

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/0238/2022

In the matter between:

KOSE MAKOA

APPLICANT

AND

ALLICANCE OF DEMOCRATS

1ST RESPONDENT

NATIONAL EXECUTIVE COMMITTEE OF

ALLIANCE OF DEMOCRATS

2ND RESPONDENT

CONSTITUENCY COMMITTEE OF

MOUNT MOOROSI NO. 67

3RD RESPONDENT

VUYISILE NONONO

4TH RESPONDENT

Neutral citation: Kose Makoa v Alliance of Democrats and 3 Others [2022]
LSHC 207Civ (30th August 2022)

Coram	:	M. J. Makhetha J
Date of Hearing	:	25th August 2022
Date of Judgment	:	30th August 2022

SUMMARY

Constitutional Law – Application for an order to declare as unlawful, null and void and of no force and effect the decision of the National Executive Committee (NEC) of Alliance of Democrats (AD) party to hold a constituency elective conference for fresh election of a nominee between the Applicant and 4th Respondent in Mt Moorosi No.67 Constituency to represent the AD in the forthcoming 2022 national elections – Held: Applicant’s nomination effected under the old Mt Moorosi Constituency before the enactment of the Delimitation Order April 2022 no longer enforceable – Mt Moorosi No.67 Constituency being a new constituency following demarcation of new boundaries which has combined the old Mt Moorosi constituency and parts of the abolished Seapala No.66 Constituency – Respondents’ decision to hold constituency election for the Mt Moorosi No. 67 Constituency afresh justifiable given the circumstances of the case and is in line with principle of democracy; fairness and natural justice - Application dismissed.

ANNOTATIONS

CITED CASES

LESOTHO

Lelala V Basotho National Party and Others (CIV/APN/156/98)

Lesotho District of the United Church v Rev. Moyeye and Others LAC (2007-2008) 103 at 107B-D par 11

Motaung v Makubela and Another NO; Motaung v Mothiba NO, 1975 (1) SA 618 at 675G

Rethabile Marumo & Ors v National Executive Committee of LCD & Ano. (COA (CIV) No. 42/2011)

Ts’ehlana v National Executive Committee of the LCD and Another LAC (2005-2005) 267 at 273G-J par 12

STATUTES

Constitution of Lesotho 1993

Delimitation Order No.37 of 2022

Legal Notice No. 109 of 2021

Legal Notice No. 140 of 2021

National Assembly Electoral Act No. 14 of 2011

JUDGMENT

A. INTRODUCTION

- [1] This is an application in terms of which the Applicant herein sought an order to declare as unlawful, null and void and of no force and effect the second Respondent's decision to direct the constituency committee for Mount Moorosi No. 67 to hold a constituency elective conference for fresh election of a candidate to represent the AD in the forthcoming national elections in October 2022.
- [2] The said constituency elective conference had been scheduled to take place on the 6th August 2022 while the Applicant filed this application on the 3rd August 2022 and was granted interim relief on the 8th August, placing it amongst urgent matters. The matter was heard on the 25th August 2022 for substantive relief. Among others, the Applicant also sought an order declaring the results of the constituency elective conference to be held by the 3rd Respondent on any other date pending finalization of the matter unconstitutional and therefore null and void for violating the provisions of the constitution of Alliance of Democrats (AD), 1st Respondent.

B. HISTORICAL/FACTUAL MATRIX

The facts giving rise to the present application are fairly straightforward and mainly common cause. Below is a brief background;

