IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/151/2021**

In the matter between:

ABIA TAXI ASSOCIATION	**1ST APPLICANT**
ABIA TAXI ASSOCIATION COMMITTEE	**2ND APPLICANT**
LIBUPUOA LETSIE	**3RD APPLICANT**
'MAMMAKO MOHALE LERATA	**4TH APPLICANT**
RETŠELISITSOE NKINYANE	**5TH APPLICANT**

AND

ABIA TAXI ASSOCIATION COMMITTEE (NEW ALLEGED COMMITTEE)	**1ST RESPONDENT**
MOTSAPI NTSETSELANE	**2ND RESPONDENT**
TEBOHO MAHULA	**3RD RESPONDENT**
MOLIKENG POONE	**4TH RESPONDENT**
MAKARA LIPOLI	**5TH RESPONDENT**
SIMON MOHAI	**6TH RESPONDENT**
MOEKETSI RAMOSEKA	**7TH RESPONDENT**
RETHABILE MOHALE	**8TH RESPONDENT**
THUSO MAKHALANYANE	**9TH RESPONDENT**
MOPE LEJONE	**10TH RESPONDENT**
CHABANE SERETSI	**11TH RESPONDENT**
MPELI MAHAKOE	**12TH RESPONDENT**
LESOTHO POST BANK	**13TH RESPONDENT**
MINISTRY OF TRANSPORT	**14TH RESPONDENT**
COMMISSIONER OF TRAFFIC	**15TH RESPONDENT**
ATTORNEY GENERAL	**16TH RESPONDENT**

Neutral Citation: Abia Taxi Association & Others v Abia Taxi Association Committee (New Alleged Committee) & Others (CIV/APN/151/2021) [2021] LSHC 66 (17 JUNE 2021)

JUDGMENT

CORAM: **MOKHESI J**
DATE OF HEARING: **18 MAY 2021**
DATE OF JUDGMENT: **17 JUNE 2021**

SUMMARY

ELECTION DISPUTE: *The applicants are disgruntled former members of the executive committee of the association- they are challenging the legitimacy of the elections which voted them out of office - Held, that there is no evidence to prove that the incumbent members were not elected properly, application accordingly dismissed with costs.*

ANNOTATIONS:

Books:

Theophilopoulos, Van Heerden and Boraine, **Fundamental Principles of Civil Procedure 3 ed. (2015)**

Cases:

Makoala v Makoala LAC (2009 – 2010) 40

Ntombela and Others v Shibe and Others 1949 (3) SA (N.P.D) 586

Swissborough Diamond Mines v Government of the Republic of South Africa 1999 (2) SA 279 (TPD)

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA); 2009 (1) SACR 361(SCA)

Wilken v Brebner and Others 1935 AD 175

[1] **Introduction**

This case concerns disputes over the election of the executive committee of an association of taxi owners who ply their trade on the route traversing the prefecture of the village of Ha-Abia and Maseru city centre. Following the disputed elections, former office-bearers (3rd to 4th applicants) launched an urgent motion proceeding seeking a plethora of reliefs. They are predominantly seeking nullification of the election of the new incumbents, -who are cited as the respondents- and for them to be declared as the legitimate committee of the association. The association has been joined as applicant by 3rd to 5th applicants.

[2] **Factual Background**

The Abia – Taxi Association (Association)is an association of taxi owners as already said, established with the sole purposes of improving, growing and protecting the taxi business within the village of Ha-Abia; to transport the passengers of Ha – Abia; to bring openness and unity within the association; to create funeral cover for its members and to assist where a number has lost the beneficiary, driver or assistant driver. The Association has a written constitution. In terms of clause 12 of the constitution, the executive committee of the Association has a tenure of one year. It is common cause that the 3rd to 5th applicants' committee was voted into office in January 2020, which meant that elective conference be held in January 2021.

[3] On the 03rd January 2021, the executive committee duly called for the elective conference, but due to Covid–19 restrictions prevailing at the time, that conference could not be held. The conference was re-scheduled to the 11th March 2021 following the loosening of restrictions pertaining to holding of gatherings. This conference did not proceed as well. It was

called off following disagreements over the eligibility criteria for voters. Following this aborted conference, the executive committee appointed the fateful day of the 02nd May 2021 as the day on which to hold annual elective conference. It is the events of that day which brought about the current application. It is common cause further that the Chairman of that executive committee had passed on while in office.

