

IN THE HIGH COURT OF LESOTHO

CIV/APN/0286/2022

HELD AT MASERU

In the matter between:

MORERO LENTS`A

1st APPLICANT

DEMOCRATIC CONGRESS

2nd APPLICANT

and

INDEPENDENT ELECTORAL COMMISSION

RESPONDENT

CONSOLIDATED WITH

CIV/APN/0288/2022

CHEPANE MOTHAE

1st APPLICANT

DEMOCRATIC CONGRESS

2nd APPLICANT

and

INDEPENDENT ELECTORAL COMMISSION

RESPONDENT

Neutral citation: Morero Lents`a & Another v Independent Electoral Commission consolidated with Chepane Mothae & Another v Independent Electoral Commission [2022] LSHC 243 Civ (22 September 2022)

CORAM : **KHABO J.,**
HEARD : **12th SEPTEMBER, 2022 &**
13th SEPTEMBER, 2022
DELIVERED : **22nd SEPTEMBER, 2022**

SUMMARY

Electoral law - General Elections - Nominees holding public office – IEC Rejecting their nomination pursuant to Section 40 (2) of the National Assembly Electoral Act, 2011 which disqualifies public officers from standing for national elections - In reaction, nominees arguing that they had resigned as at the date of their nominations - Court finds Applicants to have failed to comply with the 30 days’ notice of resignation prescribed by Section 143 (3) of the Public Service Regulations, 2008 rendering them still public officers at the date of their nomination.

ANNOTATIONS

Statutes and regulations

Constitution of Lesotho, 1993

National Assembly Electoral Act, 2011

Public Service Act, 2005

Public Service Regulations, 2008

Cases cited

- **Lesotho**

Afzal Abubaker and Another v Magistrate, Quthing and 6 Others C of A (CIV) 19 of 2015

Kelebone Albert Maope v Principal Secretary, Ministry of Foreign Affairs and International Relations and 3 Others CIV/APN/87/2018

Matebesi v Director of Immigration and Others C of A (CIV) No. 2 of 96

President of the Court of Appeal v Prime Minister and Others C of A (CIV) No. 62 of 2013

Thetsane v The Prime Minister and 4 Others C of A (CIV) No. 51 of 2014

- **South Africa**

Administrator, Transvaal v Traube [1989] 4 All SA 924 (AD)

Islam v Kabir CA : 280/2010 [2011] ZAECGHC 9

Plascon - Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

Standard Bank of South Africa Limited v Nombulelo Cynthia Chiloane [2021] 4 BLLR, 400

JUDGMENT

KHABO J.,

Introduction

CIV/APN/0286/2022

[1] The 1st Applicant herein, Mr Morero Lents'a, is a member of the Lesotho Correctional Service. He is a nominated candidate for the Sempe No. 66 Constituency, having been elected on 28th August, 2022 to represent the Democratic Congress, 2nd Applicant herein, in the national elections.¹ On 02nd September, 2022, 1st Applicant's nomination was submitted to the Independent Electoral Commission (IEC). This nomination met with a letter of rejection from the latter dated 06th September, 2022 wherein the IEC indicated that the rejection emanates from an objection lodged and that upon receipt of this objection they conducted an investigation which culminated in their decision to reject 1st Applicant's nomination. They intimated to him that their investigations revealed that he was still a member of the Correctional Service at the time of nomination in contravention of **Section 40 (2) (c) of the National Assembly Electoral Act, 2011 (NAEA)**. Applicants are before this court to challenge this rejection.

CIV/APN/0288/2022

[2] The 1st Applicant herein is Mr Chepane Mothae, a nominated candidate of Mosalemane No. 19 Constituency under the Democratic Congress ticket. He was engaged by the Ministry of Home Affairs on a fixed term contract under the Labour Code Order, 1992 as a Marking Assistant. He was elected on 14th August, 2022 to represent the 2nd Respondent in Mosalemane,² and officially nominated as a candidate for the general

¹ Para 4 of his Founding Affidavit

² Para 4.4 of his Founding Affidavit

elections on 02nd September, 2022. He intimates to the court that he was telephonically informed that the IEC had received an objection to the effect that he still held a public office at the time of his nomination. He is before this court to have the decision of the IEC reviewed and set aside, and that he be declared a lawful candidate of the 2nd Applicant for the said constituency.

