

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/0257/2022

In the matter between:

MOLOI RALENTSOE	1ST APPLICANT
KOBELI RETHABILE LETLAILANA	2ND APPLICANT
MATLOTLO RAMABOLI	3RD APPLICANT
TSEPO JOSEPH LETHOBANE	4TH APPLICANT
LEJONE PUSELETSO	5TH APPLICANT

And

MOTJOKA TOLOANE	1ST RESPONDENT
LEBOHANG LETSOELA	2ND RESPONDENT
TUMO MOLEFE	3RD RESPONDENT
SHERIFF MOTHOPENG	4TH RESPONDENT
POKELLO MAHLOMOLA	5TH RESPONDENT
THE EXECUTIVE COMMITTEE FOR REVOLUTION FOR PROSPERITY	6TH RESPONDENT
REVOLUTION FOR PROSPERITY	7TH RESPONDENT
INDEPENDENT ELECTORAL COMMISSION	8TH RESPONDENT

JUDGMENT

Neutral citation: Moloi Ralentsoe & 4 Ors v Motjoka Toloane & 7 Ors LSHC
215 CIV (01 September 2022).

CORAM: T.J. MOKOKO J
HEARD: 31ST AUGUST 2022
DELIVERED: 1ST SEPTEMBER 2022

SUMMARY

Voluntary association – Political party – Conflict within the party – Executive Committee of the party declared respondents victorious over applicants after holding interviews – Such decision invalid. Membership of applicants questioned – Applicants held various portfolios within Constituencies Committees of the party – Took part in primary elections –Article 9 of the Constitution of the Party – applicants enjoyed benefits as members – applicants found to be full members of the party.

ANNOTATIONS

Cases

1. *Attorney General v Tekateka and Others C of A (civ) NO.7 of 2001*
2. *Basotho National Party and Leseteli Malefane v Independent Electoral Commission and Thabiso Melato CIV/APN/246/98*
3. *Basotuland Congress Party and Others v Director of Elections and Others C of A (CIV) No. 14 of 1998*
4. *Executive Committee of the Lesotho National Olympic Committee and Others v Morolong LAC (2000- 2004) 449, 557*
5. *Hassan Hilale Ajinga v United Democratic Front Civil Cause Number 39 Of 2007*
6. *Koro Koro Constituency Committee and Others v Executive Working Committee - ABC C OF A (CIV) NO. 10 OF 2019*
7. *Lelala v Basotho National Party and Others CIV/APN/156/98*
8. *Lesao Lehohla v National Executive Committee – LCD CIV/APN/160/98*
9. *M.K Radebby v. National Committee of the Basutoland Congress Party- CIV/APN/159/98*
10. *Napier v Barkhuizen 2006 (4) SA 1 (SCA)*
11. *Pela – Tsoeu No. 10 Constituency Committee of Basotholand Congress Party v Basotho Congress Party and Executive Committee of the Basotho Congress Party CIV/APN/360/08*
12. *Tsolo Lelala and Leseteli Malefane CIV/APN/156/99*
13. *Wallace Chiume and Others v Aford, Chakufwa Chihana and Another Civil Case NO. 108 of 2005*

Statutes

- 1. Constitution of Lesotho 1993*
- 2. Legal Notice NO. 56 of 2022 (Elections Time Table)*
- 3. National Assembly Election (NO. 1) Amendment Act*

Introduction:

[1] All five applicants approached this court on urgent basis, for an order in the following terms;

1. That the ordinary Rules of this Honourable Court pertaining to normal periods and modes of service be dispensed with on account of urgency of this matter.
2. That a *Rule Nisi* be issued calling upon the respondents to show cause if any, why the following prayers cannot be made final to wit:
 - (a) An order declaring that the Applicants' constitutional right to participate in the affairs of the party (RFP) and right to participate in the national elections on behalf of the party in terms of **Article 9 of RFP Constitution** have been violated by the party.
 - (b) An order for setting aside the decision of the party (RFP) to substitute the Applicants with the 1st to 5th respondents in their respective constituencies.
 - (c) An order directing the party (RFP) to submit the names of the Applicants to the 8th respondent in line with the **Legal Notice NO. 56 of 2022 (Elections Time Table) Item No. 13** thereof which is attached to the Founding Affidavit as **Annexure "MR 1"**

(d) Costs of suit against 6th and 7th respondents on attorney and client scale and against any other respondents that may oppose this application.

