LESOTHO

IN THE COURT OF DISPUTED RETURNS

HELD AT MASERU   CIV/P/0002/2022

In the matter between:

INDEPENDENT ELECTORAL COMMISSION	1ST PETITIONER
DIRECTOR OF ELECTIONS	2ND PETITIONER
BASOTHO NATIONAL PARTY	3RD PETITIONER
BASOTHO PATRIOTIC PARTY	4TH PETITIONER
'MASETOTA LESHOTA	5TH PETITIONER
TEFO MAPESELA	6TH PETITIONER

AND

SPEAKER OF NATIONAL ASSEMBLY	1ST RESPONDENT
CLERK OF 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

Neutral Citation: Independent Electoral Commission v The Speaker of National Assembly & 11 Others [2023] LSHC 59 CIV/P (30TH MARCH 2023)

CORAM: MOKHESI J

              MOAHLOLI J

              KHABO J

HEARD: 20TH MARCH 2023

DELIVERED: 30TH MARCH 2023

SUMMARY:

ELECTION LAW: *Independent Electoral Commission (IEC) and other interested parties lodging an election petition under the provisions of Section 125 (c) of the National Assembly Electoral Act, 2011("the Act") on account of the error it committed when calculating proportional representation seats in the wake of the General Elections held on 7 October 2022- Held, that the IEC committed an error by not excluding the Revolution for Prosperity Party and National Independent Party in the second round of seat allocation contrary to Section 3 (2) (b) of the Third Schedule to the Act, the two parties having won more or equal constituency seats, respectively, than their provisional allocation of seats.*

ANNOTATIONS:

Cases:

Abel Moupo Mathaba and Others v Enoch Matlaselo Lehema and Others 1993 – 94 LLR/LB 402

Legislation:

Constitution of Lesotho 1993

National Assembly Act No. 14 of 2011

Books:

Arend Lijphart **Patterns of Democracy** **Yale University Press, 1999**

Articles:

Jorgen Elklit **Lesotho 2002: Africa's First MMP elections:** *Journal of African Elections*, **September 2002 Vol. 1 No. 2**

Michael Gallager, "Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities": *British Journal of Political Science,* **Volume 22, Issue 4, October 1992, 469**

JUDGMENT

Mokhesi J

[1]   **Introduction**

This matter represents the second instalment of an attempt by the Independent Electoral Commission (IEC) to have its decision to allocate proportional representation seats, following the holding of General Elections on 7 October 2022, to the Democratic Congress and Alliance of Democrats political parties, reviewed and set aside together with other consequential reliefs. The first attempt was aborted on the basis of a jurisdictional point before this court sitting as the Constitutional Court. Essentially the Constitutional Court ruled that the matter should have been instituted before the Court of Disputed Returns and not before it. Dissatisfied with the judgment, the Basotho National Party (BNP) took the matter on appeal. The appeal could not be heard expeditiously as expected for reasons I am unable to state. Consequent to the judgement of the Constitutional Court, the IEC lodged a petition before this court sitting in terms of the provisions of Section 124 of the National Assembly Act No. 14 of 2011 (hereinafter "The Act"). The matter before this court could not proceed during the pending of the appeal by the BNP. It was on the 01 March 2023 that this court was informed that the Court of Appeal had issued a Consent Order directing that the matter before this court be proceeded with and the appeal be dropped, that this court appointed a date for its hearing.

[2] The petition now properly serves before this court. For completeness, I find it apposite to reproduce the reliefs sought in these proceedings. The first petitioner seeks an order:

a) *Condoning the late filing of this petition.*

b) *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 No. 100 (Elections Results Notice) of 2022 in so far as that allocation gave the 4th respondent 11 compensatory seats instead of 8 compensatory seats.*

c) *granting your petitioner leave to amend the allocation of compensatory seats, allocated to 4th respondent, from 11 compensatory seats to 8 compensatory seats.*

d) *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 instead of 2 compensatory seats.*

e) *granting your Petitioner leave to amend the allocation of compensatory seats, allocated to 5th respondent, from 3 compensatory seats to 2 compensatory seats.*

f) *reviewing, correcting and setting aside Legal Notice No. 100 of 2022, as irregular in so far as it publishes the names of Morapeli Motoboli, `Maletsatsi Letsoepa, Katleho Mosotho and Lebohang Mochaba as persons returned as members of the National Assembly at the elections held on 7th of October 2022.*

g) granting your Petitioner leave to recalculate the compensatory seats due to the parties that contested elections of 7 October, 2022, and reallocate such compensatory seats to deserving parties as reflected on annexure IEC 3 and IEC 5 attached to the verifying affidavits.

h) further and/or alternative relief as the court may deem fit.

