



LESOTHO

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/289/21

In the matters between:

TRANSFORMATION RESOURCE CENTRE

1ST APPLICANT

DEMOCRATIC PARTY OF LESOTHO

2ND APPLICANT

And

INDEPENDENT ELECTORAL COMMISSION

AND OTHERS

RESPONDENTS

Neutral Citation: Transformation Resource Centre and Another v Independent Electoral Commission and Others [2024] LSHC 26 Civ (29 February 2024)

CORAM: S. P. SAKOANE CJ, E.F.M. MAKARA and M. KOPO JJ

HEARD : 23RD AUGUST, 04TH and 05TH DECEMBER 2023

DELIVERED : 29TH FEBRUARY 2024

Summary

Administrative law – *mandamus* to compel performance of statutory duty – failure by Independent Electoral Commission and Registrar of Societies to enforce compliance of the law by political parties – Second Amendment to the

Constitution, 1997, section 7; National Assembly Electoral Act No. 14 of 2011, sections 25(1)(c), 27 and 29; Societies Rules 1967, rules 5,6,9,10 and 11

ANNOTATIONS:

CASES CITED:

LESOTHO

Boeletse and Tuke v. His Majesty The King and Others [2022] LSHC 26 Const
(12 September 2022)

Transformation Resource Centre and Development for Peace Education v.
Speaker of National Assembly & Others Constitutional Case No.14/2017

SOUTH AFRICA

Villa Crop Protection (Pty) Ltd v. Bayer Intellectual Property GmbH [2002]
ZACC 42; 2023 (4) BCLR 461 (CC)

UNITED KINGDOM

R v. Tithe Commissioners (1849) 14 QB 459

BOOKS:

De Smith, Woolf & Jowell's Principles of Judicial Review (London: Sweet &
Maxwell, 1994)

Wade HR & Forsyth CF *Administrative Law* 8th edition

STATUTES:

Interpretation Act No. 19 of 1977

National Assembly Electoral Act No.14 of 2011

Second Amendment of the Constitution Act, 1997

Societies Act No. 20 of 1966

Societies Rules, 1967

JUDGMENT

SAKOANE CJ:

I. INTRODUCTION

- [1] The applicants are both voluntary associations. The 1st applicant is an ecumenical, non-governmental organization whose objects, among others, are advocacy for human rights, good governance and democracy. The 2nd applicant is a political party. They are before court to compel the Independent Electoral Commission (IEC) and the Registrar General of Societies to take action against political parties that are failing to comply with their statutory obligations under the **National Assembly Act No.14 of 2011** and the **Societies Rules, 1967**.
- [2] On the date of hearing there was no appearance by and/or representation for the 2nd applicant. The 2nd applicant did not participate in the proceedings and must be taken to have withdrawn its case. Nothing further need to be said about it.

Relief

- [3] The first round of the proceedings were applications for dispatch of records of the IEC and Registrar of Societies to ground orders for *mandamus* and declarators. The order for dispatch of the records was duly issued. The second round is for the issuance of the following orders:

“6. That a writ of *mandamus* be issued against the INDEPENDENT ELECORAL COMMISSION (1ST RESPONDENT) to cause for the updated and comprehensive register of political parties which has the following information:

- (a) The register of the current paid-up membership of political parties in line with SECTION 25(1)(c) read with SECTION 29(3) of NATIONAL ASSEMBLY ELECTORAL ACT NO.14 OF 2011.

(b) The register for the compliance record of political parties with the prescriptive requirements as provided for in SECTION 25 (1) (c) (iv) – (v) of NATIONAL ASSEMBLY ELECTORAL ACT NO.14 OF 2011.

7. That a writ of mandamus be issued against the INDEPENDENT ELECTORAL COMMISSION (1ST RESPONDENT) to promptly cause for the following within 21 (twenty-one) days:

(a) The deregistration of non-compliant political parties in line with the prescripts of NATIONAL ASSEMBLY ELECTORAL ACT NO. 14 OF 2011.

(b) ALTERNATIVELY, to the prayer on paragraph 1.3 above (sic), the vetting of non-compliant political parties in line with the prescripts of NATIONAL ASSEMBLY ELECTORAL ACT NO. 14 OF 2011.