(e) Granting applicants such further and/or alternative relief.

Background:

[2] On the 25th August 2022 both applicants' Counsel and the respondents 'Counsel, except for the 8th respondent appeared before this Court, as the respondents had already been served with the papers on the 23rd August 2022. Both parties were given timeframes within which to file their pleadings and the heads of arguments respectively. Due to the urgency of the matter, it was set down for hearing on the 31st August 2022. The matter was heard on the date of hearing and it was accordingly postponed to the 1st September 2022, for the delivery of the judgment. Be that as it may, the court on the 1st September 2022, delivered ex tempore order, due to the urgency of the matter, as the court had been informed that in terms of 8th respondent's timetable, parties are required to submit the names of the nominated candidates on the 2nd September 2022. This court was also seized with two other matters of the same nature, which ought to be heard on the same day- the 1st September 2022. However, immediately after the delivery of the ex tempore order, this court was informed that the respondents had noted an appeal against the judgment of this court in this matter, and it became apparent that the appeal was going to be heard on urgent basis as well. This fact therefore made it extremely necessary for this court to deliver the reserved judgment immediately, so that when the appeal was heard in the Court of Appeal the judgment of this court was available. This court will not

therefore give much details due to time constraints but will try by all means possible to give all the necessary details.

Applicants' Case:

[3] It is applicants' case that they are all members of the newly formed party (RFP). Applicants as members of this party held various portfolios at their various constituencies and contributed towards growing the party in different ways. It is a matter of common cause that applicants took part in the party elections for constituency representative. It is worth mentioning that the 1st applicant garnered 121 votes, while the 1st respondent garnered 63 votes. The 2nd applicant in his Constituency of Lithoteng No.38 garnered 28 votes, while the 2nd respondent garnered 12 votes. The 3rd applicant candidate for Mechechane No.1 garnered 104 votes, while the 3rd respondent garnered 27 votes. The 4th respondent, candidate for Thaba Putsoa Constituency No. 44 garnered 122 votes, while the 4th respondent garnered 48 votes. Lastly the 5th respondent, candidate for Thaba Moea No. 73 garnered 78 votes, while the 5th respondent garnered 54 votes.

[4] Following the primary elections, applicants were called for "interviews" at the Party Offices. Applicants stated that none of the questions that were asked questioned their capacity to participate in the said elections. Applicants to date of the institution of these proceedings, have not received any correspondence from the party challenging their capacity, and that the results of the so called interview were never communicated to them. However, on the 21st July 2022, the 1st to the 5th respondents were declared victorious over them. Applicants' complaint to the party was that the executive committee or any structure of the party does not have power to change results or substitute candidates. That the preamble of the RFP Constitution is founded on core-values - ***Botho, Democracy, Laws of***

Lesotho and International Law. That ***Article 9 of the Constitution*** of the party deals with Benefits of members, which says that members have a right to participate in the affairs of the party, locally, regionally and internationally. Members have a right to participate in the local and national elections on behalf of the party. Applicants' case was further that the party constitution embodies the right to participate in the elections in accordance with democratic principles, which are echoed in the Lesotho Constitution 1993. That section 20 of the Constitution provides in essence for a representative democracy, which is the type of democracy founded on the principle of elected officials representing a group of people. That in a representative democracy, the power is in the hands of the representatives who are elected by the people and not the political parties.

Respondents' Case:

[5] The executive committee of the party pleaded that the party had made resolutions in order to achieve its purpose and founding principles. That the party requested its majority of constituencies in Lesotho to provide four names of prospective candidates, and the leadership of the party, following a rigorous interview process, was to approve the final candidate on a merit based selection criteria. That the ultimate resolution arrived at was that the leadership of RFP be entrusted to make a final determination as to who are the individuals who shall stand as candidates for RFP based on merit and other factors alluded to. That the submission of four names and those carrying higher number of nominations were not winning candidates, as they were yet to be interviewed and vetted until the final selection was complete. That this was in line with the founding principles of RFP.

