

IN THE HIGH COURT OF LESOTHO

HELD
CIV/APN/0254/2022

AT

MASERU

In the matter between:
MAATANG CHAKA
APPLICANT

AND

NEC REVOLUTION FOR PROSPERITY
RESPONDENT

1ST

MAPHATHE DOTI
RESPONDENT

2ND

SECRETARY GENERAL NTHATI MOOROSI
RESPONDENT

3RD

INDEPENDENT ELECTORAL COMMISSION
RESPONDENT

4TH

Neutral Citation: Maatang Chaka v NEC Revolution for Prosperity & 3 Ors
[2022] LSHC 209 civ (8 September 2022)

CORAM : **Hon. Mr. Justice E.F.M. Makara**

HEARD : **24 August 2022**

DELIVERED : **8 September 2022**

SUMMARY

The applicant in the main asked the Court to order the respondents to forward her names to the Independent Electoral Commission as the candidate for the RFP political party in the 2022 national general elections following her success over the others who were interviewed at the final stage of the meritocracy selection of the best candidate. The party declined to so forward her name due to its subsequent finding that she is a member of its rival TEB political party. Having been re-summoned by the RFP to be interrogated on the allegations of her membership to the TAB, she gave conflicting

explanations compromising her credibility. It was not disputed that she knew about the meritocracy policy of the party since she participated in its processes and instituted this litigation to benefit from it. The court found that the documentarily proven duality of her membership to the two parties rendered the mutuality of trust between the RFP and herself placed in jeopardy to justify its declination. In the circumstances, her constitutional right to participate in the public affairs was found not to have been violated. The application was consequently refused.

ANNOTATIONS

CITED CASES

- 1. Cekwane v National Executive of Basotho National Party** CIV/APN/245/18
- 2. Mosisili and 3 Others v Moleleki and 10 Others** CIV/APN/424/2016
- 3. Ts'ehlana v The Executive Committee of Lesotho Congress for Democracy** C OF A (CIV) NO. 18/ 05
- 4. Magashule v Ramaphosa and Others** 2001/237795
- 5. Plascon-Evans v Van Riebeeck Paints**[1984] 2 ALL SA 366 (A)

STATUES & SUBSIDIARY LEGISLATION

- 1.** The Constitution of Lesotho, 1993
- 2.** The Constitution of the Republic of South Africa, 1996
- 3.** The Societies Act No. 20 of 1966
- 4.** The National Assembly Electoral Act No.14 of 2011

BOOKS

- 1.** The Concise Oxford Dictionary 9th Ed.
- 2.** Johan De Wall and Others Juta and Co. Ltd 1999: The Bill of Rights Handbook 2nd Edition

JUDGMENT

MAKARA J

Introduction

[1] On the 19th August 2022, the Applicant who is a cancer survivalist activist *instituted* these motion proceedings as a *bona fide* member of the Revolution for Prosperity (RFP). This is a political party registered as such in terms of the Societies Act¹ for its legal existence and with the National Assembly Electoral

¹ Act No. 20 of 1966

Act² for its participation in the national elections. She has sought for the intervention of this Court asking it to make an order in the following terms:

1. A *rule nisi* returnable on a date to be given by this Honourable Court calling upon the Respondents to show cause why:
 - a. Dispensation with the normal modes and periods of service of process herein;
 - b. (i) Interdicting the 1st Respondent from holding the leader's rally at Qacha's Nek No. 69 until the finalisation of this application;

Alternatively

- (ii) Interdicting the 1st Respondent from announcing and/or presenting the candidate for Qacha's Nek No. 69 until the finalization of this application;
 - c. Interdicting 2nd Respondent from presenting the candidate nomination form to the 4th Respondent until finalization of this application;
 - d. Directing 3rd Respondent to sign and stamp the nomination form and write a supporting letter for Applicant until the finalization of this application;
2. Directing that prayers 1 and 2(i) alternatively operate with immediate effect as interim orders

² Act No.14 of 2011

[2] It should be cautioned that it emerged from the application that the Applicant had sequentially numbered her prayers. The court even ordered this be corrected and it was.

[3] The 1st, 2nd and 3rd Respondents opposed the application by filling its Notice of Intention to Oppose and subsequently their Answering Affidavit to which the Applicant reciprocated by introducing her replying affidavit. On the other hand, the 4th Respondent did not react to the application which is indicative that it would in principle simply abide by the decision of the Court. So, reference to the Respondents would not, except where it is otherwise mentioned, apply to that party.

