

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/0312/2022

In the matter between

**CHEPANE MOTHAE
DEMOCRATIC CONGRESS**

**1ST APPLICANT
2ND APPLICANT**

And

**RETURNING OFFICER MOSALEMANE
RESPONDENT
CONSTITUENCY**

1ST

DIRECTOR OF ELECTIONS

2ND RESPONDENT

THE INDEPENDENT ELECTORAL COMMISSION

3RD RESPONDENT

LESOTHO CONGRESS FOR DEMOCRACY

4TH RESPONDENT

MOKOPOTSA LETHOLE

5TH RESPONDENT

MPHATLALATSANE (HOPE)

6TH RESPONDENT

MOKOTO NTHOFELA

7TH RESPONDENT

BASOTHO PATRIOTIC PARTY

8TH RESPONDENT

MOKOTSO FRANCIS MOKONYANE

9TH RESPONDENT

SOCIALIST REVOLUTIONARIES PARTY

10TH RESPONDENT

MOKUPO KHOTSO

11TH RESPONDENT

BASOTHOLAND TOTAL LIBERATION

12TH RESPONDENT

CONGRESS

NKHAHLE ESAIA LEFU	13TH RESPONDENT
REFORMED CONGRESS OF LESOTHO	14TH RESPONDENT
NKUTA LUCY MASEKHOBE	15TH RESPONDENT
LESOTHO ECONOMIC FREEDOM FIGHTERS	16TH RESPONDENT
PALI MOTSAMAI	17TH RESPONDENT
BASOTHO ACTION PARTY	18TH RESPONDENT
PHAPANO TANKISO	19TH RESPONDENT
BASUTOLAND CONGRESS PARTY	20TH RESPONDENT
PHOOFOO NKOE	21ST RESPONDENT
BAHLABANI BA TOKOLOHO MOVEMENT	22ND RESPONDENT
QOATI JULIUS TLALI	23RD RESPONDENT
BASOTHO NATIONAL PARTY	24TH RESPONDENT
RAMPETA LOUIS MAKARA	25TH RESPONDENT
KOPANANG BASOTHO	26TH RESPONDENT
RAMPHALILE TLOKOTSI	27TH RESPONDENT
ALLIANCE OF DEMOCRATS	28TH RESPONDENT
RAPAPA PAUL NTOI	29TH RESPONDENT
ALL BASOTHO CONVENTION	30TH RESPONDENT
RAPAPA SAMUEL TSOINYANE	31ST RESPONDENT
MOVEMENT FOR ECONOMIC CHANGE	32ND RESPONDENT
SETOI MPHO	33RD RESPONDENT
ALLIANCE FOR FREE MOVEMENT	34TH RESPONDENT
SEUTLOALI LISEBO	35TH RESPONDENT
POPULAR FRONT FOR DEMOCRACY	36TH RESPONDENT
TAEMANE DINGAANE	37TH RESPONDENT

JUDGMENT

Neutral citation: Chepane Mothae & Another vs Returning Officer Mosalemane Constituency & 36 Others LSHC 295 CIV (28th September 2022)

CORAM: T.J. MOKOKO J
HEARD: 28TH SEPTEMBER 2022
DELIVERED: 28TH SEPTEMBER 2022

SUMMARY

First applicant having noted appeal from judgment of the High Court - Seeking to stay execution of the judgment through an interdict - Impermissible for party to stay execution of judgment through substantive application for interdict - Party to seek stay of execution of judgment before the Judge whose judgment is appealed from - Provisions of Court of Appeal Rules, 2006. Objection against nomination of candidate for elections- nomination rejected - Disqualification of candidate for nomination for election- not one of the circumstances, that can render elections as failed, as envisaged in National Assembly Electoral Act, 2011.

ANNOTATIONS

Cases

1. C OF A (CIV) 60 OF 2022
2. C OF A (CIV) 61/2022
3. CIV/ANP/0286/2022
4. *Leteka v. Leteka* C OF A (CIV) 48/19 LSCA 19 (29 MAY 2022)
5. *Kali v Mahasele* C OF A (CIV) 19/2011

Statutes

1. *Constitution of Lesotho*
2. *Court of Appeal Rules, 2006*

3. *National Assembly Electoral Act, 2011*

Introduction.