(c) Consequent to the vetting exercise contemplated under the prayer in paragraph 1.3 (b) (sic) above, the INDEPENDENT ELECTORAL COMMISSION (1ST RESPONDENT) be directed to start the hearing of non-compliant political parties in terms of SECTION 27(2) of NATIONAL ASSEMBLY ELECTORAL COMMISSION ACT NO. 14 OF 2011 within 21 (twenty-one) days after the conclusion of the vetting exercise envisaged above.

8. That it be declared that the failure and or omission on the part of the INDEPENDENT ELECTORAL COMMISSION (1ST RESPONDENT) to cause for the vetting and consequent cancellation of registration of non-compliant political parties in terms of SECTION 27 of NATIONAL ASSEMBLY ELECTORAL ACT NO. 14 of 2011 read with SECTION 66A (1) (g) of the CONSTITUTION OF LESOTHO 1993 (As amended) is unlawful and amounts to a breach of its constitutional and or its legislative mandate.

9. That a writ of mandamus be issued against the REGISTRAR GENERAL OF SOCIETIES (42ND RESPONDENT) to cause for the following to be effected within 21 (twenty-one) days after the grant of this order:

(a) The opening of MAINTENANCE AND CONTROL OF THE SOCIETIES register which shall be of the ledger type composed of leaves of durable material, numbered serially and permanently bound in numerical order as contemplated under REGULATION 5 of THE SOCIETIES RULES GOVERNMENT NOTICE NO. 75 OF 1967.

(b) The rendering of returns as contemplated under REGULATION 9 of THE SOCIETIES RULES GOVERNMENT NOTICE NO. 75 OF 1967.

12. That the APPLICANTS be granted further and / or alternative relief as this Honourable court may deem fit under the circumstances.

13. Costs only in the event of opposition o this interlocutory application hereof.”

[4] No reference is made to prayers 10 and 11 because they were abandoned during oral argument by the attorney for the applicants.

Preliminary Objections

- [5] The respondents challenge the *locus standi* of the applicant. They submitted, firstly, that the power of deregistration falls squarely within the province of the IEC as the regulatory authority and enforcer of compliance by political parties. Secondly, that the applicant has failed to demonstrate existence of any rights and thereby, failed to show any cause of action.
- [6] These preliminary objections misconceive the role of organised, citizens to enforce compliance with the law by public authorities. The participation by citizens through voluntary associations in a democracy is necessary to ensure that institutions of the state discharge their constitutional and statutory obligations for the public good and the rule of law. The doctrine of generous and public-oriented standing was articulated by this Court in **Boeletse I**¹. The essence of the doctrine is that the real enquiry should be whether the applicant can show substantial non-compliance with the law or its abuse and not whether the applicant's personal rights or interests are affected over and above those of the public at large².
- [7] Thus, where it is in the interest of the public that the law should be enforced and a registered society whose objectives include the deepening of democracy steps up:

“There are substantial arguments in favour of adopting a generous approach to standing. This is particularly true in judicial review proceedings since here it is frequently important, in the interests of the public generally, that the law should be enforced. The policy should therefore be to encourage and not discourage public-spirited individuals and groups, even though they are not directly affected by the action which is being taken, to challenge unlawful administrative action. Other safeguards, besides restrictive rules as to standing, exist to protect the courts and administrators from unmeritorious challenges [e.g. striking out the

¹ *Boloetse and Tuke v. His Majesty The King and Others* [2022] LSHC 216 Const (12 September 2022)

² Wade & Forsyth *Administrative Law* 8th edition pp.681-682

case if there is no cause of action or the proceedings are an abuse of court proceedings] where there are strict rules as to standing there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action of obvious illegality or questionable legality. It is hardly desirable that a situation should exist where because all the public are equally affected no one is in a position to bring proceedings. The fears that are sometimes voiced of the courts being overwhelmed by a flood of frivolous actions are unsupported by any evidence of this happening in practice. The costs of litigation are now so heavy that it is only the most determined vexatious litigant who will indulge in legal proceedings which are without merit. The arguments in favour of a restrictive approach to standing nearly always confuse the question of the merits of the litigation with the question of who should be entitled to bring the proceedings. If there is a satisfactory mechanism for dealing with unmeritorious or frivolous claims most of the arguments for a restrictive approach fall away.”³

- [8] The applicant’s complaint is that the IEC and the Registrar-General of Societies are failing in their statutory duties to police political parties by ensuring that they comply with the provisions of the **Electoral Act, 2011** and the **Societies Rules, 1967**. The applicant seeks *mandamus* compelling the two public bodies to do what the statutory instruments require of them.
- [9] It is evidently not in the interest of the voting public and the health of our democracy that political parties who do not comply with the laws of the Kingdom should remain on the registers of the IEC and the Registrar-General of Societies and participate in elections. The *locus standi* of the applicant arises from its interest in deepening democracy⁴.
- [10] The preliminary objections are without merit and are dismissed.