[4] The papers filed marked the closure of the pleadings between the parties and the readiness of the hearing in rhythm with the recognition shared between the involved parties and the Court that the matter warranted its urgent attention and resolution.

[5] On the 20th August 2022, the Court assumed its first sitting over this matter. After having some brief reflection on the papers with the counsel, they resolved that prayers 1, 2(a), b(i) and b(ii) as well as (c) be granted in *rule nisi* terms. On the same note, they further agreed prayer (d) should be held in abeyance pending its interrogation together with the re-consideration of the reliefs allowed in the interim on the return date scheduled for the 24th August 2022. On that date, the focus

would be on prayer (d) and whether the temporarily made orders deserves to be confirmed or discharged.

[6] Blessedly, the understanding of this case and its consequent points of divergence between the parties, are simplified by the revelation from the papers and the representations for the parties that the developments which predicated this litigation are largely matters of common cause. It, resultantly became easier to identify the factual aspect upon which they disagree. In the same scenario, this simplified the identification of the legal challenges to be addressed towards a relatively speedier conclusion of the case.

The Common Cause Factual Landscape

[7] The genesis of this case commences from the background that on the 10th July 2022, the Applicant and other *bona fide* members of the RFP held primary elections for the candidate who would stand as its candidate for the Qachas'nek Constituency No.69 in the national general elections slated for the 7th October 2022. The process was from the beginning conducted in accordance with the standard procedure based upon the majoritarian determination of the preferred candidate synthesized from the onset with the meritocracy policy of the party. The outcome of the elections was:

- 2nd Respondent Maphathe Doti, emerged as the 1st with One Hundred and One (111) votes;
- Lekhooa Rabatho became the 2nd with Forty-Three (43) votes;

- The Applicant, 'Maatang Chaka became the 3rd with Thirty-Eight (38) votes and,
- The 4th was Tumisang Moruri with Four (4) votes.

[8] It is common cause that by virtue of the operating policy of the party, the first four (4) candidates in terms of the votes secured by each from those primary elections, would have their names forwarded to headquarters of the party clearly reflective of the number of the votes against each name. The parties do not dispute the narrative that, thereafter, the top four candidates were summoned to the headquarters for each of them to undergo the meritocracy screening process in accordance with the policy of the RFP for it to select the best out of them.

[9] The trajectory of significance originates from the fact conceded to by all the parties that the Applicant emerged as the best from that exercise and that she was accordingly officiously announced as such through the official media of the party. On this point, it should be underscored that it is acknowledged by all that by the operation of the meritocracy policy, she had satisfied all the procedural requirements for her to be recognized as the candidate who would finally contest the constituency elections for the party.

[10] There is no dispute that the victory of the Applicant at the meritocracy testing, entitled her to a legitimate expectation

that the 1st Respondent would, by operation of the policy of the RFP, forward her name to the IEC as its candidate for the 2022 national general elections. The same applies to the fact that instead, she was re-summoned to the headquarters to be interrogated over some allegations that surfaced after she well prevailed over the other three contestants at the meritocracy interviewing session.

[11] It is further not contested that the Applicant discovered after attending the second session at the headquarters that the 1st Respondent had unilaterally substituted her name with that of the 2nd Respondent who had attained the first position in the primary elections with one hundred and one (111) votes. In passing, the Court notes that her case is, however, not premised upon her complaint that she was not accorded a fair hearing in the matter.

[12] The critical part of the case is that it transpires from the pleadings tendered before the Court that the Applicant was prior to her participation in the said primary elections, aware of the RFP applicable policy protocols in the internal electioneering of the party. These consists of basically three phases. The initial one commences with at least four (4) candidates contesting the primary elections; the top four in terms of the votes each secured, would then qualify for the meritocracy inquiry from which one of the interviewees would be selected to feature for the RFP in the national general elections.

[13] The awareness and knowledge by the Applicant concerning the policy modalities, terms and conditions instituted by the party throughout its primary elections, is attested to by her participation throughout those processes that culminated in her emergence as the best candidate in the final phase of the tests. In any event, it has never been her case that she was not aware of the policy. On the contrary, she is insisting that she should be accorded the right to have her legitimate expectation from the system duly honoured. In simple terms she is claiming her legitimate right to benefit from the system.