[3] It should be stated that an application for intervention by the Basotho National Party (BNP), Basotho Patriotic Party (BPP), 'Masetota Leshota and Tefo Mapesela that they be allowed to intervene as the 2nd, 3rd, 4th and 5th Petitioners respectively was lodged and went unopposed. After having intervened they are seeking the following reliefs:

> *"1. An order directing that the members of Alliance of Democrats and Democratic Congress whose names were included in the Legal Notice No. 100 of 2022 be ordered to vacate their seats in the National Assembly*
>
> *2. It be declared that since 25 October 2022, the date on which the disqualified members of AD and DC were sworn as members of Parliament and up to present time, the Clerk of National Assembly and Speaker have breached their obligations to take reasonable steps, respectively, to avoid foreseeable deviations from the principle of sub-judice and separation of powers in recognizing disqualified MORAPELI MOTOBOLI, MALETSEMA LETSOEPA, KATLEHO MOSOTHO and LEBOHANG MOCHABA as MPs in the 11th Parliament.*
>
> *3. An order that the papers filed in the intervention application stand as pleadings for the purposes of removing the above-mentioned persons from National Assembly.*

4. An order reviewing the decision of the Clerk of National Assembly to swear-in the above-mentioned persons as invalid and of no legal effect.

5. An order directing the Respondents to pay costs on Attorney and own client scale in the event of opposition."

[4] **Factual Background**

In the aftermath of the General Elections held on the 07 October 2022 the IEC acting in terms of Section 106 of the Act determined and declared the results. After declaring the results, acting in terms of Section 106 (7) it published the names of members elected in each constituency with their constituencies and those members who were elected by proportional representation. After concluding this exercise, the IEC sought a review of its allocation of proportional representation compensatory seats to the 4th and 5th respondent political parties.

[5] **The Proper Context of the Proceedings**

This petition was brought in terms of Section 69 of the Constitution of Lesotho 1993(hereinafter "the Constitution") read together with Sections 125 and 126 of the Act. The latter Sections provide that:

> *"Jurisdiction of the High Court*
> *125. In accordance with section 69 of the Constitution, the High Court has exclusive jurisdiction to hear and determine any question whether –*
>
> a) *any person has been validly elected as a member of the National Assembly; or*
> b) *the seat of any member in the National Assembly has become vacant;*
> c) *proportional representation seat has been properly allocated;*

How and by whom an election petition may be made.

126. (1) The Commission may apply to the High Court to determine a question referred to in section 125.

(2) An elector, a political party which participated in the elections, a candidate or the Attorney General may apply to the High Court to determine a question referred to in section 125(a).

(3) An elector, a political party which participated in the elections, a candidate or a member of the National Assembly, the Commission or the Attorney General may apply to the High Court to determine a question referred to in section 125 (b).

(4) An elector, a political party which party which participated in the elections, a candidate or a member of the National Assembly, the Commission or the Attorney General may apply to the High Court to determine a question referred to in section 125 (c).

(5) Application shall be made by way of a petition in accordance with section 69 of the Constitution, this chapter and any rules prescribed in terms of section 133.

(6) ....

(7) ...."

[6]   There are three important issues which emerge from the above-quoted provisions of the Act: the issue or question to be referred to the court for its determination; category of persons who may bring proceedings and the type

of proceedings. These provisions provide for three specific issues which the court seating on its strength may determine, namely, validity of an election of a person as a member of the National Assembly; whether the seat of any member of the National Assembly has become vacant; and lastly, whether proportional representation seat has been properly allocated. The sections further provide for categories of persons who are granted a standing to bring proceedings in respect of the three issues mentioned in the preceding sentence. The application shall be by way of a petition.

[7] In the present proceedings, the only issue to be determined is the propriety of allocation of proportional representation seats by the IEC, and not any other matter. Although an election petition by its very nature requires the leading of *viva voca* evidence even though affidavits will have been filed (**Abel Moupo Mathaba and Others v Enoch Matlaselo Lehema and Others 1993 – 94 LLR/LB** 402 at 406), at the hearing of this matter counsel for the parties alerted the court to the Practice Note which had been filed that morning in terms of which they jointly stated that there will be no need for leading of *viva voce* evidence in the matter. The court having considered this, proceeded without hearing *viva voce* evidence.