³ De Smith, Woolf and Jowell’s **Principles of Judicial Review** (London: Sweet & Maxwell, 1994) para2-004

⁴ Transformation Resource Centre and Development for Peace Education v. Speaker of National Assembly & Others Constitutional Case No. 14/2017

II. MERITS

Statutory Frameworks

[11] The applicant invokes sections 25(1)(c), 27(2) and 29(3) of the **Electoral Act, 2011**. Section 25(1)(c) reads as follows:

“Application for registration

25. (1) An application for registration of a political party shall be-
- (a) ...
 - (b) ...
 - (c) accompanied by –
 - (i) a copy of its constitution setting out in its name, its abbreviated name, if any, and its distinguishing symbol;
 - (ii) the prescribed application fee;
 - (iii) a declaration in the prescribed form supporting the application signed by not less than 500 paid-up membership whose names appear on the Register;
 - (iv) particulars of all assets and liabilities and all bank accounts of the political party;
 - (v) a statement from a bank indicating the party’s bank account contemplated in section 24(6); and
 - (vi) any other prescribed documents.”

[12] Section 27 provides thus:

“Cancellation of registration of a political party

27. (1) The Commission may cancel the registration of a political party if –
- (a) the political party ceases to exist or no longer functions;
 - (b) the political party has dissolved or is intending to dissolve;
 - (c) it no longer complies with the requirements for registration referred to in section 24(1) (a) to (f);
 - (d) its constitution does not comply with section 24(3) and (5);
 - (e) the political party fails to comply with sections 24(5) and 27(3);
 - (f) it fails to comply in any material respect with the Code referred to under section 122;
 - (g) it contravenes the Code in the circumstances referred to section 122(4(e)); or
 - (h) the political party does not comply with its obligations in terms of this Act despite being warned by the Commission to do so.
- (2) Before the Commission cancels the registration of a political party or an alliance in terms of subsection (1), it-
- (a) shall give notice to the political party of the grounds of the proposed cancellation;

- (b) shall give the political party 30 days within which to make written representations;
- (c) may hold a hearing;
- (d) shall consider any evidence supplied or representations made in terms of paragraph (b) or (c); and
- (e) shall notify the political party of its decision and, if the Commission decides to cancel the political party's registration, shall include in that notice the reasons for its decision."

I pause to point out that reference to section 27(3) in sub-section (1)(e) is a mistake because section 27 does not have a sub-section (3). The correct reference should then be section 29(3).

[13] Section 29 reads thus:

"Inspection of documents

29. (1) The Commission shall keep the constitution of a political party registered with the Commission and a copy of every document concerning the registration of the political party in its possession.
- (2) The public may inspect the constitution and documents contemplated in subsection (1) during office hours at the office of the Commission without charge.
- (3) A political party registered with the Commission shall provide its current paid-up membership to the Commission annually in terms of section 25(1)(c)."

[14] Rules 5 and 9 of the **Societies Rules, 1967** read as follows:

"Maintenance and Control of the Societies Register

5. (1) For the purpose of Section 6 of the Act, the Registrar-General shall prepare, open and keep a register of the ledger type composed of leaves of durable material, numbered serially and permanently bound in numerical order.
- (2) In the register prescribed in paragraph (1) there shall be alphabetical index bound permanently with the other leaves.
- (3) Each leaf of the register, other than the index, shall have provision for recording the following matters in relation to each society registered -
- (a) the registration number of the deed under which the society is registered;
 - (b) the date and time of registration;
 - (c) the registered name of the society and registered head office of the society;
 - (d) the objects for which the society has been formed and registered;
 - (e) by whom the society was registered;
 - (f) the values of stamps affixed;
 - (g) remarks;

- (h) date of cancellation or suspension;
- (i) general remarks.