[14] It is precisely on account the stated *legitimate right* that the foundation of her case consists of her lamentation that the National Executive Committee (NEC) of the RFP unduly refused to present her name to the IEC for her to be registered as its candidate for the Qachas'nek constituency in the envisaged national general elections. She reinforced her protestation by charging that the party violated its own made policy by substituting her name with that of the 2nd Respondent. It should be recalled that the latter had emerged with the highest number of votes in the primaries but failed to acquit himself as the best at the determinative meritocracy screening interview.

[15] The impression conjectured from the pleadings is that the Applicant had at all material times been conscientious of the *sui generis modus operandi* of the party in conducting its primary elections towards the final identification of the

contestant who would graduate to the constituency level as its candidate.

[16] In transiting to the identifiable standing issues from the papers, it would be logically worthwhile to have the picture elucidated that the identified foundational basis of the case lodged by the Applicant, has occasioned the conflicting factual and legal accounts scenarios with relative constitutional implications. These would be projected immediately here below.

The Points of Divergence Between the Parties

[17] In synopsis terms, the conflicting accounts between the Applicant and the Respondents reveals the following standing issues for this Court to resolve:

1. The purpose of the meeting to which the Applicant was summoned post the meritocracy testing;
2. The subject-matter of the discussion between the Applicant and the 3rd Respondent including whatever resolution they arrived at; and incidentally by implication and necessity,
3. The lawfulness of the incorporation of the meritocratic processes in the primary elections reinforced with the screening interviews for the final selection of the best

candidate out of four (4) who secured more votes at the primary encounter;

[18] The identified issues from both the factual and legal perspectives which has the constitutional implications, obliges the Court to resolve them through the instrumentality of the statutory interpretation interfaced with common law under the guidance of the pertinently applicable constitutional provisions.

The Case as Presented by Each Party

[19] On the return date, the Applicant motivated the Court to confirm the interim orders and most significantly, in accordance with prayer (d), direct the 3rd Respondent to sign and stamp the nomination form and write a supporting letter addressed to the IEC for it to register her as the candidate of the RFP in the national general elections for 2022. She in supporting her case, charged that the Respondents have unjustifiably refused to honour the legitimate right that she attained from the meritocratic electioneering policy of the RFP by forwarding her name to the IEC for the already stated purpose.

[20] In her endeavour to demonstrate that the declination by the Respondent to so forward her name had no legal basis, she hastily illustrated that the subject- matter of her discussion with the 3rd Respondent did not warrant that decision. According to her, what transpired at the headquarters on the second session after being re-summoned there, was that she was asked to account over the contents in the clip circulated on social media. These concerned the allegations that she had committed

disparaging acts within the circles of the Tšepo ea Basotho political party (TEB) and that in response she denied to have ever behaved in that manner. Moreover, she denied that the 3rd Respondent ever confronted her about her membership to the TEB.

[21] The Applicant has averred that the Respondents were so desperate to exclude her from the candidacy of the constituency elections to the extent that they proposed to buy her out of the position. Her Attorney even remarked that this was a cunning way of offering her bribery and that the Applicant refused it. Her Attorney in the course of addressing the Court on that aspect of the pleadings, remarked that the offer sounds offensive and disturbing.

[22] Interestingly, the story of the Applicant suddenly took a new intriguing dimension when her Attorney reacting to the concern of the Court over the annexures to the answering affidavit that reflected the Applicant as a member of the TEB. Her Attorney after briefly consulting the Applicant, stated that the latter explains that the Respondents mistakenly interprets the annexure to be reflective of her membership to the RFP. She then counter-explained that her name was written thereon at the time she supported the campaign for the registration of the TEB. In the same breath, the Attorney told the Court that the Applicant maintains that hitherto, she has never been a member of that party.

[23] The other equally intriguing account which the Attorney told the Court, was that the Applicant further counter argues that she could not be a member of a member of the TEB since that party has to date never existed since it was never registered by the IEC. On that note, her Attorney submitted that the Applicant could not be a member of a non-existing political organization. The Court then directed the counsel to ascertain the emerging issue on the registration or otherwise of the TEB from the records of the IEC since they are public documents.

[24] Paradoxically, the Applicant has not in her founding affidavit disclosed that the Respondents *inter alia* confronted her with the allegation that she is a member of TEB. On the contrary, she has in her replying affidavit admitted the contents in the answering affidavit that she was asked about her occupation of the position of Deputy Leader in the TEB political party. She has, nonetheless, qualified that by saying that she has never been a member of that party and that her association with it, was simply to assist in its registration with the Law Office. In any event, she never denied that she was at the material moment, the Deputy Leader of the same party.