- [3] On or around the 30th January 2022 and 6th March 2022, the 2nd Respondent held constituency elective conferences for Seapala No.66 Constituency and Mount Moorosi No.67 Constituency respectively. At such conferences the Applicant was nominated by the majority of voters at Mount Moorosi No. 67 Constituency while, the 4th Respondent was nominated by the majority of voters at Seapala No.66. After such nominations, but before confirmation of the nominees by the 2nd Respondent in terms of **Section 5.2.1 (a)** of the 1st Respondent's Constitution, the Independent Electoral Commission (IEC) passed a **Constituency Delimitation Order**.¹ It appears from the parties' papers that the members of the 2nd Respondent, who included the Applicant as Deputy Chairperson were aware of IEC's notifications² from September 2021 that the Commission would undertake a review of constituency boundaries in preparation for the forthcoming national elections in 2022. As may have reasonably been expected by the 1st and 2nd Respondents the

¹ Legal Notice No. 37 of April 2022

² See Legal Notices No. 109 and 140 of 2021

Delimitation Order affected, amongst others, Seapala No.66 Constituency and Mount Moorosi No.67 Constituency.

- [4]** After the enactment of the Delimitation Order, the 2nd Respondent held a meeting of its members on the 27th April/May 2022 in which the Applicant was present and it was decided that owing to the said Order, fresh elective conferences be held in order to allow the voters to elect and nominate one nominee where the Order affected the old constituency boundaries. Then followed Circular No. AD/CRI/06/22 dated 22nd June 2022 (Applicant's additional annexure)³ which ordered that, among other things, nominated candidates from the affected constituencies must meet and agree on which candidate was going to represent the constituency in the national elections. In the event of a dispute amongst the nominated candidates, the Constituency Committee was ordered to call for the convening of nominations of election candidates amongst the affected candidates. From the Applicant's own annexures to his founding affidavit he participated in the said NEC resolutions/meetings and I have observed that nowhere in his founding and/replying papers does he mention that he expressed dissatisfaction with the resolutions made during these meetings. Only at

³ Record pages 000103 - 000106

paragraph 14 of his founding affidavit⁴ the Applicant informs the court that it was at the 2nd Respondent's meeting of 1st August 2022 where the issue of holding fresh election for the Mt Moorosi No.67 constituency was deliberated and he raised his reservations and objections about the decision and but was ignored.

- [5] The April 2022 Delimitation Order was valid until a Constitutional case was instituted in July 2022 by Democratic Congress (DC) and Hon. Selibe Mochoboroane against the IEC and 52 Others⁵ which challenged the constitutionality of the Delimitation Order by way of a review application. The application was partially successful in that only twenty (20) constituencies were held to be non-compliant with the provisions of the Constitution of Lesotho⁶ and the Court, of which I was a panel member, left it in the hands of the IEC to take corrective measures before the national elections in accordance with its governing legislation.⁷

⁴ Record page 000018

⁵ Constitutional Case No.10/2022)

⁶ 1993, Section 67(2)

⁷ National Assembly Electoral Act No. 14 of 2011, Section 142

[6] The court also takes judicial notice of the fact that following the said Constitutional Court judgment the IEC did take corrective measures⁸ and that even after such corrective measures were taken, the Seapala Constituency No.66 remains non-existent, while some of its parts having been combined with the Mount Moorosi No.67 as explained above.

C. LEGAL ISSUES FOR DETERMINATION

- a. Whether the Applicant has made out a case for the relief sought in his notice of motion.
- b. Whether the 2nd Respondent's decision to call for fresh elections with respect to the Mount Moorosi No.67 constituency is unlawful for contravening the constitution of the 1st Respondent.

D. THE PARTIES ARGUMENTS AND SUBMISSIONS

The arguments made on 25th August 2022 by the Counsel for the Applicant and Respondents have been most eloquent and helpful.

⁸ Delimitation Order (Amendment)

[7] The Applicant's case is that the 2nd Respondents' decision to direct the constituency committee for Mt Moorosi No.67 constituency to hold a constituency elective conference on the 6th August 2022 or any other date for conducting fresh election for nomination of a candidate to represent the 1st Respondent in the forthcoming national elections is unlawful, null and void and of no force and effect. For this proposition, reliance is reposed on the provisions of the 1st Respondent's constitution which spells out the process and procedure used by AD for nomination and election of candidates to represent the party in any given constituency.

