

IN THE HIGH COUR OF LESOTHO

HELD AT MASERU

CONSTITUTIONAL CASE NO. 0022/2022

In the matter between:

INDEPENDENT ELECTORAL COMMISSION	1ST APPLICANT
DIRECTOR OF ELECTIONS	2ND APPLICANT
BASOTHO NATIONAL PARTY	3RD APPLICANT
BASOTHO PATRIOTIC PARTY	4TH APPLICANT
TEFO MAPESELA	5TH APPLICANT

And

SPEAKER OF THE NATIONAL ASSEMBLY	1ST RESPONDENT
CLERK OF THE NATIONAL ASSEMBLY	2ND RESPONDENT
HIS MAJESTY KING LETSIE III	3RD RESPONDENT
DEMOCRATIC CONGRESS	4TH RESPONDENT
ALLIANCE FOR DEMOCRATS	5TH RESPONDENT
MORAPELI MOTOBOLI	6TH RESPONDENT
MALETSEMA LETSOEPA	7TH RESPONDENT
KATLEHO MOSOTHO	8TH RESPONDENT
LEBOHANG MOCHABA	9TH RESPONDENT

UNITED FOR CHANGE	10TH RESPONDENT
LESOTHO PEOPLE’S CONGRESS	11TH RESPONDENT
ATTORNEY GENERAL	12TH RESPONDENT
REVOLUTION FOR PROSPERITY	13TH RESPONDENT

Neutral Citation: Independent Electoral Commission and 4 others v Speaker of the National Assembly and 12 others [2022] LSHC 319 Const. (1st December 2022)

CORAM: M. MAHASE J
M. KOPO J
M. MAKHETHA J

HEARD: 16TH AND 17TH NOVEMBER 2022
DELIVERED: 01ST DECEMBER 2022

SUMMARY

Constitutional provisions for decision of questions as to membership of parliament- Procedure to be followed where allocation of proportional representation seats is in issue – Discussion on section 69 of the Constitution and its reference in the Electoral Act.

Annotations

Articles

Hoolo ‘Nyane. A critique of proceduralism in the adjudication of electoral disputes in Lesotho <https://www.eisa.org/pdf/JAE17.2Nyane.pdf>

Cases

Lesotho

Basotho National Party v The Principal Secretary Ministry of Law,
Parliamentary and Constitutional Affairs and 30 others CIV/APN/240/93
Attorney General v Matlakeng and Anor CIV/APN/63/89

South Africa

Olufsen V Klisser (1959) 3 SA 351

De Villiers v Louw (1930) AD 426

Statutes

The Constitution of Lesotho

Constitutional Litigation Rules of 2011

Elections Results Notice of 2022

National Assembly Electoral Act 2011(the Electoral Act)

Seventh Amendment to the Constitution Act, 2011

RULING

[A] INTRODUCTION

[1] On the 07th day of October, 2022, this country held the General Elections.

As is procedural, the Independent Electoral Commission (IEC), a body or institution entrusted with overseeing to the process of the General Elections, counted the votes and published the results of the Constituency Candidates Votes and the Party Votes. The IEC then proceeded to

calculate and eventually publicise the compensatory or proportional representation seats (PR seats). The publication was done in **Elections Results Notice of 2022¹**.

[2] On the 22nd day of October 2022, an urgent application filed on behalf of IEC and Director of Elections was moved in this court in its constitutional jurisdiction before Justice Ralebese for the following prayers;

1 *Dispensing with the rules as to form and service on account of urgency of this matter.*

2 *That the rule nisi be and is hereby issued returnable on the date and time to be determined by this honourable court calling upon the respondents to show cause, if any, why the following order shall not be made absolute:*

a) *An order interdicting the summoning of the Special Meeting of the National Assembly of the 11th Parliament of the Kingdom of Lesotho scheduled to meet on Tuesday 25th October, 2022, at 10:00 am at Parliament Buildings, pending the determination of this application.*

b) *An order interdicting the operationalisation of any convening the special meeting of the National Assembly of the 11th Parliament of the Kingdom of Lesotho pending the finalisation of this application.*