[25] The 3rd Respondent insisted that the Applicant was specifically re-summoned to the headquarters post the meritocracy session, for the party to raise its concern over the revelations that she is a member of the TEB and that there was a dedicated discussion over the subject. The impression given by the same Respondent is that it was indispensable to

interrogate her on that since the duality of her membership to both RFP and the TEB would be adversely consequential upon the former.

[26] The Respondents further give the impression that they only developed scepticism on the *bona fides* of the Applicant as a member of the RFP, after she had participated in its primary elections and prevailed over her competitors at the meritocracy interview. This is suggestive that throughout the processes, they were not aware that she had not disclosed her full particulars which they say that it would have been vital for the consideration of her illegibility to be endorsed as a candidate for the RFP at the constituency level.

[27] In the mist of the convergences and divergences between the parties, the 3rd Respondent gives the impression that at the end of their deliberations, the Applicant conceded that she is not eligible to remain the candidate for the Qacha's Nek constituency. She stated that at that moment, their conversation got tuned to a reconciliatory note. Resultantly, the discussion culminated into a consensus that the Applicant would be rehabilitated into the party and be considered for being entrusted with the assignments of the of the party in future.

The Decision

[28] In terms of both the content and form, the Applicant is asking the Court to intervene against the procedural injustice under which she has been subjected by the RFP. The testimony

of this is that she has articulately protested that the party is refusing to transmit her names to the IEC for her registration as the RFP candidate for the Qachas'nek constituency. The procedural obligation for the party to do so, emanates from its policy that the candidate who prevails over the others at the meritocracy screening, would be presented to the IEC for the stated purpose.

[29] The identified procedurally founded protestation occasioned by the refusal of the party to refer her particulars to the IEC, inspired the Applicant to appreciably perceive that the party is violating her substantive right under Section 20 of the Constitution³ that endowers upon her the right to participate in the affairs of the Government as a citizen. It is deserving to be cautioned that the Court is fully mindful that the case under consideration is not directly brought for the enforcement of the rights protective under Section 22 of the Constitution. In that event, the case would have been instituted in the Constitutional Court.

[30] Notwithstanding the jurisdiction of the Constitutional Court, this Court is conscientious that every court, especially the superior courts, must whenever there is a constitutional implication in a case before it, seek to advance the values in the constitutional democracy. The background philosophy is for the courts to vigilantly under the deserving cases, seize such opportunity to protect and advance *human dignity*,

³ The Constitution of Lesotho, 1993

equality and *freedom* as the key values in the democratic constitution.

[31] The nature of the case presented before the Court renders it incidentally indispensable for the judgment to interrogate the question on the relevancy or otherwise of meritocracy in a democratic constitutional dispensation. This for the sake of the mutuality of understanding, warrants that the definitions of *democracy* and *meritocracy* be initially addressed due to their critical significance in the matter.

[32] The rather simplified dictionary meaning of *democracy* is expressed in these words:

A system of government by the whole population usually through elected representatives.⁴

On the other hand, the simple version of *meritocracy* is defined as:

Government by persons selected competitively according to merit.⁵

[33] The above dictionary meaning is just presented for the sake the simplification of the concept by avoiding its philosophical conceptualization and dynamics into the various spheres of disciplines including legal perspectives. It should nonetheless, be recognized that the application of the phenomena is not confined to government. Instead, it transcends into the academic, parastatal, international organizations, companies, private sector, civic organizations etc. This is ascribable to the realization of the instrumentality

⁴ The Concise Oxford Dictionary 9th Ed.

⁵ Ibid page 358

of meritocracy to exclude nepotism, corruption, patronage, political favouritism etc. in the transactions of the organization concerned for the sake of meaningful development.

[34] The idea of synthesizing *democracy* with *meritocracy* is not novel in political science and public administration spheres since their complementarity has passed the test in many advanced economies to speedily and meaningfully enhance the achievement of the values in the democratic constitution. This applies in particular to the human rights and fundamental freedoms. A rather in exhaustive list of the countries that have long adopted the approach consist of Germany, The United States of America, Czechoslovakia, Australia, Bulgaria, Norway and Singapore. Incidentally, the Peoples Republic of China which is not a constitutional democracy, has incorporated *meritocracy* in its communistic constitutional system.