[8] The Applicant avers that he was duly elected and nominated throughout the AD structures, from the sub-branches, branches up to the constituency level within the Mt Moorosi constituency and finally nominated, uncontested, as a candidate to represent the AD to stand for the forthcoming national elections in the Mt Moorosi constituency in compliance with the AD's Constitution.

[9] During oral argument Counsel for the Applicant emphatically submitted that the 2nd Respondent's decision to set aside the Applicant's democratic and lawful election which was commenced and processed through the structures

of the AD constitution and approved by 2nd Respondent, by holding fresh constituency election for Mt Moorosi No.67 constituency is unlawful as it contravenes the provisions of the party's constitution.

[10] It appears from paragraph 15⁹ of the Applicant's founding affidavit that the motivating factor for 2nd Respondent's decision was that the 4th Respondent, Vuyisile Nonono, had also stood and won constituency elections for Seapala constituency which now forms part of the Mt Moorosi constituency and therefore it was essential that both the Applicant and the 4th Respondent contest in the constituency election for the party to come out with one nominee to represent it in the forthcoming elections in October 2022. The abovementioned factor is confirmed by the Respondents in their answering papers and it forms the basis for 2nd Respondent's opposition to the Applicant's claim as will be realized hereafter.

[11] According to the Applicant, the 4th Respondent was never elected and/or nominated at the sub-branch and branches elective conferences of the Mt Moorosi constituency and therefore he is not entitled to contest for candidacy to represent AD in the national elections under the Mt Moorosi

⁹ Record page 000018

constituency; it is only him who complied with the nomination and election process as dictated by the party's constitution and won the candidature throughout the nomination and election ranks within the constituency.

[12] It is also the Applicant's case that the Respondent's decision to set aside his March 2022 uncontested nomination for Mt Moorosi candidacy without giving him a hearing is prejudicial to him and amounts to a suppression of the principles of democracy guaranteed in the constitution of the AD and should accordingly be set aside as unlawful.

[13] The Applicant further submits that the 2nd Respondent does not retain any power to elect/nominate a member to stand for constituency elections to represent the AD without undergoing the steps set out in the party's constitution which he has fully complied with for the Mt Moorosi No.67 constituency. He contends that any changes to the party's constitution can only be done through an amendment to or suspension of parts of the constitution in line with the constitution itself, which the Respondents did not seek to do before making such a drastic decision to call for new constituency election where the Applicant and the 4th Respondent have to compete.

[14] According to the Respondents, the effect of the April Delimitation Order is such that Seapala No.66 Constituency does not exist anymore as some of the villages which formed part thereof before the delimitation, now form part of Mount Moorosi No.67 Constituency. As a result of the combination, the current Mt. Moorosi No.67 constituency is no longer the old Mt Moorosi constituency under which the Applicant was nominated for AD constituency candidacy for the coming national elections¹⁰.

[15] In his replying affidavit to the Respondents' answering papers the Applicant confirms that the former's defense is premised on the fact that there was a Delimitation Order which varied the boundaries of some constituencies including Mt Moorosi. But he further avers that following the Delimitation Order of April 2022, the Constitutional Court judgment referred to in the afore-going paragraphs, delivered on the 8th August 2022, declared unconstitutional and set aside the Delimitation Order to the extent of its non-compliance in respect of the 20 constituencies which includes Mt Moorosi constituency. During oral argument, Counsel for the Applicant argued that the net effect of the Constitutional Court judgment on Mt Moorosi constituency was to restore the *status quo* in favour of the Applicant by

¹⁰ Respondent's Heads of Argument paragraph 6.2

which he then remained the only rightful candidate elected and nominated as a candidate to represent the party in the national elections under Mt Moorosi constituency.