Matters of Common Cause:

[6] The following are matters of common cause;

- (a) That applicants won the primary elections with the highest number of votes in their respective constituencies.
- (b) Despite the fact that applicants had garnered the highest number of votes in the primary elections, in their respective constituencies, the executive committee of the RFP, held what was termed “interviews”, and first to fifth respondents were declared as the candidates selected as winners to represent their constituencies in the coming general national elections.
- (c) That applicants’ grievances were not resolved by the party.

Issues for Determination:

[7] The issue for determination by this court is whether the decision by PFP to select or choose the first to the 5th respondents over the applicants is ultra vires the constitution of RFP. The other issue is whether the applicants are not members of the 7th respondent

The Applicable Legal Principles:

[8] Before dealing with the merits of this case, it is necessary to begin by discussing the legal principles applicable to the resolution of the disputes within the political parties. I would like to start with the *Constitution of Lesotho 1993*, as it plays a critical role in upholding the democratic principles and practices. It should be remembered that political parties play a big role in the modern democracies.

[9] *Section 1(1) of the Constitution of Lesotho* provides that, Lesotho shall be a sovereign democratic Kingdom.

[10] This court would like to refer to the words of **Dr. K.E Mosito P.** in the case of *Koro Koro Constituency Committee and Others v Executive Working Committee*¹, when dealing with the role of political parties in the development of constitutional democracy. The Court of Appeal had this to say:

“[37] The role of political parties in the development of constitutional democracy is of vital importance. A political party is an organisation through which the electorate is involved in both the exercise and transfer of power. It is the presence of two or more political parties within a democratic structure that separates constitutional democracy from the pseudo-democratic structures found in single-party totalitarian states. Political parties in a constitutional democracy are independent of the state. They are concerned with the integration and representation of many interests and beliefs, and crucially, they are open to wide public participation. There is competition between political parties to achieve government. Even if a political party is too weak to form a government, it has the ability to influence government policies and legislation. Political parties act as a means of representing all interests in the membership of the constitutional democracy and at the same time, they provide an efficient and peaceful means for the transfer of power in the state. A ... modern democracy is unthinkable save in terms of the parties... [Political] parties are not therefore merely appendages of modern government; they are in the centre of it and play a determinative and creative role in it. (*SEE Schattschneider Party Government*², cited in *WP Cross and RS Katz* “The challenges of intra- party democracy” in

¹ ABC C OF A (CIV) NO. 10 OF 2019

² (1942) 1

WP Cross and RS Katz (eds) The challenges of *Intra-Party Democracy*³).

[11] In the case of *Pela – Tsoeu No. 10 Constituency Committee of Basotholand Congress Party v Basotho Congress Party and Executive Committee of the Basotho Congress Party*⁴, **Peete J** stated that political parties duly registered are important elements in the democratic governance of Lesotho. For example, a leader of a political party that commands a majority in the National Assembly after general elections can be invited to form a government of His Majesty. Under the new Mixed Members Proportional Model operating in Lesotho, political parties that have been registered under law and have contested general elections are entitled to be allocated some seat in the National Assembly. (*Section 92A of the National Assembly Election (NO. 1) Amendment Act*⁵).

[12] **Dr. K. E Mosito** in the *Koro koro Constituency committee* case (*supra*) at *page 19* stated that while *Section 1 (1) of the Constitution* supports the system of multi-party democracy, there are no explicit rules in the constitution that regulate how political parties function, whether their internal system should be democratic, how they should appoint leaders and office bearers, how they should manage their relationship with their members, nor does the Constitution require auditing or disclosure of their finances. What explains this relative “absence” of regulation of political parties in democratic constitutions is anyone’s guess.

[13] *Section 2 of the Constitution of Lesotho* provides that, this Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

³ (2013) 2

⁴ CIV/APN/360/08

⁵ No. 16 of 2001

In the same case the court interpreted **Section 2 of the Constitution** at page 20 of the judgment to mean:

“[40] This section states in peremptory terms that any law inconsistent with it is invalid and, importantly, that the obligations imposed on it must be fulfilled. Our courts are the foremost and watchful protectors of our Constitution, its values and mores. They have an obligation to respect, protect, promote and fulfil its obligations. As a result, no court may countenance or enforce a contractual clause what is incongruent with the Constitution as it will be acting in violation of the Constitution- the supreme law.”