[1] Applicants approached this Court on urgent basis, seeking the following prayers;

1. That the rules of this Court pertaining to the normal modes and periods of service be dispensed with on account of urgency.
2. That a rule nisi be issued returnable on the date and time to be determined by this Court, calling upon the respondents to show cause, if any, an order in the terms shall not be made absolute:
 - 2.1 That the applicants be given leave to serve the 1st, 2nd, and 3rd, respondents at their given addresses and the rest of the respondents be served with notices of this application at the Constituency offices of the IEC at Mosalemane Constituency.
 - 2.2 That pending final determination of the proceedings herein and the appeal in *C OF A (CIV) 61 OF 2022*, that the 1st and 2nd respondents be interdicted and restrained from holding elections scheduled for the Mosalemane Constituency on the 30th September 2022 and the 07th October 2022 respectively.
- 3 That the decision of the respondents to continue with the elections scheduled for both the 30th September 2022 and the 07th October 2022, despite the pending appeal in *C OF A (CIV) 61 OF 2022* be declared null and void.
- 4 That the 1st respondent be directed to declare the elections scheduled for the 30th September 2022 and 07th October 2022 as failed elections.

ALTERNATIVELY;

- 5 That the second applicant be allowed to present a new name for a candidate who would contest for elections on its behalf in Mosalemane Constituency.
- 6 That respondents pay costs of suit.
- 7 That prayers 1, 2, 2.1, 2.2 should operate with immediate effect as interim relief.

Background.

[2] On the 28th September 2022 at around 15:00 hours, applicants' counsel appeared before court, seeking that a rule nisi be granted in terms of prayers 1, 2, 2.1 and 2.2 of the notice of motion. The court directed that the matter should be heard on the 29th September 2022 at 11:00 am. The court further directed the second respondent to appear in court on the 29th September 2022.

[3] On the 29th September 2022 at around 11:00 am the matter proceeded, and the second respondent was personally before court. Adv. Letuka appeared for the 2nd and 3rd respondents as such the second respondent was excused.

[4] In a nutshell the first applicant's case is that on the 2nd September 2022, he was officially nominated and presented to the 1st respondent as the nominated candidate to represent the 2nd applicant in the elections to be held on the 07th October 2022 at Mosalemane Constituency in Quthing district. On the 6th September 2022, first applicant was advised by the 1st respondent, that there was an objection to his nomination, as a result of which his nomination had been rejected. On the 7th September 2022, first applicant instituted proceedings before the High Court challenging the rejection of his nomination by the 3rd respondent. The High Court dismissed the first applicant's application. On the

23rd September 2022, first applicant noted an appeal from the judgment of the High Court, to the Court of Appeal designated as **C OF A (CIV) 61/2022**.

[5] First applicant stated that the Court of Appeal is yet to set a date of hearing of the matter. However, in terms of the *National Assembly Electoral Act, 2011*, section 41 (6) thereof, states that if the candidate dies before voting begins, or no candidate is nominated for the elections the returning officer shall immediately declare that the elections have failed. That IEC should therefore act in terms of the law and declare the said elections as having failed, and fresh elections be called.

[6] First applicant stated further that he has prospects of success in the appeal, pending before the Court of Appeal. First applicant submitted that the 3rd respondent conducted its own investigations, and thereafter made a determination, resulting from its own investigations. In doing so, the 3rd respondent became a judge in its own cause in contravention of the *nemo iudex in causa sua* principle. He pleaded further that he was not afforded a hearing by the 3rd respondent, before the decision to reject his nomination was made.

[7] The Second respondent's case is that, *section 42 of the Act* provides for the objections to nomination of candidate for elections in constituency. Second respondent pleaded that, *Section 42. (1)* Provides that an elector or political party may lodge an objection in respect of any name that appears on the list contemplated in *section 41. Sub-section 3* provides that within 5 days of the lodging of the objection, the commission shall consider the objection, make a decision on it and inform the objector and the person, against whom the objection is directed, of its decision in writing. *Sub-section 4* provides that a person who is aggrieved by the decision of the commission may appeal against the decision to the High Court.

[8] Second respondent submitted further that, in terms of *Rule 13* of the *Court of Appeal Rules, 2006*, the first applicant ought to have applied to the Judge of the High Court, whose decision was appealed from, to seek stay of the execution of the judgment. The first applicant attempted to obtain certain reliefs disguised as interdict, while in actual effect was the stay of the execution of the judgment in *CIV/ANP/0286/2022*. This is evidenced by the fact that in the founding affidavit, the first applicant made detailed submissions about his prospects in the appeal at the Court of Appeal.

[9] Second respondent went further to state that, section 44 of the *National Assembly Act, 2011* provides for what happens when constituency elections fail. *Section 44. (1)* of the *National Assembly Electoral Act, 2011* provides only two circumstances under which the elections shall be declared as failed. The first situation is where a candidate nominated for elections under *section 41 (6) of the Act*, dies before voting begins. The second situation is where there is no candidate nominated for elections.

Discussion.

[10] It is a matter of common cause that the first applicant's nomination for the elections was rejected by the 3rd respondent, after an objection was made. It is not in dispute that the first applicant instituted proceedings in the High Court to challenge the rejection of his nomination, presumably as provided for by the *National Assembly Electoral Act, 2011*.