[8] It should be borne in mind that in terms of Section 127 (2) of the Act, in determining elections petition this court shall be guided by the substantial merits of the case without regard to legal form or technicalities and shall not be bound by the rules of evidence."

[9] **Electoral Model**

The operative electoral model in the Kingdom is a mixed-member proportional (MMP). It is provided for under Section 57 (1) of the Constitution (as amended by Section 3 of the Fourth Amendment to the Constitution Act of 2001) in the following terms:

> *"(1) The members of the National Assembly shall be elected in terms of a mixed member proportional electoral system that –*
>
> *(a) is prescribed by the legislation;*
> *(b) is based on a national common voters roll; and*
>
> *(c) provides for the Constitution of the National Assembly as follows –*
>
> > *(i)   eighty members to be elected in respect of each of the constituencies contemplated by section 67 (1); and*
> >
> > *(ii) forty members to be elected to forty seats in accordance with the principle of proportional representation applied in respect of the National Assembly as a whole."*

[10] In terms of Section 104 of the Act, the approach for allocating seats in accordance with the principle of proportional representation is decreed:

> *"(1) After all constituency votes have been declared in accordance with section 102, the Commission shall convert the constituency candidates votes into national political party votes in terms of section 55.*

(2) In converting the candidates' votes into political party votes, the Commission shall take into consideration the special ballot papers contemplated in sections 44 and 45.

(3) The 40 seats contemplated in section 57 (1) (c) (ii) of the Constitution as amended shall be allocated between political parties in accordance with the formula contained in Schedule 3.

(4) The allocation of seats takes place at general elections only and the results of any fresh elections or by-elections for a constituency seat between general elections shall not affect the allocation of seats under this section."

[11] It is important that the basic characteristics of this electoral model be understood as they are the animating principles behind the procedure for allocating proportional representation seats in terms of Schedule 3 of the Act. Prior to the year 2001, the operative electoral system was First-Past-the-Post (FPTP) or plurality/majoritarian system in terms of which only a single candidate from each constituency would emerge as the winner, hence reference to it by the name winner-take-all method. This system has its own shortcomings: a party winning majority of votes countrywide tended to be overrepresented. The system also had a natural consequence of ensuring underrepresentation of smaller parties. The leading scholar in this field, Arend Lijphart **Patterns of Democracy Yale University Press, 1999** (available at digamo.free.fr/lijphart99.pdf) at p.143 said:

> *"...The typical electoral system of majoritarian democracy is the single-member district plurality or majority system; consensus democracy typically uses proportional representation (PR). The plurality and*

11

majority single-member district methods are winner-take-all-method-the candidate supported by the largest number of voters wins, and all other voters remain unrepresented – and hence a perfect reflection of majoritarian philosophy. Moreover, the party gaining a nationwide majority or plurality of the votes will tend to be overrepresented in terms of parliamentary seats. In sharp contrast, the basic aim of proportional representation is to represent both majorities and minorities and, instead of overrepresenting or underrepresenting any parties, to translate votes into seats proportionally."

[12] As the name suggests, the MMP retains First-Past-the-Post system in respect of eighty Constituencies and in order to attain some level of proportionality, a compensatory mechanism is used in respect of the forty seats, the sole purpose of which is to compensate for the disproportionality which is generated by the First-Past-the-Post system (see: Jorgen Elklit **"Lesotho 2002: Africa's First MMP Elections":** *Journal of African Elections,* September 2002 Vol. 1 No. 2 at p.148: Arend Lijphart (1999) at p. 146).

[13] It is important to reproduce the provisions of Schedule 3 in terms of which allocation of seats in accordance with proportional representation is carried out.

"SCHEDULE 3 – ALLOCATION OF SEATS [Section 104]

1. The Commission shall determine the total votes cast for-

(a) each political party which participated in the proportional representation elections according to section 105 and add

together all the total party votes which shall be referred to in this Schedule as the "total votes";

(b) each political party by adding the total votes from the constituencies which shall be referred to in this Schedule as the "total party votes";

2. (1) The Commission shall then determine the number of votes required for the allocation of seats by –

(a) dividing the total votes by 120 or any number of Constituencies that successfully contested elections plus forty proportional representation seats; and

(b) rounding off to the next number, any decimal fraction, including a whole number.

(2) The resulting figure shall be referred to in this Schedule as the "quota of votes".