[14] **Section 118 of the Constitution** provides for the Judiciary. It provides that the judicial power shall be vested in the courts of Lesotho, which shall consist of- (a) a Court of Appeal; (b) a High Court; (c) Subordinate Courts and Courts-martial; (d) such tribunals exercising function as may be established by Parliament. It goes further to provide that the courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law. The Court of Appeal in the **Koro Koro case** (*supra*) at page 20 at Para [41] interpreted the provisions of **Section 118 of the Constitution** to mean that, the core mandate of the Courts is to interpret, protect and enforce the Constitution and the rights and freedoms provided thereunder.

[15] **Chapter II of the Constitution** provides for the protection of fundamental human rights and freedoms. Amongst these fundamental human rights and freedom, there are rights such as the right to a fair trial; freedom

of association; the right to equality before the law and the equal protection of the law; and the right to participate in government.

[16] The Court of Appeal when dealing with the freedom of association, interpreted freedom of association in the ***Koro Koro case*** (*supra*) at *page 21* at Para [43] to mean that every person is entitled to, and is not hindered in his enjoyment of freedom to associate freely with other persons for political purposes. Thus, the freedom to belong to political parties as its constitutional basis in this provision.

[17] In the right to participate in government, ***Section 20 (1) of the Constitution*** provides that every citizen of Lesotho shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote or to stand for elections at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot; to have access, on general terms of equality, to the public service.

[18] **Dr. K.E Mosito P.** when interpreting the provisions of section 20 of the Constitution, had this to say in the case of ***Koro Koro case*** (*supra*) at *page 21* at *Para [44]*.

“It is clear therefore that ***Section 20 of the Constitution*** provides in essence, for a representative democracy, which is a type of democracy founded on the principle of elected officials representing a group of people. In a representative democracy, the power is in the hands of the representatives who are elected by the people. All political parties participating in Parliament can be taken to subscribe to constitutional principles.”

[19] The Court continued at *page 22* to say:

“[45] I am of the view that it was in recognition of this legal imperative that **Guni J** held in the *Lelala v Basotho National Party and Others*⁶ at *Page 4*, that ‘ I have therefore found it expedient to allow the people of HA MAAMA Constituency who are final and ultimate authority as regards the determination of who should represent them to exercise their right which enables them to participate in government. *The Supreme Law of the Land (1993 Constitution of Lesotho)* so demands by enshrining every citizen’s right to vote his or her representative to parliament”.

[20] At section 19 of the Constitution, it is provided that every person shall be entitled to equality before the law and to the equal protection of the law. In interpreting this section, **Dr. K.E Mosito P.** in the *Koro Koro Case* at *page 22* at *Para [47]* said the following:

“In my opinion therefore, every person’s freedom of association and the right to participate in government must be equally protected.”

[21] This court must also consider the issue surrounding the handling of disputes in political parties. On this issue, **Adv. Tsa’beha**, counsel for applicants referred this court to the case of *Hassan Hilale Ajinga v United Democratic Front*⁷ (unreported) in which **Chikopa J** set out the law on how disputes in the context of political parties should be handled. The members conduct, however, is regulated by the clubs’/ constitution which acts like some contract between the members and the club and between the members themselves. The clubs (in this case the parties’ activities are regulated by the clubs rules/constitution. In the case of party primaries, they must be run in

⁶ CIV/APN/156/98

⁷ CC No. 39 Of 2007

accordance with the party's rules/constitution. If there are disputes, they should be resolved in accordance with the party's rules/constitution.