[35] It is against the backdrop of the phenomenal developmental strides achieved by the countries which have incorporated meritocracy in their government systems, that Randall Morck⁶ lamentably cautioned that the political and the economic systems in the Sub-Saharan Africa, remain under undeveloped due to the absence of meritocracy in the appointment of people to guide the relevant and vital institutions and processes⁷.

⁶ Department of Sociology. FASS, National University of Singapore Randall Morck

⁷ Randall Morck, *Ibid*

[36] The mere fact that Lesotho is in terms of Section 1(1) of the Constitution a sovereign democratic Kingdom, is self-explanatory that the country is committed to the recognition and protection of *human rights and fundamental freedoms* as provided for under chapter II of the Constitution. *Good governess* is one dimensional aspect of democracy since it would institutionalize transparency, accountability and fairness into the government, public and under qualifying circumstances in the private sector as well. Thus, incorporation of meritocracy into any such space, could be legally readable into our Constitution.

[37] To demonstrate the relevancy and the unavailability of the *readability* of some words and concepts into our Constitution, the *right to human dignity* is readable therein though it is not written in its text. Otherwise, it would create absurdity for a democratic constitution to be read in such a way that it would exclude one of its foundational values. Resultantly by analogy, good governance would be readable into our democratic Constitution. The same could apply to its supportive ideas and systems.

[38] The fact that the factual and legal controversies in this case arise specifically from the complaint that the Applicant has been deprived of her constitutional Section 20 constitutional right to participate in government as a result of its meritocracy policy, calls for a closer scrutiny of the parameters of that right. This would have to be analysed within the context of the

circumstances surrounding the impugned decision. In that exercise, Section 20 would have to be interrogated in conjunction with the relevant constitutional provisions and be harmonized accordingly. In that endeavour, Section 20 which is key in the consideration, would have to be read together with Section 16 which constructively authorizes the establishment of political parties in Lesotho.

[39] It should be recognised that unlike in the constitution of the Republic of South Africa⁸ (RSA), where Section 19 provides for the right to form political parties, there is no such corresponding provision in our Constitution. Instead, in Lesotho the formation of the political parties and their incorporation as legal entities, originates from Section 16 (1) of the Constitution of Lesotho which provides;

Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes.

[40] The only section in the Constitution where reference is made though, in passing, and rather superficially is in Section 87 of the Constitution where it is provided:

- (1)
- (2) The King shall appoint as Prime Minister the member of the National Assembly who appears to the Council of State to be the leader of the political party or coalition of parties that will command the support of a majority of members of the national Assembly.

⁸ The Constitution of the Republic of South Africa, 1996

[41] It is in consonance with Section 16 (1) that the legislature has instrumentalized the formation and the legal personification of *inter alia* political parties by enacting the Societies Act, for their existence through registration and the National Assembly Electoral Act, for their qualification to participate in the national and local government elections.

[42] There must be a realization that a mere reading of the Section 20 (1) (a) of the Constitution gives a *prima facie* impression that the right to the freedom of a citizen to participate in the government is unlimited. However, upon reading it in conjunction with (2), it becomes clear the right is not expressed in absolute terms since it is circumscribed. The relevant operational provisions are configured thus:

- (1) a) Every citizen of Lesotho shall enjoy the right-
to take part in the conduct of the public affairs, directly or indirectly
freely chosen representatives;
- (2) The rights referred to in subsection (1) **shall be subject to the other provisions of this Constitution.**

[43] The limitation provided for in (2) subjects the right under the other constitutional provisions. Understandably, this refers to the provisions applicable in the circumstances of each case. In the instant matter, this would be Section 16 of the Constitution that creates the *right to freedom of association* in this simple wording:

- (1) Every person shall be entitled to, local elections. shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes.

[44] The *voluntariness* requirement which is envisaged in Section 16(1) of the Constitution, constitutes the key consideration in the membership of a person to any *voluntary* organisation that is contemplated in the Constitution. So, the *voluntary* willingness of a person to become a member of any friendly society registered under the Societies Act, would, in principle, oblige such a member to acquiesce to the operating terms, conditions and policies of the concerned *voluntary* organisation to which one is voluntarily a member. Understandably, this could circumscribe some of the rights and liberties of such a member which affected person could have otherwise fully enjoyed.