Consolidation of the two matters

[3] These matters were filed separately as can be seen from their citations. The Court, however, found it prudent to consolidate them because they impinge on the same issue, namely, whether the decision of the Respondent to reject the nomination of Messrs Lents`a and Mothae on the basis that they were still serving in a public office at the time of their nomination in contravention of **Section 40 (2) (c)** of NAEA was lawful. The reliefs sought are similar. Applicants are basically seeking that Respondent's decision to reject their nomination to the respective constituencies be declared unlawful, and secondly, that they be declared rightful candidates for the constituencies.

Respondent's stance

[4] It is Respondent's case that Applicants are not eligible to be elected as members of the National Assembly on the following grounds:

(a) that they failed to comply with **Section 143 (3) of the Public Service Regulations, 2008**; and

(b) that their nomination is in violation of Section 40 (2) (c) of NAEA.

The first hurdle to pass in the circumstances is to ascertain Applicants' status, namely, whether or not they were public officers. This is despite the fact that Counsel agreed that Applicants were public officers. As the issue

goes to the root of this dispute, the court felt it should traverse it, *albeit*, briefly.

Whether Respondents are/were public officers

[5] At the centre of this dispute is *Section 40 (2) of NAEA* in terms of which Applicants were disqualified from standing for general elections. The Section reads (to the extent relevant to these cases):

A person is not eligible to be elected as a member of the National Assembly, if at the time of nomination, the person -

(a) ...

(b) is a member of the Defence Force, the Police Service, the National Security Service or the Correctional Service; or

(c) holds, or is acting in a public office.

[6] The term “*public office*” is as defined in the *Constitution of Lesotho, 1993*³ (the Constitution). Section 154 (1) of the Constitution defines a “*public office*” as “*any office of emolument in the public service,*” and public service is in turn defined as “*the service of the King in respect of the Government of Lesotho.*” The cases of *Thetsane v The Prime Minister and 4 Others*⁴ is instructive on the definition of “*public officer*” as contained in the *Constitution* as well as *Kelebone Albert Maope v Principal Secretary, Ministry of Foreign Affairs and International Relations and 3 Others*⁵ consolidated with *John Naazi Olphant v Principal Secretary, Ministry of Foreign Affairs and International Relations and 3 Others*.

³ Section 4 of the Public Service Act, 2005

⁴ C of A (CIV) No. 51 of 2014

⁵ CIV/APN/87/2018

- [7] As aforesaid, Mr Morero Lents'a is a member of the Lesotho Correctional Service, whilst Mr Chepane Mothae was engaged under the Labour Code Order, 1992 on a fixed term contract. Although not appointed by the Judicial Service Commission, they are for present purposes public officers as they occupy or occupied offices of emolument in the public service and have not been excluded for present purposes by any of the constitutional provisions. Having established that Applicants held public offices, the next enquiry is whether at the time of their nomination they were still public officers, and therefore disqualified to stand as nominees to the National Assembly.
- [8] It is common cause that Mr Morero Lents'a tendered his resignation with immediate effect from Correctional Service on 01st September, 2022.⁶ Mr Chepane Mothae's case is not as straight forward. There are two resignation letters filed of record, one annexed to his Founding Affidavit dated 02nd August, 2022,⁷ and another filed by Respondents in their Answering Affidavit dated 19th August, 2022,⁸ allegedly retrieved from his personal file at Home Affairs.
- [9] According to the Respondent, these resignations do not meet the requirements stipulated in **Section 143 (3) of the Public Service Regulations, 2008**. The Section provides that:

A public officer who wishes to stand for general elections to the National Assembly ... shall resign or retire from the public service by giving a written notice of at least one month prior to the nomination day for the general elections ... as appointed by the National Assembly General Elections Act, 1992...

⁶ Per annexure to his Founding Affidavit "Sempe 1"

⁷ IEC 2

⁸ "CM 2" to Respondent's Answering Affidavit

The Section is couched in peremptory terms. It strikes one, why public officers?

Why electoral laws are stringent on public officers

[10] The spirit behind the above Section requiring public officers to tender a one month notice of resignation seems to be in Section 143 (1) of the said Regulations. It provides:

A public officer shall not be an active member of a political party, speak in public of any political party or matter, or take an active part in the support of any candidate in an election, and do anything by word or deed which is calculated to further political interest of any party (emphasis added).

