was marred with illegality, procedural irregularities and technically somehow doctored elections results. At this stage, focus should now be turned to these rather controversially intricate aspects especially after the purely legal issues have been traversed.

**[45]** A synopsis finding of the Court is that Form A2 which is a template for a recording of the elections for each branch in a constituency represents a primary way of accounting for the manner in which the process was conducted. For that purpose, it has a column for names of the constituency committee members who officiated over the elections and one for a signature of each of them. At the bottom it has a space for confirmation of all entries by the elections officer, a chairman of the outgoing committee and then by a secretary of the constituency. At the left corner of the document is a space for placing the official stamp of the constituency.

**[46]** The understanding of the Court is that all the spaces provided for in the form, should be completed save where an explanation is given for a blank one. It should be cautioned that each space has been created for a purpose since the form serves as a holistic accounting instrument and for demonstrating transparency, authenticity and accuracy. No space should be assumed insignificant since it has been created for a specific accounting purpose.

**[47]** There are discrepancies identified in Form A2 of the Qacha branch of the Qachas nek constituency. This constitute of several material spaces that are left blank with no explanation given. Spaces for representatives of women and youth remain blank.

**[48]** This may be indicative that they may not have been notified about the elections or their date and venue or that they might have wilfully decided not to attend. Whichever the case was, it was incumbent upon the secretary to have recorded that.

**[49]** Form A2 for the Makanyane branch of the same constituency, seems to have been written by one person due to the apparent similarity of the handwriting regarding names of the officials who superintended over the elections and their signatures.

**[50]** The Letsoara branch Form A2, attracts the same reasonable suspicion that its column for the officials and the signatures against each name were all written by one person by virtue of the similarity of the handwriting involved.

**[51]** Form A2 for the Maboloka branch of the Qachas nek constituency is worse for not having signatures of the officials who supposedly officiated over the process and the constituency chairman has not signed the form to confirm its contents.

**[52]** As for the United branch, there is only one official who signed Form A2 and there was no representation for women and the youth without any written reason for that.

**[53]** The officials and the signature column of the Manyase Form A2 also appear to have been written by the same person on account of the similarity of the hand writing.

**[54]** The same hand writing improprieties as in the Manyase branch applies to the Pheellong branch. Moreover, the Secretary of the constituency has not signed the Form A2 concerned to confirm its contents.

**[55]** It should suffice to be recorded that the similarity of the hand writing phenomena in the same columns applies *mutandis mutatis* over the Form A2's of White Hill, Qanya, Bolahla, Patlong, Noosi and 'Manteko branches. This is *prima facie* a serious offence! especially when it concerns signatures. I pray that if this is so, it would be wise for everyone never to repeat it.

**[56]** Lastly, in the Molalanyane branch it is only the secretary of the branch who has ostensibly signed against his name in the appropriate column. The rest have virtually not done so. Also, the chairman of the branch has not confirmed the contents in the same form.

**[57]** It should sufficiently serve justice to be recorded the form A2 scenario presented about the branches in the Qachas nek constituency is *mutandis mutatis* a reflection of what obtains in the branches of the Qoaling, Qhalasi and Mafeteng constituencies.

**[58]** The authenticity and accuracy in the elections under consideration are fundamentally undermined by the demonstrated lack of credibility, fairness and transparency in almost all the branches of the four constituencies. A 'sinful' crescendo in the manner in which the elections were conducted, is marked by the statement made by the party electoral officer Matsoso Ts'oaeli,

on or about the 6<sup>th</sup> February 2019. He made a misleading statement that the next day the party leader will call a pitso for deliberations over the reforms and the unveiling of the statue of the late Prime Minister Chief Leabua Jonathan.

**[59]** A paradox that exposes the deceptiveness in the message by the electoral officer, is that on that next day, those present at the 'pitso' were suddenly informed that the constituency elections should be held in preparation of the forthcoming AGC. This was transacted despite objections by the outgoing committee members. It is in that context, that the Court describes the announcement to have been deceptive from the onset in that it has a propensity of excluding other potential candidates from participating competitively in the contest.

**[60]** It is in the context of this case, found imperative to be straightened that under a constitutional democracy, whenever elections are to be held, the agenda concerning that should besides the prayer, constitute of report by the outgoing committee and then the elections. It should never be clouded with other matters.

**[61]** The BNP is blessed with a good and benevolent constitution which does not have appearances of dictatorial and element of

unilateralism. This should guide it to maintain its unity and practise internal good governance within the atmosphere of mutual trust, respect, discipline and democratic ethos. Consequently, adherence to such ideals would prepare it to translate those virtues into action whenever it ascends into the governance of the country. This is the wish for all our political parties' establishments. After all, charity begins at home.

[61] In the premises, the Applicants are found to have on the balance of probabilities proven their case and the application is accordingly granted as prayed.

[62] This being a domestic matter, there is no order on costs.

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**E.F.M. MAKARA  
JUDGE**

**For Applicant : Adv. Molati inst. M.W. Mukhawana Attorneys**

**For Respondent : Mr. Rasekoai of Phoofolo Associates Inc.**