[45] The sub heading of Section 20 captures the intention of the Legislature in the provisions made thereunder. It is presented as *the right to participate in Government*. However, in Section 1(a) the right is expressed as *the right of every citizen to participate in public affairs directly or through freely chosen representatives*. It is trite that reference to the sub heading aids in the construction of the intention of the Legislature under the section concerned. Thus, the reconciliation of the word, “government” in the heading with the wording *the right to participate in public affairs directly or through freely chosen representatives* applies contextually to the exercise of that right in the national public affairs including in particular, in the general elections and local elections. The telling words here are *government* and *public affairs*. The latter cannot be legally and technically interpreted to include the internal affairs of political parties since they do not fall within the purview of the

government and public affairs. On the contrary, political parties are contractually established private concerns. The Legislature would have expressly extended the meaning to include the political parties if it had that intention.

[46] The Constitutions of political parties should be understood in their proper legal and technical sense in that they, simply represent written contractual agreements concluded between the individual political parties and its individual members. This jurisprudence, is attested to in the decision in **Cekwane v National Executive of Basotho National Party**⁹ in these terms:

The legal reality is 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.

[47] The same interpretation that political parties' constitutions are contracts was maintained in **Mosisili and 3 Others v Moleleki and 10 Others (unreported)**¹⁰. This case is illustrative of the binding effect of the constitutions of political parties upon their leaderships, its structures and membership. It is commonly referred to as the *Apex Powers Case* (The powers of the Sehlohlolo) in Sesotho). The nomenclature is traceable from the fact that in that case, members of the National Executive Committee (NEC) of the Democratic Congress (DC), tactfully challenged the

⁹CIV/ APN/245/18

¹⁰ (CIV/APN/424/2016)

party's 'constitutionally' entrenched strong powers of the leader. They did so by *inter alia* passing a resolution to unseat him from the leadership. The court recognized that the immense powers of the leader were provided for in the 'constitution' of the DC. In the same vein, it realized that the NEC had not sought for the endorsement of the resolution by the leader as it is enjoined in the 'constitution', declared it null and void to that extent. It then explained the contractual status of the 'constitution' of the DC over the DC as follows:

..... The constitution of the D.C. is the party's contract *unberima fidei* and therefore, analogously the member's covenant. This means a legal agreement requesting utmost good faith¹¹.

[48] The same sentiments of trust and utmost good faith, were expressed in the case of **Ts'ehlana v The Executive Committee of Lesotho Congress for Democracy**¹². To demonstrate the entrenchment of the principle that the constitutions of political parties are *sui generis* contractual documents, the same was reiterated on the foreign terrain in **Magashule v Ramaphosa and Others**¹³ where the court stated:

In broad legal characteristics, a political party is a voluntary association where the relationship between the party and its members is regulated by contract, admittedly of a unique nature. In other respects, political parties live in the public consciousness of a society as their work is so fundamentally public in nature and, is at least theoretically, meant to be aligned to the public good¹⁴.

[49] The authorship of the stated contractual limitation of the rights of the members of the political parties is traceable from

¹¹ Para 34

¹² (C OF A (CIV) NO. 18/ 05

¹³ [2021] SA ZAGPJHC 88

¹⁴ Ibid Para 3

the Section 16 (1) constitutional caveat to the provision on the right of every person to the freedom of association. This is introduced by the bracketed caveat therein, expressed in the wording, “*except with his own consent*”. that every person shall be entitled to enjoy freedom to associate freely. It is, thus, in the context of the contractual undertaking by the members of the political parties that they have some of their rights compromised.

[50] The Section 20 (2) (1) limitation of the *right* under consideration is of cardinal significance since it renders it to be comprehended in harmony with the other constitutional provisions. This is expressed in the wording that the right shall be enjoyed subject to the other provisions of *this* Constitution. The initially reference made has already been extensively made to its limitation of the applicable rights upon one’s attainment of a membership of a political party by virtue of basically its terms, terms and conditions in its founding document termed a ‘constitution’.

[51] It must be realized that the projected limitation under the Section 20 (2) (1), is in the main, intended to ascertain that all the constitutional provisions are interpreted to give effect to the supremacy clause under Section 2 of the Constitution. Incidentally, therefore, all the acts or decisions by the voluntary organizations are subject to be challenged for their constitutional compliance. The underlining explanation is that the political parties retain their autonomy to have their creating

‘constitutions’ and to so operate their internal affairs subject to the superintendence of the Constitution and other laws especially laws governing the essentialities for a valid contract. In the latter case, the provisions in a ‘constitution’ of a political party would, for instance, have to be legal, in pursuit of lawful objectives and not *contra bones mores* etc.