[22] The Court of Appeal in the ***Koro Koro*** case, aligned itself with what was said in the case of *Ajinga v. United Democratic Front*, referred to above. The court in that case stated as follows; '[i]n the case of ***Wallace Chiume and Others v Aford, Chakufwa Chihana and Another***⁸ (Mzuzu Registry, unreported), we, borrowing a leaf from the Constitutional Court of South Africa and the House of Lords in England, opined that judicial officers are not best placed to decide on matters inter alia of politics. The considerations operating in politics are different to those obtaining in the courts. The courts are preoccupied with the law, facts, evidence and ensuring that their decisions are in accordance with legal, factual and evidential merit. Politics on the other hand deals primarily in numbers with emotions and egos taking a not too distant second. In politics he who has the numbers carries the day. Merit in whatever respect is not a primary consideration. We talk of the foregoing not because we have some particular distaste for politics but to drive home our view that as much as possible the courts should be slow, very slow in our humble view, to adjudicate on matters that, though dressed up as legal, are really political disputes. In fact, our position is that the more political a dispute is the more amenable it should be to a political solution. The less political it is or becomes, the more amenable it is or becomes to juridical intervention.

[23] In a nutshell it is the applicants' case that RFP's Constitution is founded on the principles of democracy. That the preamble of the 7th respondent (RFP) is to defend the spirit of Botho/Bosotho in full recognition of the role of Lesotho in global sphere of democratic politics; the need to preserve the

⁸ CC No. 108 of 2005

independence, territorial integrity, peace and self-sufficiency of the Kingdom of Lesotho requires participation in governance in line with the globally accepted democratic political practices; the party aspires to govern the Kingdom of Lesotho in terms of democratic practices, the laws of Lesotho and the international treaties.

[24] Applicants submitted that **Article 9 of the RFP Constitution** deals with Benefits of Members- Members have a right to participate in the affairs of the party, locally, regionally and internationally. Members have the right to participate in the local and national elections on behalf of the party. It is submitted by the applicants that the status of the party is that of a voluntary association, as such the constitution of the party as the contract amongst the members, and the party has the right to regulate its own internal affairs. That on the basis of the preamble of the party, the party has violated in more than one respect its own constitution and its decision is therefore a nullity in law.

[25] Having made that foundation, the applicants state that on or around the 10th July 2022, the primary elections were held in the various constituencies of the party, in respect of which all the applicants took part as the candidates. It is a matter of common cause that all the applicants emerged out of the primary elections as the winners as they had each garnered the highest number of votes in their respective constituencies. I need not put the numbers each applicant obtained here, as the figure is not material for the purposes of the applicants' case. What is of relevance is that applicants won the primary elections in their respective constituencies.

[26] Following the elections of the 10th July 2022, applicants together with their competitors at the primary elections were called for what was termed "interviews" at the party's offices. First applicant states that none of the

questions asked at the interview questioned his capacity to participate in the elections. That up to the time applicants approached this court, they had not received any correspondence from the party challenging their capacity or membership in any manner whatsoever. The results of the interview were never communicated to them. On the 21st July 2022, the first to fifth respondents were declared victorious over the applicants, as the candidates who will be representing the party in their respective constituencies in the coming general elections.

[27] Applicants' complaint is that the executive committee of the party or any structure of the party does not have power to change the election results or substitute candidates.

[28] On the other hand the respondents pleaded that applicants having dismally failed to allege and prove their membership are non-suited in this matter. In support of this fact the Court was referred to the case of the National *Executive Committee of the Lesotho National Olympic Committee and Others v Morolong*⁹. The Court was further referred to the case of *Attorney General v Tekateka and Others*¹⁰, where the court stated that it is trite that an applicant must make out his or her case in the founding affidavit and that a court will not allow an applicant to make out a different case in reply or still less, in argument. Respondents went further to state that applicants even in reply failed to produce anything to prove their full membership to RFP.

[29] The respondents on the complaint that the first to fifth respondents were declared victorious over the applicants, stated that due to the strict timelines that the party found itself in, the party had to make many resolutions in order

⁹ LAC (2000- 2004) 449, 557

¹⁰ C of A (civ) NO.7 of 2001

to achieve its purpose and founding principles. That the party requested its majority of constituencies in Lesotho to provide four names of prospective candidates, and that the leadership of the party, following a rigorous interview process, was to approve the final candidate on a merit-based selection criteria. Lastly that it follows that as at the stage of submission of four names those higher numbers of nominations were not winning candidates. They were yet to be interviewed and be vetted until the final selection is complete. This is in line with the founding principles of RFP.