3. (1) The Commission shall determine the provisional total number of seats in the National Assembly to which each political party is entitled on the basis of its share of the total vote and, this allocation shall be referred to in this Schedule as the "provisional allocation of the total number of seats" and, it shall do so in the following manner:

(a) it shall divide the "total party votes" by the "quota of votes," the resulting number shall be referred to as the "party's quota of votes";

(b) it shall allocate seats to each political party, equal to the party's quota of votes without taking any decimal fraction into account;

(c) it shall then add all the seats allocated under paragraph (b) and deduct that total from 120 seats in the National Assembly or any number of constituencies that successfully contested elections plus forty proportional representation seats;

(d) if there are fewer seats provisionally allocated than the total number of seats in the National Assembly, the remaining seats shall be allocated in the following manner:

(i) the first remaining seat shall be allocated to a political party with the highest decimal fraction arising from the calculation done in terms of paragraph (a);

(ii) the next remaining seat shall be allocated to the political party with the next highest decimal fraction; and

(iii) each further remaining seat shall be allocated to the political party with the next highest decimal fraction

(2) The Commission shall then determine each party's provisional allocation of proportional representation seats and shall do so by deducting the number of seats won by the party in the constituency elections from the total seats allocation in terms of section 3 (1) (d) and, the resulting number of seats shall be referred to as "party's provisional allocation of compensatory seats" under this Schedule.

(a) The Commission shall then add the total number of compensatory seats provisionally allocated in terms of subsection (2) and if the resulting total is equal to the number of seats set aside for

proportional representation, the provisional allocation shall be the final allocation.

(b) If the total referred to in paragraph (a) add to more than the total number of seats set aside for proportional representation, the Commission shall determine the final allocation of seats in the following manner:

> *(i) if a political party has won equal or more constituency seats than its provisional allocation, then the constituency seats shall be its final allocation;*

> *(ii) the Commission shall exclude the political party from further calculation of compensatory seats; and*

> *(iii) the Commission shall then allocate to the remaining political parties, number of seats which are available for allocation by following the same procedure contained in section 2 and 3(1).*

(c) If in any calculation two or more political parties receive the same quota of votes or the same decimal fraction as a result of division and there are not sufficient seats to be allocated to both or all of the political parties, the commission shall allocate the seats as follows:

> *(i) the political party with less constituency seats than the provisional allocation shall be given preference;*

> *(ii) in all other cases by lot administered by the Commission in the presence of the political parties affected.*

4. For the purpose of this Schedule all fractions shall be allocated to as many decimal places as may be necessary to distinguish between them, but to at least 5 decimal places."

[14] Explicit in the formula for allocating proportional representation seats as provided for in Schedule 3 is the fact that under our MMP electoral system, seat allocation can take more than one round depending on the results of the elections. The first round of seat allocation is conducted in terms of Section 1 up to section 3(2)(a) of Schedule 3 (hereinafter 'the Schedule'). If the total number of all compensatory seats adds to more than 40 proportional representation seats, then the second round of seat allocation which is provided in section 3(2)(b) and the succeeding provisions of the Schedule gets triggered.

[15] It is apposite, in my judgment, that the rationale behind the formula for seat allocation provided for in the Schedule is fully appreciated so that the basis of the IEC's supposed error is readily comprehended. The formula for seat allocation as detailed out in the Schedule, is Hare quota plus largest remainders (LR), in terms of which the quota of votes is calculated on the basis of the number of seats open in the National Assembly and the number of valid votes garnered in the General Elections. This quota will be used to determine the number of seats each political party is entitled to. The seats that remain unallocated, are allocated to parties with have the largest remainders, that is, the number of votes which remain for each party after allocation of seats in terms of the quota. The party with the largest remainders gets to have the first bite, as it were, when seats are allocated on the basis of the remaining votes. The method of the largest remainders works to reduce wastage of votes

cast. In his scholarly work, Michael Gallager, **"Comparing Proportional Representation Electoral Systems:** Quotas, Thresholds, Paradoxes and Majorities," *British Journal of Political Science* **Volume 22, Issue 4, October 1992**, 469 at 471, states:

> *"Largest Remainders Methods*
> *The operation of the largest remainder (LR) method entails the calculation of a quota based on the number of seats at stake and the number of votes cast. Each party is awarded as many seats as it has full quotas. If this leaves some seats unallocated, each party's 'remainder' is calculated by deducting from its vote the total number of votes it has already used up by winning seats. The unallocated seats are then awarded to the parties that present the largest remainders. The different methods vary in the quotas they use. One variant (henceforth LR-Hare) employs the Hare (or 'natural') quota, which equals the number of votes divided by the number of seats.... "*

[16] I now turn to consider whether the IEC committed an error as alleged, and I will do so by making calculations in terms of the multi-step procedure outlined in the Schedule up to Section 3(2)(a) thereof whose application to the facts of the case is the bone of contention and on which the decision of this case rests. Once the application of this section is appreciated the following provisions fall into place without any controversy. This much was conceded by Counsel on both sides of the spectrum.