¹ Legal Notice No. 100 of 2022

- c) *An order reviewing, the correcting and setting aside Legal Notice No. 100 of, 2022, as irregular.*
- d) *An order reviewing, correcting and setting aside the allocation of compensatory seats made following the General Elections of the 7th October, 2022, published in Legal Notice No, 100 (Election Results Notice) of 2022 in so far as that allocation gave 4th Respondent 11 compensatory seats in state of 8 compensatory seats.*
- e) *An order granting the applicants leave to amend the, allocation of compensatory seats, allocated to 4th respondent, from 11 compensatory seats to 8 compensatory seats.*
- f) *An order reviewing, correcting and setting aside the allocation of compensatory seats made following the General Elections of the 7th October, 2022 published in Legal Notice No. 100 (Elections Results Notice) of 2022 in so far as that allocation gave the 5th respondent 3 compensatory seats in state of 2 compensatory seats.*
- g) *An order granting the applicants leave to amend the allocation of compensatory seats, allocated to 5th respondent, from 3 compensatory seats to 2 compensatory seats.*
- h) *An order granting leave to recalculate the compensatory seats due to parties that contested elections of 7 October, 2022, and reallocate such compensatory seats to*

deserving parties as reflected on annexure IEC2 to the founding affidavit.

i) Further and/or alternative relief as the court may deem fit.

j) Directing that prayers 1 and 2 (a) operate with immediate effect as interim reliefs.

[3] The matter was, on record, initially opposed by the DC (4th Respondent).

The record shows that per agreement, the parties were put to terms on periods of filing and on when the matter will be heard. Several other parties joined as Applicants and Respondents to eventually cause the litigants to be as they are now. Two intervention applications (by Basotho National Party (BNP), Basotho Patriotic Party (BPP), Tefo Mapesela and Revolution For Prosperity (RFP)) were moved and granted at different times.

[4] The matter was eventually set down to proceed on the 16th day of November for deliberation of the preliminary issue relating to jurisdiction as DC and RFP had raised it. This judgment is therefore on whether the matter should have been instituted constitutionally or under the **National Assembly Electoral Act 2011 (the Electoral Act)**.²

² Act No. 14 of 2011

[B] SUBMISSIONS

[I] FOR DC AND RFP

[5] Advocate Teele KC appeared and argued the case for the DC while Advocate Molati argued the matter for the RFP. Their argument was that the matter should not have been moved in this court sitting in its constitutional jurisdiction was more or less the same and therefore will be looked at together. Where they differ, clarity will be provided.

[6] It was argued for both DC and RFP that the procedure followed by the Applicants in instituting this matter is ultra vires the provisions of section 69 of the **Constitution**³ as amended read with section 125 of the Electoral Act. It was argued further that the manner in which the procedure on how a matter instituted under section 125 of the Electoral Act is designed is meant to allow even for calling of *viva voce* evidence which is a different procedure to that provided for under the **Constitutional Litigation Rules (the Rules)**⁴.

³ The Constitution of Lesotho

⁴ Legal Notice No. 194 of 2000

[7] In the alternative, Advocate Teele KC argues that should the court find that the procedure to challenge the allocation of the PR seats is allowed even under the Constitution, it should not be followed as there is a non-constitutional remedy available. Advocate Molati supported the principle of subsidiarity too.

[II] FOR THE APPLICANTS

[8] Advocate Letuka for the 1st and 2nd Applicants argued that since the IEC is saying it committed an error, it committed that error in exercising its constitutional mandate. Secondly, in correcting that error, the IEC will be changing the parliament, which is a constitutional creature and therefore the matter has been properly instituted under the jurisdiction of this court sitting in its constitutional capacity.

[9] Advocate Letuka argued further that section 69 of the Constitution has elaborately provided the procedure for instituting the matter such as the present one and reference to the High Court in that section refers to this court sitting in its constitutional jurisdiction hence the **Rules** as issued by the Chief Justice.

[10] Another ground upon which the Applicants argue that the matter could not be instituted under the procedure as envisaged in the Electoral Act is

that the procedure under this Act is meant for disputed returns. It was argued that in this matter there are no election results that are disputed.

[11] The applicants buttress their point further by arguing that the self-review application is inherently a rule of law application and therefore constitutionally based. For that reason, this matter could not be moved under the Electoral Act.

[12] On subsidiarity, both Advocate Letuka and Mr. Rasekoai are in harmony that it is only under section 22 of the Constitution that this court can decline to hear a matter constitutionally where there is a redress elsewhere. As Mr. Rasekoai put it, the present application is not a rights-based application as envisaged under section 22 and therefore this court cannot decline to hear it.

[13] Advocate Lephuthing at one point argued that it does not matter if the matter was moved under the constitutional litigation rules or under the Electoral Act. For that reason, therefore, he argued, this court is rightly seized with the matter.