[30] On the issue that applicants are not members of the seventh respondent, applicants reacted to that allegation by stating that as the starting point, *Article 9 of the Constitution* of the party provides for benefits to members. It provides that members shall have the right to participate in the affairs of the party- locally, regionally and internationally. Members shall have the right to participate in the local and national elections on behalf of the party. Applicants submitted that the right to participate in the national election starts with internal primary elections. That it is a matter of common cause that the applicants participated in the primary elections, and if they were not members they would not have participated in these elections. Further that the applicants have been in the various leadership portfolios of the party in Constituency committees.

[31] On this issue the court holds a strong view that the respondents argument that the applicants have not proved that they are members of the 7th respondent is without merit, because the Court agrees with **Adv. Tsabeha's** submission that *Article 9 of the Party's Constitution*, clearly provides that members shall have the right to participate in the affairs of the party- locally, regional and internationally. It provides further that members have the right to participate in the local and national elections on behalf of the party. This

court is cognisant for example of the averments of the 1st applicant¹¹. He says the following:

“I did apply for membership of the party by filling the relevant membership form and was accordingly registered as such by the party. While I cannot recall the exact date, I took membership, however, I went to take part in the Makhaleng NO. 50 Constituency Committee Elections, and I was duly elected as the Chairperson. These elections were held on the 16th April 2022. The first respondent had also taken part in those elections for the same portfolio and lost to me on that occasion as well.”

[32] Having looked at the provisions of **Article 9 of the Constitution** of the 7th respondent, one of the benefits of being a member is to participate in the affairs of the party locally. The court has a considered view that if the first applicant for instance, was not a member of the party there was no way he could have participated in the affairs of the party; namely taking part as the candidate in the contestation for the portfolio of chairperson if he was not a member. In the same token he could not have taken part in the primary elections as a candidate in the primary elections. It should be emphasised that first applicant participated in those primary elections to enjoy one of the benefits of being a member- to participate in the national elections on behalf of the party.

[33] 2nd applicant, 3rd applicant, and 5th applicant held different portfolios in their respective constituency committees. The Court holds a strong view that if they were not members of the 7th respondent, they would not have participated in the affairs of the party, because it is only members of the party who enjoy such benefits. The 4th applicant stated in the supporting affidavit that as the member of the party he worked hard to recruit

¹¹ Paragraph 11. of the Founding Affidavit

membership for the party in all 33 branches within the constituency. It would seem that by so doing, the fourth applicant was participating in the affairs of the party as a member of the 7th respondent.

[34] On top of all the differing contributions and participation of all the applicants in the affairs of the party, all the applicants enjoyed their benefit of being members by taking part in the primary elections that will qualify them to represent the party in the national elections. It is on the basis of these reasons that the court holds that, the respondents' argument that the applicants have not proved their membership is without merit and is misconceived.

[35] Moving fast forward to the issue as to whether the 7th respondent (RFP) had authority in terms of the party constitution to substitute the names of the applicants with those of the first to the fifth respondents as victorious over applicants.

[36] Counsel for applicants referred this court to the case of *Koro Koro*, where it is stated that the role of political parties in the development of constitutional democracy is of vital importance. A political party is an organisation through which the electorate is involved in both the exercise and transfer of power. Applicants questioned the legality of the 7th respondent's decision to drop the names of the applicants in favour of the 1st to 5th respondents, on two fronts. Firstly, that it is not clear who made the decision that who won primaries would be subjected to post facto scrutiny and or vetting, such that the final decision will lie somewhere within the party structure and not the per the outcome of the elections. Secondly the constitutionality of that decision as it is ultra vires the constitution of the 7th respondent.

[37] The 7th respondent's submission on the question as to who made the decision that those who won the primaries would be subjected to the vetting and scrutiny, so that someone within the party structures would be make the final decision, was that such a decision was made by the executive committee based on merit. During the hearing of this matter, **Adv. Molati**-counsel for the 1st to 7th respondent, was asked by the Court to indicate which provisions of the Constitution of the 7th respondent, give the executive committee of the party, powers to have acted in the manner it did. **Adv. Molati's** response was that **Article 20**. (b) and (c) of the Constitution gives the executive committee such powers.

[38] **Article 20**. Provides for the powers of the executive committee. It provides that, the powers of the executive committee shall be to;

(b) Make plans, programmes and procedures for the party.