[17] As the first step in terms of Section 1 of the Schedule, the IEC is enjoined to determine the total votes cast for each political party (total party votes) which participated in the proportional representation elections and to add them

together. I find working with tables which illustrates these exercises, convenient, as I do in the ensuing discourse:

Table 1

Political Party	Abbreviation	Total Party Votes
1. African Ark	AA	344
2. All Basotho Convention	ABC	37,553
3. Alliance of Democrats	AD	20,798
4. Alliance For Free Movement	AFM	2,002
5. Allies for Patriotic Change	APC	195
6. African Unity Movement	AUM	750
7. Basutoland African National Congress	BANC	446
8. Basotho Action Party	BAP	29,118
9. Basotho Council for Economic Freedom	BCEF	302
10. Basotho Covenant Movement	BCM	4,112
11. Basotho Congress Party	BCP	1,908
12. Basotho Democratic Congress	BDC	1,166
13. Basotho Democratic National Party	BDNP	1,165
14. Basotho Economic Enrichment	BEE	1,005
15. Basotho Liberation Movement	BLM	1,527
16. Basotho National Party	BNP	7,343
17. Basotho Patriotic Party	BPP	3,198
18. Basotho Poverty Solution Party	BPSP	471
19. Basotho Redevelopment Party	BRP	288

20. Basotho Social Party	BSP	557
21. Basotho Total Liberation Congress	BTLC	853
22. Bahlabani ba Tokoloho Movement	BTM	468
23. Democratic Congress	DC	128,105
24. Development Party for All	DPA	461
25. Empowerment Movement for Basotho	EMB	279
26. Mphatlatsane	HOPE	3,713
27. Khothalang Basotho	KB	828
28. Lesotho Congress for Democracy	LCD	12,174
29. Lesotho Economic Freedom	LEFF	1,153
30. Lekhotla la Mekhoa le Meetlo	LMM	577
31. Lesotho People's Congress	LPC	2,069
32. Movement for Economic Change	MEC	17,093
33. Metsi and Natural Resources Party	METSI	533
34. Marematlou Freedom Party	MFP	1,764
35. Mpulule Political Summit	MPS	4,482
36. Mookoli Theological Front	MTF	264
37. National Independent Party	NIP	3,703
38. People's Convention	PC	225
39. Popular Front for Democracy	PFD	4,636
40. Prayer Shawl and Light	PSL	113
41. Revolutionary Alliance for Democracy	RAD	428
42. Reformed Congress of Lesotho	RCL	1,805
43. Revolution for Prosperity	RFP	199,867
44. Socialist Revolutionaries	SR	10,738
45. Tšepo ea Basotho	TEB	421

46. United for Change	UFC	2,921
47. Yearn for Economic Sustainability	YES	228
48. Your Opportunity and Network Alliance	YONA	716
49. Zhen Yu Shao (Independent)	ZYSIN	123
TOTAL VOTES		**515,018**

[18] In terms of Section 2(1) of Schedule, the next step is to determine the number of votes required for the allocation of seats to each party, what is termed "quota of votes". The same Section instructs us to divide the total votes by 120 or any number of constituencies that successfully contested elections plus forty proportional representation seats. The dividing number in the circumstances is 119 because of failed elections in Stadium Area Constituency as a result of the death of one of the candidates. Any decimal fraction, including a whole number should be rounded off to the next number.

$$\frac{515,018}{119} = 4,327.8823 \text{ and}$$

Rounded off to the next number, the quota of votes is **4,328**

[19] What follows is a step which is provided for in Section 3(1) of the Schedule. In terms of this step the provisional allocation of the total number of seats in the National Assembly to which each political party is entitled on the basis of its share of the total vote, should be determined. The first step towards determining provisional allocation of the total number of seats is provided in Section 3(1)(a) of the Schedule, which is done by dividing total party votes by the quota of votes.