[52] The typical scenario occurs where the right to freedom against discrimination under Section 18 of the Constitution read with the right to the equality before the law and to the equal protection of the law, is to be balanced with the freedom of Association in the context of membership to a religious institution. Here, regard should be had to the fact that the right to associate for religious purposes is equally provided for under Section 16 (1).

[53] Johan De Wall and Others illustrate the complexity in balancing the *right to equality* with *the right to associate for religious purposes* by reference to the instances where some religious institutions refuse to ordinate women as priests on the basis of their doctrinal beliefs and requires priests not to marry. In that context, they analyse that the law of general application would not apply to resolve the matter and that these discriminatory treatments would be permissible in so far as it is required by the telling of religion concerned. The freedom of religion also guarantees a degree of autonomy for religious groups to run their affairs free from interference¹⁵.

¹⁵ Johan De Wall and Others Juta and Co. Ltd 1999: The Bill of Rights Handbook 2nd Edition, pp 279-280

[54] It must, nevertheless, be realized that on account of the supremacy clause under Section 2 of the Constitution, the autonomy of the associations is not absolute since the provisions in their 'constitution' and their decisions and acts, all remain subject to their consistency with the Constitution. This is illustrated in the case of **Magashule v Ramaphosa**¹⁶ where the step-aside rule under Rule 25.70 of the 'constitution' of the African National Congress (ANC), was relied upon to suspend the applicant. The court came to the determination that the conduct of a political party *is not insulated from the supreme law* and that the Rule was found to be unconstitutional in relation to the 'constitution' of the party and that of the constitution of the Republic of South Africa (RSA). In the latter instance, the decision was *inter alia*, premised upon the analysis that it violates the presumption of innocence guaranteed in terms of *Section 35(3)(h)* of the Bill of Rights and the right to equality and human dignity in terms of *Section 9* and *10* of the Bill of Rights¹⁷.

[55] Now, turning directly to the instant case, it is clear that the Applicant is a member of the RFP and that it is self-explanatory that she freely subscribed to its 'constitution'. This means that she *voluntarily* undertook to observe and comply with it *uberrima fides* as the covenant of the party that binds the NEC to vertically uphold its values and for the individual members to do so horizontally amongst themselves.

¹⁶ *Supra*

¹⁷ *Ibid* para 92-94

[56] Human rights and fundamental freedoms are personal endowments. In this case, this applies to the *right of every citizen to participate in public affairs*. An individual person is free to exercise it in one's private capacity or through a political party. It is that reason that where some individuals feel that the policy of a particular party frustrates the concerned person to fulfil that right, either advocates for the reforms within the party or elects to cross to another party to meaningfully exercise the right. In some incidences the affected individual may under the deserving circumstances decide to stand for the elections as an independent candidate. The Court is, nevertheless, aware of the occasions where the party can frustrate its member to participate in the public affairs and, so justify a resort to the court for its intervention.

[57] The above said, the Applicant and the rest of the members of the party individually, should be presumed to have read the 'constitution' and understood it. The same should apply to its corresponding *principles manifestos, modus operandi, code of conduct and policies* to mention just the few. In the long existing political parties, guidance could even be provided by their established practices which in some are even recognized as the *unwritten parts of the 'constitution'*. Policies and strategies need not to be written in the party 'constitution'. It could suffice for them to be communicated to the membership of the party.

[58] In this respect, she has in the papers agreed that she knew that the RFP meritocracy election system commences from the primary elections where the top (4) candidates in the order of majority votes, would undergo the meritocracy interview for the selection of the one who would contest the constituency elections.

[59] It transpires from pleadings tendered by the Applicant that her case is from the onset riddled with inconsistencies and contradictions in the material aspects of her case. This is manifested in both her founding and replying affidavits. To illustrate this, she has not in the founding affidavit disclosed that the Respondents had at the meeting to which she was re-summoned to attend, confronted her about her membership and position in TEB. However, she has admitted that in her replying affidavit.

[60] Her denial that she is or has been a member of the TEB, has been exploded by the documentary revelation exhibited by the Respondents in the document annexed to the answering affidavit where she appears as the Deputy Leader of that other party. The Court conjectures from the circumstances that she had, perhaps, inadvertently failed to realize her obligation to have taken the Respondents into her confidence about her association with the TEB before or at time the meritocracy interviews. Her omission to do so for whatever reason, constituted failure to have made a material disclosure on the matter that hinges upon the mutuality of trust between the

party and herself especially when she was considered for the sensitive position of political trust.