(c) Oversee the implementation of the Party's decisions/policies.

[39] The court asked **Adv. Molati** whether the decisions and policies as regards this decision was available in the form of minutes or the documented policy of the 7th respondent. His reply was that there were no such minutes and that the decision to subject candidates to scrutiny and interviews was in the policy of the party. When asked by the court about the availability of the policy he was referring to. He said the policy could not be availed because it has not yet been adopted by the General Assembly. The court asked **Adv. Molati**, whether it was correct for the 7th respondent to apply the policy which has not been adopted by the 7th respondent – General Assembly. His answer was in the negative.

[40] The court having looked at the provisions of Article 20 of the 7th respondent's constitution does not find that the 7th respondent had power to substitute the names of the applicants with the 1st to the 5th respondent.

[41] This court has had an occasion to look at the case of *Basotho National Party and Leseteli Malefane v Independent Electoral Commission* and *Thabiso Melato*¹², where the court quoted with approval the words of **Guni J** in the dispute between *Tsolo Lelala and Leseteli Malefane*¹³ and had this to say:

“I have therefore found it expedient to allow the people of Ha Maama Constituency who are the final and ultimate authority as regards the determination of who should represent them to exercise their right...The *Supreme Law of the Land 1993 Constitution of Lesotho* so demands by enshrining every citizen's right to vote for his or her representative in Parliament.”

[42] In the case of *Tsolo Lelala v BNP*¹⁴ (*supra*), the dispute between the parties was that Tsolo Lelala was fighting the nomination of Leseteli Malefane as the BNP candidate in his place. It was in deciding this very issue that **Guni J** ordered that BNP members elect their own candidate, so that the BNP executive should not do it for them.

[43] What **Guni J** said in **CIV/APN/156/98** was reinforced by what **Peete AJ** (as he then was) said in the *M.K Radebby v. National Committee of the Basutoland Congress Party*¹⁵. In that case, the *Basutoland Congress Party*

¹² CIV/APN/246/98

¹³ CIV/APN/156/99

¹⁴ CIV/APN/156/99 (*supra*)

¹⁵ CIV/APN/159/98

Constitution gave the National Executive Committee the final say in the selection of candidates. **Peete AJ** said:

“The party constitution is supreme...supreme as it is, the constitution of a party is to be interpreted in a manner which is consistent with the provisions and principles of the Lesotho Constitution. Even if there was an inherent power” to save the party” this power cannot give the National Executive Committee power to assume the basic right to select a representative for a constituency.”

[44] **Ramodibedi J** in the case of *Lesao Lehohla v National Executive Committee – LCD*¹⁶ faced with a similar provision in a constitution said:

“There is no room for appointment or nomination in those circumstances as suggested by the respondents or at all.”

[45] In the case of *Basotho National Party and Leseteli Malefane v IEC and Thabiso Melato (supra)* at page 13 the court said:

“In terms of the constitution, parliamentary candidates at elections represent people of constituencies. They are nominated by the people who live in the constituencies. Political parties are mere national associations formed by people with the similar ideas, principles and political objectives. They were initially informal bodies as British history discloses. As time went on, they became highly organised political machines that dominate parliamentary government. The constitution of Lesotho has recognised political parties as a reality, but like British constitutional practice they have stuck to the principle that each constituency should not for one parliamentary representative. During this

¹⁶ CIV/APN/160/98

process, any person may stand if duly nominated. Political parties may field or endorse candidates, but they enjoy no special rights.”

[46] The Court of Appeal in the case of *Basotuland Congress Party and Others v Director of Elections and Others*¹⁷, stated that by the same token electors have a right to enforce their right to participate in government through properly nominated and elected members. For this reason, they can challenge anybody and any practice that impedes an election. The court went further to state that it is therefore wrong for any political party to treat an election as if it is for it alone or for political parties only.

[47] In the case of *Pela -Ts’oeu (Supra)* **Peete J** held the following to say:

“[9] It is my firmly held view that being the pillars of democratic governance the Constitution of political parties must essentially have democratic practices, processes and procedures that support a democratic culture – otherwise it would be difficult to expect a political party with undemocratic tendencies and practices, to practice democracy once it forms a government. I can only command thus far and avoid being unwillingly drawn into a bottomless political quagmire!