[C] ANALYSIS OF THE SUBMISSIONS

[14] Upon a closer perusal of the submissions, three (3) issues come to the fore. They are the following;

- Has the Electoral Act provided for the procedure to be followed for the relief sought by the applicants?
- Can the matter be instituted under section 69 of the Constitution?
And if so;
- In a situation that the Electoral Act can also be relied on for the relief sought, can the principle of subsidiarity also be relevant in as far as section 69 of the Constitution is concerned?

[15] In tackling these issues, this court will deal with the first and second issue jointly as they involve interrogating both the provisions of the Constitution and the Electoral Act mutually.

[16] It may not be necessary to quote the entire relevant provisions of both the Constitution as amended by the **Seventh Amendment to the Constitution Act, 2011**⁵ and the Electoral Act due to their lengths. They will, however, be paraphrased and then compared and contrasted them.

⁵ Act No. 15 of 2000

[17]Section 69 (1) (d) of the Constitution provides that the High Court shall have jurisdiction to hear and determine any question on whether the PR seats have been properly allocated. Section 69 (4A) then provides that an application for an issue envisaged under 69 (1) (d) may be made by any registered voter, a political party that participated in the elections or the IEC. Sub-section (5) enjoins the parliament to make provisions upon which an application under this section may be made to the High Court and its powers thereto.

[18]Section 125 (c) of the Electoral Act on the other hand provides that in accordance with section 69 mentioned in the preceding paragraph, the High Court has jurisdiction to determine whether PR seats have been properly allocated. Section 126 (1) goes further to provide that IEC can apply to the High Court to effect section 125.

[19]It is this court's considered view that the answer to the interpretation of Section 69 of the Constitution hinges around sub-section (5). It is therefore, apposite to quote the entire section verbatim. It states thus;

“(5) Parliament may make provision with respect to-

(a) the circumstances and manner in which and the conditions upon which any application may be made to the High Court for the determination of any question under this section; and

(b) the powers, practice and procedure of the High Court in relation to any such application,

but, subject to any provision in that behalf made by Parliament under this subsection, the practice and procedure of the High Court in relation to any such application shall be regulated by the Chief Justice.”

This sub-section is clear that from the onset, the **Constitution** makes it clear that the implementation of Section 69 shall be through the promulgation of an Act of parliament. This point is buttressed further by the opening text of Section 125 of the Electoral Act itself that the powers conferred on the High Court therein are in accordance with section 69 of the Constitution.

[20] Prior to the coming into existence of the Electoral Act, the Chief Justice made the Rules in the year 2000. Rule 14 of the said rules provides for the procedure of an application brought under Section 69 of the Constitution. These Rules, and Rule 14 in particular, seem to give credence to the argument that questions as to the membership of parliament can be made under the constitutional jurisdiction of this court. However, a closer scrutiny of Section 69 (5) of the Constitution and the advent of the

Electoral Act may require of us to re-assess the issue. Section 69 (5) provides that the Rules made by the Chief Justice shall be subject to an Act of Parliament. This means that whatever the Rules made by the Chief Justice say pertaining to Section 69 of the Constitution, they have to be interpreted subject to what the Electoral Act says. For that reason, Rule 14 cannot be followed as it is inconsistent with the Electoral Act.

[21] The decision that issues relating to section 69 of the Constitution should be through the predecessor to the Electoral Act (which was similar to the Electoral Act in many respects) had already been reached in the case of **Basotho National Party v The Principal Secretary Ministry of Law, Parliamentary and Constitutional Affairs and 30 others**⁶. In this case, Cullinan CJ, with Molai J and Kheola J concurring, had this to say on the subject;

“... the High Court’s powers in the matter, have been expressly provided for by Parliament, namely that any such question, or any matter ancillary to such question, can only be determined by the High Court sitting as the Court of Disputed Returns, upon an election petition.”

⁶ CIV/APN/240/93

This court agrees with that decision in as far as it relates to the fact that section 69 of the Constitution is implemented by an Act of parliament.

[22] Advocate Lephuthing referred this court to an Article by Professor Hoolo ‘Nyane titled **A CRITIQUE OF PROCEDURALISM IN THE ADJUDICATION OF ELECTORAL DISPUTES IN LESOTHO**⁷ criticising the **BNP case**⁸ among others. Professor ‘Nyane in opining that the High Court in its constitutional jurisdiction could preside over elections disputed returns had this to say;

“The Hight Court of Lesotho is empowered by the Constitution to adjudicate the electoral petitions. The fact that a provision of the electoral statute... provides that the High Court shall be a Court of Disputed Returns should not be interpreted in a manner that undermines the Constitution.”