[11] Section 42 of the Act provides for the objections to nomination of candidate for elections in constituency. *Section 42. (1)* Provides that an elector or political party may lodge an objection in respect of any name that appears on the list contemplated in *section 41*. *Sub-section 3* provides that within 5 days of the lodging of the objection, the commission shall consider the objection, make

a decision on it and inform the objector and the person, against whom the objection is directed, of its decision in writing. Sub-section 4 provides that a person who is aggrieved by the decision of the commission may appeal against the decision to the High Court. This court believes that the first applicant approached this court in the first instance, on the basis of the provisions of section 42 of the Act. Be that as it may, the first applicant's application was dismissed by the High Court. Because of that outcome, the first applicant then noted an appeal from the decision of the High Court to the Court of Appeal.

[12] It is trite that there is a procedure to be followed once a party has noted an appeal from the judgment of the High Court, to the Court of Appeal. *The Court of Appeal Rules, 2006* at section 13 provides for the effect of noting an appeal.

[13] Section 13. (1) of the *Court of Appeal Rules* provides that subject to these Rules, the noting of an appeal does not operate as a stay of execution of the judgment appealed from. (2) The appellant may, at any time after he has noted an appeal, apply to the Judge of the High Court whose decision is appealed from or, if he is not available, to any other Judge of the High Court, for leave to stay execution.

[14] At this juncture, I would like to make a special reference to prayer 2.2 as appears in the notice of motion. It reads thus;

“That pending final determination of the proceedings herein and the appeal in **C OF A (CIV) 61 OF 2022**, that the 1st and 2nd respondents be interdicted and restrained from holding elections scheduled for the Mosalemane Constituency on the 30th September 2022 and 07th October 2022.”

[15] From the reading of the above prayer, the view of this court is that the first applicant sought this court to stay the execution of the judgment in **CIV/APN/0286/2022**, pending the final determination of the appeal in the Court of Appeal.

[16] This court further wants to make special reference to prayer 3 of the notice of motion. It reads thus;

“That the decision of the respondents to continue with the elections scheduled for both the 30th September 2022 and the 7th October 2022, despite the pending appeal in **C OF A (CIV) 61/2022**, be declared *null and void*.”

It is a considered view of the court that the first applicant sought this court to declare that proceeding with the elections, while the appeal was pending before the Court of Appeal was null and void. Effectively, the first applicant prayed this court to postpone the holding of the elections in the Mosalemane Constituency, pending the final determination of the appeal.

[17] *Section 131 (a) of the Constitution of Lesotho* provides that the **Chief Justice** may make rules for regulating the practice and procedure of the High court and the President may make rules for regulating the practice and procedure of the Court of Appeal in relation to appeals to the Court (including the practice and procedure of any court from which such appeals are brought) whether before or after final judgment in the Court of Appeal.

[18] Section 19 (1) of the Constitution of Lesotho, provides that there shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings.

[19] In the case of *Leteka v. Leteka*¹, Scott J.A pointed out in *Kali v Mahasele*² at para 9:

“The High Court of Lesotho has unlimited original jurisdiction. (See *section 119 (1) of the Constitution*). As such, it has inherent jurisdiction to regulate its procedures which would include the giving of directions for the procurement of evidence.”

[20] The court in the *Leteka case (supra)* continued to say at page 7, para 15:

“It is clear from the foregoing remarks that the High Court has broad common law powers to regulate its own procedure, both within the Rules and within the common law, taking into account the interests of justice. The rules of procedure are devised for the purpose of administering justice and not for hampering it; where Rules are deficient; the Judge would go as far as he/she can in granting orders, which would help to further the administration of justice. If there is a construction of the Rules which would assist in this respect, the Judge would be disposed to adopt it. The variety of its inherent power has to do purely with the conduct of litigation, with procedure- not with substantive law.”

[21] In terms of *Rule 13 of the Court of Appeal Rules, 2006*, the first applicant ought to have applied to the Judge of the High Court, whose decision was appealed from, to seek stay of the execution of the judgment. The first applicant attempted to obtain certain reliefs disguised as interdict, while in actual effect was the stay of the execution of the judgment in *CIV/ANP/0286/2022*. This is evidenced by the fact that in the founding affidavit, the first applicant made detailed submissions about his prospects in the appeal at the Court of Appeal. It

¹ C OF A (CIV) 48/19 LSCA 19 (29 MAY 2022)

² C OF A (CIV) 19/2011

should be stated that, one of the requisites in the application for stay of execution, is to show that there are prospects of success in the appeal. It is for these reasons that the court finds that this application was misconceived and has no merit.