[4] On this latter date of the Conference, the issue of eligibility of voters cropped up again and loomed large. The applicants (3rd to 5th) content that at the start of the conference, observations were made to the effect that there were people present who were not members of the association, and that upon this realization the 'members' of the executive committee resolved that all electorates present be ordered to vacate the hall in order for due diligence to be conducted before voting could commence. The applicants even listed the names of the individuals they say were not eligible to vote. I am using the word 'members' in inverted commas because, although, the three applicants would want this court to belief that the decisions which they say are attributable to the committee were taken by it as the collective, one individual by the name of Paul Monyane who was in the same committee disputes the applicants' version and has even made common cause with the respondents in support of their version. I revert to these issues in due course.

[5] Mr Libupuoa Letsie, who deposed to the founding affidavit on behalf of the 3rd to 5th applicants variously averred, that:

> *"4.3 I must mention that at the Conference there were members of Abia Taxi Association the 1st applicant herein, and other people who are not members of the 1st applicant aforementioned.*

4.4. I must further inform this Honourable Court that, having realized that among those who were present were people who are unqualified, we then as members of the 2nd applicant, advised ourselves that the electorates must get out of the hall where the elections were held. The main idea for such was to make sure that only people with necessary power to vote would be allowed in. I must mention further that we informed those who were present that only taxi owners with identify Document and valid C-permit registered into ones' names would be eligible to vote.

4.5 Immediately after indicating to the people the purpose of driving them out of the hall, majority of them showed displeasure and started chanting vulgar words ...."

[6] Mr Letsie further averred that, present at the conference, was an observer team made up Mr Motlatsi Maphatsoe from the department of traffic, and two police officers by the names of Inspector Lefu Lefu and Police Constable Lerato Letsatsi. He says this observer team made a security assessment of the situation which was prevailing at the time and came to the conclusion that the conference must be called off. He avers that consequent to the advice of this observer team, the executive committee called off the conference, and the three applicants left. There were forty-one members present on that day in the hall, but after the 3rd to 5th applicants had left, only thirty-five members remained and continued with the conference business. He says these three observers specifically addressed the electorates that the conference should be called off, but surprisingly no confirmatory affidavits of these individuals have been annexed to the applicants' founding papers.

[7] The respondents (2nd and 12th) vehemently oppose the applicant and put up a version different to that of the applicants: They aver that indeed there were disagreements about eligibility criteria, which they contend was imposed by the applicants, and had no foundation in the Association's constitution. This caused patience of the electorates to wear thin. They construed applicants' actions as skulduggery and chicanery aimed at thwarting the holding of an elective conference, hence the flaring of tempers. The majority, however, contrary to the applicants' wishes, resolved to continue with the conference. The respondents aver that the applicants of their own volition left the conference after this resolution. Before pleading, the respondents had raised four of the so-called points in *limine*, *viz*, non-joinder of previous committee members; (a) mis-joinder of the Association as the 1st respondent; (c) lack of authority to institute the proceedings (d) urgency. At the hearing of the matter I had already made a determination that the matter is indeed urgent. Regarding non-joinder, I directed that the other members (apart of Paul Monyane) of the executive committee be caused to indicate whether they wished to be joined in the present matter, and for their response to be provided, but with the benefit of the hindsight, that course was unwarranted. What therefore remains is mis-joinder and lack of authority to institute the proceedings.

[8] **Issues for determination:**

(a) the points in *limine* raised.
(b) the merits

[9] **Points in *limine***

In this jurisdiction whenever one picks up an application, there is almost a sinking feeling of *déjà vu* with regard to the raising of unmerited so-called

points in *limine,* and this case is no exception. The purpose of raising a point in *limine* is to disposes of the matter without the necessity of the merits being traversed. Surely, misjoinder of a party cannot be raised as a point in *limine* because it is incapable of disposing of the matter when it upheld. This practice of raising unmeritorious points in *limine* was deprecated in **Makoala v Makoala LAC (2009 – 2010) 40** but it does not seem to be coming to an end.