Rendering of Returns

9. Every society shall, within six months from the expiration of its financial year, furnish to the Registrar-General the following information except to the extent that such information is excluded by the Constitution of Lesotho and the Act -

- (a) a revenue account showing the revenue and expenditure for the year including the expenses of management of the society and any contribution towards such expenses;
- (b) a balance sheet showing the financial position of the society at the close of that year;
- (c) in the case of a society which controls trust funds, a certificate by a suitably qualified person approved by the Registrar-General that such trust funds are correctly controlled and invested;
- (d) a copy of any special report by the auditor relating to the activities of the society during the financial year to which the documents relate;
- (e) a copy of any annual report that the society may have issued to its members or shareholders in respect of the said financial year; and
- (f) a copy of any other statement that the society may have presented to its members or shareholders in respect of any of its activities during such financial year.”

[15] In order to appreciate the enforcement procedures the Registrar-General must follow when acting against defaulting political parties, these Rules should be read with Rule 11(1) which reads as follows:

“Investigation of the Affairs of a Society

11. (1) The Registrar-General may, with the consent of the Minister, investigate the affairs or any part of the affairs of a registered society, to an extent that is not inconsistent with the Constitution of Lesotho and the Act, or appoint an inspector to hold such an investigation and to report the result of his investigation to the Registrar-General –

- (a) if the society, having failed to make a return required by this Act, has not made that return within a period of thirty days from the first date upon which the Registrar-General drew the attention of the society in writing to such failure; or
- (b) if the society has not, within a period of thirty days as from a date upon which the Registrar-General demanded from it in writing any information which the Registrar-General was entitled under the Constitution of Lesotho and this Act to demand from it, furnished that information fully to the satisfaction of the Registrar-General; or
- (c) if any return furnished by the society to the Registrar-General shows that the society has failed to comply with any material provision of the Act or these Rules; or
- (d) if the auditor has informed the society of an irregularity that needs correction and the society has not corrected that irregularity within a period of thirty days as from the date upon which the Registrar-

- General called upon the society in writing to correct the irregularity;
- or
- (e) if the Registrar-General has information which in his opinion requires an investigation into the affairs of the society;

Provided that no investigation shall be held by virtue of this paragraph unless Registrar-General has afforded the society a reasonable opportunity of furnishing an explanation of any matter which forms a ground for the Registrar-General's opinion and the society has failed to furnish such explanation or has furnished an explanation which does not satisfy the Registrar-General."

Constitutional Framework

[16] Section 7 of the **Second Amendment to the Constitution** amends section 66 of the Constitution in the following manner:

"The Constitution is amended by adding the following sections after section 66

–

Powers, duties and functions of Electoral Commission

66A(1) The Electoral Commission shall have the following functions –

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g) to register political parties;"

Applicant's Case

[17] In summary, the applicant's case is as follows:

17.1 In November 2020, the Director of the applicant wrote to his counter-part in the IEC raising issues around the political parties' "perpetual non-compliance with the requirements of registration and incessant financial unaccountability (sic)."

17.2 The IEC reacted by inviting the applicant's representative to a meeting at its offices on 29 January 2021. The recorded minutes of that meeting reflect that:

“...the chairman of the Commission made the following proposals which did not receive any dissent (sic):

1. Timeliness to meet the TRC demands be set with the Secretariat of the IEC.
2. The Acting Director of Elections release documents requested in the letter of November 2020.
3. The Commission shall meet political party leaders according to the Commission’s own plan of action.
4. The issue of cancellation of political parties is not as urgent as depicted.
5. Both parties should operate on the basis of mutual trust.
6. The legal process should be followed.”

[18] With reference to **annexure IEC 3** (a party funding table from the IEC), the applicant contends that political parties are in breach of laws on accountability for funds. There is also no register of scientific data that serves the purpose of verifying or comprehensively vetting paid-up membership prior to registration in accordance with section 24(2)(a) and (g) and (4) of the **Electoral Act, 2011**. This speaks to utter breach of section 25.

[19] In respect of non-compliance by political parties with the **Societies Act, 1966** and the **Societies Rules, 1967**, it is contended that each of these legal frameworks require political parties to observe their constitutions, for example, by electing new members of the executive and registering them with the Registrar-General.

[20] The applicant’s search to ascertain whether political parties comply, revealed the following:

- (a) some of their registered offices were not authentic and some had no active offices;

- (b) no registration of office bearers and in some instances elections were not conducted in line with constitutions;
- (c) no authentic minutes of special or annual conferences;
- (d) no properly documented audited reports and rendering of accounts.