Political Party	Abbreviation	Party Quota of Votes
1. African Ark	AA	$344/4,328$ $= 0.0794$
2. All Basotho Convention	ABC	$37,553/4,328$ $= 8.6767$
3. Alliance of Democrats	AD	$20,798/4,328$ $= 4.8054$
4. Alliance for Free Movement	AFM	$2002/4,328$ $= 0.4625$
5. Allies for Patriotic Change	APC	$195/4,328$ $= 0.0450$
6. African Unity Movement	AUM	$750/4,328$ $= 0.1732$
7. Basutoland African National Congress	BANC	$445/4,328$ $= 0.1030$
8. Basotho Action Party	BAP	$29,118/4,328$ $= 6.7278$
9. Basotho Council for Economic Freedom	BCEF	$302/4,328$ $= 0.0697$
10. Basotho Covenant Movement	BCM	$4,112/4,328$ $= 0.9500$
11. Basotho Congress Party	BCP	$1,908/4,328$ $= 0.4408$

12. Basotho Democratic Congress	BDC	1,166/4,328 = 0.2694
13. Basotho Democratic National Party	BDNP	1,165/4,328.0 = 0.2691
14. Basotho Economic Enrichment	BEE	1,005/4,328 = 0.2332
15. Basotho Liberation Movement	BLM	1,527/4,328 = 0.3528
16. Basotho National Party	BPP	3,198/4,328 = 1.6966
17. Basotho Patriotic Party	BPP	3,198/4,328 = 0.7389
18. Basotho Poverty Solution Party	BPSP	471/4,328 = 0.1088
19. Basotho Redevelopment Party	BRP	288/4,328 = 0.0665
20. Basotho Social Party	BSP	557/4,328 = 0.1286
21. Basotho Total Liberation Congress	BTLS	883/4,328 = 0.2040
22. Bahlabani ba Tokoloho	BTM	468/4,328 = 0.1081
23. Democratic Congress	DC	128,105/4,328 = 29.5991
24. Development Party for All	DPA	461/4,328 = 0.1065

25. Empowerment Movement for Basotho	EMB	279/4,328 = 0.0644
26. Mphatlalatsane	HOPE	3,713/4,328 = 0.8579
27. Khothalang Basotho	KB	828/4,328 = 0.1913
28. Lesotho Congress for Democracy	LCD	12,174/4,328 = 2.8128
29. Lesotho Economic Freedom	LEFF	1,153/4,328 = 0.2664
30. Lekhotla la Mekhoa le Meetlo	LMM	577/4,328 = 0.1333
31. Lesotho People's Congress	LPC	2,069/4,328 = 0.4780
32. Movement for Economic Change	MEC	17,093/4,328 = 3.9493
33. Metsi and Natural Resources Party	METSI	533/4,328 = 0.1231
34. Marematlou Freedom Party	MFP	1,764/4,328 = 0.4075
35. Mpulule Political Summit	MPS	4,482/4,328 = 1.0355
36. Mookoli Theological Front	MTF	264/4,328 = 0.0609
37. National Independent Party	NIP	3,703/4,328 = 0.8555

38. People's Convention	PC	225/4,328 = 0.0589
39. Popular Front for Democracy	PFD	4,636/4,328 = 1.0711
40. Prayer Shawl and Light	PSL	113/4,328 = 0.0261
41. Revolutionary Alliance of Democracy	RAD	428/4,328 = 0.0988
42. Reformed Congress of Lesotho	RCL	1805/4,328 = 0.4170
43. Revolution for Prosperity	RFP	199,867/4,328 = 46.1799
44. Socialist Revolutionaries	SR	10,738/4,328 = 2.4810
45. Tšepo ea Basotho	TEB	421/4,328 = 0.0972
46. United for Change	UFC	2,921/4,328 = 0.6749
47. Yearn for Economic Sustainability	YES	228/4,328 = 0.0526
48. Your Opportunity and Network	YONA	716/4,328 = 0.1654
49. Zhen Yu Shao (Independent)	ZYSIN	123/4,328 = 0.0284

[20]   The next step, which is step four, is based of Section 3(1)(b) of the Schedule. In terms of this step seats should be allocated to each political party, equal to each party's quota of votes without taking any decimal fraction into account. The following parties have seats under this step:

1. All Basotho Convention (ABC) = 8 seats
2. Alliance of Democrats (AD) = 4 seats
3. Basotho Action Party (BAP) = 6 seats
4. Basotho National Party (BNP) = 1 seat
5. Democratic Congress (DC) = 29 seats
6. Lesotho Congress for Democracy (LCD) = 2 seats
7. Movement for Economic Change (MEC) = 3 seats
8. Mpulule Political Summit (MPS) = 1 seat
9. Popular Front for Democracy (PFD) = 1 seat
10. Revolution for Prosperity (RFP) = 46 seats
11. Socialist Revolutionaries (SR) = 2 seats

[21]   In terms of Section 3(1)(c) all the allocated seats under section 3(1)(b) should be added and deducted from the 120 seats in the National Assembly or any number of constituencies that successfully contested elections plus forty proportional representation seats. In the present matter the allocated seats should be deducted from 119 seats (79 Constituencies that successfully contested elections plus 40 proportional representation seats).