[10] It is true that the Association has been misjoined, but that does not mean that such an issue should have been raised as a preliminary point. The Association should not have been joined, for the simple reason that an office–bearer of a voluntary association who challenges the supposed usurpation of his office by his fellow counterparts is suing in his individual capacity not in his capacity as an office–bearer, and therefore, is not taken to be representing the association: This much was made clear in the off-quoted decision in **Ntombela and Others v Shibe and Others 1949 (3) SA (N.P.D)** 586 at p.p. 587 – 588:

> *"…. In my view, if a person is elected to an office under the constitution of a voluntary association like a church or club, his right to the office is a personal one and, if someone wrongfully usurps the office and prevents the holder of it from performing his functions, the right of the holder is a personal one against the usurper, and he must sue as an individual. Similarly, where there are a number duly elected officers who in combination have the right to conduct the affairs of association, then if their offices are usurped by other individuals who wrongfully claim to hold the offices and wrongfully conduct the affairs of the association, the rights which have been infringed are personal rights, and legal proceedings are properly taken by the persons concerned, as individuals. If Mr. Macaulay's argument were right, the court would have to insist upon the plaintiffs suing in their capacity as officials and,*

a such representing the church. But that procedure would get the plaintiffs no distance because at the threshold of the case it would assume, as having been settled in favour of the plaintiffs, the very issue which the action is designed to decide, namely whether the plaintiffs or the defendants are the persons properly in power ...."

[11] I do not think it is necessary to deal with the point of lack of authority to represent, as it will not take this matter anywhere. The applicants (3rd to 5th) have stated in their founding affidavit that they are suing in their personal capacities and on behalf of the Association. They are seeking to vindicate rights which are personal to them as the aggrieved office-bearers. The Association has nothing to do with their grievances. In the light of this, the matter will be dealt with from the premise that, what is being vindicated are rights personal to 3rd to 5th applicants. I now turn to the merits of the application.

[12] **The Merits:**

It is the applicant's contention, as already seen, that the conference was called off because of security concerns and on the advice of an observer mission comprising the two police officers. Surprisingly, the applicants did not attach the confirmatory affidavits of these three observers on whose opinion the committee supposedly relied on to call off the conference. This was a fatal oversight on the part of the applicants, as the absence of confirmatory affidavits, renders the actions and words attributable to those observers, inadmissible hearsay. This is trite, as was confirmed by the learned authors **Theophilopoulos, Van Heerden and Boraine, Fundamental Principles of Civil Procedure 3 ed. (2015) at p. 144.**

> *"Where the applicant refers in the supporting [in the founding affidavits] to communications or actions by other persons, such reference must be affirmed by obtaining affirming or confirmatory affidavits, from the said persons and attaching it to the supporting affidavit [founding affidavit]. The attachment of confirmatory affidavit is necessary in order to comply with the evidentiary rule against hearsay evidence. Only admissible evidence should be contained in the affidavit."*

[13] From the excerpt of the applicants' founding affidavit reproduced above at para.5, they aver, among others that after the members of the executive committee had realised that among the people present in the hall, there were some who did not have reason to be there and to vote as they were "unqualified,". They aver that consequent to this discovery, members of the executive made a decision for all members to vacate the hall, in order for due diligence to be done. It was at point that the majority of members of the Association started hurling insults at them. I have read the length and breadth of the applicants' founding affidavits and I have not had sight of the instance where the applicants provide proof of members who were unqualified to be present and to vote. They merely make bare allegations.

[14] It is always important for counsel to recall the role and purpose which is served by affidavits in motion proceedings. The affidavits embody pleadings and evidence and serve an important purpose of drawing the battle lines between the litigants (defining the issues). This was aptly articulated in **Swissborough Diamond Mines v Government of the Republic of South Africa 1999 (2) SA 279 (TPD) at 323 G – I,** wherein Joffe, J., said:

"It is trite law that in motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In ***Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D)*** *it was stated that at 469 C – E that:*

'Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof…"

[15] The respondents dispute that the Conference was called off. They argue, instead, that, the applicants left when they realised that their prospects of re-election were rather bleak, and after their attempts to call off the conference were shot down by the majority of members in favour of proceeding with the conference. The respondents admit that at the start of the conference there were disagreements about the criteria on voting eligibility. They aver that the disagreements were generated by what

majority perceived to be the applicants' attempts to disenfranchise them and to act contrary to the association's constitutional prescripts on eligibility to vote. They aver that, following these disagreements, the conference resolved that the conference must proceed as scheduled and the three other members left. There are clearly genuine disputes of fact regarding whether the conference was called off and for what reason, and whether the majority of members resolved to proceed with the conference. Guidance for the resolution of this material dispute of fact is trite, and has repeatedly been re-stated:

> *"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon – Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitiously disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers …."* ***(National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA); 2009 (1) SACR 361(SCA)*** *at para.26****)***