[61] Unfortunately, the Applicant in seeking to rescue herself from the documental revelation that she is not just a member of a rival political party but its deputy, advanced an unconvincing account. Her counter explanation was that her names featured in the document at the time she simply assisted the TEB to be registered as a party and not as its member. Be that as it may, assuming that this is so, it would still have been obligatory for her to make that disclosure to the RFP prior or during the interviews. The reasoning is simply that she should have equally taken the party into confidence that she had assisted its rival to qualify for registration and that she has, however, never become its member.

[62] In a nutshell, it was incumbent upon the Applicant to have made material disclosure to the Respondents about the history of her relationship with the TEB in order to demonstrate her *bona fides* in accordance with the applicable contractual principle requiring mutuality of trust between the parties. This holds so especially when she was interviewed for being considered for being assigned to the position of trust in the RFP.

[63] It could also incidentally arise a polemic question as to whether the Respondents were still legally entitled to re-summon the Applicant and confront her about her relationship with the RFP after she had emerged as the best candidate at the final stage of the meritocracy electioneering system within the

party. The significant development is that at that epoch stage, her name was due to be forwarded to the IEC as its candidate for the constituency of Qachas'nek. This is considered in recognition that the Applicant had by that time developed a legitimate interest towards that.

[64] At this stage, the attainment of the stated legitimate expectation of the Applicant and the obligation of the Respondents to honour it, should against the evidence that they afterwards discovered the documentation revealing the she was simultaneously a member of one of the rival political parties. It was then that she was re-called to be confronted about that emerging information. The impression is, this was intended to establish if the Applicant had not concealed a material particularity about herself that is equally material for the party to have accepted her to participate in its meritocratic designed primary elections that culminated in the intervening process where she prevailed over her competitors.

[65] The fact that the Respondents discovered what appeared to be the duality of the membership of Applicant to their party and to the TEB, justified them to recall her for the ascertainment of her loyalty. It would not make sense to judge that they were barred from revisiting the credentials of the Applicants since there has been no evidence suggestive that they ought to have known about her said duality of relationship or were ever in a position to establish that. The justification of their move is, in the same breath, fortified by the recognition that it was

incumbent upon the Applicant to have disclosed her connection with the TEB and to have assured the RFP that she has since severed her relations with that party and then declare her loyalty to it.

[66] The approach adopted in the **Plascon-Evans v Van Riebeeck Paints**¹⁸ which authored the Plascon-Evans Rule, is relevant for resolving the areas of divergences on the material facts in the matter. This is warranted by the nature of the pleadings from both sides. The application of the rule is rendered by the:

- Identified admissions made by the Applicant in her replying affidavit on the salient aspects of the answering affidavit filed by the Respondents;
- Pertinent contradictions in her account such as her denial that she has the relationship with the TEB;
- Failure of the Applicant to satisfactorily explain the appearance of her name in the correspondence addressed to the IEC in which she is recorded as the Deputy Leader of the TEB;
- Failure of the Applicant to explain her reason for not having disclosed to the RFP her relationship with the TEB to avoid being accused of failure to make a material disclosure especially during the interview.

[67] The Plascon-Evans rule directs that in the circumstances where as it is in this case, it is clear that facts, though not

¹⁸ [1984] 2 ALL SA 366 (A)

formally admitted, cannot be denied, they must be regarded as admitted. The worse scenario in the matter, is that the Applicant has admitted the material aspects that sustains the defence advanced by the Respondents. Consequentially, the inconsistencies and contradictions in her case particularly, in consideration of the replying affidavit and the verbal representations made for her, undermine the credibility of her case.

[68] On an *obiter dictum* note, the party should realize the importance of reducing serious interactions of the magnitude involved here into writing. On a rather different note, it would appear wise and humane for the party to initiate reconciliatory process with the Applicant. She appears to be a good citizen who is a cancer survival activist. The duality of her membership to the TEB could have been occasioned by inadvertence rather than any *sinister* motive against the party.

[69] In the premises, the *rule nisi* order is discharged and the application, is consequently dismissed. There is no order on costs.

E.F.M. Makara
JUDGE

For Applicant : Makhera Attorneys Co.
For Respondent : Adv. M. Shakhane inst. by M.W.
Mukhawana Attorneys