[16] The Respondents' case against the Applicant's claim is also the Applicant has not yet been confirmed by the 2nd Respondent as a candidate for representing the party in the forthcoming national elections. Even assuming without conceding that he had been confirmed, that was with respect to the old Mount Moorosi, not the new one that now has some villages from Sehapala Constituency which has been abolished. My finding from the papers is that indeed the Applicant had not yet been confirmed by the 2nd Respondent at the time of a decision to call fresh elections at Mt Moorosi constituency. Neither did the Applicant through his Counsel pursue the issue during oral argument.

[17] On the basis of the above contention, Counsel for the Respondents submitted that registered members of the 1st Respondent who reside in the Sehapala villages that have now been annexed to the current Mt Mroorosi No.67 constituency also have a right to elect a representative of their choice, more

so when they had already appointed another nominee in their old constituency.

[18] The starting point for the Respondents' argument in support of the above proposition was reliance on sections of the Constitution of Lesotho in relation to voters' rights in the country. Counsel referred the court to Section 1 (1) of the Constitution of Lesotho which provides that "Lesotho shall be a sovereign democratic Kingdom. Counsel emphasised that resultantly, the country has committed itself to providing a system of periodic elections with a free choice of candidates, the opportunity to change any aspect of the governmental system through agreed procedures.

[19] In substantiating this point Counsel referred the court to the case of **Lelala v Basotho National Party & Others**¹¹ which dealt with a dispute regarding the elections of nomination for candidacy to stand for the general elections at the Ha Maama constituency. In that case there were more than one nominee for a single constituency under the same political party, BNP. Her Ladyship Guni J (as she then was), while ruling that new constituency

¹¹ (CIV/APN/156/98 at p4

elections of candidates be held had the following to say regarding the right of voters to participate in government;

“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 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] It was accordingly submitted by Counsel for the Respondents that the principle of democracy demands that the new Seapala villagers in the new Mt Moorosi constituency also be given a chance to elect a candidate of their choice. Failure to do so would be tantamount to depriving the new members of their constitutional right to participate in government.

E. ANALYSIS AND FINDINGS

[21] The starting point for a fair determination of the identified legal issues above is to first resolve the effect of the April 2022 Delimitation Order on the AD constituency elective conferences held in January and March for the Seapala No.66 and Mt Moorosi No.67 constituencies which saw the election and/or nomination of the 4th Respondent and the Applicant as qualifying candidates for representing AD in the forthcoming elections.

Reference will also be made to the Constitutional Court judgment referred to in the afore-going paragraphs and IEC's latest amendment of to the April Delimitation Order¹² which the court has taken judicial notice of.

[22] It is undisputed that the Applicant was nominated as a candidate at Mt Moorosi No.67 constituency before the Delimitation Order of April 2022 was issued. Due process for Applicant's nomination and election from the sub-branch, branch, up to the constituency elective conference was followed, in compliance with the 1st Respondent's Constitution.

[23] It is also a matter of common cause that the 4th Respondent had also been nominated as a candidate to stand for the Sebapala No.66 constituency before the above Delimitation Order was issued. Due process for Applicant's nomination and election from the sub-branch, branch, up to the constituency elective conference was followed, in compliance with the 1st Respondent's Constitution.

¹² National Assembly Electoral Act, 2011 Constituency Delimitation (Amendment) Order, Order, 2022 Legal Notice No.87

[24] It is further undisputed that the April 2022 Delimitation Order varied the boundaries of the constituencies after the election of the Applicant and the 4th Respondent in their respective constituencies. As a result of the new delimitation, the Mt Moorosi No. 67 constituency was affected to the extent that it now includes new villages from the extinguished Seapala No. 66 constituency that were not part of the former before. A proper interpretation of the effect of the April 2022 Delimitation Order with regard to the combination of the two constituencies by a legal instrument is that the old Mt Moorosi constituency is no longer existent. So is the old Seapala constituency which has in fact been abolished by the Delimitation Order. What remains in my view now is the new Mt Moorosi No.67 constituency which is composed of parts of the old Mt Moorosi and parts of the Seapala constituencies.