IEC's defence

[21] The IEC answers the applicant's case as follows:

- 21.1 The process to deregister political parties is guided by the conflict ridden history of Lesotho. Accordingly, persuading political parties to comply is more beneficial than enforcement by cancellation of registration.
- 21.2 Absence of subordinate legislation concerning implementation of the **Electoral Act, 2011**, makes it difficult to determine dates of default in a calendar.
- 21.3 The IEC has a discretion in matters of deregistration of non-compliant political parties. The applicant fails to specify the political parties in respect of which it alleges that the exercise of the discretion is invalid.

Registrar-General's response

[22] The Registrar-General has not filed any answering papers, except for a confirmatory affidavit of what the Minister of Justice says in relation to her.

Minister's response

[23] The Minister of Justice contends that:

- 23.1 The applicant comes to court with dirty hands in that it has not complied with Rule 9 of the **Societies Rules**. It last filed change in membership of its Executive Committee in 2020.
- 23.2 The **Electoral Act, 2011** needs implementing subordinate legislation and does not prescribe timeframes within which action should be taken and consequences for failure to act. There is no prescribed instrument to show compliance for paid-up membership.
- 23.3 All political parties registered post-2011 have been irregularly registered because there is no prescribed fee as required by the Act.
- 23.4 Cancelling the registration of political parties would lead to a constitutional crisis because the country's regime does not have a solution to this problem. Should the court order the IEC and the Registrar-General to cancel non-compliant political parties, there will be turmoil and commotion in the public on the legitimacy of the National Assembly and Cabinet.
- 23.5 To avert a potential constitutional crisis, the court should order every stakeholder to comply with the requirements of the law. The IEC must be given an opportunity of two to three months to promulgate regulations that will direct political parties on how to conduct their affairs in order to be compliant with the laws.

Rival Contentions

- [24] The applicant seeks no order against political parties, their joinder was a matter of convenience and not necessity. The proceedings are not against them but about them. This was conceded by the attorney for the applicant and accepted by the attorney of the political parties. It is therefore, not

necessary for the court to consider and analyse the voluminous affidavits they have filed.

Discussion

- [25] The system of registration of political parties in the Kingdom is dual or double. Political parties first register their public existence and recognition under the **Societies Act No. 20 of 1966**. Only thereafter can they register under the **Electoral Act, 2011**.⁵ Each of the two registration regimes has its own requirements and sanctions.
- [26] Rule 11 obliges the Registrar-General to investigate the affairs of the society and failure to file returns and even examine on oath any person who was or is an auditor, officer, shareholder or member of the society.
- [27] The responsibilities of the Registrar-General and societies under the Rules are laid down with clarity. The Registrar-General vets applications for registration, registers the societies and investigates their affairs if they fail to file returns or file insufficient returns. Before triggering an investigation, the Registrar-General must call upon the society to furnish an explanation of the subject-matter of the intended investigation. The investigation should commence once a society fails to furnish an explanation or furnishes one that is not satisfactory.
- [28] The applicant's assertion that political parties registered by the Registrar-General are not discharging their Rule 9 responsibilities of filing returns has not been answered by the Registrar-General. The court is constrained to accept its validity. The question that then arises is why the Registrar-

⁵ Section 24 (1)(a) of the Electoral Act, 2011

General has not triggered investigations as is duty-bound in terms of Rule 11. Her silence in this regard is deafening.

[29] The Minister attempts to rescue the Registrar-General by contending that the applicant is itself guilty of failing to file a return of change in membership of its committee after 2020. The Minister's attempt has limping legs. Firstly, he attributes the source of the accusation against the applicant to the Registrar-General. But nothing of the sort is mentioned in the confirmatory affidavit. Secondly, even if what the Minister accuses the applicant of is true, it is not an answer to the applicant's assertion. On the contrary, the accusation validates the assertion that the Registrar-General is not enforcing the rule and has no explanation or excuse for this dereliction of duty. Thirdly, the reliance on the doctrine of unclean hands to non-suit the applicant is unimpressive and misplaced. The doctrine is not a defence but a judicial power to prevent abuse of court process. Abuse of process arises where court procedures are used to achieve purposes for which they are not intended. Courts jealously guard against abuse of their processes but still mindful that the litigants' constitutional right of access to court is not unnecessarily undermined. As explained by the Constitutional Court of South Africa in **Villa Crop**⁶:

“[72] Our courts have long recognized their power, in exceptional circumstances, to prevent an abuse of process. That power has more recently been affirmed, and an abuse of process may include a litigant who comes to court with unclean hands. The power is an incident of the court's inherent power to ensure that those who use the process of law do not do so for ulterior ends that undermine what the courts are established to secure. It is a power most sparingly used. That is so because the exercise of the power prevents a litigant from having their dispute resolved before the courts, the very essence of their right under section 34 of the Constitution. But the authorities do bear out the proposition that to dismiss a claim that a litigant would pursue before the courts on the grounds of abuse is not precluded because that claim exists in law. The claim is

⁶ *Villa Crop Protection (Pty) Ltd v. Bayer Intellectual Property GmbH* [2022] ZACC 42;2023 (4) BCLR 461(CC)

dismissed because the litigant who would bring it is disqualified from doing so by reason of their abuse.”

- [30] Turning to the case against the IEC, it is common cause that the issues were brought to the attention of the IEC in writing on November 2020 and discussed in a meeting held on 29th January 2021. It is in that meeting that it was agreed that the IEC would release documents on the status of compliance by political parties. But nothing of the sort happened until these proceedings were brought on 12 August 2021 – six months after the January meeting. It is apparent that six months passed without the IEC honouring its promise to release documents requested by the applicant. Hence the relief for dispatch of records for purposes of review.
- [31] The contention of the applicant is that the dispatched records disclose that some political parties are not complying with the relevant sections of the **Electoral Act, 2011** such as failure to account for funding and no verification of the authenticity of paid-up members.
- [32] The IEC takes the stance that the applicant has not particularised the political parties in respect of which it is called to exercise its power to cancel their registration. This stance differs from the one it took in the 29 January meeting, namely, that the IEC would release documents as requested and meet leaders of political parties according to its plan of action to persuade them to comply with the law instead of going the deregistration route.

- [33] In the January meeting, the question whether the IEC's power to deregister defaulting political parties is discretionary or not did not arise and was therefore, not debated. Neither was identification of the political parties. In any event, at that stage the applicant was yet to be furnished with the requested documents and could not, therefore, be in a position to particularise as suggested. Knowing the issues raised by the applicant and having discussed them, the reasonable thing the IEC should have done is to be proactive by conducting an internal audit of non-compliant political parties. The audit should then have been shared with the applicant. This could have avoided unnecessary litigation.
- [34] The IEC contends that given the history of the political conflicts in the Kingdom, persuading political parties to comply with the law is far more beneficial and important than enforcement. The Minister, who says he is a member of the IEC's Law Committee contends that an order for deregistration will lead to a constitutional crisis.
- [35] What these arguments boil down to is that talking to non-compliant political parties instead of enforcing the law serves its purpose of course, section 27(1)(h) empowers the IEC to warn a defaulting political party to comply. But this is a far-cry from persuading it to comply. Warning in this context means to issue a directive to comply accompanied by threat to act if it is not heeded. Parliament does not pass laws with the expectation of their enforcement at the convenience or pleasure of the IEC, the Registrar-General and political parties. The public's expectations are no different.

[36] The IEC argues that it has a discretion in matters of cancellation of registration of political parties. But it does not pinpoint the section that reposes the discretion on it. The argument betrays a misconception of its power in section 27(1). Although the word used is “may”, it does not convey discretion but is permissible and empowering⁷. The word “may” should be construed to confer power coupled with the duty to use it as the public interest requires. As aptly put by Coleridge J in **Tithe Commissioners**⁸:

“The words undoubtedly are only empowering; but it has been so often decided as to become an axiom that in public statutes words only directory, permissive, or enabling, may have a compulsory force where the things to be done is for the public benefit or in advancement of public justice.”

[37] Being the enforcer of the Act enacted for the benefit of the electorate and not just for the political parties, it is senseless for the IEC to argue that it has discretion. The section 27 powers are bestowed on the IEC to police compliance with prescriptions of the law. The duty to police compliance means that the IEC’s duties are mandatory and not discretionary.

[38] Furthermore, the IEC contends that it is not possible for it to vet lists of paid-up members of political parties because of absence of regulations. A similar argument is made by the Minister. Both of them do not give reasons why 24 years after the enactment of the **National Assembly Electoral Act, 2011**, no regulations have been made as required by section 195.