[11] The rationale behind this restriction on public officers not to actively participate in politics could be that public officers provide public services, and as such have to remain non - partisan and serve everyone equally. Thus, the legislator is not worried about private sector employees. The level of integrity expected of public officers is placed at a very high level.

Whether Applicants were still public officers at the time of their nomination

[12] Applicants have been disqualified from standing for general elections on the basis that at the time of their nomination, they were still in public offices. **Section 143 (3) of the Public Service Regulations, 2008** prescribes that the officer wishing to stand for national elections give a **“written notice of at least one month.”** It does not cater for immediate resignation. Mr Morero Lents’a’s resignation ran from 01st September, 2022 to 01st October, 2022 in terms of this Section, things being equal. It followed, therefore, that as at 02nd September, 2022 when his nomination was tendered with the IEC he was still serving in terms of the law.

[13] For purposes of **Section 143 (3) of the Public Service Regulations, 2008**, Mr Lents'a's resignation took effect from when the one month notice period expired. The case in point is **Standard Bank of South Africa Limited v Nombulelo Cynthia Chiloane**⁹ in which the court pointed out that parties are bound by the notice period prescribed in the law and that a contract only terminates or takes effect when the specified period runs out.

[14] The above regulation refers to the repealed National Assembly General Elections Act, 1992. Applicants' Counsel raised a point that **Section 143 (3)** has no force or effect as it refers to a repealed law. I do not agree with Counsel here, the Section remains valid in terms of Section 197 of NAEA which is a transitional clause and provides that:

Anything done under the National Assembly General Elections Act, 1992, and continuing at the date of commencement of this Act, shall be deemed to have been done under this Act in so far as it is consistent with the provisions of this Act.

[15] Coming back to Mr Chepane Mothae's case. The two letters are reproduced for a better appreciation of the dispute at hand. The letter annexed to his Founding Affidavit reads:

"IEC 2"

MOTHAE

CHEPANE

MOSALEMANE

02nd August, 2022.

The Principal Secretary,

Ministry of Home Affairs

Maseru - 100

⁹ [2021] 4 BLLR, 400

Dear Sir/Madam

RE: Resignation from my position at the Ministry

The above captioned matter bears reference.

I wish to tender my resignation to your good office from the position of Marking Assistant. The resignation is effective immediately. I further wish to forfeit in lieu of notice a month's salary to be deducted from my severance package.

Yours Faithfully

Mothae Chepane

[16] The one annexed to Respondent's Answering Affidavit reads:

"CM 2"

Nokong Ha Ntina

P.O. Box 359

Maputsoe, 350

The Manager

Ministry of Home Affairs Department of LRMIS

Berea 200

Lesotho

Dear District Manager

Please accept this letter as a formal notification of my resignation followed (sic) being nominated as a candidate for the upcoming general elections. Have tremendously enjoyed my time serving for Government of Lesotho. I am also serving a one month notice in that regard. Please let me know how I can assist during this time of transition. I will do everything I can to make it as smooth as possible.

Thank you for understanding

Kind Regards

Mothae Chepane

CC: Area Supervisor Sebitia, Registrar

[17] Mr Chepane's nomination was rejected on the basis of the resignation letter of the 19th August, 2022, to which Respondent concluded that his resignation took effect on 19th September, 2022, past the last date of tendering of nominations to the IEC.

[18] In his Reply, Mr Chepane denied being the author of this resignation letter and even annexed a supporting affidavit of the Principal Secretary, Ministry of Home Affairs and that of the Director, Human Resource. Surprisingly, this letter bore a vivid date stamp of the Ministry of Home Affairs and had two minutes inscribed by hand to DHR (Director, Human Resource) and one to `Me NRM to facilitate. The two letters clearly raise a dispute of fact. These being motion proceedings, pleadings constitute evidence.

[19] The court is, therefore, faced with a dispute of fact. It is trite that where there is a dispute of fact in motion proceedings, Respondent's version prevails. We are fortified in this position by the case of *Afzal Abubaker and Another v Magistrate, Quthing and 6 Others*¹⁰ that

To the extent that there is a dispute of fact in regard to those matters, the rule in Plascon - Evans Paints v Van Riebeeck Paints ... which rule has consistently been applied by this court in motion application applies ...