[25] It logically follows from the above conclusion therefore, that any candidacy rights earned by the Applicant from the constituency election of March 2022 under the old Mt Moorosi constituency are no longer in existence. The same argument applies for the 4th Respondent in respect of his old Seapala constituency which no longer exists. He cannot therefore seek to enforce his entitlement for candidacy under the current Mt Moorosi No.67 constituency

which has terminated the rights that he earned under the old and replaced constituency.

[26] The Applicant alternatively contends that following the Delimitation Order of April 2022, the Constitutional Court judgment referred to in the foregoing paragraphs, delivered on the 8th August 2022, declared unconstitutional and set aside the Delimitation Order to the extent of its non-compliance in respect of the 20 constituencies which includes Mt Moorosi constituency. During oral argument.

[27] Counsel for the Applicant argued that the net effect of the Constitutional Court judgment on Mt Moorosi constituency was to restore the *status quo* in favour of the Applicant by which he then remained the only rightful candidate elected and nominated as a candidate to represent the party in the national elections under Mt Moorosi constituency. I do not agree with the Applicant's interpretation of the Constitutional Court decision as it relates to reasons for setting aside the Order in respect of the non-compliant constituencies. The Court did not set aside the Order on the basis

wrong/unlawful demarcation but non-compliance with the prescribed quota as per S67(2) of the Constitution.

[28] Even assuming that the Applicant was restored to his original position by leaving the old Mt Moorosi without the Seapala parts which then formed part of it under the April 2022 Order, it is worth mentioning again that the court has taken judicial notice of the fact that following the Constitutional Court judgment delivered on the 8th August 2022, the IEC did take corrective measures and that even after such corrective measures, Seapala No.66 Constituency remains non-existent, some of its parts having been combined with the Mount Moorosi No.67 as explained above. So the current Mt Moorosi No.67 constituency remains to be a new constituency. Having so concluded, it is my view also that he was not entitled to hearing as claimed because there was no duty on the 2nd Respondents to do so when he had no more candidacy rights under the new Mt Moorosi constituency, which has been brought about by a legal instrument and not one of the party's creation.

[29] In any event, I have established that the Applicant was consulted on the matter as he is/was a member of the 2nd Respondent. He was amenable at all material times to the calling of new elections following the Delimitation Order, but started to resist earlier decisions when the impact affected his constituency. He has made a bare denial that he was not part of the NEC meetings where the issue of new election at Mt Moorosi constituency was discussed. I cannot rely on him on this part. I therefore, conclude that the Applicant has no rights that he is claiming under the current Mt Moorosi constituency to the extent of entitling him to the nomination that occurred under the old Mt Moorosi constituency.

[30] Notheless, I acknowledge with respect the various decisions by the Apex Court¹³ to the effect that the relationship between a political party and its members is a contractual one, the terms of the contract being contained in the party's constitution. In terms of those decisions, it is my understanding that a member of a political party has *locus standi* to sue on the decisions of the party's NEC if such decisions contravene the provisions of the contract between the parties, viz the constitution. If you are a party to a contract, you

¹³ Rethabile Marumo & Ors v National Executive Committee of LCD & Ano. (COA (CIV) No. 42/2011), Ts'ehlana v National Executive Committee of the LCD and Another LAC (2005-2005) 267 at 273G-J par 12, Lesotho District of the United Church v Rev. Moyeye and Others LAC (2007-2008) 103 at 107B-D par 11,

have a direct and substantial interest in matters affecting the operation of such a contract. In that event the Applicant in this case had the right to sue the 2nd Respondent for violating the provisions of the AD constitution, even if it was not for his personal claim in the context of his alleged entitlement which has been disposed of above.