8 + 4 + 6 + 1 + 29 + 2 + 3 + 1 + 1 + 46 + 2 = 103 seats.

[22] The remaining 16 seats (119 – 103) shall be allocated to political parties with the highest decimal fractions arising from the calculation of the party's quota of votes done under Section 3(1)(a) of the Schedule. This exercise is done in terms of Section 3(1)(d) of the Schedule. The largest remainder method comes into play in this step. The allocation is done as follows:

1. Basotho Covenant Movement (BCM) 0.9500 = 1 seat
2. Movement for Economic Change (MEC) 3.9493 = 1 + 3 = 4 seats
3. Mphatlalatsane (HOPE) 0.8579 = 1 seat
4. National Independent Party (NIP) = 1 seat
5. Alliance of Democrats (AD) 4.8054 = 1 + 4 = 5 seats
6. Lesotho Congress for Democracy (LCD) 2.8128 = 1 + 2 = 3 seats
7. Basotho Patriotic Party (BPP) 0.7278 = 1 seat
8. Basotho Action Party (BAP) 6.7278 = 1 + 6 = 7 seats
9. Basotho National Party (BNP) 1.6966 = 1 + 1 = 2 seats
10. All Basotho Convention (ABC) 8.6767 = 1 + 8 = 9 seats
11. United for Change (UFC) 0.6749 = 1 seat
12. Democratic Congress (DC) 29.5991 = 1 + 29 = 30 seats
13. Socialist Revolutionaries (SR) 2.4810 = 1 + 2 = 3 seats
14. Alliance for Free Movement (AFM) 0.4625 = 1 seat
15. Basotho Congress of Lesotho (BCP) 0.4408 = 1 seat
16. Reformed Congress of Lesotho (RCL) 0.4170 = 1 seat.

[23] In terms of Section 3(2) of the Schedule, each party's provisional allocation of proportional representation seats should be determined and that exercise should be carried out by deducting the number of seats won by each political party in the Constituency elections from the total seats allocated in terms of

Section 3(1)(d) of the Schedule. The result will be each party's provisional allocation of compensatory seats.

Political Party	Provisional Allocation	Constituency	Provisional Compensatory Seats
1. Basotho Covenant Movement (BCM)	1	0	1
2. Movement for Economic Change (MEC)	4	1	3
3. Mphatlalatsane (HOPE)	1	0	1
4. National Independent Party (NIP)	1	1	0
5. Alliance for Democrats (AD)	5	2	3
6. Lesotho Congress for Democracy (LCD)	3	0	3
7. Basotho Patriotic Party (BPP)	1	0	1
8. Basotho Action Party (BAP)	7	0	7
9. Basotho National Party	2	0	2
10. All Basotho Convention	9	0	9
11. United for Change (UFC)	1	0	1

12. Democratic Congress (DC)	30	18	12
13. Socialist Revolutionaries (SR)	3	1	2
14. Alliance for Free Movement (AFM)	1	0	1
15. Basotho Congress Party (BCP)	1	0	1
16. Reformed Congress of Lesotho (RCL)	1	0	1
17. Revolution for Prosperity (RFP)	46	56	N/A
18. Mpulule Political Summit	1	0	1
19. Popular Front for Democracy (PFD)	1	0	1
	119	**79**	**50**

[24] This step is the basis upon which the Democratic Congress (DC) (4th respondent) vigorously contended, through Adv. Teele KC, that Revolution for Prosperity party (RFP) should be given -10 provisional compensatory seats which is a result of 46 provisionally allocated seats minus 56 constituency seats it has won which when added together with other parties' compensatory seats will equal 40 compensatory seats. Therefore, the argument went, rendering this process of allocation, a final step in terms of

the provisions of Section 3(2)(a) of the schedule. Dr 'Mamphono Khaketla deposed to answering affidavit on behalf of the DC and states:

> *"17.8 It is important to note at this (sic) that because Revolution for Prosperity has -10 which means it takes away 10 PR seats, therefore we have to go back to the 16 decimal fraction list and remove 10 lowest decimal fraction."*

[25] Adv. Teele KC argued that it is illegal for the IEC to invoke Section 3(2)(b) of the Schedule because when RFP's -10 is used to deduct seats from the 16 lowest 10 decimal fraction, and when all the parties' provisional compensatory seats are added the result will be equal to 40 proportional representation seats set aside for this purpose, making this the final step in the allocation of seats.