[22] First applicant further sought the court to direct the first respondent to be directed to declare the elections scheduled for the 30th September 2022 and 07th October 200 as failed elections. The basis for this is that first applicant submitted that *section 41(6) of the National Assembly Electoral Act, 2011*, provides that if a candidate dies before voting begins, or no candidate is nominated for the elections, the returning officer shall immediately declare that the elections have failed.

[23] Section 44 of the *National Assembly Act, 2011* provides for what happens when constituency elections fail. *Section 44. (1)* Provides thus:

“If a candidate nominated for elections in terms of *section 41 (6)* dies before voting begins or no candidate is nominated for elections, the returning officer shall immediately-

- (a) Declare in the prescribed form that the elections have failed; and
- (b) Forward the declaration to the Director.

1) When the Director receives a declaration referred to in *subsection (1)*, the following applies-

- (a) The Director shall cancel the elections notice in so far as it relates to that constituency;
- (b) the King shall proclaim a date for fresh elections in that constituency in terms of *section 38*; and

(c) the Director may use the electors' register that was prepared for the failed elections for the fresh elections.

- 2) If the elections fail because of the death of a candidate, the other candidates nominated under *section 41 (6)* are deemed to be nominated candidates for the fresh elections unless they withdraw.
- 3) Notwithstanding failure of elections due to death of a candidate, voting shall proceed in respect of proportional representation elections.
- 4) The Director shall, using the special ballot paper, make arrangements, for voting to take place in the constituency concerned on the elections day prescribed for the purpose of voting during proportional representation elections.

[24] *Section 44. (1)* of the *National Assembly Electoral Act, 2011* provides only two circumstances under which the elections shall be declared as failed. The first situation is where a candidate nominated for elections under *section 41 (6) of the Act*, dies before voting begins. The second situation is where there is no candidate nominated for elections.

[25] The first applicant pleaded that the first respondent's decision to reject his nomination, and to proceed with the elections, while the question of his nomination is pending before the Court of Appeal, justifies the declaration that the elections have failed in the Mosalemane Constituency, therefore fresh elections should be called.

[26] This court holds a strong view that the first applicant's case is misconceived and without merit, because the first applicant has not satisfied the

requirements of *section 44. (1) of the National Assembly Electoral Act, 2011*, as the first applicant does not say that a candidate nominated for elections has died before voting could begin, or that no candidate has been nominated for elections. All that the first applicant is saying is simply that, his nomination as the candidate for the elections has been rejected; therefore, the elections should be declared as failed in the Mosalemane Constituency.

[27] The court concludes that disqualification or the rejection of the first applicant as the candidate nominated for the elections is not one of the circumstances envisaged in *section 44. (1) of the Act*, in terms of which, the elections can be declared as failed. The court further concludes that the only remedy available to the first applicant was the one provided for in *section 42. (4) of the Act*. Indeed, the first applicant exercised his right as contemplated in *section 42. (4) of the Act*. Be that as it may, the fact that the first applicant has noted an appeal from the judgment of the High Court, does not per se justify declaration that the elections for Mosalemane Constituency have failed. This is so because *section 44. (1)* does not contemplate, a situation whereby a candidate nominated for the election, has his/her nomination rejected by the Commission.

[28] The court finds that in terms of the Act, the only remedy open to the first applicant, if he is dissatisfied with the decision of the commission, regarding the objection to his nomination is provided under *section 42. (4) of the Act*. *Section 42. (4)* provides that a person who is aggrieved by the decision of the Commission may appeal against the decision to the High Court. The Act does not therefore provide that the elections may be declared as failed, when there is a pending appeal before the Court of Appeal. The procedure set out in the Court of Appeal Rules, 2006 is very clear, as to what should happen once there is an appeal from the judgment of the High Court, to the Court of Appeal. It is for

this reason that this court concludes that the first applicant's case is misconceived and without merit.

[29] Lastly, the first applicant sought that the second applicant should be allowed to present a new name of a candidate who would contest for elections on behalf of the second applicant in the Mosalemane Constituency. This court is of the view that, it would lead to chaos if this court was to grant the second applicant this prayer, while the appeal of the first applicant was pending in the Court of Appeal. The court further holds a strong view, that *National Assembly Electoral Act*, does not make a provision for the alternative candidate where there has been a rejection of the nominated candidate. If this court was to grant the first applicant this relief, that would result in an untenable situation, as the Act does not provide for that.

The court makes the following order.

1. The application is dismissed with costs.

T.J. MOKOKO
JUDGE

APPEARANCE:

FOR 1ST APPLICANT:

ADV. T. LESUPI

FOR 2ND APPLICANT:

ADV. THOAHLANE

1ST, 2ND & 3RD RESPONDENTS:

ADV. K. W. LETUKA