Conclusion:

[48] From the authorities referred to above, it is without any doubt that political parties have no say at all in the election or nomination of candidates to represent the party at the constituencies for the general elections. This is so because Chapter II of the Lesotho Constitution provides for the protection of fundamental human rights and freedoms. Furthermore, the Constitution provides that in the respect of right to participate in government, every citizen of Lesotho shall have a right to take part in the conduct of public

¹⁷ C of A (CIV) No. 14 of 1998

affairs, directly or through freely chosen representatives. This court holds a strong view that these rights cannot be attained, if the political parties were to select candidates to represent parties in the elections. This is so because the citizens' constitutional rights to freely choose their representatives would be taken away from them. This Court finds that the applicants argument that section 20 of the Constitution provides for a representative democracy, which is founded on the principle of elected officials representing a group of people cannot be faulted, because in a representative democracy, the power is in the hands of the representatives who are elected by the people and not the political parties. See *Basotho National Party and Leseteli Malefane v IEC and Thabiso Melato (supra)*, *Tsolo Lelala v BNP (supra)*, *M.K Radebby v National Committee of the Basotuland Congress Party (supra)*, *Lesao Lehohla v NEC- LCD (supra)*.

[49] On the issue of the constitutionality of the decision of the 7th respondent to select the candidate to represent the party in the coming national elections. The Court of Appeal in the *Koro Koro case* (supra) had this to say at page 41 at para [81]:

“ I also find myself in respectful agreement with **Cameron JA** in *Napier v Barkhuizen*¹⁸ at para 13, that, the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of ‘freedom of contract’, while seeking to permit individuals the dignity and autonomy of regulating their own lives. It is also to recognise that intruding on apparently voluntarily concluded arrangement is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.”

¹⁸ 2006 (4) SA 1 (SCA)

[50] The Court of Appeal continued at *page 42 at para [83]* to state that the doctrine of unconstitutionality is about how the court will decide a contract term being enforceable or not in case one party of the contract has more power than the other. This doctrine is well acknowledged in Common law. A strong case can be made out for the proposition that clauses in a contract that unreasonable, oppressive or unconscionable are in general inconsistent with the values of the open and democratic society that promotes human dignity, equality and freedom.

[51] In my view the assertion that the policy of the 7th respondent provides that the executive committee has power to select the best candidate based on merit, cannot pass the constitutional test, because that practice or principle is in stark violation of the ***Supreme Law of the Land- 1993 Constitution of Lesotho*** as that interferes with the citizens' right to vote for their representatives in parliament. The court holds that the citizens' right to vote their representatives to Parliament means that the final and ultimate authority lies with those who elect their representatives and not the party.

[52] It is a considered view of this court that if the executive committee of the 7th respondent was to be allowed to select its own candidates to represent the party in the coming elections, that would infringe the applicants' right to take part in the conduct of public affairs, through chosen representatives, as the first to the fifth respondents, would not have been freely chosen representatives.

[53] This court has found that the decision to subject the applicants to an interview while they had won the primary elections is found wanting because the Constitution of the 7th respondent does not have any provision to that effect. Even if the Constitution of the 7th respondent was to have a

provision to that effect, it would still not pass the constitutional test as more fully demonstrated by the authorities referred to above.

[54] it is the considered view of this court that the applicants are entitled to the equality before the law and their right to freedom of association must be given equal protection of the law.

Disposition;

The Court makes the following order;

1. It is declared that the applicant's constitutional right to participate in the affairs of the party (RFP) and the right to participate in the national elections on behalf of the party in terms of **Article 9 of the party Constitution** has been violated by the party.
2. The decision of the party (RFP) to substitute the applicants with the first to fifth respondents in their respective constituencies is set aside.
3. The 7th respondent (RFP) is directed to submit the names of applicants to the 8th respondent in line with the **Legal Notice No. 56 of 2022 item No. 13**.
4. Applicants are awarded costs on an ordinary scale.

T.J MOKOKO
JUDGE.

FOR THE APPLICANTS:

ADV. TSABEHA

FOR THE 1ST TO 7TH RESPONDENTS:

ADV. MOLATI