[20] The rule in Plascon - Evans is that where there is a dispute as to the facts in motion proceedings and the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order, the court should grant the order. Mr Chepane has not been able to explain away the resignation letter of the 19th August that even bears handwritten minutes and a bold stamp of the Ministry of Home Affairs. The

¹⁰ C of A (CIV) 19 of 2015

Respondent averred that it retrieved the letter from Applicant's personal file. The Court held in a later case of *Islam v Kabir*¹¹ that:

When in application proceedings there is a dispute of fact which has to be resolved on the papers and on the principle enunciated in Plascon - Evans Paints matter the court can only reject the version of the respondent if the absence of bona fides is abundantly clear and manifest and substantively beyond question.

Respondent acting as investigator and judge in its own cause

[21] This brings me to the next point raised by Mr Chepane that the Respondent had no power to investigate him. That it just had to respect 2nd Applicant's members' democratic right to have nominated him. He further complained that the Respondent investigated and made a decision, rendering itself a judge in its own cause, thereby infringing upon the *nemo iudex in causa sua* principle (no one should be a judge in their own cause). It is this court's view that the IEC has a duty to guarantee free and fair elections, and can only carry out this mandate effectively if it ensures that voters and nominees meet the legal requirements set out in the law.

[22] The IEC cannot just accept any information without vetting it. This may entail having to undertake independent investigations, all in the name of facilitating free and fair elections, and ensuring that only people who qualify to vote or voted in do so. It is my considered view, that the Respondent acted *intra vires* its powers by independently investigating Mr Chepane and taking a decision it deemed appropriate in the circumstances. I liken Applicants' position to that of persons seeking employment, where the employer upon receiving applications, scrutinises them and even conducts a background check on the candidates to ensure that he or she gets people who meet his or her standards.

¹¹ CA : 280/2010 [2011] ZAECGHC 9

Objections raised not compliant with the law

[23] The crux of Applicants' case in this regard is that the Respondent accepted objections outside **Section 42 (1) of NAEA**. The objections envisaged by this Section are those of lists of persons who have submitted applications for nominations, posted inside and outside the office by the Returning Officer on the day after the close of nominations. The objections received by the Respondent are not related to this Section, they are in a way related to the preceding heading. These are people who provided information to the Respondent in respect of people they suspected did not act by the book.

[24] Applicants' Counsel submitted that the Respondent will fall foul of meddling in internal political party conflicts, thereby, conducting itself in a manner that compromises its independence and autonomy. He contended that the IEC has to act above reproach in carrying out its statutory mandate, and first and foremost respect the nominees' constitutional right to stand for elections, a right echoed in the preamble to NAEA. In my view, in rejecting Applicants' nominations the Respondent was not denying Applicants their right to stand for elections, but was merely enforcing procedures prescribed by law.

[25] The Respondent has powers under **Section 40 (1) of NAEA** to disqualify nominees who are not eligible to be elected as members of the National Assembly, at the time of their nomination. This is prior to putting up notices prescribed by **Section 41 (4) of NAEA** which only occurs after the close of nominations. Naturally, they have a right to vet candidates before they accept their nominations to ensure fair elections. They may receive a heads up from anyone, and as watchdogs of the election process they cannot just sit back. In my opinion, it is irrelevant where they get information.

Failure to afford Applicants the right to be heard

[26] One of Applicants' complaint is that the respondent failed to afford them a hearing before taking a decision that prejudicially affected them. The *audi alteram partem* rule is sacrosanct. The Court of Appeal held in *Matebesi v Director of Immigration and Others*¹² that:

Whenever a statute empowers a public official or body to do or act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, the latter has a right to be heard before the decision is taken unless the statute expressly or by implication indicates to the contrary (emphasis added).

These words are traceable to the earlier decision of *Administrator, Transvaal v Traube*.¹³ and were reiterated in a number of decisions that include *President of the Court of Appeal v Prime Minister and Others*.¹⁴ NAEA is, however, silent on the right to be heard prior to taking any decision to reject a nominee. It does not seem to have envisaged either expressly or by implication the right to be heard prior to rejecting nominees for general elections.

ORDER

Both applications are dismissed with costs.

F.M. KHABO
JUDGE

¹² C of A (CIV) No. 2 of 96

¹³ [1989] 4 ALL SA 924 (AD) at 928

¹⁴ C of A (CIV) No. 62 of 2013

For the Applicants : Adv., T. Lesupi assisted by Adv., Phamotse

For the Respondent : Adv., K. Letuka