[31] So the next question for determination is in relation to Applicant's prayer for the court to declare the decision of the 2nd Respondent to or the holding of fresh elections for purposes of re-election of candidates in the Mt Moorosi Constituency as unconstitutional for violating the party's constitution. That question will answer the legal question for determination, viz whether the 2nd Respondent's decision to hold constituency election afresh is unlawful or not.

[32] The answer is, it is the 2nd Respondent's duty to call elective meetings between conferences, but *in casu*, the Respondents have in contravention of its constitution, instructed the holding of elections at the highest level of the election and nomination process/structure, that is at the constituency level. The 2nd Respondent has also outside its mandate under the constitution

directed that the Applicant and 4th Respondent compete for constituency candidacy at the highest level. In my view the correct approach is to start the process afresh from the sub-branch level.

[33] But in view of the following factors that have been revealed from the parties' pleadings, there is no time left between the order of court in this case and the party's obligation to submit the names of confirmed nominees to represent the AD in the forthcoming national elections to IEC, the deadline being the 2nd September 2022. I have also considered that the change in the constituency boundaries affecting Mt Moorosi constituency was an eventuality beyond the control of the political parties and for that reason, any decision by the 2nd Respondent which purports to violate the constitution of its own party is an excusable for as long as it is viewed in the light of serving the best interest of the party.

[34] For this reason, I do not find anything unlawful if the 2nd Respondent directs that the Applicant and the 4th Respondent compete for candidacy at the abovementioned constituency in view of the remaining time for the party to submit the name of a nominee to IEC before the deadline. It is my view that none of the voters within that constituency will be prejudiced by such a

decision. Rather the party stands to gain by the holding of the election as directed by the 2nd Respondent in the Mt Moorosi constituency within the remaining period for the party's representation in that constituency.

[35] I agree with Counsel for the Respondents that **Clause 5.2.1** of the 1st Respondent's constitution endows the 2nd Respondent with the power to call for elections. In exercising such a power, the 2nd Respondent called for new elections for the new Mt Moorosi No.67 constituency because there was in principle no candidate as of yet. The reasons that: one, the Applicant had not yet been confirmed, two, even if he was that constituency from which he was nominated was altered so as to include villages wherein he was not nominated.

[36] Indeed if the 2nd Respondent had not resolved to have fresh elections, that would mean infringement upon the rights of the voters whose right therein necessitates new elections so as to afford others a voting chance of the representative of their choice. Thus the 2nd Respondent, as a governing body, tried to ensure that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law was upheld, by

calling for fresh elections, thereby ensuring that it represents the public in Parliament, not just an individual. I agree with Counsel.

[37] In reaching the above conclusion, I have adopted the approach invoked by the court in **Motaung v Makubela and Another NO; Motaung v Mothiba NO**¹⁴ where it was held that the court is entitled to adopt a benevolent approach (what it actually termed ‘the common sense’ approach, which makes it possible for the association to perform its functions without being carpingly worried that the courts would pin it down for minor ferreting by its officials) in interpreting a constitution. The court then went further to indicate that where, however, despite the adoption of the benevolent approach there has in fact been a serious breach of the constitutional provisions of such an association and that such breach is therefore not a ‘mere matter of form with any interference with the substance’ of the decision involved, the court should not hesitate to give full effect to the legal consequences of such a breach by declaring them invalid.

¹⁴ 1975 (1) SA 618 at 675G

[38] The 2nd Respondent's decision to call for fresh election between the Applicant and the 4th Respondent is in line with principles of democracy which demands fairness to all voters.

F.CONCLUSION

[39] On the bases of the foregoing arguments, I conclude that the Applicant has failed to make a case for declaring the decision of the 2nd Respondent to call constituency election in Mt Moorosi No. 67 constituency as unlawful and/or unfair.

[40] I therefore order as follows;

- (a) The application is dismissed.
- (b) Parties much each bear the costs of suit.

M. J. MAKHETHE
JUDGE

For Applicant : Adv. Fiee

For Respondents : Adv. Khesuoe