[16] Before I decide this issue of disputes of fact, it is opportune to refer to salient sections of the Association's constitution. In terms of clause 14, the Executive Committee administers and manage the affairs of the association

in between the annual elective conferences. Crucially, clause 11 of the said constitution (translated version) provides that:

> *"11.1 GENERAL CONFERENCE*
> *The general conference is the highest point of management. The general conference shall elect executive committee and to amend the constitution.*
>
> *11.2 To map a way for the association and the executive committee.*
>
> *11.3 Notice for the holding of general conference shall be done 30 days before such conference could be held.*
>
> *11.4 The number needed for the general conference to be held shall be 2/3 majority of the members of the association."*

[17] It is trite that the constitution of a voluntary association constitutes a contract between the members **(Wilken v Brebner and Others 1935 AD 175).** What is apparent from Section 11, above, is that the conference is the highest decision-making body of the association, not the executive committee. The conference is the 'Parliament' of the association whose decision binds all and sundry. I am attracted to the following remarks by Wessels, C. J. in **Wilken v Brebner and Others** (ibid) even though it was made within the context of a political party, they are applicable in the instant matter (at p. 186);

> *"The problem before us is whether the resolution of the congress [**conference]** binds individual member. If it does, as I think it does, then the cases quoted to us by Mr Beck are of no assistance to us in this case. It might be different if the constitution of the party did not*

*constitute the congress as it were the parliament of the party [**Association**]*

*In these circumstances it seems clear that the individual member as such has no say with regard to any resolution which the congress may adopt. He has surrendered his own will and his own voice to that of the supreme council [**conference**] of the party [**Association**] …"*

[18] Reverting to the disputed facts in the present matter, the version of the respondents that the conference was not called off and that the majority of members resolved to proceed with the conference, is to be preferred. It cannot be said that this version is uncreditworthy, palpably implausible, far-fetched or so clearly untenable that the court should reject it outright on the papers. It will be observed that there were forty-one members present in the hall to vote on that fateful day and after the three applicants together with the other three members had left, thirty-five members remained behind to continue with the business of the conference. Even one former member of the executive committee, Mr Paul Monyane remained behind to participate in the conference. On this scenario alone it is abundantly clear that way more than what the constitution prescribes as the quorum, thirty-five members remained behind and cast their votes. The conference was lawfully convened, and so, the fact that some officer-bearers left before the conference could transact the business of the day, does not invalidate the acts which were done on that day. The conference as the highest decision-making body of the Association made a resolution to proceed with conference, and more than two-thirds of the members participated in electing the new executive committee. In my view, the applicants harboured under a serious misconception regarding the powers of the executive committee. The executive committee's powers cannot compete with those of the conference, once the conference resolves to take

a particular route, each member of the association must fall in line and follow the course adopted by the majority. Majoritarianism is the overarching and operating principle in matters of voluntary associations.

[19] On the issue of non-eligibility of some members, the applicants could not have been more destructive to their case, and this goes further to show why the respondents' version is to be preferred. When responding to the point of non-joinder raised, in para.5 of their Replying affidavit, the applicants say:

> *"Contends herein are vigorously denied. I have never said those people who listed at paragraph 6.2 were not members in good standing and therefore not eligible to vote or to be voted into office… The idea of mentioning such individuals was solely an indication of the unlawfulness of the purported elections of 02nd May 2021…"*

Clearly, the applicants are reprobating and approbating on the issue of ineligibility of some participants in the conference. They squarely raised this issue in their founding affidavit and even listed their names. Dare I say this issue is one of the central planks of their case. For the applicants to blow hot and cold on this critical issue can only spell doom for their case. I have deliberately not made mention of a document depicting a list of members on whose behalf an insurance has been taken. The reason for this is that, it was not referred to in the respondents' answering affidavit. It was only produced belatedly during argument without the applicants being given an opportunity to deal with it.

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

(a) The application is dismissed with costs, such costs to be levied against the 3rd, 4th and 5th applicants.

(b) For avoidance of doubt, the elections which were held on the 2nd May 2021, were free and fair, and consequently, the Executive Committee which was elected following those elections is the legally recognised executive committee of the Abia Taxi Association.

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MOKHESI J

For 3rd to 5th Applicants:	**ADV. G. LEJAKANE** **instructed by T. Maieane & Co. Attorneys**
For 1st to 12th Respondents:	**ADV. T. LESUPI** **instructed by K. D. Mabudu & Co. Attorneys**