[26] Adv. Letuka for the IEC contended on the contrary that the approach which the 4th respondent is agitating for is not sanctioned by the law, and that what should happen is that, because RFP has won more Constituencies than its provisional allocation, it should be skipped. The result of this line of argument is that when all the parties' provisional compensatory seats are added they equal to fifty (50), ten more than forty (40) proportional representation seats set aside for allocation, thereby triggering the second round of seats allocation which is governed by the provisions of Section 3(2)(b) onwards.

[27] It should be stated that the mixed-member proportional representation electoral model has one of its possible natural consequences, the scenario which played itself out in these elections: a party (RFP) has won more

constituency seats than its provisional allocation (proportional entitlement relative to its share the national votes) leading to a situation where compensating all the parties is well-nigh impossible. When this situation arises, in terms of our model, the remaining seats should be allocated proportionally as far as it is possible. As stated earlier in the judgment build into our system of elections is a method of allocating seats (Hare quota plus largest remainders) which is geared primarily at ensuing that no valid votes are wasted, but instead should be counted in the quota system.

[28] If it is kept in mind that the purpose of Section 3(2) of the Schedule exercise is to determine each party's provisional allocation of proportional representation seats, it should readily be accepted that there is no place for negative numbers. An argument was advanced by Adv. Teele KC that Section 3(2) of the Schedule is silent on what should happen when a party has won more Constituency seats than its provisional allocation. He argued that when such a situation arises, because mathematically a large number can be deducted from a small one it should be done in this instance. With due respect to Counsel, that approach is untenable as it is antithetical to the spirit of our electoral model alluded to above: instead of ensuring that no votes are wasted, it actively discards legitimate votes, thereby, creating a possibility of a lot of voices being unrepresented.

[29] Secondly, the procedure is not sanctioned by the law. While it is true that Section 3(2) is silent on what should happen in a situation now under discussion, in my judgment, it is inherent in our electoral system as outlined in the Schedule - Section 3(2) thereof- that where a party has won more Constituencies than its provisional allocation of proportional representation

seats, provisional allocation of compensatory seats is not applicable to it, because logically, it has won more than what it was entitled to, relative all the votes garnered in the General Elections. While Dr Khaketla's mathematical adroitness should be admired, there is simply no place for such ingenuity in the context of Section 3(2) when determining each party's provisional allocation of proportional representation seats because it is not sanctioned by the law.

[30] If it is accepted, as it should, that when all the parties' provisional compensatory seats are added they equal fifty (50) seats, ten (10) more than forty seats set aside for proportional representation seats, then in terms of Section 3(2)(a) this should not be the final allocation, but instead, the provisions of Section 3 (2)(b) onwards are triggered. This is the second round of seats allocation. This provision states that if the total provisional compensatory seats of all the parties add to more than forty proportional representation seats at stake, the IEC shall determine the final allocation of seats in the following manner:

> "(i) if a political party has won equal or more constituency seats than its provisional allocation, then constituency seats shall be its final allocation.
>
> (ii) the Commission shall exclude the political party from further calculation of compensatory seats; and
>
> (iii) the Commission shall then allocate to the remaining political parties, number of seats which are available for allocation by following the same procedure contained in section 2 and 3(1)."

[31] From this formulation, it is evident that the RFP and NIP should be excluded from the allocation of seats in the second round. Clearly, the exclusion of the RFP and NIP is bound to affect the outcome of seat allocation under this round. The NIP should be excluded because its provisional allocation of compensatory seats is one (1) and had won one Constituency. To have included both parties in the second round of seat allocation was contrary to the law and should be reviewed, corrected and set aside. This conclusion makes it unnecessary to consider the reliefs sought by the interveners as they boil down to the those sought in the main by the IEC.

[32] In the result

(i)   The petition succeeds as prayed in the 1st Petitioner's Notice of Motion.

_____
MOKHESI J

I agree

_____
MOAHLOLI J

I agree

_____
KHABO J

For the 1st and 2nd Petitioners: Adv. K. W Letuka instructed by MAFT Legal Attorneys

For the 3rd to 6th Petitioners: Adv. C. J Lephuthing instructed by Rasekoai, Rampai Lebakeng Attorneys

For the 1st to 3rd Respondents: No Appearance

For the 4th Respondent: Adv. M. Teele KC instructed by Mei & Mei Attorneys

For the 5th to 12 Respondents: No Appearance