[23] While this court agrees with most parts of this article by Professor ‘Nyane, it does not agree that interpreting the Electoral Act to say that it confers powers to the High Court to hear disputed returns undermines the constitution. In fact, the Electoral Act upholds the Constitution. The very core of Professor ‘Nyane’s article and the critique on the High Court that it is overly following form over substance, can only be avoided through the

⁷ <https://www.eisa.org/pdf/JAE17.2Nyane.pdf>

⁸ Supra

Electoral Act. The Electoral Act prescribes that the procedure should be by way of a petition. Moreover, the Act provides for the relaxation of the strict rules of the law of evidence. Finally, according to professor ‘Nyane Electoral Act supports the inquisitorial approach as opposed to the adversarial one that we follow in our jurisdiction. In fact, Advocate Teele KC had rightly argued that under the constitutional jurisdiction, there is no provision for leading viva voce evidence and procedure is by way of Motion Proceedings. Indeed, in staying true to the nature and history of the disputed returns petition, Curlewis J.A in the South African case of **De Villiers v Louw**⁹ that was cited with approval by Cullinan C.J in the **BNP case**, said the following:

“...it is well to bear in mind that a Court of law can have jurisdiction in connection with an election petition only in so far as jurisdiction has been conferred upon it by the Electoral Act, and that the power either of the court below or of this court to deal with an election petition in the first instance or on appeal, and the extent of the power, must be found within the four corners of the Act. The provisions of the Act clearly indicate that the trial by a court of law of an election petition cannot be regarded as a trial of any ordinary action before a Court, but as something special and distinct.”

⁹ (1930) AD 426

When the history (which has been expertly narrated by Professor ‘Nyane) that the disputes of election returns were originally the purview of parliament itself is considered and we accept that historically election returns did not follow a legalistic approach, such procedure cannot be achieved through motion proceedings and strict legal forms envisaged under the Rules. There is therefore no doubt in this court’s mind that reference to the High Court under section 69 of the Constitution means the High Court sitting to determine disputed returns under the Electoral Act. Furthermore, and again with reference to the history of disputed returns, the Constitution had to be specific that the High Court will have jurisdiction to hear disputed returns. By so saying, it was not necessarily saying in its constitutional jurisdiction. In the South African case of **Olufsen V Klisser**¹⁰, which has been cited with approval in **Attorney General v Matlakeng and Anor**¹¹ and in the **BNP case**¹², Harcourt A.J still in resonance with the history of the adjudication of disputed returns, puts it thus;

“...Legislature, in transferring the supervision of elections from itself to the Courts, must be taken to have granted to the Court no more of its jurisdiction than is expressly conferred by the Act”

¹⁰ 1959 (3) SA 351

¹¹ CIV/APN/63/89

¹² Supra

[24] It has been argued for the respondents that the election returns are not disputed and therefore this is not a matter for the court of disputed returns. However, section 125 (c) is clear that allocation of PR seats is the terrain of the High Court under the Electoral Act. This argument therefore stands to be dismissed on that ground alone.

[C] CONCLUSION

[25] Having come to the conclusion that section 69 of the Constitution does not necessarily inherently confer constitutional jurisdiction on the High court directly but gives the High Court jurisdiction to hear disputed returns under the Electoral Act and that the determination on the question of allocation of PR seats is catered for under section 125 (c), there is no longer need to look into the other issues mentioned in paragraph **[14]** above. For that reason, therefore, the following order is made:

This matter should not have been instituted by way of Motion Proceedings following the Constitutional Litigation Rules. The matter is struck-off the roll of this court sitting in its Constitutional jurisdiction. It is accordingly ordered that it is to be instituted under the Electoral Act procedure.

There is no order as to costs

**M. S. KOPO
JUDGE**

I CONCUR_____

**M. MAHASE
JUDGE**

I CONCUR_____

**M. MAKHETHA
JUDGE**

For 1st and 2nd Applicants: Adv. Letuka

For 3rd and 5th Applicants: Adv. Lephuthing

For 4th and 6th Applicants: Mr. Rasekoai

For 4th Respondent: Adv. Teele KC

For 13th Respondent: Adv. Molati