[39] In any event, the argument does not hold water for three reasons. First, when considering an application for registration, section 24(2) casts a duty on the IEC to verify paid-up membership by checking membership or a

⁷ Section 14 of the Interpretation Act No. 19 of 1977

⁸ R v. Tithe Commissioners (1849) 14 QB 459 @474

membership card register of a political party. The section does not require a form for doing this. Secondly, section 25(1)(c)(iii) provides that an application for registration must be accompanied by “a declaration in the prescribed form supporting the application signed by not less than 500 paid-up membership whose names appear on the Register kept by the IEC itself.” Thirdly, the argument is belied by the fact that during the oral argument the IEC presented to the court a list of political parties whose registration it cancelled despite the absence of the prescribed forms.

- [40] Verification of 500 paid-up membership is by checking both registers of the political party and the IEC. The court does not see how this exercise is rendered impossible because of absence of a prescribed form. In any case, absence of forms does not excuse the IEC from performing the verification duties in sections 24(2) and 25(1)(c)(iii). The argument of impossibility of conducting verification of paid-up membership lacks merit and is rejected.
- [41] Cancellation of registration of a political party is done in accordance with the procedure in section 27(2), to wit, notice of grounds of proposed grounds of cancellation, written representations of hearing of the political party, consideration of representations or evidence and a reasoned decision. If the political party is unhappy about the decision, it has a statutory right to appeal to this Court within 30 days. Similarly, investigation against a defaulting society under Rule 11 of the Societies Rules requires notice and hearing procedural fairness is the DNA of the process of investigation and cancellation of registration.

III. DISPOSITION

[42] The IEC and the Registrar-General must keep their eyes and ears perpetually open to see and hear complaints about political parties that vow to be voted into Parliament but do not comply with laws enacted by the very Parliament. Properly kept and regularly updated registers are indispensable tools in closing the gates to non-compliant political parties. The IEC and the Registrar-General have a mandatory duty to put in motion the statutory machinery of continuous assessment of compliance by political parties. Political parties are not above the law and should not be persuaded or reminded to obey the law.

[43] The requirements of *mandamus* are satisfied, namely:

- (a) a right to the performance of a legal duty;
- (b) a demand or request to a public body to perform the duty imposed on it by law;
- (c) refusal by the public body to discharge the duty;
- (d) refusal consists of either:
 - (i) delay in complying with request or demand; or
 - (ii) indication of readiness to comply only subject to conditions; and
 - (iii) persistent temporising and failure to give a direct answer⁹.

[44] The application succeeds. Costs follow the cause.

⁹ Footnote 3 paras 15-005 to 15-007

Order

[45] In the result, the following order is issued:

- 1 The Independent Electoral Commission is directed to:
 - (a) conduct a full audit of compliance by political parties with the prescripts of sections 25(1)(c) and 29(3) of the **National Assembly Electoral Act, No. 4 of 2011**;
 - (b) The full audit must be completed within 45 days from the date of this order and shared with the applicant.
2. The IEC is directed:
 - (a) to take action in accordance with section 27 against political parties which the audit reveals their non-compliant status;
 - (b) the action must be commenced and completed within 45 days after completion of the audit; and
 - (c) the applicant must be informed of the date of commencement and conclusion of the action and outcomes thereof.
3. The Registrar-General is directed;
 - (a) to compile, maintain and control an up-dated register of political parties registered under the **Societies Act No. 20 of 1966**;
 - (b) to conduct an audit of compliance by political parties with Rule 9 of the **Societies Rules, 1967**;
 - (c) to give the applicant access to up-dated and properly maintained register together with the audit to the applicant; and

- (d) the actions in (a), (b) and (c) above must be commenced and completed within 90 days from the date of this order.
4. The Registrar-General is directed:
- (a) to take action in accordance with Rule 11 against any political party that is in breach of Rule 9;
 - (b) inform the applicant of the type of action taken and outcomes; and
 - (c) the action must commence and be completed within 60 days from the date of this order.
5. The respondents to pay the costs of the application.



S. P. SAKOANE
CHIEF JUSTICE

I agree



E.F.M. MAKARA
JUDGE

I agree



M. KOPO
JUDGE

For Applicant:

Mr. M. *Rasekoai* and Adv. C.J. *Lephuthing*

For Respondents:

Adv. K. *Letuka*, Adv. R.A. *Ntema*, Adv. M. *Mokobocho*, and Mr. K.D. *Mabulu*